

Copyright Alliance Guide to Bringing a Case Before the Copyright Claims Board



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copyright alliance

Table of Contents

I.	Preamble: How the CASE Act Came into Being	2
II.	Key Terms Used in this Guide	6
III.	Key Components of the CASE Act	9
IV.	Basic Information About the Tribunal	12
V.	Types of Claims that Can and Cannot Be Brought Before the CCB	13
VI.	Bringing a Case Before the CCB: Legal Representation	15
VII.	Step #1: Starting the Process of Bringing a Case Before the CCB	15
VIII.	Step #2: Notifying the Respondent	18
IX.	Step #3: Respondent Decides Whether to Participate in the Proceeding	20
X.	Step #4: CCB Issues the Scheduling Order	20
XI.	Step #5: Respondent Responds to the Claim	22
XII.	Step #6: The Proceedings—Submissions, Discovery, & Conferences	22
XIII.	Things That Could End the Case Before the CCB Renders a Decision: Settlement & Dismissal	24
XIV.	Step #7: The CCB Renders its Decision	25
XV.	Remedies	26
XVI.	Penalties for Bad Faith Claims/Actors	30
XVII.	Step #8: Challenging the CCB's Decision	31
XVIII.	Step #9: Enforcing the Decision in Federal Court	32
XIX.	Relationship Between CCB Cases and Federal Court Proceedings	32
XX.	Other Important Provisions	34

Disclaimer: The information in this guide is up to date as of August 12, 2021. The Copyright Office will be enacting implementing regulations following the date of this publication. We will be updating this Guide after these regulations are enacted. Check back with us to make sure you have the latest version of the Guide.

Thinking About Bringing a Case Before the U.S. Copyright Office's Small Claims Court?

Here is What You Need to Know¹

On December 27, 2020, the CASE Act was signed into law. The CASE Act is an acronym for the Copyright Alternative in Small-Claims Enforcement Act (the "CASE Act"), a law that creates a tribunal called the Copyright Claims Board (CCB) within the U.S. Copyright Office to handle small copyright claims.

I. Preamble: How the CASE Act Came into Being

The CASE Act is the culmination of years of Congressional deliberation, Copyright Office research and expertise, stakeholder input, and advocacy from individual creators and small businesses, as well as negotiations to address concerns with previous versions of the bill.

Before the CASE Act was enacted federal courts had exclusive jurisdiction over copyright.² The problem with this is that litigation in federal court is so expensive that many professional creators and small businesses simply cannot afford to enforce their rights in federal court when someone infringes their copyrighted works. In 2019, the American Intellectual Property Law Association (AIPLA) conducted a study showing that the cost of litigating a copyright infringement case through the appeals process averages \$397,000.³ While a large corporation can afford this, clearly this is not affordable to individual creators and small businesses who own copyrights.

To make matters worse, according to a survey by the American Bar Association (ABA), most attorneys will not even consider taking a case if the amount at stake is less than \$30,000, and when these individual creators and small businesses do find the resources to sue in federal court, they often face well-heeled opponents with the financial means to cause them to exhaust their own resources.⁴

¹ The legal information provided in this guide is intended to be used as an educational tool and does not constitute, and is not a substitute for, legal advice.

² "Exclusive jurisdiction" means that that only a federal court could hear and decide a copyright case. A case cannot be brought in state court, for example.

³ Report from American Intellectual Property Law Association (AIPLA), 2019 Report of the Economic Survey, at I-208 (2019), <https://www.aipla.org/detail/journal-issue/2019-report-of-the-economic-survey>.

⁴ https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf

Visual artists, authors, songwriters and many other small creators are affected the most by the high cost and complexity of federal litigation because the individual value of their works or transactions is often too low to warrant the expense of litigation in federal court and most attorneys will not even consider taking these small cases. Some have suggested that a typical infringement for a professional creator is valued at approximately \$5,000. While that may not seem like a huge loss, in fact it represents a significant and potentially devastating loss of income to individual creators and small business owners. That's a monthly rent payment, or perhaps it's the cost of travel to a location where an author is going to research information to write his next book or where a photographer will go to capture images for her next exhibit.

In effect, prior to enactment of the CASE Act, our copyright laws were virtually unenforceable by creators other than large corporate copyright owners. Vesting exclusive jurisdiction for copyright infringement cases with the federal courts meant that copyright infringements would regularly go unchallenged, leading many creators to feel disenfranchised by the copyright system. In effect, these creators had rights but no remedies.

In recognition of this, back in 2011, following a congressional hearing on the need for remedies in the copyright small claims context, former Representative Lamar Smith (R-TX), then-Chairman of the House Judiciary Committee, sent a letter to the U.S. Copyright Office highlighting the importance of this issue and the high cost of federal litigation. In that letter he also requested the 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," along with recommendations where appropriate.

Following up on this request, the Copyright Office solicited public comments in three separate comment periods between October 2011 and February 2013 and received a total of 107 substantive comments from a wide array of interested parties. The Office also held several public hearings across the country, during which stakeholders with various points of view had an opportunity to comment on topics, such as obstacles copyright owners face in handling small claims, technical aspects of the small claims process—like discovery parameters, available relief, and treatment of frivolous claims—as well as voluntariness and the types of claims that would be appropriate for adjudication. Using information gathered over the course of its two-year study, the Copyright Office issued a comprehensive report to Congress in September 2013 recommending the creation of a voluntary small claims process that would be administered by the Office. The report included draft legislation, the bulk of which was incorporated into two similar bills introduced by Representative Hakeem Jeffries (D-NY) and Representative Judy Chu (D-CA) during the 114th Congress. Representative Jeffries re-introduced his bill during

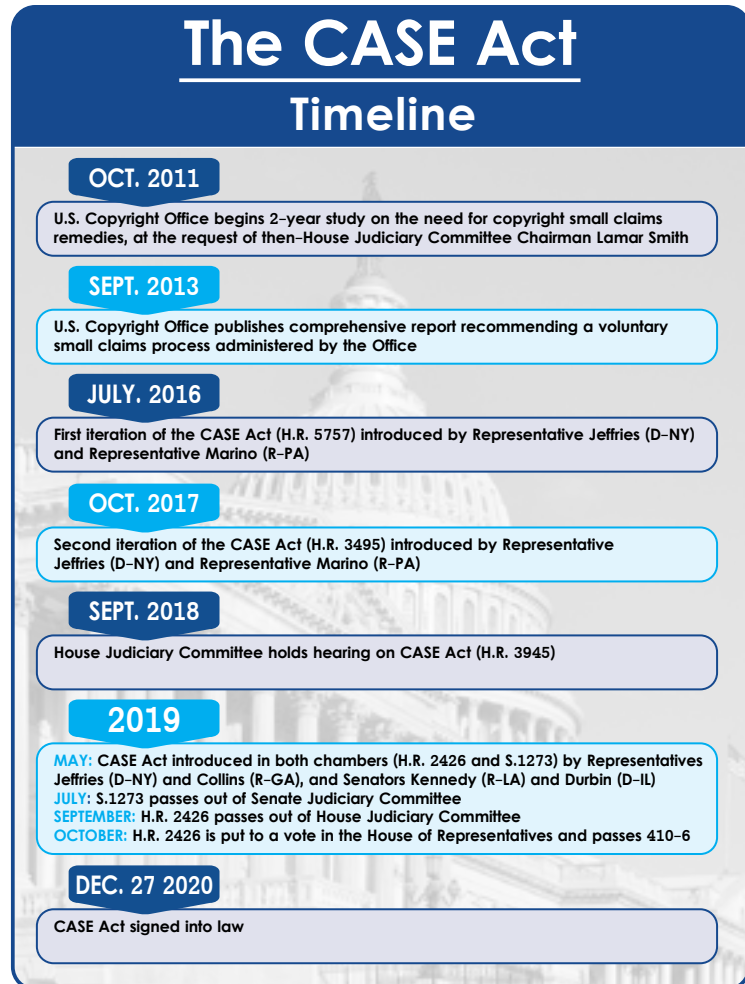
the 115th Congress and the House Judiciary Committee held a hearing on it on September 27, 2018.

