

**Before the
COPYRIGHT OFFICE**

In the Matter of)
)
Copyright Alternative in Small-Claims) Docket No. 2021-1
Enforcement (“CASE”) Act Regulations)
)

**COMMENTS OF PUBLIC KNOWLEDGE, RE:CREATE, THE CENTER FOR
DEMOCRACY & TECHNOLOGY, R STREET INSTITUTE, AND ORGANIZATION
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I. INTRODUCTION & SUMMARY

The CASE Act calls for the creation of a Copyright Claims Board (“CCB”) under the administration of the Copyright Office. On March 26, 2021, the Copyright Office issued a Notice of Inquiry (“NOI”) seeking public comment “regarding regulations implementing to establish the new Copyright Claims Board (CCB).”¹ In response, Public Knowledge, Re:Create, the Center for Democracy & Technology, R Street Institute, and the Organization for Transformative Works (“Joint Commenters”) submit these comments and urge the Copyright Office to: (1) acknowledge that there are significant constitutional concerns regarding its ability to operate the CCB; (2) ensure that the opt-out process is designed to favor respondents who intend to opt-out of all CCB proceedings and minimize claimants’ ability to abuse the system; (3) narrowly tailor the types of claims that the CCB can adjudicate; and (4) address ambiguities in the CASE Act that might allow claimants to litigate the same facts twice. These recommendations do not represent the totality of concerns or recommendations that Joint Commenters have regarding the Copyright Office’s implementation of the CASE Act, but rather address some of the most pressing issues that Joint Commenters believe the Copyright Office must address.

II. THE COPYRIGHT OFFICE’S IMPLEMENTATION OF THE CASE ACT SHOULD CONSIDER THAT THERE ARE SERIOUS CONSTITUTIONAL CONCERNS ABOUT THE CASE ACT AS PASSED.

There is an elephant in the metaphorical room of this proceeding that the Copyright Office should not ignore — the CASE Act, and the Copyright Claims Board (“CCB”) that it creates, are likely unconstitutional. While this is not the Copyright Office’s doing, the Office expressed concerns about the constitutionality of a small claims court that is not opt-in.²

¹ Copyright Office, CASE Act and the Copyright Claims Board (CCB) Implementation Regulations (March 26, 2021), <https://www.copyright.gov/rulemaking/case-act-implementation/> [hereinafter NOI].

² Copyright Office, Copyright Small Claims: A Report of the Register of Copyrights, 39 (Sept. 2013).

Congress chose to ignore those concerns and pass the legislation. As the Copyright Office looks at implementing the CCB, these serious constitutional questions should inform the Office's approach. While the Office likely cannot repair the act's constitutional infirmities, at a minimum the Office should acknowledge and address these constitutional concerns by making the opt-out process as easy as possible, enabling a blanket opt-out option or a near substitute, substantially limiting the subject matter of claims on which the CCB may make determinations, and limiting claimants' ability to proceed with claims before multiple adjudicators.

A. The CCB Violates the Separation of Powers Principle Embedded in the Constitution.

The separation of powers between the legislative, executive, and judicial branches is a cornerstone principle of America's system of government.³ James Madison described the critical checks and balances this separation provides to governmental power in Federalist Paper No. 48, stating "that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers."⁴ The risk, as Madison explained, is that "power is of an encroaching nature" and "it ought to be effectually restrained from passing the limits assigned to it."⁵ The Supreme Court has repeatedly recognized the importance of maintaining the separation of powers, particularly with regard to the Judiciary. Most recently, in *Stern v. Marshall*, the Supreme Court stated that "the judicial Power of the United States can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary

³ See The Federalist Nos. 47- 49 (Alexander Hamilton, James Madison). See also, Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C.L. Rev. 1037, 1050 (March, 1999).

⁴ The Federalist No. 48 (James Madison).

⁵ *Id.*

the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.”⁶ Yet, this is exactly what the CASE Act purports to do.

