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CASE Act: Implications for College & Research Libraries

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In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement (CASE) Act that aims to “provide an efficient and user-friendly option to resolve certain copyright disputes that involve less than \$30,000,” by ostensibly creating an alternative venue for creators to bring copyright infringement claims outside the Federal courts.¹ Participation in small-claims proceedings are voluntary, but respondents must make an affirmative choice to opt-out. The CASE Act generates significant implications for college and research libraries, their workers, and library stakeholders, including academic researchers, faculty, and students.

Basics of the CASE Act

The legislation added a new chapter to U.S. copyright law (Title 17, United States Code), Chapter 15, establishing a “Copyright Claims Board [CCB], which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work” (17 U.S.C § 1502[a]). The CCB is staffed by three Copyright Claims Officers (CCOs) who are not judges, but individuals with “deep expertise in copyright law.”² CCOs will “render determinations on the civil copyright claims, counterclaims, and defenses that may be brought before” them (17 U.S.C. § 1503[a][1][A]). They will be assisted by Copyright Claims Attorneys (CCA) who will help with CCB administration .

Filing a Claim

To begin a proceeding, the claimant (the instigating party) files a claim against a respondent with the CCB and pays the associated filing fee. Claims categories include:

- Claims of “infringement of an exclusive right in a copyrighted work provided under section 106” (17 U.S. Code § 1504[c][1]). For example, if a photographer, Beth, feels another individual, Chris, has violated her public display rights by placing a photograph

to which she holds the copyright on a public webpage, she can bring a claim of infringement against him before the CCB.

- Counterclaims for “a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106” (17 U.S. Code § 1504[c][2]). Using the above example, Chris may file a counterclaim requesting the CCB declare his use noninfringement as he feels it falls within the scope users’ rights (e.g., fair use) found in U.S. copyright law.
- Claims for “misrepresentation under Section 512(f)” of U.S. copyright law. Chris could file a claim arguing that Beth knowingly misrepresented that the photograph he posted to his public web page was an infringement of her Section 106(5) right, or that the photograph “was removed or disabled by mistake or misidentification” (17 U.S. Code § 512[f][2]).

CCB staff review the claim to confirm its compliance with the law and applicable regulations. If it does, they will notify the claimant, who then has 90 days to serve notice of the claim on the respondent, typically by complying with procedures of State law for serving a legal summons (e.g., handing it to someone in person, or delivering it via U.S. mail) and file proof of service with the CCB.

Opting-Out of Proceedings

Participation in CCB proceedings is voluntary. When a respondent is notified of a claim against them, they have 60 days to opt-out of the proceedings. If a respondent chooses to opt-out, the claimant may then choose to file a copyright lawsuit against the respondent in Federal court. If they fail to opt-out of the CCB proceeding before the deadline, respondents lose their opportunity to have the dispute decided by a court. The proceeding then moves forward in the

CCB, with or without their participation, and the respondent “shall be bound by the determination in the proceeding” (17 U.S.C. § 1506[i]).

Proceedings

As part of CCB proceedings, both parties can submit documents and testimony as evidence supporting their claim, counterclaim, or defense. The CCB can also conduct hearings to receive oral presentations or testimony “on issues of fact or law” (17 U.S.C. § 1506[p]). Both parties may be represented by an attorney or qualified law student (17 U.S. Code § 1506[d][2]). After hearing evidence, the CCB will issue their determination, reached by a majority of the Board, in writing. It will include:

- an explanation of the factual and legal basis of their determination;
- any agreed terms regarding the cessation of infringing activity under section 1504(e)(2);
- terms of any settlement the parties agreed to under subsection (r)(1); and
- a clear statement of all damages and other relief awarded.

Damages that can be awarded to the prevailing party include “actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement” (17 U.S.C. § 504[b]) or “statutory damages for all infringements involved in the action” (17 U.S.C. § 504[c]) which, under the CASE Act, can run up to \$15,000. No party pursuing one or more claims or counterclaims in a single proceeding may seek to recover more than \$30,000.

Why Should Libraries (and Library Workers) Care About the CASE Act?

Section 1506(aa) of the CASE Act permits libraries and archives to preemptively and permanently opt-out of proceedings before the CCB. However, a Notice of Proposed

Rulemaking (NPRM) concerning “Small Claims Procedures for Library and Archives Opt-Outs and Class Actions” confirmed that even though libraries and archives as *institutions* may opt-out of CCB proceedings under the statute, this privilege would not extend to the *employees* of libraries and archives (86 *Fed. Reg.* 49276 [2 September 2021]). If this provision carries into the final rule, it means that library employees could have copyright infringement claims brought against them.

Many college and research libraries, as well as individual library workers, submitted comments to the NPRM arguing that employees should be excluded from CCB proceedings if their employing library opts-out. Libraries can only operate through the actions of their employees, and if the law provides for libraries to permanently opt-out, then this benefit should also extend to its employees. Library employees working in higher education regularly engage in copyright decision-making, including “digitizing and sharing collection materials online, posting readings or other content to online course websites or in digital exhibits, making preservation copies of fragile materials, and undertaking interlibrary loan throughout the world.”³ Library workers take part in these activities in a responsible fashion.

