

# Copyright Claims Board: A New Stage for Copyright Infringement Claims

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“There are no small roles, only small actors.” —Konstantin Stanislavski

Paraphrasing the famous line from the father of modern acting technique, in establishing the Copyright Claims Board (CCB) on June 16, the Copyright Office effectively declared that there are no small copyrights, only small copyright infringement claims. Time will tell whether this new stage will serve as a well-respected and well-run forum for copyright owners, seeking redress (perhaps a summer “Shakespeare in the Park” to continue shamelessly flogging this analogy) or the legal equivalent of a cruise ship dinner theater. But regardless of the eventual reputation of the CCB, copyright holders would now be well advised to familiarize themselves with this new forum for resolving copyright infringement claims and to consider its benefits and potential downsides in bringing or defending copyright infringement actions.

## What Is the Copyright Claims Board?

Congress passed the Copyright Alternative in Small-Claims Enforcement Act (CASE Act) in December 2020. The CASE Act provided for the Copyright Office to establish the CCB, a three-member tribunal, to resolve certain copyright disputes that involve up to \$30,000 in total damages, and any statutory damages are limited to \$15,000 per work infringed.<sup>[1]</sup> The proceedings before the CCB are entirely voluntary. Both parties must agree to participate. If the parties agree to participate, the CCB can consider a number of claims, including for infringement of one of the exclusive rights in the Copyright Act<sup>[2]</sup>. The CCB is prohibited from hearing a number of claims, but most notably:

- Any claims or counterclaims finally adjudicated by a court of competent jurisdiction or pending before a court of competent jurisdiction<sup>[3]</sup>; or
- For claims asserted against persons/companies outside the U.S.

## CCB Procedures

Once the parties have agreed to proceed before the CCB, the matter will move forward rapidly. The respondent will file a response to the claim. Discovery will begin with the parties required to use the CCB’s standard interrogatories and document requests.<sup>[4]</sup> No depositions are allowed. Pre-discovery and post-discovery conferences are conducted virtually. There is no formal motion practice. As with motion practice, there are no

formal rules of evidence followed by the CCB. Once discovery is completed, the proceedings before the CCB are conducted by means of written submission, hearings, and conferences carried out through telecommunications or video — no in-person attendance is required. In reaching a determination, the CCB can consider (1) documentary and other nontestimonial evidence and (2) testimonial evidence<sup>[5]</sup>.

## **CCB Determinations**

The CCB's determinations are based on judicial precedent, the records of the proceeding before the CCB, and applicable regulations of the Register of Copyrights. The written determination must be by a majority of the three-member tribunal<sup>[6]</sup> and is not precedential in other actions or proceedings. A successful party before the CCB may obtain several forms of remedies, including actual damages, statutory damages, a requirement to cease activity, and attorneys' fees and costs. As mentioned before, monetary relief is capped at \$30,000, exclusive of attorneys' fees and costs. The final determination by the CCB precludes litigation in another forum of the claims and counterclaims asserted and finally determined in the CCB.

An unhappy party may request reconsideration of the CCB's determination if the party "identifies a clear error of law or fact material to the outcome, or a technical mistake." The CCB may either deny the reconsideration or amend the final determination. If a reconsideration is denied, then a party may request review by the Register of Copyrights.<sup>[7]</sup> The review by the Register of Copyrights is limited to whether the CCB "abused its discretion in denying reconsideration of the determination." A party may also seek an order from a U.S. district court, "vacating, modifying, or correcting" the determination of the CCB. However, the district court may only vacate, modify, or correct a determination if it was the result of fraud, corruption, misrepresentation, or other misconduct; the tribunal exceeded its authority or failed to render a final determination; or a default or failure to prosecute was based on excusable neglect.

## **Is the CCB the Right Forum?**

The CCB clearly was created with the "little guy" copyright owner in mind. Whether an artist, photographer, or musician, the potential simplicity, low-cost, and ease of access of the CCB could make the forum an attractive option. While the awards will not be as significant as are possible in federal litigation, which may turn off plaintiffs seeking large monetary damages, the tradeoff is in less expenses to prosecute and the efficiency and quickness by which a determination could be achieved. Similarly, defendants may appreciate the attractiveness of a more rapid process than civil litigation to resolve uncertain claims against them within a forum that caps damages.

On the other hand, the early promise of quick and inexpensive resolution of copyright infringement claims may prove elusive if proceedings break down over discovery and testimony disputes. Defendants may also routinely opt out of the CCB if it becomes perceived as a lopsided forum favoring copyright owners.

The early trends indicate that CCB will be a busy forum, with close to 100 claims already being initiated in under two months of existence. These early claims seem to be largely individuals, with the respondents being companies of varying size, however, there appear several companies taking advantage of the CCB and filing claims. The claims filed so far seem to run the gambit from online infringement to sale of infringing product. Additionally, although an attorney is not necessary in the proceedings, multiple claimants and respondents are generally represented by counsel in the initiated proceedings.

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[1] The CCB offers an even more streamlined process called a “smaller claims proceeding” if the claimant is seeking \$5,000 or less in monetary relief (excluding attorneys’ fees and costs).

[2] Exclusive rights provided to copyright owners include reproducing the work in copies or phonorecords; preparing derivative works based upon the work; distributing copies or phonorecords of the work to the public by sale or other transfer of ownership or by rental, lease, or lending; performing the work publicly if it is a literary, musical, dramatic, or choreographic work or a pantomime or a motion picture or other audiovisual work; displaying the work publicly if it is a literary, musical, dramatic, or choreographic work or a pantomime or a pictorial, graphic, or sculptural work. This right also applies to the individual images of a motion picture or other audiovisual work; perform the work publicly by means of a digital audio transmission if the work is a sound recording. See 17 U.S.C. § 106.

[3] A caveat exists that allows the CCB to hear a claim or counterclaim if a court has granted a stay of proceedings to permit that claim or counterclaim to proceed forward before the CCB.

[4] Good cause will have to be shown to the CCB to have additional relevant discovery, including requests for admission.

[5] Expert testimony or other types of testimony may be allowed if good cause is shown.

[6] An officer who dissents from a determination may attach a statement, detailing their reasoning for disagreeing.

[7] A request for a review of determination by the Register of Copyrights requires an additional fee.

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