The CASE Act allows the CCB to hand out awards unchecked. As written, the CASE Act does not allow respondents to appeal the CCB’s application of the law or findings of fact. By withholding the District Court’s right to review the CCB’s findings of fact and law, the Legislature has taken power for itself from the Judiciary *and* denied the Judiciary its right to serve as the ultimate arbiter of fact and law. To add insult to injury, the CASE Act then requires District Courts to turn determinations handed out by the CCB into enforceable judgments without the ability to review the awards if a party does not comply with the relief requirements.⁷ Essentially, the Legislative Branch has decided that it will “completely administer” the powers of and assert an “overruling influence” over the Judiciary and with regard to small copyright claims—exactly what Madison warned against.⁸

Not only does withholding appellate review cause the Legislative Branch to encroach even further on powers it was never intended to wield, it also raises significant concerns about the due process rights of litigants. As the Supreme Court has explained, “The structural principles secured by the separation of powers protect the individual as well.”⁹ The lack of a proper appeals process is of particular concern for any respondents subject to a default judgment. The CCB has the right to issue default awards up to \$30,000 and an unwitting respondent can only appeal a default award for excusable neglect.¹⁰ In contrast, an Article III court may vacate a

⁶ *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (citations omitted).

⁷ CASE Act §1508(a).

⁸ Although the 4th Circuit has previously ruled that the Copyright Office (despite being a Legislative Agency) can perform some Executive Branch duties, the CASE Act enables the Copyright Office to perform a *judicial* function *without* allowing the Judiciary a chance for review. This is markedly different from creating regulations that interpret the terms of the Copyright Act. *See Eltra Corp. v. Ringer*, 579 F.2d 294, 299-300 (4th Cir. 1978).

⁹ *Bond v. United States*, 564 U.S. 211, 222 (2011).

¹⁰ CASE Act, §1508(c)(1)(C).

default judgment for mistake, fraud, newly discovered evidence, improper service, or other equitable reasons justifying relief.¹¹ Essentially, with regard to copyright claims, the Legislative Branch has removed one of the most important judicial structural principles protecting citizens from abusive litigation, the appellate procedural right of review.

Joint Commenters urge the Copyright Office to address the elephant in the room and approach its process of implementing the CASE Act in light of these serious concerns about whether or not it is even constitutional for the Copyright Office to move forward with implementing the CASE Act. While Joint Commenters remain skeptical that the Office can remedy the act’s constitutional weaknesses, it should at least to avoid exacerbating Constitutional concerns. To that end, it is particularly essential that the Copyright Office interpret the CCB’s scope and power narrowly and make opt-out procedures easy and welcoming.

B. Even if the Supreme Court Determined that the Legislative Branch Could Perform a Judicial Function, the CCB Fails the Public Rights Doctrine Test.

Even if the courts ignored the separation-of-power issues present in the CASE Act, any judicial function given to the Executive Branch or an Independent Agency must pass the “Public Rights Doctrine” test to protect the right to a trial by jury in civil cases.¹² The doctrine holds that an Article 1 tribunal may only adjudicate public rights—not private causes of action rooted in common law.¹³ Only Article 3 federal courts have the jurisdictional authority to review such

¹¹ *See* Fed. Rules of Civ. Proc. 60(b).

¹² *See* *Stern v. Marshall*, 131 S. Ct. 2594, 2610 (2011).

¹³ *Id.* at 2609 (“The Court has long recognized that, in general, Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”).

disputes.¹⁴ Moreover, Article 1 tribunals must have party consent, protect due process, and allow appeals to an Article 3 court.¹⁵ The CASE Act fails, or likely fails, every step of this test.

First, copyright infringement actions are private rights involving matters between private parties that the Supreme Court has held have their origins in the common law.¹⁶ As early as 1834 the Court stated that the “right of an author to the benefit and profit of his work, is recognized by the common law.”¹⁷ This alone should remove copyright infringement cases from the class of eligible disputes Article 1 adjudicating bodies are allowed to settle.

Additionally, infringement claims do not fall into the category of broader public rights like public health or welfare. Some have argued that a recent Supreme Court decision related to the Patent Trial and Appeal Board (“PTAB”)¹⁸ is the equivalent of the CASE small claims proceeding. However, the legal analysis in this memo is flawed. The court specifically found the granting and re-examination of a patent meets the public right doctrine test, not infringement actions which are common law. The PTAB reviews its own agency’s issuance of a patent. In other words, the PTAB does not consider whether or not a party infringed upon the patent; it only reviews whether or not the patent should have been granted in the first place. The CCB will have a completely separate function—it will review whether or not an individual or organization infringed upon a copyright, which is a function of a common law Article 3 court.