In the 116th Congress, Representatives Jeffries and Doug Collins (R-GA), introduced the CASE Act (H.R. 2426) in the House, with Judiciary Committee Chairman Jerry Nadler (D-NY) and IP Subcommittee Chairman Hank Johnson (D-GA), as well as Representatives Martha Roby (R-AL), Judy Chu (D-CA), Ben Cline (R-VA), Ted Lieu (D-CA), Brian Fitzpatrick (R-PA) as original cosponsors. A companion bill, S. 1273, was also introduced in the Senate by Senators John Kennedy (R-LA), Dick Durbin (D-IL), Thom Tillis (R-NC), and Mazie Hirono (D-HI). On July 18, 2019, the Senate Judiciary Committee voted the CASE Act out of

committee without opposition and on October 22, 2019, the CASE Act passed the House by an overwhelming 410-6 vote. It was then enacted by Congress on December 21, 2020, as part of the [Consolidated Appropriations Act, 2021](#), which was then signed into law by the president on December 27.

Throughout the legislative process, numerous changes were made to the CASE Act to address concerns that the legislation might be used for so-called trolling or that unsophisticated users might routinely and unknowingly fail to respond to notices of proceedings against them, resulting in the issuance of default judgments. To appease these critics and enable passage of the legislation, numerous changes were made to the CASE Act from prior versions, such as:

- The CASE Act gives respondents 60 days to opt out before the proceeding becomes active, which is double the response period provided in prior versions of the bill. The increase in the response time provides respondents with more time to make an informed decision about whether to opt-out or proceed. (The CCB may also extend the opt-out period beyond 60 days “in the interests of justice.”)



- In addition to the respondent being notified by the claimant, the CASE Act provides that they will also receive a notice from the CCB, often referred to as a “second notice.” The purpose of the second notice is to reinforce the seriousness of the proceeding and potential consequences, and the importance of the respondent reviewing and understanding the notice and the nature of the claims against them. Since this notice will be sent from an office of the U.S. Government, it is unlikely to be ignored.
- To prevent notices that are sent to large organizations with multiple locations from being misdirected, the CASE Act allows organizations to designate an agent to receive service of process, which will be made publicly available so that the notices go to the correct person at an organization.
- The legislation allows the CCB to penalize those found to be filing frivolous claims (i.e., trolling), counterclaims and defenses, or otherwise abusing the system by awarding attorneys’ fees in excess of \$5,000 in extraordinary circumstances; prohibiting the abuser from filing a case for one year; and dismissing all pending cases filed by the abuser.
- The CASE Act authorizes the Copyright Office to issue regulations limiting the number of cases a person or entity can bring in a year.
- The CASE Act allows libraries and archives to preemptively opt out of the small claims process.
- A provision allowing the CCB to issue third-party subpoenas, was removed from the bill.

After years of consideration and deliberation at the U.S. Copyright Office and Congress, and various changes to the bill that were made to address stakeholder concerns, the CASE Act was ripe for consideration and passage by Congress. When one considers all the requests for public comments, roundtable discussions, Congressional hearings, and negotiations, interested stakeholders were given years and ample opportunity to voice their thoughts and concerns. The result of that process was resounding support for the bill.

The law requires that the CCB begin operating within one year of the date the CASE Act was enacted, which would be December 27, 2021. However, there is also a provision allowing for a six-month extension to account for delays associated with the pandemic or other significant reasons. So at the latest, the CCB should begin operating by late June 2022.

Like most laws, the government office charged with administering the law (here, the U.S. Copyright Office) must now fill in some of the details about how

the law will work in practice. As a result, during the time between passage and operation of the CCB, the Copyright Office will issue regulations to fully implement the CCB. It will do so by issuing notices of inquiry and notices of proposed rulemakings in which the Office solicits input from the public on topics relating to implementation. The Office will also hire CCB officers and attorneys. As of the drafting of this paper, the Copyright Office is in the midst of the implementing and hiring.

II. Key Terms Used in this Guide

There are several key terms that arise throughout this guide that you should know as you read more about the CASE Act and the Copyright Claims Board:

The Participants in a Small Claims Proceeding

Claimant: A party who initiates a proceeding before the Copyright Claims Board. (similar to a plaintiff in federal court).

Respondent: A party against whom a claimant initiates a Copyright Claims Board proceeding (similar to a defendant in federal court).

Counterclaimant: A respondent who asserts a claim against a claimant in the same proceeding that the claimant brought against the respondent.

Copyright Claims Board (CCB): The Copyright Claims Board (CCB) is a tribunal located within the U.S. Copyright Office in Washington, DC that was created by the CASE Act to handle certain small copyright claims. The CCB is comprised of three officers that administer, manage, and decide proceedings brought by claimants.

CCB Officers: CCB Officers are similar to judges in federal court. They are responsible for administering, managing, and deciding cases brought before the CCB.

Types of Remedies

Actual damages: Actual damages are equal to the financial loss of the copyright holder caused by a copyright infringement, as well as any profits earned based on the infringement that are not already calculated in the determination of the financial loss.

Statutory Damages: Statutory damages are damages specified by statute (here the Copyright Act) rather than being calculated based on the extent of harm

to a party. The Copyright Act and CASE Act both establish ranges of statutory damages, which depend on certain factors.

Injunction: A type of equitable relief granted by a court in which a party is ordered to perform or cease from performing a certain act. (Note: The CCB cannot issue injunctions)

Litigation Terms

Article III Court: All federal courts of the United States. “Article III” refers to Article III of the Constitution, which establishes the judicial branch of government. (The CCB is not an Article III court.)

Claim: An allegation brought by a claimant against the respondent in a proceeding before the CCB.

Counterclaim: A claim brought by a respondent against a claimant in response to the claim the claimant brought before the CCB. The counterclaim must relate to the same transaction or occurrence of the claimant's claim.

Default judgment/determination: When the CCB grants a final determination against the respondent during the course of an active proceeding because the CCB finds that the respondent has either failed to appear or has stopped participating in the proceeding.

Defense: An allegation brought by respondent (or where the respondent has brought a counterclaim against the claimant, the claimant) that will, if proven to be true, relieve the respondent (or claimant) from liability for a claim or reduce their liability.

Discovery: The portion of a proceeding during which the parties exchange information and documents related to a case before the CCB. (see interrogatories and requests for admissions below)

Dismissed “without prejudice”: When a case, claim, or counterclaim is dismissed without a final ruling and the case, claim, or counterclaim may be refiled (so long as the statute of limitations does not expire).

Interrogatories: Written questions that one party sends to another party during the discovery portion of a case which must be answered.

Notice: The process by which a party is made aware of legal proceedings being brought against that party.

Opting out: When a respondent answers the notice by indicating that the respondent will not participate in the proceeding.

Preponderance of the evidence: An evidentiary standard in which the burden of proof is met when the party who is responsible for showing proof convinces the deciding body/person that there is a greater than 50% chance that a claim, counterclaim or defense is true.

Requests for admissions: When one party requests that another party admit or deny the truth of a statement under oath during the discovery portion of a case.

Service of process: The process of notifying a party that they are being sued by delivering a court summons and a copy of the suit to them.

Statute of limitations: The period of time that a person has to commence a proceeding, measured from the time that the claim accrued.

Subpoena: A written order to compel a party to provide information on a particular subject.

Summons: A court order requiring a person to appear in court, or in this case the CCB. (In the context of the CCB the requirement to appear does not require an in-person appearance since the process will be conducted remotely (*this is discussed in more detail below*)).

Tolling of statute of limitations: A temporary suspension (i.e., pause) of the running of the statute of limitations.

