

CASE Act Signed Into Law: What This Means

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On December 27, creators across the country collectively celebrated as the CASE Act was signed into law. Naturally, many of you have questions about the how the new small claims process will work. Below, we answer some of the questions we've heard so far, and provide some need-to-know details.

What is the CASE Act?

The CASE Act is the acronym for a bill called the "Copyright Alternative in Small-Claims Enforcement Act of 2019" (the "CASE Act") that would create a three-"judge" tribunal called the Copyright Claims

Board (CCB) within the U.S. Copyright Office to handle small copyright claims.

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. Visual artists, authors and songwriters are hurt the most by the high cost of federal litigation because the individual value of their works or transactions is often too low to warrant the expense of litigation and most attorneys won't even consider taking these small cases. As a result, these infringements regularly go unchallenged, leading many creators to feel disenfranchised by the copyright system. In effect, these creators have rights but no remedies.

When will the CCB begin operating?

The law requires that the CCB begin operating within one year of the date it was enacted, which would be December 27, 2021. However, there is also a provision allowing for a six-month extension to account for delays associated with the pandemic or other significant reasons. So at the latest, the CCB should begin operating by late June, 2022.

How are the CCB Officers selected?

The "judges" are known as CCB officers, and are appointed by the Librarian of Congress. To be considered for the position, candidates must have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works. This helps to ensure that the officers are fair and unbiased. Also, unlike in federal court where the judge is handling a variety of different cases and may never have heard a copyright case before, the CCB officers are subject matter experts, which should lead to more consistently correct decisions than in federal court.

What types of copyright claims can be brought before the CCB?

The tribunal created by the CASE Act can hear three types of claims by copyright owners and users, as well as all defenses (like fair use) and counterclaims allowed in federal court. The three types of claims that can be heard by the CCB are:

- Creators can bring infringement claims against those who are infringing their works;
- Users can request that the CCB issue a declaration of non-infringement stating that their activity does not infringe the copyright owner's exclusive rights; and
- Users who received a DMCA takedown notice can challenge that notice if they believe it contains some form of misrepresentation relating to the alleged infringing activity. Creators who sent a DMCA takedown notice and then received a counternotice may also challenge that counternotice if they believe the counternotice contains some form of misrepresentation relating to material that was removed.

You'll notice that the types of claims that can be brought are mix of those brought by copyright owners *and* users, so this new tribunal isn't just being created to help copyright owners. It will also benefit users with fair use and other claims.

How much will it cost to file a claim with the CCB?

The exact cost of filing a claim will be determined by Copyright Office regulations, but the bill requires that the fee be at least \$100, but no more than the cost of filing a claim in federal district court.

Does the CASE Act require creators who are infringed to bring their small infringement cases before the CCB instead of federal court?

No. A creator is free to sue in federal court, pursue mediation or arbitration, or to take other or no action at all. No creator is required to use the new copyright small claims tribunal. What the CCB offers is *a choice* that creators presently do not have.

Does the CASE Act require those who are accused of infringement to defend themselves in a CCB proceeding?

No. One of the most prominent and important features of the CASE Act is that the process would be 100% optional. If an individual or organization that is accused of infringement by a creator in a CCB proceeding does not want to defend itself, they can simply opt out. When an opt out is submitted, the CCB proceeding is terminated. There is also a special provision allowing libraries and archives to preemptively opt out of the small claims process.

If it is so easy to opt out, won't everyone opt out?

Although it is quite simple to opt out of a proceeding, the CASE Act includes several incentives to encourage parties to participate. For example, in federal court, a successful plaintiff may be awarded damages of up to \$150,000 in statutory damages *per work* infringed. The CASE Act limits that amount to a maximum of \$15,000. The CASE Act also limits the total amount of damages that can be awarded in each case to no more than \$30,000, as compared to federal court, which has no limit whatsoever. Capping the damages dramatically reduces the infringer's potential liability and will incentivize them not to opt out. In addition, participating in the small claims proceeding is significantly less costly than participating in a proceeding in federal court, primarily because the process is so streamlined that there is no need to hire or pay an attorney.

How do the CCB Officers make their decisions?

CCB Officers are bound by judicial precedent in deciding a case. When there is conflicting judicial precedent, the CASE Act specifies that the CCB must follow the law of the federal jurisdiction where the action could have been brought if filed in federal district court; or, if it could have been brought in more than one jurisdiction, the jurisdiction that the CCB determines has the most significant ties to the parties and conduct at issue.

How is a CASE Act proceeding different than a proceeding in federal court?

The CASE Act would create a much less formal, streamlined process than exists in federal court. For example, unlike federal court, attorneys and in-person appearances would not be necessary and discovery would be extremely limited. Damages for copyright infringement would be much less in a CCB proceeding than in federal court because the CASE Act limits statutory damages to a maximum of \$15,000 per claim, with a cap on the total amount of damages that can be awarded in each case to no more than \$30,000. In contrast, there is no cap on the total amount of damages allowed in federal court. Further, unless a party has brought a claim, counterclaim or defense in bad faith, the CCB cannot award attorneys' fees or costs to the prevailing party. Lastly, the CASE Act also includes numerous safeguards to prevent against frivolous lawsuits and trolling that do not exist in the federal court.