¹⁴ *Id.* at 2615 (“This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous ‘public right,’ then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking.”).

¹⁵ *See id.* at 2610-2611.

¹⁶ *Feltner v. Columbia Pictures*, 523 U.S. 340, 348 (1998). (“By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript.”).

¹⁷ *Wheaton v. Peters* 33 U.S. 591, 669 (1834).

¹⁸ *Oil States Energy v. Greene's Energy*, 138 S. Ct. 1365 (2018).

Second, even under the very remote possibility that a court finds that the CASE Act small claims court is a public right, it would still fail the Public Rights Doctrine test. Public rights that do not involve the government as a party, like the PTAB, are required to have a de novo right of appeal to the courts. The CASE Act does not allow appeals to the courts on errors of fact or law, easily failing this test. Additionally, it is questionable if the 60-day opt out would pass the consent requirement. And, the proceeding lacks traditional due process requirements such as the ability to call witnesses, the right to cross-examine and potentially the right to present evidence because of its limited discovery. Importantly, voluntariness alone, which Joint Commenters dispute is the case, is not enough.

Thus, even if a court accepts the fiction that the Copyright Office is an Executive Agency, the CASE Act would still fail at least two of the Public Rights Doctrine's requirements, and may fail all four. Therefore, in implementing the CASE Act, it is essential—at the very least—that the Copyright Office attempt to frame a CCB process that avoids usurping the role of courts and makes participation in CCB proceedings as close to voluntary as possible.

III. THE COPYRIGHT OFFICE SHOULD ENSURE THAT ITS COMMUNICATIONS AND PROCEDURES REGARDING THE CCB AND OPTING-OUT ARE CLEAR, EASY-TO-FOLLOW, AND IMPARTIAL.

In order for the CCB to properly function, both litigants and respondents must have confidence in the system. The Copyright Office can help mitigate some of the significant concerns that Joint Commenters have previously raised about the CCB by ensuring that its communications and procedures are clear, easy-to-follow, and impartial. Specifically, the Copyright Office should adopt a blanket opt-out for respondents who intend to consistently opt-out of CCB claims. At a minimum, the Copyright Office can maintain a publicly available list of people and organizations that will opt-out. Regardless, the Copyright Office must ensure

that its communications about a party's opt-out rights and other CCB procedures are accurately conveyed.

A. The Copyright Office Can Create a Blanket Opt-Out Because Congress Never Intended to Foreclose Such an Option.

The Notice of Inquiry notes that the specific library opt-out “suggests the Office lacks authority to adopt other blanket opt-outs by registration.” That interpretation ignores the unique nature of origins of the library-specific blanket opt-out, and should not be read as a clear foreclosure of the Office's ability to implement some form of blanket opt-outs for other respondents. The House and Senate Judiciary Committees did not include a blanket opt-out for libraries in the CASE Act versions they passed. There was no Congressional record established about the blanket opt-out. Instead, the legislation gave the Copyright Office wide authority to adopt rules and regulations as it saw fit. The version passed by the House and Senate Judiciary Committees represents the true Congressional intent of the CASE Act. This intent is further compounded by the fact that in much of the CASE Act negotiations over the last four years, advocates like those represented in these comments were assured by the bill's authors that they would not add blanket opt-out to the legislation, preferring to keep it open for the Copyright Office to decide.

Instead, at the last second, the language for the Library opt-out was added with so little record that any implication of Congressional intent related to its inclusion is simply inaccurate. Reading restrictive intent into this provision, despite the Congressional record, creates even further distrust in the Copyright Office's intent as it engages in the process of implementing the legislation.

The CASE Act does not foreclose the Copyright Office's ability to adopt a blanket opt-out procedure. This procedure serves multiple important purposes, creating a stronger CCB

that will work better for both plaintiffs and respondents. A blanket opt-out would prevent plaintiffs from bringing claims against respondents that plan to opt-out every time, saving plaintiffs time and money. It will also save the CCB from spending unnecessary paperwork and staff time on cases never destined for the CCB to begin with. Additionally, a blanket opt-out will prevent a clerical error or oversight from leading to CCB jurisdiction and prevent potentially entering a default judgment against a respondent that clearly would have opted-out otherwise.