Other Relevant Provisions in the Copyright Law

Timely registration: Under U.S. copyright law, a copyrighted work is “timely” registered if it is registered with the U.S. Copyright Office (1) before the infringement starts or (2) within three months after first publication of the work, if the infringement began after the work was first published.

Section 512 of the Digital Millennium Copyright Act (DMCA): The DMCA, which was enacted into law over twenty years ago, made several changes to the Copyright Act (Title 17 of the U.S. Code). One of these changes was to add section 512 to the Act. Section 512 sets out a procedure for copyright owners to get infringing online material and activities taken down (referred to as the notice and takedown process) and prevents service providers, like internet platforms, from being liable for the infringements of their users if they follow certain rules. This protection from liability is referred to as a “DMCA safe harbor.”

512(f) of DMCA: Paragraph (f) of section 512 provides that where a party makes a misrepresentation in a DMCA notice or counter-notice, the person making the misrepresentation may be liable to the other party.

512(h) of DMCA: Paragraph (h) of section 512 provides that a copyright owner, or his representative, may request the clerk of a court to issue a subpoena to a service provider to identify an infringer.

III. Key Components of the CASE Act

This guide discusses in detail the workings of the Copyright Claims Board. As an overview, there are several key components to the CCB:

- **The CCB Process is Simplified and Streamlined:** The CASE Act creates a streamlined process for faster resolution of certain types of copyright disputes. The entire CCB process is intended to be simple and efficient.
- **No Travel is Required:** The CASE Act explicitly states that proceedings “shall be conducted at the offices of the Copyright Claims Board without the requirement of in-person appearances by parties or others” and that each party will make its case “by means of written submissions, hearings, and conferences carried out through internet-based applications and other telecommunications facilities.” Thus, in-person appearances before the CCB are not required—in fact, proceedings will be conducted entirely electronically, where possible.
- **The Parties Do Not Need to Hire Attorneys to Represent Them:** The CCB process is intended to be much simpler than federal court and so streamlined that it will be unnecessary for the parties to hire attorneys to represent them. A party can hire an attorney if she wants, but the use of an attorney is completely optional. If a party feels the need for legal representation the CASE Act allows her to retain law students that are supervised by a licensed attorney.
- **Damages Are Significantly Less Than in Federal Court:** In a copyright infringement case filed in federal court, a successful plaintiff may be awarded up to \$150,000 in statutory damages per work infringed. In contrast, a successful claimant may only be awarded up to \$15,000 in statutory damages per work infringed in the CASE Act’s small claims process—10% of the maximum damages available in federal court. The CASE Act also limits the total amount of damages that can be awarded in each case to no more than \$30,000, as compared to federal court, which has no limit.

- **No Injunctions:** Unlike in federal court, injunctions are not available in CCB proceedings. However, if the parties reach an agreement for one party to cease infringing activity, cease sending DMCA notice for 512(f) violations, or to cease some other activity, the CCB can make that agreement part of its final determination.
- **The CCB Process is Voluntary:** The most important aspect of the CCB is that it is voluntary. A respondent who is sued in the CCB can “opt out” of the proceeding (see chapter IX for details about opting out). If a respondent opts out of the proceeding, the proceeding is immediately terminated. (The claimant is free to bring their claim as a suit in federal court.) Similarly, the CCB process is also voluntary for the claimant. A claimant is not required to use the CCB to decide their infringement, non-infringement, or 512(f) case. The CCB is a voluntary alternative to federal court, which means parties can choose to bring any of these claims in federal court instead.

A process that mandates participation would be more effective than the voluntary opt-out process under the CASE Act. But it is important to understand that the Constitution prevents the process from being mandatory. The Constitution guarantees a person’s right to have a case heard by an Article III court with the right to a jury trial. But even though a person has this right, they can waive that right. This waiver is accomplished in the CASE Act by giving respondents the opportunity to opt out of a CCB proceeding if they wish not to waive those rights.

While participation in the small claims process outlined by the CASE Act is completely optional, there are numerous incentives built into the process to encourage parties to participate in the proceedings rather than to opt out. Those incentives include:

- **Money Saved by Not Hiring an Attorney:** The small claims process created by the CASE Act is simplified so that there is no need to hire an attorney. When a case is litigated in federal court, the largest cost associated with bringing or defending a copyright case is the cost of hiring an attorney. In fact, legal fees can often exceed the actual damages in a copyright infringement case. Giving parties the practical ability to defend themselves without paying an attorney encourages parties to participate.
- **Cap on Damages Significantly Limits the Defendant’s Liability:** By capping the amount of damages that may be awarded, the CASE Act dramatically reduces an alleged infringer’s potential liability. Parties who may be liable for tens of thousands of dollars or more if the copyright owner brings a copyright infringement case against them in federal court may be unwilling to take that risk and will instead want to limit their liability by choosing to proceed before the CCB.

- **Unlike Federal Court Judges, CCB Officers are Copyright Experts:** The CASE Act requires that at least two of the three CCB judges (called “officers”) to have “substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims” and “represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted work” (emphasis added). In contrast, federal court judges are generalists by design, hearing cases on a range of criminal and civil issues. Thus, a party who believes that they have a meritorious defense(s) against copyright infringement claims or viable counterclaim may choose to proceed before the CCB, with the benefit of adjudicators who are dedicated experts on copyright law (including the available affirmative defenses under copyright law such as fair use).
- **No Travel Required:** The ability to participate remotely in the proceedings without the need to travel to a federal courthouse will be a significant factor in determining whether a party opts out because of the cost savings and convenience compared to the same case being brought in federal court.
- **Quicker Process than Federal Court:** The CASE Act creates a streamlined process for faster resolution of copyright infringement disputes. A party who believes they have a meritorious defense(s) against copyright infringement claims is likely to choose to proceed before the CCB in order to more quickly resolve any legal claims against them.

When all the incentives are considered together, they certainly provide a strong enticement to participate in the system instead of opting out. Even where the respondent does not opt out, the mere bringing of the case serves to educate them about copyright law so that the user will be more aware of engaging in the same or similar infringing activity in the future.

Ultimately, no one can say with any certainty what percentage of parties will opt out. However, by creating a process that encourages parties to participate while at the same time not penalizing them if they choose not to, the CASE Act will achieve balance and fairness for those who bring their cases before the CCB.

IV. Basic Information About the Tribunal

The Copyright Claims Board (CCB) will be located within the U.S. Copyright Office and will be comprised of three full-time “judges” who are referred to as CCB officers. All three officers are appointed by the Librarian of Congress, in consultation with the Register of Copyrights and must have at least seven years of legal experience. Two of the officers must have “substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims” and “have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.” These qualifications help to ensure that the officers are fair and unbiased. The third officer is required to have experience in alternative dispute resolution and be substantially familiar with copyright law. Thus, unlike in federal court where the judge is handling a variety of different cases and may never have heard a copyright case before, the CCB officers are subject matter experts, which should lead to more consistently correct decisions than those made in federal court.

The CCB officers are responsible for:

- Rendering determinations on claims, counterclaims, and defenses;
- Ensuring that claims, counterclaims, and defenses are properly asserted and otherwise Appropriate for resolution by the CCB;
- Managing the proceedings;
- Rendering rulings (including scheduling, discovery, evidentiary, etc.);
- Requesting, from participants and nonparticipants in a proceeding, the production of information and documents;
- Conducting hearings and conferences;
- Facilitating settlement by the parties;
- Awarding monetary relief and/or a requirement that certain activities cease or be mitigated—if the parties agree (see the remedies section below for more information);
- Providing information to the public about CCB procedures and requirements; and
- Maintaining records of the proceedings, including certifying official records and (where appropriate) making records available to the public.

When not performing these functions, the officers may perform other duties assigned by the Register of Copyrights. However, they may not undertake any duty that conflicts with his/her CCB duties.