The reach of the CASE Act extends to constituents served by academic libraries. Faculty, instructors, and students not only create and publish their own original copyrightable scholarship, they use and repurpose the copyrighted content of others. For example, a faculty author in architecture might reproduce a building photograph in their academic article to contribute new scholarship and understanding to the topic. Or a media studies instructor could include a short documentary clip in their course management system. Under the CASE Act, teachers, students, and researchers could start to receive notices of alleged copyright infringement, even though many of their uses may not constitute infringement due to fair use or other copyright exceptions.

There is a justifiable concern that CASE Act infringement allegations could have a significant chilling effect on the legal actions of educational communities if unsuspecting teachers, researchers, and students are intimidated by claims notices even though they can opt-out of the proceedings.

Looking Ahead: Preparing for Copyright Small Claims Proceedings

The CCB must begin hearing claims by June 25, 2022. There are several campus stakeholders who will need to engage with each other when preparing for this eventuality, including library leadership, the Office of General Counsel (OGC), and campus educational partners.

Library leadership should be kept informed of how small copyright claims will impact the library, and there are particular decisions they'll have to make regarding the handling of CASE Act provisions. As described above, the statute allows for libraries to preemptively and permanently opt-out of CCB proceedings. Section 1506(aa) of the Act states that a library is eligible if it qualifies for the limitations on exclusive rights under 17 U.S.C. § 108. In the NPRM on "Small Claims Procedures for Library and Archives Opt-Outs", the U.S. Copyright Office (USCO) proposed that "the authority to exercise the preemptive opt-out option should belong to any person with the authority to take legally binding actions on behalf of the library or archives in connection with litigation." The person with this authority, which could be the head of the library, will need to "submit a self-certification that [the library] 'qualifies for the limitations on exclusive rights under section 108'" (86 *Fed. Reg.* 49275 [2 September 2021]). The proposed rule suggests that the person with this authority may opt-out for multiple libraries or archives that are part of the same institution, although it states that each individual library to be covered by the blanket opt-out submission should be identified.

At the time of writing, the USCO has not issued a final determination on whether library employees will remain subject to proceedings under the CCB. If library employees will be subject to the CASE Act proceedings, library administrators and the OGC should provide them information regarding their options, and point employees to support and resources offered by other university units.

The OGC will also need to partner with library staff on multiple aspects. It is likely to be involved in the Library's decision whether to preemptively opt-out of the CCB. There are also ongoing legal questions, such as how state sovereign immunity intersects with the CCB procedures. While Section 1504(d)(3) of the law expressly prohibits claims brought against a Federal or State governmental entity, it is unclear whether employees of these same institutions (such as persons employed at public universities and state colleges) are also exempt. Additionally, is the OGC willing to provide advice to faculty or staff who might receive a CCB claim while working in their official capacity as an employee of the University?⁴

Similarly, the OGC along with any student legal services should anticipate whether they will provide legal advice to students who receive a CCB claim notice. OGC should think through these questions in advance and, ideally, communicate them to campus.

Key campus educational partners such as the Office of Scholarly Communications (OSC) should be prepared to provide the campus community with accurate information about the CCB processes. Informational materials they create can address both library workers and others including instructors, faculty authors, and students who may receive claims notices.⁵ In particular, the campus community should understand that a claim notice is a legal document initiating a legal proceeding and should not be ignored. Community members should also know that unofficial warnings or demand for payment from rightsholders outside of the CCB process

are not official legal documents and carry no legal penalty. Individuals on campus should understand when and how to opt-out of CCB proceedings, why one might choose not to participate in a CCB proceeding, and that opting-out does not preclude the plaintiff from filing a lawsuit in Federal court. If an individual chooses to continue with a CCB proceeding, they need to know how it will operate and the potential damages that could be assessed should they be found liable for infringement.

Finally, the campus community should know who to contact on campus if they receive such a notice (which will depend on the practices of each campus). For instance, while faculty members may be directed first to the OSC, they might be referred to the OGC if the claim stems from work performed in the scope of their employment. Students, on the other hand, might be referred to student legal services, if the campus has such a provider.

The CASE Act purports to expedite small-claims copyright infringements in a non-courtroom setting. Even though participation in the proceedings is voluntary, libraries should keep abreast of developments as the CCB gets up and running. The CASE Act procedures will possibly have wide-ranging effects on college and research libraries, library employees, and campus stakeholders who create and leverage copyrighted works in their teaching, research, and scholarship.

Notes

[1] U.S. Copyright Office. “Copyright Small Claims and the Copyright Claims Board,” n.d.

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

[2] U.S. Copyright Office. “Copyright Small Claims and the Copyright Claims Board,” n.d.

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

[3] University of California Libraries. “Comments.” Berkeley, California, October 5, 2021.

<https://www.regulations.gov/comment/COLC-2021-0003-0087>.

[4] More information about these potential situations can be found in the U.S. Copyright Office,

“Circular 30: Works Made for Hire”, available at <https://www.copyright.gov/circs/circ30.pdf>

[5] For example, see this webpage hosted by the University of California Berkeley Libraries:

<https://www.lib.berkeley.edu/scholarly-communication/copyright/small-claims>.