At a minimum, the Copyright Office should instruct the CCB to maintain a searchable and publicly available database of organizations and individuals that wish to opt-out of all CCB proceedings. If done correctly, this can achieve almost the same goals as a blanket opt-out with minimal effort.

Moreover, to ensure that opting-out is as easy and safe as possible, Joint Commenters propose that the CCB must: (1) ensure that any contact information, including email addresses, provided to it remain private and are not available on the publicly searchable database; (2) notify anyone on the list when a litigant chooses to initiate an action against them via their preferred contact method; (3) include specific language in the notice that explains that they are receiving the notice because they signed up for the CCB Opt-Out List and offering a one-click or one-button option to opt-out of the CCB's jurisdiction for the pending claim; (4) notify a potential litigant that the person against whom they wish to bring a claim is on the opt-out list and offer them the chance to withdraw their claim and receive a filing fee refund if they have already paid one.

While this process is not as streamlined as a blanket opt-out, it will still offer sufficient protection to potential respondents and deterrence to claimants who abuse the system or use it as a tool to harass.

B. To Establish the CCB’s Credibility, the Copyright Office Must Ensure Its Communications about the CCB Are Impartial and Factually Accurate.

As the Office is keenly aware, the undersigned groups had serious concerns with the CASE Act and the impact it could have on Internet consumers, users, and the new generation of digital creators. Because of this, there is skepticism that exists in the communities that represent these groups. In order to establish credibility as a fair and neutral arbiter, the CCB must carefully and transparently communicate with respondents about the CCB itself, and the opt-out specifically.

The CCB is not an arbitration nor alternative dispute resolution—rather, it is the Legislative Branch promulgating an official statutory interpretation, enforceable via the Federal Judiciary, on individual disputes. The CCB and the Office assume this role with the utmost care and sensitivity. A perception of unfair or biased judgment undercuts not only the credibility of the CCB, but the government in general. While Joint Commenters appreciate the diligence with which the Copyright Office is approaching this proceeding, not long ago a prior Register publicly asserted that the Office’s role was to advocate for rights holders. This historical context creates anxiety—justified or not—regarding the Office’s impartiality when adjudicating such disputes. The heightened role of the Copyright Office—creating and overseeing the functions of a quasi-judicial adjudicatory body—presents serious ethical considerations that the Copyright Office has not previously faced. The Copyright Office is no longer just about copyright policy, law, the 1201 triennial review, advising Congress and Executive Branch agencies and registration; it is now a steward of equal justice under the law, and must do everything in its power to act impartially.

Appearances of impropriety matter for equal justice. Decisions of the CCB are only reviewable by, and thus answerable to, the Register herself. Because of this, the Office stands in

a position of enormous power (real or perceived) over the CCB's decisions. When the Office takes a specific position on the legality of an unsettled issue that may appear in an action before the CCB, that position inherently poisons the well. One recent example of this is the Office's negative assessment of Controlled Digital Lending (an unsettled issue at the center of ongoing fair use litigation) in a recent letter to Senator Tom Udall.¹⁹ Optically, this creates the impression that "the fix is in" against parties who attempt to defend this practice before the CCB.

The Copyright Office also must approach publicly disagreeing with case law carefully. In the recent Section 512 report, the Office repeatedly stated its disagreement with judicial interpretations of Section 512.²⁰ Those public disagreements will make it hard for either party in an action to feel they are engaging in an impartial resolution.

A separate but related complication is the Office's decision to co-host events or otherwise partner with organizations, companies and individuals that are potential parties in a CCB action. Joint Commenters would recommend that, in order to maintain the appearance of impartiality, the office refrain from such partnerships for official events of Office or the broader Library of Congress.