The term of each officer is for six years and is renewable. The length of the terms for the first set of officers varies and will be staggered so they do not end all at the same time. On July 20, the Copyright Office announced the appointment of [David Carson](#) (for four years), [Monica P. McCabe](#) (for five years), and [Brad](#)

[Newberg](#) (for six years) to serve as the first Copyright Claims Officers. Their terms began (or will begin) on July 6, September 13, and August 16, 2021, respectively.

The Copyright Office will also hire at least two full-time CCB attorneys to assist the officers and administer the CCB. Each attorney must have at least three years of substantial experience in copyright law.

The CCB attorneys are responsible for:

- Providing assistance to the CCB officers;
- Providing assistance to members of the public with respect to the CCB procedures and requirements; and
- Providing information to potential claimants contemplating bringing a CCB action about obtaining a subpoena under section 512(h) for the purpose of identifying a potential respondent;

When not performing these functions, the attorneys may undertake other duties assigned by the Register of Copyrights. However, they may not undertake any duty that conflicts with their CCB duties. The Copyright Office has begun its search for attorneys.

The CASE Act also allows the Copyright Office to hire staff for administrative support.

V. Types of Claims that Can and Cannot Be Brought Before the CCB

The CCB can hear three types of claims by copyright owners and users. These are:

- **Infringement Claims:** Copyright owners can bring infringement claims against those who are allegedly infringing one or more of their exclusive rights in their copyrighted work(s).
- **Declarations of Non-Infringement:** When a copyright owner has alleged that a user is infringing her work and either has threatened to take action to enforce her rights or has sent a DMCA takedown notice, the user can bring an action before the CCB to request that the CCB issue a declaration stating that the activity does not infringe the copyright owner's exclusive rights.
- **DMCA 512(f) Misrepresentation Claims:** Users who received a DMCA takedown notice from a copyright owner can challenge that notice if they believe it contains a misrepresentation relating to the alleged

infringing activity that violates section 512(f) of the DMCA. Similarly, creators who sent a DMCA takedown notice and then received a counternotice from the user may challenge that counternotice if they believe the counternotice contains a misrepresentation relating to material that was removed that violates section 512(f) of the DMCA.

In addition to these types of claims, the CCB can also hear:

- **Defenses:** The CCB can hear any defenses brought by the respondent that are available under the Copyright Act (like fair use) or otherwise available under law.
- **Counterclaims:** The CCB can hear counterclaims that a respondent might raise in response to claims brought by the claimant, provided however, that in order to bring a counterclaim, it must arise out of the same incident or event that is the subject of a claim, or must arise under an agreement pertaining to the same incident or event that is the subject of a claim of infringement, if the agreement could affect the relief awarded.

The CASE Act also delineates the types of claims that cannot be brought before the CCB. These include:

- **Non-Permissible Claims:** The CCB cannot hear any claim or counterclaim that is not identified (above) as a permissible claim. So, for example, the CCB cannot hear copyright ownership disputes or disputes related to other forms of intellectual property.
- **Adjudicated Claims:** The CCB cannot hear any claim or counterclaim that has been finally decided by a court of competent jurisdiction or that is pending before such court⁵ unless that court has granted a stay to permit that claim or counterclaim to proceed before the CCB.
- **Claims Involving the Government as a Party:** The CCB cannot hear any claim or counterclaim by or against a federal or state governmental entity.
- **Claims Against Non-US Resident:** The CCB cannot hear a claim against a foreign resident. However, if a foreign resident brings a claim, the respondent can bring a counterclaim against that foreign resident.
- **Claims Against Service Providers Who Comply with the DMCA:** A claimant cannot bring a claim of secondary liability⁵ against a service provider for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in section 512 of title 17 (the DMCA) unless the service provider fails to remove or disable infringing material pursuant to a proper takedown notice sent under section 512.

⁵ Secondary liability occurs when an internet provider is liable for the infringing acts of one or more of its users.

VI. Bringing a Case Before the CCB: Legal Representation

The process of bringing, prosecuting, and defending a case before the CCB is intended to be simple so that anyone could do it themselves without the need to hire an attorney to represent them.

Although the CASE Act neither requires nor compels parties to hire attorneys to represent them in CCB proceedings, the CASE Act does allow parties to be represented by an attorney. The CASE Act also allows for law students to represent a party provided that (1) they are qualified under applicable law governing representation by law students of parties in legal proceedings, and (2) such representation is on a pro bono basis (e.g., no fee is charged by the students). We expect that the Copyright Office will explain the use of law student representation in more detail when it issues its final implementing regulations, which will not happen until later in 2021 or during the first half of 2022.

VII. Step #1: Starting the Process of Bringing a Case Before the CCB

The first step in bringing a claim before the CCB is to file the claim. The CASE Act specifies that the claim must:

- Include a statement of material facts that support the claim;
- Be certified by a CCB attorney;
- Be accompanied by a filing fee; and
- In the case of an infringement claim(s) being brought by a copyright owner, any copyrighted works that are at issue in the claim must be either already registered with the Copyright Office or be the subject of a registration that is pending with the Office.

Currently, we do not have much information on what these requirements will entail because the CASE Act does not provide much specificity, but all four requirements will be explained in more detail when the Copyright Office issues its final implementing regulations, which will not happen until later in 2021 or during the first half of 2022.

Here is what we do know about these four requirements:

- **Statement of Facts:** The Copyright Office regulations will require the claimant to certify the accuracy and truthfulness of the statements made. The CASE Act requires a CCB attorney to examine the claim to make

sure it meets the CASE Act's requirements. If a claim does not meet these requirements, the claimant has 30 days to amend the claim so that it does comply. If the amended claim still does not comply, the claimant is given another 30 days to further amend it. If the twice-amended claim still does not comply, the claim will be rejected by the CCB attorney and there will be no proceeding. The CCB attorney will also reject a claim if the claimant fails to amend a non-compliant claim within the 30-day period. The CASE Act makes it clear that there are no additional fees for amending the claim.

- **Certification:** To be certified, a claim must meet the requirements set forth in the CASE Act (as discussed throughout this guide) and must also be brought before the CCB within the three-year statute of limitations established by the Copyright Act.
- **Fees:** The Copyright Office regulations will require that the total filing fee be between \$100 and the cost of filing a claim in federal district court, which presently is \$402. This does not necessarily mean that the initial fee for filing a claim will be between \$100 and \$402 because the CASE Act allows the Copyright Office to impose two or more staggered fees over the course of the proceeding in lieu of one fee and it's the total of those staggered fees that must be between \$100 and \$402. So, for example, there may be a small initial fee of, say, \$25, and then when the respondent does not opt out and the claim therefore becomes active, the Copyright Office may impose a second fee. In this example, the sum of the initial fee and the second fee must be between \$100 and \$402. Thus, the second fee would be between \$75 and \$377. One additional point about fees that is worth mentioning is that, unless the Copyright Office regulations say otherwise, fees paid to the Office are not refundable. Therefore, if a claimant brings a claim and the respondent opts out, the initial fee paid by the claimant would not be refunded.
- **Registration:** The CASE Act requires that a claim or counterclaim alleging infringement of an exclusive right in a copyrighted work can only be brought before the CCB when:
 1. The copyright owner has submitted a completed copyright registration application, a deposit copy of the work, and the required fee for registration of the copyrighted work to the Copyright Office; and
 2. The Office has either issued a registration certificate or the application is still pending with the Office.

This means that a copyright owner cannot bring a claim or counterclaim if:

1. A registration application for the copyrighted work at issue in the claim has not been submitted to the Copyright Office;
2. The application has been submitted but is incomplete (e.g., is missing the fee or deposit copy); or
3. The application has been rejected by the Office. (If the application is rejected, the CCB will dismiss the proceeding “without prejudice.”)

