

# The Copyright Small Claims Court

By Michael Lambert

Changes are coming for copyright law. Federal courts will soon no longer have exclusive jurisdiction over federal copyright claims. Instead, the Copyright Claims Board (CCB), a three-judge panel within the U.S. Copyright Office that will hear “small” copyright claims, will begin operating as soon as December 27, 2021 (but no later than June 2022). The copyright small claims court, designed to provide copyright claimants a quicker and less expensive way to enforce their rights, will hear limited types of copyright claims, counterclaims, and defenses. Monetary damages will be capped at \$30,000 per proceeding with statutory damages limited to \$15,000 per work infringed. Importantly, participation in this court is voluntary, and respondents who prefer to adjudicate in federal court can opt out of the CCB. Unlike federal courts, the CCB will operate online and through other remote means.

In December 2020, then-President Donald Trump signed the Copyright Alternative in Small-Claims Enforcement Act (CASE Act) into law as part of the Consolidated Appropriations Act of 2021. *See* 17 U.S.C. §§ 1501–1511. Congress passed the CASE Act after legislative reports found that “the costs of litigating in federal court have become increasingly prohibitive,” and technology has led to a rise in illegal copying of works “at virtually no cost, much to the detriment of authors and the market for their works.” *See* [House Judiciary Report](#), No. 116-252 (September 12, 2019). The copyright small claims court is intended to give content creators “a realistic ability to enforce [their] rights when they have a comparatively modest claim for damages.” *Id.* The U.S. Copyright Office has promulgated proposed regulations implementing the CASE Act, *see* [Proposed Regulations](#), 86 Fed. Reg. 53897–53913 (Sept. 29, 2021), and the CCB is scheduled to begin operations as soon as December 27, 2021. Before then, content creators should begin considering whether to use the CCB to enforce their rights or defend against claims. This will depend on several factors explored in this article, such as the:

- Nature and complexity of each claim, defense, and counterclaim
- Number and nature of the parties and third parties
- Nature of each party’s representation (attorney or pro se)
- Parties’ resources and financial limitations
- Type and amount of discovery needed to prove a claim or defense
- Potential maximum and minimum actual and statutory damages that may be awarded
- Importance of recovering attorney’s fees and costs

- Timetable for resolution of the claim
- Convenience of proceeding remotely

**Nature of the claim and filing requirements:** The CCB can only hear limited types of copyright claims, namely claims for infringement under 17 U.S.C. § 106, declarations of non-infringement, and claims for misrepresentation under the Digital Millennium Copyright Act (DMCA). § 1504(c). It cannot hear claims by or against any federal or state governmental entity. § 1504(d). A claim must (1) contain a statement identifying the parties, the claim asserted, the alleged injury, and the relevant facts; (2) certify that the statement is accurate and truthful to the best of the claimant’s knowledge; and (3) be served on the respondent. § 1506(e). The CCB will dismiss a claim without prejudice for failure to join a necessary party; lack of an essential witness, evidence, or expert testimony; or if the relevant issue of law or fact could exceed the number of proceedings the CCB can “reasonably administer” or the CCB’s “subject matter competence.” § 1506(f)(3). A claim can be filed in the CCB once a work has been submitted for registration, but registration must be issued before a decision is made. § 1505(a). In federal court, the work must be registered before a claim is filed. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

**Nature of representation:** Rules governing representation are similar for the CCB and federal courts, although pro se parties may be more likely to file in the CCB. Claims and assertions made by a pro se party will be “construed liberally.” *See Proposed Regulations at 53898*. Law students may represent parties under “applicable law governing representation by law students.” § 1506(d)(2).

**Costs:** Litigating a case in the small claims court should be less expensive than in federal court because CCB proceedings will be more streamlined, discovery will be abbreviated, and there should be no travel costs for the remote proceedings. The filing fee in the CCB is expected to be \$100 per claim.

**Responding to a claim:** The CCB is voluntary, but a respondent must affirmatively opt out within 60 days of receipt of the claim to preserve the right to litigate in federal court. § 1506(i). If a respondent opts out, the claim will be dismissed without prejudice. *Id.* If a respondent does not timely opt out, the proceeding becomes active, and the respondent waives the right to a jury trial and will be bound by the CCB’s decision. *Id.* If the respondent fails to opt out, the CCB will issue a scheduling order with a 30-day deadline for the respondent to file a response to the claim. §§ 1506(k); 1506(g)(7)(B). The response must include a short statement disputing the facts, describing why the claim is meritless, and identifying all relevant defenses. *See Proposed Regulations at 53903*. A respondent may also raise counterclaims that arise out of the same transaction or occurrence. § 1506(g)(7)(B).