Similarly, the Office must moderate the tone of its communications about the CCB. The Copyright Office must ensure that its statements about the CCB are factually accurate, devoid of opinion, or include all the information necessary to let a party decide what is in their broader interests. A quick survey of the current materials from the Office regarding the CCB show that, at this moment, these standards are unmet. First, the home page for the CCB contains a "booster" text pitching the Board's benefits. Joint Commenters strongly recommend that the Office remove

¹⁹ Sen. Tom Udall, Letter to the Copyright Office (April 16, 2020), <https://www.copyright.gov/laws/hearings/Sen-Udall-Response-National-Emergency-Library.pdf>.

²⁰ E.g., Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights, 84 (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

this section. The Office should not pitch potential parties on the CCB as a forum; it should simply describe the functions and availability of the system. Boosterism is inappropriate.

Moreover, the benefits and facts section contains a number of factually inaccurate, misleading, and opinion statements. To name a few a few:

1. “Monetary damages will be capped at \$30,000. No one will be able to bring a proceeding in the CCB seeking more than \$30,000 total (with lower per-work limits if someone is seeking statutory damages). If a party is seeking statutory damages, the CCB will not consider whether an infringement is willful. This means that respondents will be assured that they cannot face damages as high as those available in federal court (which can be up to \$150,000 per work infringed).”²¹

This statement is factually inaccurate. Because the standard for timely registration is different for actions at the CCB than for judicial actions, some parties will be able to avail themselves of statutory damages at the CCB even when they could not do so in federal court. In these cases, respondents will actually face higher damages at the CCB than in federal court.

2. “It will be voluntary”²²

This point is extremely important and at the core of one of the Constitutional issues facing the CCB. While the opt-out provision creates the opportunity for respondents not to participate, the true nature of the opt-out has scenarios that are not voluntary if the 60 days lapse for the respondent without being able to have an informed decision on their choices. This 60 day period is far too short to be meaningfully voluntary, given the complicated and nuanced nature of copyright law and damages. Joint Commenters would advise the CCB to avoid calling it voluntary, as this is taking a stance on a disputed issue.

There are more problematic statements on the Frequently Asked Questions page:

²¹ <https://copyright.gov/about/small-claims/>

²² Id.

3. “The CCB is not mandatory so that it is consistent with the Constitution, including regarding the role of federal courts, the right to a jury trial, and to ensure proper due process.”²³

This is a disputed interpretation of the final statutory language--not to mention a hotly contested issue and a likely subject of litigation. Additionally, even if it is “voluntary” it still faces many Constitutional hurdles. To opine on the constitutionality of the clause is inappropriate given this debate.

4. “If you opt out, however, the other party still can bring a claim against you in federal court, which would likely be more expensive and time consuming.”²⁴

As Joint Commenters note in Part V (below), it appears to be possible for claimants to pursue claims in both federal court and before the CCB over the same act, even when respondents do not opt out. Likewise, Joint Commenters have already observed that the CCB’s inconsistent approach to timely registration and statutory damages may allow for higher damages before the CCB than would be available in federal court.

Finally, on the Office’s “Coming Soon” Flyer:

5. “How will the CCB be a better place to bring or defend against a copyright claim? The CCB will be efficient, cost-effective, and easy to use. It will have streamlined processes like limited discovery and motions and will be mostly paper-based. As a result, everyone involved in CCB proceedings will need to use far fewer resources (in money and time) than in federal court. Additionally, if someone brings a claim against you, the maximum you will have to pay if the CCB rules against you is \$30,000. This significantly reduces your potential liability depending on the case. For example, if a copyright owner is seeking statutory damages (which are different than actual damages and limited to a certain monetary range), they will be limited to \$15,000 per work in damages for timely registered works, which is ten times less than the \$150,000 per work limit in federal court. Regardless of whether you are bringing or defending against a claim, you will benefit from the expertise of the CCB Officers, who will have extensive experience with copyright law and be well equipped to assess your position.”²⁵

²³ <https://copyright.gov/about/small-claims/faq.html>

²⁴ Id.

²⁵ <https://copyright.gov/about/small-claims/quick-facts.pdf>

Again, this is an inappropriate one-sided discussion that only focuses on the benefits of the CCB and has opinions about the CCB that constitute potentially bad or misleading advice to parties.