More Information About Pending Registrations: The CCB can proceed with a case while the application is pending with the Office. However, the CCB cannot render a determination in the case until:

1. A registration has been issued by the Office;
2. The registration has been submitted to the CCB;
3. The registration has been made available to the other parties involved in the case; and
4. The other parties have been provided an opportunity to “address” the registration certification. (Note: It is a little unclear what “address” means here but we expect this to be clarified by the Copyright Office in the implementing regulations.)

While the registration application is pending with the Office, the CCB can suspend the case for up to a year. If the registration application is still pending with the Office after a year, the CCB may dismiss the case “without prejudice” as long as the CCB first provides written notice to the parties involved in the proceeding and gives those parties 30 days to respond to the notice.

The CASE Act allows claimants and counterclaimants to apply for an “expedited” registration. An expedited registration is one that is examined and issued (or rejected) more quickly than a regular application (similar to the existing “special handling” procedures used by the Office). The Office will be issuing implementing regulations to explain how expedited registration will work. Once those regulations issue we will provide more details here.

VIII. Step #2: Notifying the Respondent

When all the requirements for filing a claim are completed (as outlined above in chapter VII) and any additional requirements set forth in regulations are satisfied, the proceeding is considered to be “commenced.” Once a proceeding has commenced, the next step is for the claimant to notify the respondent about the claim against them. The claimant notifies the respondent through a process called “service of process.” The claimant cannot notify the respondent until the claim meets all the requirements explained in the prior chapter and the claimant has been instructed by the CCB to proceed with service.

The claimant must serve the respondent with two things:

1. A notice of the proceeding; and
2. A copy of the claim.

Service of Process: There are four ways an individual (who is not a minor or considered to be incompetent) may be served in a CCB proceeding:

1. Complying with State law in the State where service is made;
2. Delivering a copy of the notice and claim to the individual personally;
3. Leaving a copy of the notice and claim at the individual's home with an appropriate person; or
4. Delivering a copy of the notice and claim to the respondent's designated agent (or an agent authorized by law to receive service of process).

There are two ways a corporation or other business entity may be served:

1. Complying with State law in the State where service is made; or
2. Delivering a copy of the notice and claim to an officer, a managing or general agent, or the respondent's designated service agent (listed in the Copyright Office directory).

In many cases, a party may wish to hire a process server to ensure that service is completed in a manner that conforms with the law. In any case, service may not be completed by anyone under the age of 18, or anyone who is a party to the case (including attorneys).

The claimant has 90 days to serve the respondent with notice and file proof of service with the CCB. The 90-day period begins on the date the claimant was instructed by the CCB to proceed with service.

Elements of a Proper Notice: The Copyright Office will specify in more detail all the requirements of a proper notice when it issues the implementing regulations. The CASE Act broadly requires that a notice of the proceeding shall:

- Adhere to a prescribed form set forth by the Copyright Office;
- Set forth the nature of the CCB and the proceeding;
- State the right of the respondent to opt out of the proceeding (see discussion of opting out in the next chapter); and
- State the consequences to respondent of opting out and not opting out, including a prominent statement that, by not opting out, the respondent will forgo the opportunity to have the dispute decided by an Article III court and will be waiving the right to a jury trial regarding the dispute.

Serving a Respondent Through a Designated Agent: The CASE Act allows individuals, corporations, partnerships, or unincorporated associations to designate a service agent. The Copyright Office will keep an updated list of designated agents for corporations, partnerships, and unincorporated associations and will provide the list to the claimant. (Note: The Office is not required to keep a list for designated agents that may be used by individuals). If the respondent is included on this list, the claimant must be served by delivering a copy of the notice and the claim to the service agent identified on the list.

Statute of Limitations: Once a proceeding has commenced, the statute of limitation for the same claim is tolled (i.e., paused).

Failure to Complete Service: In a case with multiple respondents, if one or more respondents has not been properly served within 90 days, claims against the respondent(s) who was not served will be dismissed without prejudice. If none of the respondents in a case (including a case with only one respondent) were properly served within 90 days, the proceeding will be dismissed without prejudice.

IX. Step #3: Respondent Decides Whether to Participate in the Proceeding

When someone is sued in federal court, they usually have no choice but to participate in the proceeding. As noted in Chapter III, that is not the case with the CCB. A respondent who is sued in the CCB can “opt out” of the proceeding. Most of the process for the respondent opting out will be determined by the Copyright Office in its implementing regulations.

We do know the following about the opt out process:

- A respondent has 60 days to decide whether to opt out or participate in the proceeding.
- If the respondent opts out within the 60 days, the case is immediately terminated.
- If the respondent requests it, this 60-day period may be extended by the CCB for another 60 days under exceptional circumstances.
- If respondent does not respond within the 60 days, the case will proceed.

X. Step #4: CCB Issues the Scheduling Order

If the respondent has not opted out within the 60-day period, the case is considered to be an “active” case. Once the case is active, the CCB will issue a scheduling order. The scheduling order will set forth a schedule for all future conduct of the CCB proceeding, including dates for respondent to respond to the claim. The schedule may subsequently be amended by the CCB in “the interest of justice.”

If the Respondent Misses a Deadline or Requirement (i.e., Default Judgments):
If a respondent who has not opted out fails to respond to the claim by the deadline or fails to meet one or more deadlines or requirements set forth in the schedule that will be set by the CCB (see discussion about the schedule in the next chapter), the CCB may enter a default determination if:

- After reviewing the relevant evidence and other information from the claimant (including damages), the CCB finds in favor of the claimant under applicable law; and

- The CCB notifies the respondent about the potential default and the legal significance of it and gives the respondent 30 days to respond.
 - If the respondent responds within this 30-day period, the CCB will: (i) consider the response; (ii) give the claimant an opportunity to respond to the respondent's response; and (iii) amend the CCB's determination as appropriate and the determination would no longer be considered to be a default judgment.
 - If respondent fails to respond within this 30-day period, the CCB will enter a default judgment, but the respondent may still be able to request reconsideration and a review by the Register of Copyrights (see Chapter XVII for more information).

A Default Judgment is Not Automatic if Respondent Does Not Respond: Even if a respondent is non-responsive, that does not mean the CCB will automatically issue a default judgment in favor of the claimant. The claimant still needs to prove to the CCB that an infringement, non-infringement or 512(f) violation occurred and that the respondent is liable. The [legislative history](#) (at pages 24–25) of the CASE Act makes clear that “The Act establishes a strong presumption against default judgments” and that “Relative to federal courts, the Copyright Claims Board has both more statutory authority and a greater obligation to scrutinize the merits of a claim.” The CASE Act legislative history also makes clear that “In cases where the respondent is absent, the [CCB] is expected to carefully scrutinize the available evidence, and ... consider applicable affirmative defenses such as fair use, where warranted by the circumstances of the case. Likewise, the claimant must provide evidence to prove damages even if the respondent is not present.”

If the Claimant Misses a Deadline or Requirement: If a case is active and the claimant fails to meet one or more deadlines or requirements in the scheduling order without having a good reason for doing so (the CASE Act refers to this as “justifiable cause”), the CCB may issue a determination dismissing the claimant’s claims. Before dismissing the case, the CCB must first provide written notice to the claimant alerting them of the potential dismissal and give the claimant 30 days to respond. If the claimant fails to respond within this 30-day period, the CCB may enter the dismissal, but the claimant can still request reconsideration and a review by the Register of Copyrights (see Chapter XVII for more information). The dismissal will include an award of attorneys’ fees and costs.

When to Elect Damages: The scheduling order may specify when a claimant or counterclaimant must choose between actual and statutory damages, but the CASE Act makes clear that, regardless of the schedule, ultimately the claimant or counterclaimant may elect the type of damages any time before the CCB issues a final determination.

XI. Step #5: Respondent Responds to the Claim

As noted above, once the case is active, the CCB issues the scheduling order, which will include a deadline for the respondent to respond to the claim. The response may include defenses and/or counterclaims that the respondent is asserting.