**Discovery:** Discovery will be more limited in the small claims court than in federal court. The CCB allows for production of documents, written interrogatories, and written requests for admission, but depositions and third-party subpoenas are not routinely allowed. Additional

discovery and expert witness testimony may be permitted in an “exceptional case.” § 1506(n), (o).

**Procedural rules and substantive law:** Procedural rules will be “relaxed” for CCB claims, while substantive copyright law will largely be the same in either venue. Traditional rules of civil procedure are expected to be “relevant” for CCB claims, but they may be “significantly relaxed in order to save litigants effort and expense.” *See* Proposed Regulations at 53903. The CCB will not make new law and must follow existing copyright precedent. If precedent is conflicting on an issue, the CCB will apply the law of the federal jurisdiction where the action could have been brought, or if it could have been brought in more than one jurisdiction, the jurisdiction with “the most significant ties to the parties and the conduct at issue” will control. § 1506(a)(2). Oral hearings may be held on issues of fact or law. § 1506(p).

**Damages:** In CCB proceedings, total damages are capped at \$30,000, and willfulness is not considered. Statutory damages are limited to \$15,000 per work. § 1504(e)(1)(A)(ii). A claimant before the CCB may elect actual damages and profits or statutory damages. § 1504(e)(1)(B). Either way, however, a claimant’s total monetary recovery cannot exceed \$30,000, exclusive of attorney’s fees and costs. § 1504(e)(1)(D). By comparison, in federal court there is no cap on actual damages and statutory damages range from \$750 to \$30,000 per work, which can be increased to \$150,000 in cases of willful infringement. In assessing damages, the CCB will consider whether the infringing party has agreed to cease or mitigate the infringing activity. § 1504(e)(1). Unlike in the CCB, a claimant cannot recover statutory damages in federal court unless the work is registered before the infringement began or within three months after first publication. § 412.

**Attorney’s fees:** Attorney’s fees and costs are more likely to be awarded in federal court than in the CCB, which may award attorney’s fees and costs only up to \$5,000 and only if a party pursued a claim, counterclaim, or defense for a “harassing or other improper purpose, or without a reasonable basis in law or fact.” §§ 1504(e)(3), 1506(y)(2). A party that pursues a claim, counterclaim, or defense for an improper purpose more than once in a year will be banned from the CCB for a year. § 1506(y)(3). In federal court, attorney’s fees are discretionary. § 505. Federal courts have “wide latitude” to award attorney’s fees and often consider “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *See Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 136 S. Ct. 1979, 1985 (2016).

**Deciding a claim:** CCB claims will be decided by a three-judge panel instead of a federal court judge or magistrate. The CCB must make factual findings based on a preponderance of the evidence and issue written decisions with an explanation of the factual and legal basis for the decision. § 1506(s), (t). Decisions must be made by at least two of the three judges. § 1506(t). The judges, who will serve renewable terms of six years, must have at least seven years of legal experience and “substantial” experience in copyright litigation, and one judge must have experience in alternative dispute resolution. § 1502(b). At least two attorneys with at least three years of “substantial” copyright experience will assist the judges. *Id.*

**Appeals:** Most CCB claims will not be reviewable by a federal court. Parties before the CCB have 30 days from a decision to request reconsideration from the CCB. § 1506(w). If a request for reconsideration is rejected, the parties will have another 30 days to request review from the Register of Copyrights. § 1506(x). Review of a CCB claim by a federal court is only permitted if a decision was issued because of “fraud, corruption, misrepresentation, or other misconduct” or if a party refuses to comply with a judgment. § 1508(a), (c)(1).

**Conclusion:** These are some of the many differences between the CCB and federal courts that content creators should assess before litigating before the CCB. Anecdotal evidence will likely guide decisions for the first few months before data can be collected. CCB decisions will be available online, but all other information relating to CCB proceedings will be exempt from disclosure under the Freedom of Information Act. § 1506(t)(3), (4). After three years of the CCB’s operation, the Register of Copyrights must file a report with Congress assessing the CCB’s effectiveness. *See House Judiciary Report*. Ultimately, the copyright small claims court will serve as a legislative experiment. Its success could lead to the creation of similar courts for other types of disputes, while its failure will have the opposite effect. For now, content creators should prepare for what is to come by weighing the pros and cons of litigating in the CCB.

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