It is clear that the Copyright Office thinks that the CCB is a good option. As groups that represent the interests of a large swath of potential respondents, Joint Commenters strongly disagree with this point. As Copyright Office Staff, Members of Congress, and supporters have said on numerous occasions, the purpose of the CASE Act is to help copyright holders get access to monetary damages for infringement where the courts are a bad option.²⁶ If the courts are not a realistic option, why would submitting to CCB jurisdiction be a good thing for respondents? When statutory damages are available at the CCB and not available in court, that is especially the case. It is important that the Copyright Office takes this into account if they want to be seen as neutral arbiters rather than on the side of plaintiffs.

C. The Method of Informing Respondent’s of Their Opt-Out Rights Is Important for the Credibility of the CCB.

The systems for party notification and opt-out will be critically important. As Joint Commenters have already stated, it is important that the Office’s materials function as a neutral presentation of facts—not boosterism, or pitching the CCB as a “better alternative” to federal

²⁶ See, e.g., <https://copyrightalliance.org/case-act-signed-into-law/#:~:text=The%20CASE%20Act%20authorizes%20the,of%20the%20small%20claims%20process>. (“Why is the small claims process important? Because federal courts have exclusive jurisdiction over copyright, and federal litigation is so expensive, many professional creators and small businesses simply cannot afford to defend their rights when someone infringes their copyrighted works; <https://www.copyright.gov/laws/hearings/testimony-of-karyn-temple-for-june-26-oversight-hearing.pdf>, Statement of then Register of Copyrights Karyn Temple, “...low-dollar but still valuable copyrighted works are frequently infringed with impunity, and individual creators and small businesses often lacking [sic] an effective remedy... For this reason, the Copyright Office strongly supports a small claims tribunal structured along the lines of the proposal detailed in the Copyright Office’s 2013 report.”)

court (which it may not be for many respondents). The Office should refrain from putting a thumb on the scale to pressure respondents into accepting the CCB's jurisdiction.

The notice language needs to describe the opt-out process clearly, concisely, and in a manner that is comprehensible to a lay audience. Joint Commenters are happy to work with the Office to help develop language that Joint Commenters think would best communicate the opt-out to a respondent.

The opt-out process must be quick and easy to exercise. Joint Commenters recommend a simple postcard system, wherein respondents may check a box to opt out of proceedings and place the response card in the mail. There should also be an option to easily opt out online via the CCB's website. Joint Commenters recommend placing a prominent opt-out link or "button" on the CCB's front page. This should click-through to a simple opt-out page where all the respondent needs to do is enter a case number, check a box, and offer an e-signature to opt out of proceedings.

Joint Commenters also recommend that a link and a QR code are added to the notice that would bring respondents to the opt-out page. The more clicks and requirements a respondent faces, the less likely they are to opt-out. Given that a failure to opt out effectively waives a respondent's basic constitutional rights (including due process, full appellate rights and a jury trial), it needs to be as easy as possible for a respondent to opt-out. Joint Commenters are happy to work with the copyright office on how to best do this, including reviewing potential forms.

IV. THE COPYRIGHT OFFICE SHOULD NARROWLY TAILOR WHAT CLAIMS ARE APPROPRIATE FOR THE CCB.

Although the Copyright Office specifically asks commenters to address regulations regarding "eligible types of work," it fails to ask the broader, and frankly more important, question about "what types of claims" are appropriate for the CCB to resolve. The CASE Act

explicitly allows the Copyright Office to establish “further limitations and requirements” with regard to “permissible claims, counterclaims, and defenses.”²⁷ And, there are other provisions in the CASE Act that further demonstrate Congress’ intent that the Copyright Office determine what is “appropriate for resolution” by the CCB.²⁸

The scope of this query is important because, in addition to classes of works that the CCB should not address, there are other concerns that are inappropriate for the CCB. Most importantly: anything that is novel or too complicated to easily fall into established precedent. This applies to issues of law, complicated areas of fact, and new and/or complex works.

A. The CCB Should Not Hear Claims That Pose Novel Questions of Law or Involve Complicated Issues That Do Not Fall Within Clearly Established Precedence.