At this point, there is very little else that we know about this process since these details will be left up to the Copyright Office to determine in the implementing regulations.

Counterclaims: Similar to when a claim is filed by a claimant, a respondent's counterclaim must be served on the claimant. After that takes place, a CCB attorney will review the counterclaim to ensure that it complies with both the CASE Act and implementing regulations. If the counterclaim does not comply, the respondent has 30 days to amend it. If the amended counterclaim still does not comply, the respondent has another 30 days to amend it. The CCB attorney will reject the counterclaim if the respondent does not amend it within the first 30-day period, or the counterclaim fails to comply after second attempt. There are no additional fees for amending a counterclaim.

XII. Step #6: The Proceedings—Submissions, Discovery, & Conferences

After the respondent responds to the claim or fails to respond by the deadline the case proceeding begins. The CCB will supervise limited discovery relating to any claims and counterclaims, hold conferences between the parties, and facilitate settlement. Like with many of the prior topics, we will not know many details about the proceedings until the Copyright Office issues its implementing regulations. Here is what we do know so far:

Party Submissions: As noted above, in-person appearances are not required. The proceedings will be conducted through written submissions and video conferences. There is no formal motion practice, as in federal court. However,

- Parties may request that the CCB address case management and discovery matters; and
- The CCB may request or permit parties to make submissions addressing relevant questions of fact or law.

Discovery: Discovery is limited to the production of relevant information and documents, written interrogatories, and written requests for admission. When one of the parties requests it and can show good cause for the request, the CCB may approve:

- Additional relevant, limited discovery, consistent with the interests of justice; and/or
- A protective order to limit the disclosure of documents or testimony that contain confidential information.

The CCB may apply an adverse inference⁶ with respect to disputed facts against a party who has failed to timely provide discovery materials in response to a proper request for materials.

Most of the discovery process will be explained in much more detail in the implementing regulations.

Evidence: The types of evidence that the CCB can consider include:

- Documentary and other nontestimonial evidence that is relevant to the claims, counterclaims, or defenses;
- Testimonial evidence that is (i) submitted in written form under penalty of perjury; or (ii) at a hearing, limited to statements of the parties and nonexpert witnesses, that is relevant; and
- In exceptional cases, expert witness testimony or other types of testimony may be permitted if the parties can show a good cause for including it.

Hearings: The CCB may conduct a hearing to hear oral presentations on issues of fact or law from the parties and/or witnesses to a proceeding. When a hearing takes place:

- The hearing must be attended by at least two of the CCB officers;
- The hearing must be noted in the record of the proceeding and may be recorded or transcribed; and
- A recording or transcript of the hearing must be made available to any CCB officer who is not in attendance.

⁶ When a party fails to provide information, documents, or other evidence that has been properly requested, the CCB Officers can assume (i.e., infer) that the evidence would have been unfavorable to that party and may adopt the other party's viewpoint, if reasonable. This is what is referred to as an "adverse inference."

XIII. Things That Could End the Case Before the CCB Renders a Decision: Settlement & Dismissal

During the course of the proceedings there are a few things that could happen that could result in an early end to the case. These include:

Settlement by the Parties: Any time during an active proceeding, some or all of the parties may:

- Jointly request a conference with a CCB officer for the purpose of facilitating settlement discussions; or
- Submit to the CCB an agreement providing for settlement and dismissal of some or all of the claims and/or counterclaims. The settlement may include a request that the CCB adopt some or all of the terms of the settlement in a final determination. For example, as noted above, even though the CCB cannot issue injunctions, if the parties reach agreement where one party agrees to cease particular conduct, the CCB can include a requirement in its determination that the party abide by the agreement to cease the conduct.

Dismissal Due to Non-Responsiveness of a Party: As noted in Chapter X, the CCB can dismiss a case where a claimant or respondent fails to meet a deadline or requirement.

Dismissal Due to Bad Faith Conduct of a Party: If a party is found to have brought claims, counterclaims or defenses “for a harassing or other improper purpose” or “without a reasonable basis in law or fact,” the CCB can dismiss the claims, counterclaims or defenses. The CCB can not only dismiss the case in which the bad conduct occurred but if the bad actor has other cases pending before the CCB, the CCB may also dismiss those other cases as well.

Dismissal of Unsuitable Claims: The CCB can dismiss a case if it deems the claim or counterclaim to be “unsuitable.” A claim or counterclaim can be dismissed for unsuitability for the following reasons:

- The claim is brought for harassing or other improper purposes;
- Failure to join a necessary party;
- Lack of an essential witness, evidence, or expert testimony; or
- The determination of a relevant issue of law or fact could exceed either the number of proceedings the CCB could reasonably administer, or the subject matter competence of the CCB.

Dismissal Due to Class Action: Any party in an active proceeding before the CCB who receives notice of a pending or putative class action, arising out of the same transaction or occurrence, in which that party is a class member may submit a written request to the CCB, requesting that the CCB dismiss the proceeding. After notifying all claimants and counterclaimants, the CCB will then dismiss the proceeding without prejudice.

XIV. Step #7: The CCB Renders its Decision

After the evidence has been collected through party submissions, discovery and any hearing(s) and the proceeding draws to a close, the CCB will consider the facts and legal issues at stake in the case and render a decision in the case. The decision is referred to as a “determination.”

The Basis of the CCB’s Decision: The CCB’s decision must be made independently and be based on the facts in the records of the proceedings, the law and federal judicial precedent. If there is conflicting judicial precedent, the CCB must follow the law of the jurisdiction where the case could have been brought if it had been brought in federal district court. Where the case could have been brought in more than one jurisdiction, the CCB must follow the law of the federal jurisdiction that the CCB determines has the most significant ties to the parties and conduct at issue.

Factual Findings and Determinations by the CCB: Any factual findings made by the CCB must be based upon a preponderance of the evidence. Any legal determinations rendered by the CCB must:

- Be reached by a majority of the CCB officers;
- Be in writing;
- Include an explanation of the factual and legal basis of the determination;
- Set forth any terms by which a respondent or claimant (who has a counterclaim filed against them) has agreed to cease an activity;
- Set forth the terms of any settlement; and
- Include a clear statement of all damages and other remedies awarded.

Impact of Final CCB Decisions: Final decisions by the CCB will be made publicly available on the Copyright Office website. Final decisions cannot be cited or relied upon as legal precedent before any court or tribunal, including the CCB itself.

XV. Remedies

If the CCB decides in favor of the claimant or respondent, there are various remedies that the CCB can award (and some it cannot). The remedies that are available to a claimant or counterclaimant in a CCB proceeding depend on the type of claim(s) that are brought. These remedies include:

- **Monetary Damages:** The CCB can award monetary damages to the prevailing party, but cannot issue injunctive relief (with one caveat, see below). Monetary damages awarded by the CCB cannot exceed \$30,000 in one case. For infringement claims, the claimant or counterclaimant may choose between (i) actual damages and profits or (ii) statutory damages at any time before the CCB makes a final determination in the case. A party can also choose not to pursue damages at all.
- **Actual Damages:** The CCB may award anywhere between \$0 and \$30,000 in actual damages. This is true regardless of how many claims are brought in the proceeding. For example, if a party brings three separate claims and proves actual damages amounting to \$11,000 for each claim, the CCB would only be permitted to award \$30,000. If a party brings just one claim and proves actual damages amounting to \$35,000, the CCB would only be permitted to award \$30,000. As noted above, for infringement claims, the claimant or counterclaimant has a choice between actual or statutory damages or no damages. For other claims, the claimant or counterclaimant may pursue actual damages (not statutory damages). For infringement claims, actual damages will include both the actual damages suffered by the copyright owner as a result of the infringement as well as any profits the infringer obtained that are attributed to the infringement that were not already taken into account. Unlike with statutory damages (as discussed below), there is no minimum amount of actual damages that can be awarded by the CCB in a case, meaning the CCB could assess actual damages as low \$0. In infringement cases, it is often difficult to prove the damages suffered by the copyright owner and the profits gained by the infringer, which is why copyright owners often choose to pursue statutory damages instead.
- **Statutory Damages:** Statutory damage awards are only available for infringement claims. The CCB may award statutory damages in infringement cases if the claimant or counterclaimant elects statutory damages. Depending on the number of works infringed in a case (and other factors), the CCB may award anywhere between \$750 and \$30,000 in statutory damages. One significant factor is whether the copyrighted work(s) infringed was timely registered with the Copyright Office, as this

factor will establish the upper end of the range of damages that the CCB is permitted to award.