How will the CASE Act prevent trolling and other abuses?

The CASE Act discourages bad faith claims, counterclaims and defenses, and other abuses by granting the CCB the authority to not only dismiss frivolous claims, but also to:

- award attorneys' fees of up to \$5,000, or more in extraordinary circumstances;
- prohibit the bad faith actor from filing a case for one year; and
- dismiss *all* pending cases filed by the bad faith actor.

In addition, the CASE Act allows the Copyright Office to issue regulations preventing any one person or entity from bringing a certain number of cases in a year. There is no such restriction on the number of cases that can be filed in federal court. Also, keep in mind that the small claims process is optional, and each time a respondent opts out, the claimant loses the non-refundable filing fee. This gives the respondent leverage, not the claimant, because if the claimant is a troll they stand to lose money every time a respondent opts out.

The small claims process is also unfriendly to copyright trolls because the CASE Act caps damages for infringement at a maximum of \$15,000 in statutory damages per claim. This figure pales in comparison to the \$150,000 in statutory damages per claim available in federal court for copyright infringement. The CASE Act also caps *total* damages per case at \$30,000. In contrast, there is NO cap under existing federal law. The CASE Act damage caps would prevent trolls from making threats of massive, unpredictable copyright damages in an effort to extort cash settlements.

What sort of process did the CASE Act go through before being passed?

The CASE Act is the culmination of years of Congressional deliberation, Copyright Office research and expertise, stakeholder input, and advocacy from individual creators and small businesses on the issue, as well as negotiations to address concerns with previous versions of the bill. Following a 2-year study during which the Copyright Office received a total of 107 substantive comments over the course of three separate comment periods, and held several public hearings across the country, the Office issued a comprehensive report to Congress in September 2013 recommending the creation of a voluntary copyright small claims process. The report included draft legislation, the bulk of which is incorporated into the CASE Act.

Despite a few misleading headlines, the CASE Act is not a controversial piece of legislation. From public comments, to roundtables, to Congressional hearings, to negotiations, interested stakeholders were given years and ample opportunity to voice their thoughts and concerns. The result of that process was resounding support for the bill, with a few outliers who, despite a stated desire to address the issue, had no real desire for any process that would help creators.

Is the CASE Act constitutional?

The CASE Act is constitutional. The Constitution guarantees a person's right to have a case heard by an Article III court. But that right can be waived. By giving respondents a fair opportunity to waive their right to appear before an Article III court, the CASE Act is fully consistent with Supreme Court precedent. Also, in assessing whether a non-Article III tribunal is constitutional, the Supreme Court considers whether that tribunal usurps the constitutional prerogatives of Article III courts. Here, there is no such usurpation because any impact on Article III courts is at most "*de minimis*" given that today typically individual creators cannot afford to bring suit in federal court." Further, in cases where Congress assigns an adjudicatory role to a governmental agency, the Supreme Court places significant weight on whether the legislation is tied to a well-defined federal statutory scheme. The CASE Act sets out a detailed copyright regime with specific rights and remedies to further the public interest in accessing creative works.

How version of the CASE Act that passed different than previous versions?

Some critics of the CASE Act previously raised concerns about the bill being used for so-called trolling and that unsophisticated users will routinely and unknowingly fail to respond to notices of proceedings against them, resulting in the issuance of default judgments. In response, the most recent version of the CASE Act makes the following changes:

- The CASE Act now gives respondents 60 days to opt out before the proceeding becomes active, which is double the response period provided in prior versions of the bill. This change provides respondents with more time to make an informed decision about whether to opt-out or proceed. (The CCB may also extend the opt-out period beyond 60 days "in the interests of justice.")
- In addition to the respondent being notified by the claimant, the current version of the CASE Act provides that they will also receive a notice from the CCB. The purpose of the CCB notice is to reinforce the seriousness of the proceeding and potential consequences, and the importance of the respondent understanding and understanding the notice and the nature of the claims against them. Since this notice will be sent from an office of the U.S. Government, it is unlikely to be ignored.
- To prevent notices from being misdirected, the CASE Act now allows organizations to designate an agent to receive service, which will be made publicly available so that the notices go to the correct person at an organization.
- The bill allows the CCB to penalize those found to be filing frivolous claims (i.e., trolling), counterclaims and defenses, or otherwise abusing the system by awarding attorneys' fees in excess of \$5,000 in extraordinary circumstances; prohibiting the abuser from filing a case for one year; and dismissing *all* pending cases filed by the abuser.
- The CASE Act authorizes the Copyright Office to issue regulations limiting the number of cases a person or entity can bring in a year.
- The CASE Act allows libraries and archives to preemptively opt out of the small claims process.

There were also concerns raised about a provision allowing the CCB to issue third-party subpoenas, so that was removed from the bill.

What's next?

As the Copyright Office prepares to launch the CCB, keep an eye on our website and social media accounts as we will continue providing educational materials to explain the process in greater detail. In addition, the Copyright Office will be issuing regulations that flesh out the process more, including the exact cost for filing a claim. So, stay tuned!

For more information on the CASE Act visit our [compilation page](#).