Claims that involve novel questions of law or complicated facts that are not easily applied to established precedent fall well outside the jurisdictional scope of the CCB and could lead to a CCB determination that conflicts with a judicial judgment on the same set of facts. It is well established that Congress cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law.”²⁹

Not only does modern Copyright Law encompass a body of jurisprudence that was developed over centuries through common law,³⁰ but many of the statutory provisions of the Copyright Act are largely reiterations of well established common law copyright principles. And Courts still use common law to address novel and complicatedly nuanced copyright claims.³¹ Anything that would require the CCB to make a determination on a novel or complicated fact

²⁷ CASE Act § 1504(c).

²⁸ CASE Act § 1503(a)(1)(B).

²⁹ *Murray v. Hoboken Land*, 59 U.S. 272, 285 (1856).

³⁰ *See Feltner v. Columbia Pictures*, 523 U.S. 340, 347-53 (1998) (describing the common law roots of Copyright Law).

³¹ *See Google v. Oracle*, 593 U.S. __ (2021).

pattern that falls outside of clearly established precedence would necessarily require common law to reach a determination. Because Congress cannot remove common law issues from judicial review, the Copyright Office must bar the CCB from adjudicating these types of issues.

Moreover, the CASE Act explicitly states that CCB determinations have no precedential value, even within the CCB itself.³² By preventing CCB determinations from having any weight at all, Congress demonstrates that it did not intend for the CCB to engage in precedent-making issues.

Finally, except on the most straightforward of copyright claims, the CCB risks handing out determinations that could conflict with a District Court's on the same exact set of facts. The CASE Act does not allow the CCB to hear all counter claims and it also gives a respondent the right to bring a counterclaim in district court. This could result in essentially two parallel proceedings on the same set of facts—one at the CCB and one in District Court. Although an initial claim of infringement and a responsive counterclaim would necessarily have some differences, there could be overlapping issues at play resulting in contradictory judgments. This is particularly problematic since the CASE Act excludes judicial review of the CCB's determinations on issues of fact and law.

The Copyright Office must expand its consideration of what is appropriate for the CCB to hear and determine that the CCB cannot hear complicated or novel issues of law.

B. The CCB Should Not Hear Claims That Involve New Technologies Or Complicated Works Such as Software.

Similarly with issues of law, the Copyright Office should not allow the CCB adjudicate copyright disputes involving new technologies and complicated works like software. It took more than ten years for the federal court system to work through the issues posed by APIs in

³² CASE Act § 1507(a)(3).

Google v. Oracle.³³ When Oracle first brought its claims of infringement against Google, the technology at stake was new. Moreover, the lengthy litigation demonstrates just how complicated some types of copyrighted works, like software, can be. The CCB has no business making copyright determinations about these types of works.

First, new mediums for creative works and complicated works like software are likely to involve novel issues of law or require common law adjudication. Our statutory copyright scheme was designed to address specific types of works.³⁴ This often means that new types of creative works do not fit within the Copyright Act's statutory regime. In order to figure out how to address such works, the CCB would likely have to make common law determinations on how to address claims involving new creative mediums. As discussed in the previous section, such determinations fall outside the scope of the CCB's jurisdiction.

Additionally, the CCB was designed to simplify the copyright claims process. The legislation does not provide the CCB with the right tools to evaluate new creative mediums or complicated works—which would likely require extensive discovery, and fact-finding in order to make a determination on a claim. This could result in judgments made on new creative works without the proper information necessary to determine whether and to what extent the Copyright Act may apply.

Thus, just as with issues of law, the Copyright Office must determine that the CCB cannot adjudicate claims related to new mediums of creative works or works already known as particularly complicated, such as software.

³³ Oracle sues Google over Android, Reuters, (August 12, 2010) <https://www.reuters.com/article/us-google-oracle-android-lawsuit-idUSTRE67B5G720100813>, last visited April 26, 2021.

³⁴ Jessica Litman, Ch. 2: The Art of Making Copyright Laws, *Digital Copyright*, 11-22 (2017).

C. The CCB Should Decline Jurisdiction Over Cases that Raise a Fair Use Defense.

Fair-use analysis falls outside the scope of the CCB's ambit. Fair use is a complicated, mixed question of law and fact that requires balancing factors on a case-by-case basis.³⁵ Importantly, the Supreme Court's recent decision in *Google v. Oracle*³⁶ contains substantial updates to the standard fair-use analysis; however, District Courts have not had an opportunity to apply the decision to new fact patterns.