- *Works That Are Timely Registered:* For works that are timely registered, the CCB may award up to \$15,000 in statutory damages per copyrighted work infringed, and up to \$30,000 per case.
- *Works That Are Not Timely Registered:* For works not timely registered, statutory damages are limited to \$7,500 per copyrighted work infringed and a total of \$15,000 for all works infringed that were not timely registered. This means that in a case involving only infringement claims in which all of the works at issue were not timely registered, the CCB can award a no more than \$15,000 for the entire case.
- *A Case with a Mix of Timely and Untimely Registered Works:* Where a case involves infringement of both timely and untimely registered works, the CCB could award up to \$7,500 for each work that was not timely registered (or no more than \$15,000 in total for all works not timely registered), and up to \$15,000 for each work that was timely registered, as long as the sum of the total damages awarded does not exceed \$30,000. For example, if a claimant brings five infringement claims in one case and those five claims consist of two claims involving timely registered works and three claims involving works that are not timely registered, the CCB could award up to \$15,000 total for the three works not timely registered (with the award for any one work not exceeding \$7,500), and up to \$15,000 for each of the two remaining works, as long as the total damage award is \$30,000 or less. So, in that example, the CCB could award \$5,000 for each of the three works not timely registered, \$9,000 for one of the works that was timely registered, and \$6,000 for the other timely registered work. These numbers are used for the sake of illustrating how the damage limits will operate in practice, and should not be construed to mean that damages awards will reach or even approach these maximums in most cases. In another example using those same five works, the CCB could award \$750 for each of the works not timely registered, and \$1,000 for the two works that were timely registered, for a total damage award of \$4,250.
- *Minimum Award of Statutory Damages:* Like federal courts, the CCB cannot award statutory damages less than \$750 per work infringed except where the infringer proves that he or she was not aware and had no reason to believe that his or her acts constituted an infringement of copyright (also known as “innocent infringement”). In such a case, the CCB, like federal court, cannot award statutory damages less than \$200 per work infringed. Successful assertions

of innocent infringement are rare, in part, because inclusion of a proper copyright notice on a published work defeats an innocent infringement assertion by the infringer. Lastly, in cases where the alleged infringer is a nonprofit library, archive or educational institution or an agent or employee of one of these entities, or a public broadcasting entity, the CCB may reduce statutory damages to zero (more details of the qualifications for this reduction can be found in section 504(c)(2) of the Copyright Act).

- **Injunctions/Agreements to Cease the Certain Conduct:** The CCB cannot issue injunctions. However, if the parties reach agreement where one party agrees to cease a particular conduct, the CCB can include a requirement in its determination that the party abide by the agreement to cease the conduct. The agreement may also have an impact on the amount of monetary damages awarded in an infringement case—because the CASE Act allows the CCB to take into account whether the infringing party has agreed to cease or mitigate the infringing activity when determining the amount of damages that the CCB will award. While technically, incorporation of the parties' agreement into the CCB determination is not injunctive relief, it effectively serves the same function.
- More specifically, in an infringement action the CCB may include in its determination a requirement that a party cease activity that is found to be infringing, including removing, disabling access to, or destroying infringing materials, if the parties' agreement is made part of the record. In an action for misrepresentation contained in a notice or counternotice under section 512, the CCB may include in its determination a requirement that a party cease sending a takedown notice or counternotice to the other party regarding the conduct at issue in the case if that notice or counter notice was found to be a knowing material misrepresentation under section 512(f) and the parties' agreement is made part of the record.
- **Attorneys' Fees or Costs:** The parties must pay their own attorneys' fees and costs except where a claim is dismissed for failure to prosecute, or where the CCB has determined that a party has pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact. Where the CCB determines that the party has engaged in such bad faith conduct, the CCB will typically award reasonable costs and attorneys' fees to any adversely affected party in an amount of not more than \$5,000. There are two exceptions to this: (1) where an adversely affected party is not represented by an attorney in the proceeding, the award to that party will be for costs only, in an amount of not more than \$2,500; and (2) in extraordinary circumstances, such as where a party has demonstrated a pattern or practice of bad faith conduct, the CCB may, in the interests of justice, award costs and attorneys' fees in excess of \$5,000.

When attorneys' fees and costs are awarded by the CCB they would not be included when calculating the cap placed on damages (as discussed above).

Some Differences Between Remedies Available Before the CCB v. Federal Court:

- The upper limits for statutory damages that can be awarded by a federal court for infringement of a copyrighted work are much higher than can be awarded by the CCB. The maximum statutory damage award in federal court is \$150,000 per work infringed. The CCB cannot award more than \$15,000 in statutory damages per work infringed.
- In federal court there is no limit on the amount of actual damages that can be awarded by a federal court in a copyright infringement case. At the CCB, there is a limit of \$30,000 that can be awarded in a case.
- Even if a work is not timely registered, the CCB can award statutory damages. This is different than federal court. In federal court, a work that is not timely registered is ineligible for statutory damages.
- In federal court, the upper limit of a statutory damage award is increased where the infringement was committed willfully. In a CCB proceeding, willfulness has no impact on the range of a statutory damage award, or the amount awarded by the CCB.
- Federal courts can issue injunctions to prevent the infringing activity from continuing. Injunctive relief is not available in a CCB proceeding (except to the extent discussed previously in this section).
- In federal court, attorneys' fees and court costs may be awarded to the prevailing party. At the CCB, attorneys' fees and costs are not recoverable except where bad faith conduct is proven, or where a claim is dismissed for failure to prosecute, if appropriate.

XVI. Penalties for Bad Faith Claims/Actors

When the CASE Act was being considered by Congress there were several groups that raised concerns that the tribunal could be ripe for abuse by so-called copyright trolls. No one wanted to see this tribunal be subject to abusive practices and the bringing of frivolous cases, so there were several cautionary guardrails added to the CASE Act to prevent abuse of this process. The most prominent safety net in the CASE Act is the fact that participation is voluntary (see discussion in Chapters I and III). The other protections against abuse include:

- **CCB Can Dismiss a Case, Claim, or Defense, and Other Pending Cases:** If a party is found to have brought claims, counterclaims, or defenses “for a harassing or other improper purpose” or “without a reasonable basis in law or fact,” the CCB can dismiss the claims, counterclaims or defenses. The CCB can not only dismiss the case in which the bad conduct occurred but if the bad actor has other cases pending before the CCB, the CCB may also dismiss all those other cases as well.
- **CCB Can Award Fees:** As noted previously, each party is responsible for its own fees and costs. The exceptions to this general rule occur when a party is found to have brought claims, counterclaims or defenses “for a harassing or other improper purpose” or “without a reasonable basis in law or fact.” In this case, the CCB may award attorneys’ fees and costs up to \$5,000. If the party is not represented by an attorney, the CCB may award up to \$2,500 in costs. In extraordinary circumstances, such as “where a party has demonstrated a pattern or practice of bad faith conduct” the CCB can exceed these amounts. Where a claim is dismissed for failure to prosecute, the CCB will also award attorneys’ fees and costs, if any have been incurred.
- **CCB Can Prohibit the Bad Faith Actor from Bringing a CCB Case for One Year:** If a party is found to have brought claims, counterclaims, or defenses “for a harassing or other improper purpose” or “without a reasonable basis in law or fact,” and the party engages in the conduct in more than one instance, the CCB can prohibit the bad faith repeat offender from filing a case before the CCB for one year.

