The CASE Act makes its way through Congress

Sounds like a great idea: providing a venue to litigate small claims of copyright infringement so rights holders with limited resources can avoid the costs and extensive time necessary to bring a federal lawsuit. In fact, this is what the U.S. Copyright Office proposed in its 2013 policy study "Remedies for Copyright Small Claims," requested by the House Judiciary Committee.

It's true that the federal copyright court system makes it next to impossible for graphic artists, photographers, songwriters, authors, and others to enforce their rights of copyright when infringement occurs. Likewise, alleged infringers face the same high litigation costs.

In response, the House Judiciary Committee introduced the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), and the Senate Judiciary Committee introduced companion legislation (S.1273), which awaits a full Senate vote.

The Library Copyright Alliance (LCA), whose members include ALA, ACRL, and ARL, recognizes the good intentions of the CASE Act but opposes the bill, primarily because of the opt-out process. Alleged infringers can opt out of the trial by submitting a written notice, and the proceeding will be dismissed. This would seem to lead to the dismissal of many of the cases and the small claims court not being used, ending the opportunity for the rights holder to have their day in court.

On the other hand, if respondents do not opt-out, they lose their right to litigate under federal copyright law with copyright exceptions, including the fair use exception, and waive their right to a jury trial, leading to a default judgement in the small claims proceeding. One wonders if the small claims court would be used under this model, but at the same time, those who don't opt out would face default judgement and be fined up to $15,000 per infringement, not to exceed $30,000.

Civil society organizations who oppose the CASE Act also argue that innocent infringers—people who post an image on Facebook, not realizing it is protected by copyright—would be dragged into court. That's a valid point: as we know all too well, people are unaware they could be breaking copyright laws when they post images they find on the web. Under the CASE Act, works do not have to be registered before infringement occurs, which further hinders people's understanding of what works are protected by copyright.

There are other reasons why the CASE Act is problematic. In practice, the legislation could lead to increased copyright trolling. Copyright trolls make copyright infringement litigation their business model, often targeting copyright users who have no idea that they infringe copyright. Trolls are also pursuing libraries and nonprofit organizations.

While LCA is sympathetic to rights holders having an alternative to a federal court trial, a better alternative could be developed. Some suggest an opt-in process would be better, allowing alleged infringers the right to a jury trial and the right to appeal. Furthermore, statutory damages should be aligned with state law small claims damages, about one-fifth of the amount proposed in the CASE Act. LCA will continue to monitor the legislation and apprise the library community of developments.

Carrie Russell is senior program director and copyright specialist at ALA's Washington Office, email: crussell@alawash.org