As *Google v Oracle* illustrates, fair use is not static; courts are constantly adapting the four factors to accommodate new uses, formats, technologies, and concerns. Circuit splits are common; the CCB will necessarily have to choose which circuit's precedent to apply.³⁷ This runs the risk of not only exacerbating the general unpredictability of fair use defenses, but compounding it by potentially creating a new "circuit"--the CCB itself--with its own idiosyncratic jurisprudence. Small claims tribunals make sense in situations where disputes center around questions of *fact*. Fair use, as a mixed question of law and fact, necessarily requires judicial interpretation.

Moreover, the underlying facts in a fair use case often require significant discovery. The Court's fair use analysis in *Google* demonstrates just how complicated the discovery underlying a fair use claim can be.³⁸ The CCB is simply not structured to deal with these types of cases. Properly analyzing fair use requires qualified counsel and full discovery—a fact that filers and respondents will likely realize long after the 60-day opt-out window has passed. To address these

³⁵ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 560 (1985)

³⁶ *Google v. Oracle*, 593 U.S. ___ (2021)

³⁷ Even if the CCB could determine which circuit's law to apply based on where the case might have been filed, copyright claims often have a significant nexus to multiple districts (California based plaintiff and a New York based respondent).

³⁸ See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Google LLC v. Oracle America, Inc.*, 593 U.S. ___ (2021).

concerns, the CCB should dismiss cases that raise a fair use defense for lack of subject matter jurisdiction; such cases are better suited to the judicial branch and a full and proper process.

V. THE COPYRIGHT OFFICE MUST ADDRESS CLAIM PRECLUSION TO PREVENT CLAIMANTS FROM LITIGATING THE SAME FACTS TWICE.

As written, the CASE Act does not provide sufficient certainty for respondents regarding the preclusion of additional claims based on the same acts that may have led to a claim before the CCB. The relevant provisions would allow claimants to pursue in an Article 3 court any claim not asserted or finally determined by the CCB, even if those claims are based on the same facts as claims brought before the CCB.³⁹ This loophole would allow claimants to file a limited claim at the CCB, for example by only alleging infringement of one of their exclusive rights under section 106, and then after the CCB determination, to file in an Article 3 court a complaint alleging infringement of a different exclusive right or a claim based on another provision of copyright law, such as the removal of copyright management information under section 1202 and 1203.

This gives plaintiffs an unfair advantage—getting two opportunities for legal redress for the same act. Not only does this provide an opportunity to double dip on statutory damages, it also gives claimants a low-cost way to test their own legal arguments and expose the legal strategy of defendants before pursuing legal action in court.

This loophole will also mislead defendants who may not understand the complex bundle of rights protected by copyright. They may believe that, once the CCB has rendered a final determination, they are safe from further legal action arising from the act of infringement addressed by the CCB. Yet they would still remain liable for any claim not asserted, or not determined by the CCB. Finally, the ability for claimants to seek redress through both the CCB

³⁹ CASE Act, §1507(a)-(a)(1).

and Article 3 courts completely undermines the premise of the statute, which purports to offer defendants potentially lower damages in exchange for waiving the procedural protections guaranteed by federal courts. Instead, by not opting out of the CCB process, defendants expose themselves to damages for which they have no appeal mechanism and may still remain liable for additional claims of damages based on a single act of infringement.

While the statute does not appear to delegate to the Office any opportunity to directly address this provision, the Office should consider ways to mitigate abuses of this loophole.

VI. CONCLUSION

The Copyright Office has a responsibility to the public to ensure that the CCB is fairly managed and not another tool for rights holders to harass and threaten people lawfully using copyrighted material. To that end, Joint Commenters urge the Copyright Office to acknowledge that the CASE Act is likely unconstitutional; ensure that its communications and CCB procedures are clear, easy-to-follow, and impartial; narrowly tailor what claims the CCB can hear; and address ambiguities regarding claim preclusion that could allow a claimant to litigate the same facts twice.

Respectfully Submitted,

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