There are other provisions in the CASE Act that also indirectly prevent abuse. For example:

- The CASE Act allows the Copyright Office to issue regulations preventing any one person or entity from bringing a certain number of cases in a year (a party is not limited in the number of cases they can bring in federal court);

- Fees are non-refundable, which means that each time a respondent opts out because a frivolous case has been brought, the claimant loses the non-refundable filing fee; and
- Because the CASE Act caps damages for infringement at a maximum of \$15,000 in statutory damages per claim and total damages per case at \$30,000, so-called copyright trolls are prevented from making threats of massive, unpredictable copyright damages in an effort to extort cash settlements. (There is no cap under existing federal law.)

XVII. Step #8: Challenging the CCB's Decision

The parties have a very limited ability to appeal a decision made by the CCB.

Requesting the CCB to Reconsider or Amend its Ruling: If either the claimant or the respondent is unhappy with the final determination of the CCB, they may challenge the determination by requesting reconsideration of, or an amendment to, it provided they identify a clear error of law or fact material to the outcome, or a technical mistake by the CCB. The parties have 30 days to request reconsideration or amendment. After a request is made the other party will have an opportunity to address the arguments made by the requesting party. Once that takes place the CCB will either deny the request or issue an amended final determination.

Requesting the Register to Review the CCB's Denial of Reconsideration: If the CCB denies the request for reconsideration, the aggrieved party can request a review by the Register of Copyrights. The Register will issue regulations to set forth the rules for requesting the review. There will be an additional fee for this review. That fee will be established in the regulations. The review by the Register is limited to consideration of whether the CCB abused its discretion in denying reconsideration. The aggrieved party has 30 days from the CCB's denial to make this request. After the other party has an opportunity to address the request for a review, the Register will either deny the request, or send the proceeding back to the CCB for reconsideration of issues specified by the Register and for issuance of an amended final determination (this is called a "remand"). Once the CCB issued an amended final determination that determination is not be subject to reconsideration or review by the Register, except as provided in the next paragraph.

Appealing the CCB's Final Decision to Federal Court: After reconsideration and review by the Register have been completed or deadlines have passed without a request for either reconsideration or review, the losing party has a limited right to appeal the decision to federal district court. This appeal must be filed within 90 days after the date on which the CCB issued a final or amended final determination, or after the date on which the Register of Copyrights completed review of the determination, whichever occurs later. The losing party may seek an order from a federal district court requesting the court vacate, modify, or correct the CCB determination in the following cases:

- The CCB's final determination was the result of fraud, corruption, misrepresentation, or other misconduct;
- The CCB exceeded its authority or failed to render a final determination; or
- In the case of a default or determination based on a failure to prosecute, if it is established that the default or failure was due to excusable neglect.

XVIII. Step #9: Enforcing the Decision in Federal Court

Final determinations of the CCB cannot be re-litigated before any court or tribunal, including the CCB, except as provided in the previous chapter.

If the losing party does not comply with the CCB's final determination, the prevailing party can bring an action in federal district court to enforce the CCB's determination.

XIX. Relationship Between CCB Cases and Federal Court Proceedings

Relationship to Other Actions in Federal District Court: When a claim is brought before a federal district court and that claim is already the subject of a pending or active CCB proceeding the court will stop or suspend its proceedings or such other relief as the court determines appropriate. This rule does not apply to class actions.

Alternative Dispute Resolution Process: In 1998, Congress passed a law requiring federal district courts to make “alternative dispute resolution (ADR) processes”—methods for resolving disputes outside of a courtroom, including through arbitration or mediation—available to parties in a civil dispute, and allowing the courts to refer a civil case to ADR if the parties agree. The CASE Act makes it clear that a district court may refer an eligible case to the CCB (if both parties agree).

Class Actions: In the event that there is a class action brought involving the same transaction or occurrence as the claim(s) at stake in a CCB case the following rules apply:

- *Notice of Class Action:* Any party involved in an active CCB proceeding who receives notice of a pending class action arising out of the same transaction or occurrence as the proceeding before the CCB in which the party is a class member must either opt out of the class action (in accordance with regulations established by the Register of Copyrights) or seek dismissal of the CCB proceeding.
- *Dismissal of the CCB Case:* Any party in an active proceeding before the CCB who receives notice of a pending or putative class action arising out of the same transaction or occurrence in which that party is a class member may submit a written request to the CCB, requesting that the CCB dismiss the proceeding. After notifying all claimants and counterclaimants, the CCB will then dismiss the proceeding without prejudice.
- *CCB Case Has No Effect on Class Action:* A proceeding before the CCB will not have any effect on a class action proceeding in federal district court.

XX. Other Important Provisions

There are several other provisions in the CASE Act that may be relevant to any particular proceeding, depending on the type of case and facts. (Some of these may have been briefly mentioned above) These include:

- **Limit on Number of Cases Brought in a Year:** As noted in Chapter XVI, the Copyright Office may issue regulations preventing any one person or entity from bringing more than a certain number of cases in a year. The purpose of this is to ensure the CCB is not overwhelmed with more cases than it can handle and to prevent abuse.
- **Microclaims:** In most situations, a case filed with the CCB will be presided over and decided by three CCB officers. However, in cases where the total damages sought do not exceed \$5,000 (often referred to as “microclaims”), the case can be decided by one CCB officer. Where the rules for these types of case differ from larger cases, the Copyright Office will establish rules explaining the process in more detail in its implementing regulations.
- **Blanket Opt Out:** As noted in Chapters I and III, respondents can opt out of any proceeding for any reason. However, parties cannot opt out on all proceedings at one time or preemptively. They must opt out of each proceeding when they are notified about the proceeding. There is one exception to this rule: libraries and archives are permitted to opt out preemptively, on a blanket basis (i.e., opt out of all case at one time, before they are notified about a case). The regulations establishing how the libraries and archives can do that will be set forth in implementing regulations forthcoming from the Copyright Office.
- **Filing a CCB Claim Should Prevent a Service Provider from Re-Posting Material Under the DMCA:** Under the Digital Millennium Copyright Act’s (DMCA) notice and takedown provisions found in section 512 of the Copyright Act, if an alleged infringer responds to a notice sent by the copyright owner by filing a counternotice with the service provider, the service provider must decide whether it will re-post the alleged infringing material. Under section 512(g), if the service provider re-posts the material, the DMCA provides that it should do so within 10–14 business days, unless the copyright owner notifies the service provider that they have “filed an action seeking a court order to restrain the [user] from engaging in infringing activity” before the 14-day period expires. The CASE Act makes clear that filing a claim with the CCB qualifies as “filing an action” (under Section 512(g)), and has the same effect as filing in

federal court for purposes of the 10-day window for filing an action after a counternotification is sent.

- **Parties that Cannot be Sued Before the CCB:** The CASE Act provides that a claimant cannot bring a claim of second liability against a service provider for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in section 512 of title 17 (the DMCA) unless the service provider fails to remove or disable infringing material pursuant to a proper takedown notice sent under section 512. (for more about the notice and takedown process in section 512 of the Copyright Act (referred to as the DMCA) go to Copyright Alliance website's "Copyright Law Explained" page. In addition, a claim or counterclaim cannot be filed against a Federal or State governmental entity.

Lastly, there are several provisions in the CASE Act that set deadlines or requirements for the parties or the CCB. In some instances, the CCB can, in the "interests of justice," extend a deadline, withdraw or alter a requirement or vacate or alter a decision it has made. We tried to identify each instance in the process where this "interest of justice" condition may arise.