Sara R. Benson, Carla S. Myers, and Timothy Vollmer

CASE Act

Implications for college and research libraries

In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement (CASE) Act, a law that aims to "provide an efficient and user-friendly option to resolve certain copyright disputes" 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, the library workers employed therein, and the stakeholders served by these libraries, including academic researchers, teaching 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."* 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 (17 U.S. Code § 1504[c][1]).

Sara R. Benson is copyright librarian and assistant professor of scholarly communication and publishing at the university library of the University of Illinois, email: srbenson@illinois.edu, Carla S. Myers is coordinator of scholarly communications at the university libraries of Miami University, email: myersc2@miamioh.edu, and Timothy Vollmer is scholarly communication and copyright librarian at the University of California-Berkeley, email: tvollmer@berkeley.edu

• *Counterclaims for "a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106."* 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 (17 U.S. Code § 1504[c][2]).
• *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 (Beth, in the example above), 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. Note that although an infringement claim cannot be brought in federal court before a claimant has registered their copyright with the U.S. Copyright Office (USCO), CCB claims can be filed concurrently with a registration deposit. This means that a CCB claim can be filed, potentially, sooner than a claim could be filed in federal court.

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

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 and profits or statutory damages" (17 U.S.C. § 1504[e][B][i]) 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. A claimant's ability to recover monetary damages under the CASE Act differs from a plaintiff's ability to recover monetary damages in federal court. In the traditional court system, only plaintiffs who have registered their works prior to infringement are eligible to recover statutory damages and attorney's fees. However, under the CCB, a claimant could potentially recover up to $7,500 in statutory damages per work infringed, even if the infringement predates registration of the work.

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. Initially, a Notice of Proposed Rulemaking (NPRM) concerning "Small Claims Procedures for Library and Archives Opt-Outs and Class Actions" stated 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]). 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, as libraries can only operate through the actions of their employees. Library workers in higher education regularly engage in copyright decision-making in a reasonable and informed fashion, 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]

In response to these comments, USCO announced in March 2022 that the "final rule will apply a library's or archives' opt-out election to both the qualifying entity and its employees for activities [performed] within the employee's scope of employment."[4]

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, but they also use and repurpose the copyrighted content of others. For example, a faculty author in architecture might reproduce two building photographs in an academic article in order conduct a comparative analysis of their structural designs, thus contributing new scholarship and understanding to the topic. Or a media studies instructor could include a short documentary clip in their course management system for students to view prior to a group discussion and class assignment. 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 limitations and exceptions to copyright. 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 will 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)(4) of the Act states that a library is eligible if it qualifies for the limitations on exclusive rights under 17 U.S.C. § 108. The final rule issued by USCO states that "any person with the authority to take legally binding actions on behalf of a library or archives in connection with litigation may submit the notification" must "list the name and physical address of each library or archives to which the preemptive opt out applies" (37 CFR Part 223[2][c]) and "provide a point of contact for future correspondence, including phone number, mailing address, email address, and the website for the library or archives, if available" (37 CFR Part 223[2][2]).

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. Libraries situated within federal or state government institutions should feel comfortable preemptively opting out under the library opt-out procedures (which will now exclude library employees from CCB proceedings), even if technically they do not need to because federal and state governmental entities are exempted from CCB claims under the statute. 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 *other than* library or archives staff 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?[5] 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. The 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 campus constituents who may receive claims notices, including instructors, faculty authors, and students.[6] 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 claimant from filing a lawsuit in federal court. As noted above, individuals have 60 days to opt out of proceedings before the CCB. 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.

Conclusion

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. It's promising that when a library opts out of the CCB proceedings, those opt-outs now will also cover library employees acting in the scope of their employment. At the same time, the CASE Act procedures will possibly have wide-ranging effects on college and research libraries 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. Ibid.
3. University of California Libraries, "Comments," Berkeley, California, October 5, 2021, https://www.regulations.gov/comment/COLC-2021-0003-0087.
4. "Small Claims Procedures for Library and Archives Opt-Outs and Class Actions," 87 *Federal Register* 13171 (09 March 2022), p. 3175.
5. 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.
6. For example, see this webpage hosted by the University of California Berkeley Libraries, https://www.lib.berkeley.edu/scholarly-communication/copyright/small-claims.