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A (ZOMBIE) LEGISLATIVE PROPOSAL WITH IMPLICATIONS FOR FAIR USE AND REMIX CULTURE

During 2018 a proposed bill was under consideration in the House of Representatives that had implications for fair use and remix culture because, however well-intentioned, it might have made it easier for copyright trolls to file frivolous claims that would have netted fair-users. Introduced in October of 2017, the Copyright Alternative in Small-Claims Enforcement (CASE) Act, H.R. 3945, would have created a Copyright Claims Board within the Copyright Office (House of Representatives). The CASE Act died at the conclusion of the 115th Congress but could – and probably will – be re-introduced.

An argument in favor of such a board is that, in the case of small claims, copyright holders “have legal rights, but not legal remedies” when their copyrights are infringed because litigating small claims is too costly (Samuelson and Hashimoto 689). The money lost because of infringement is substantial. Business analysts estimated that by 2015, losses worldwide would be as high as \$960 billion, and photographers would suffer losses of as much as \$10 billion because of unauthorized online use of their work (Dorrell 450). Presumably these numbers have not fallen in intervening years. At least in case of infringement in the United States, and in the case of small claims, the Copyright Claims Board might allow copyright holders to defend themselves against the loss of misappropriated income even if they do not possess the proverbial deep pockets. Looking at the example of photographers, with an annual median wage of a little over \$29,000, the argument is that they would be otherwise unable to litigate to protect their intellectual property when the median cost of doing so would be \$350,000 (Dorrell 450).

Given such factors, Kevin Madigan, columnist for the Center for the Protection of Intellectual Property, supports the creation of the board as a mean of “empowering a class of rights holders who have limited means and few opportunities for recourse.” Similarly, Tom Kennedy, executive director of the American Society of Media Photographers (ASMP), writes that the creation of the board would

correct an historic inequity in the copyright law: the failure of the law to provide individual creators with an effective and affordable means to combat infringements of their creative works – an especially vexing problem in a digital environment where piracy occurs at the click of a mouse.

The ASMP was joined in its support of the CASE Act by the American Photographic Artists, the Digital Media Licensing Association, the Graphic Artists Guild, the National Press Photographers Association, the North American Nature Photography Association, and the Professional Photographers of America (Copyright Defense).

Support was predicated on looking out for the ‘little guy’ (cf. Levine and “independent creators”).

The proposal would have created the following process for pursuing small claims:

- The copyright holder submits to the board written justification for a claim of infringement.
- Board staff review the claim.
- If the claim survives the initial review, the alleged infringer is sent a notice.
- The alleged infringer is given a deadline to notify the board if they wish to opt out. If the alleged infringer opts out, the copyright holder must pursue the case in federal court instead of the board.
- If the copyright holder does not opt out by the deadline, the board makes a determination as to whether infringement has taken place.
- Awards for infringement could range up to \$30,000 per claim (mix of statutory and actual damages).
- With board ruling in hand, copyright holders can ask federal courts to enforce awards and to order a halt to ongoing infringement.

Among groups taking a stand in opposition to the process specified in the CASE Act were the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, the Authors Alliance, the Center for Democracy & Technology, Engine, Public Knowledge, the R Street Institute, and Re:Create. Under the umbrella of the Library Copyright Alliance (LCA), these organizations submitted a letter to the sponsors of the CASE Act and to members of the House Committee on the Judiciary that sketched out concerns, including that alleged infringers would be

unsophisticated consumers who would not know to opt out or who would fail to respond altogether, leading to a default judgment. This would turn the Board into a default judgment mill, attractive to abusive litigants because of the lower costs of initiating an action compared to federal court. (Library Copyright Alliance)

In a nutshell, this passage captures one of the major concerns raised repeatedly by parties and organizations that objected to the CASE Act. Additionally, the LCA suggested that existing rules for civil procedures can be adapted to allow copyright holders to seek redress for infringement (Pietz).

Public Knowledge, mentioned above, and the Electronic Freedom Foundation (EFF) are two of the organizations that offer detailed objections to the proposed Copyright Claims Board. Writing for the EFF, Mitch Stoltz and Corynne McSherry raise objections that range from the constitutional to the procedural. Agreeing with the LCA,

Stoltz and McSherry argue that the process “would invite gamesmanship and abuse.” They stress that an opt-in rather than opt-out process would “help prevent copyright holders from abusing the system to obtain inexpensive default judgments that would be hard to appeal.” They also object to the automatic awarding of civil penalties without any requirement that copyright holders provide evidence that they have been harmed. Stoltz and McSherry also point out that under the CASE Act a vastly enlarged number of works would be “eligible for automatic, no-proof-required civil penalties” because the Act would eliminate the “timely registration rule” for creative works. Writing for Public Knowledge, Meredith Rose Filak likewise raises constitutional and procedural questions. She argues that the Copyright Claims Board would not be answerable to the courts in any meaningful way. Both Stoltz/McSherry and Filak point out that the financial awards could exceed what would typically be awarded by states in the cases of small claims, and both argue that the opt-out approach would lead to a high number of default judgments. As her overall assessment of the CASE Act, Filak poses and answers a question.

So what happens when you have a court that is (a) not answerable to the judiciary, (b) capable of assigning steep damages, and (c) capable of subjecting people to its jurisdiction by default? If you guessed “litigation mill,” you’d be right.

Consistent with the stands taken by the LCA, Public Knowledge, and the EFF were the concerns documented by Pamela Samuelson and Kathryn Hashimoto in their report on a one-day workshop devoted to the CASE Act held under the aegis of the Berkeley Center for Law & Technology and the UC Hastings Law School. Economists and experts in IP and civil law pointed to numerous issues, including those of constitutionality, procedural fairness, and potential for abuse (691). Samuelson and Hashimoto point to questions about due process in the context of the “assertion of nationwide personal jurisdiction,” including “service of process issues” that might result, even in the age of the internet, from the fact that board actions would be centered on one place, Washington, D.C. (694). Another concern was, again, that the board would rely on an opt-out by alleged infringers rather than an opt-in approach. Workshop participants were concerned “that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster” (696). Participants also expressed concern that failures to respond to notifications from the board would lead to a high proportion of default judgments against alleged infringers and resulting damage awards. Copyright holders could then ask for orders of enforcement from federal courts, and such orders would be difficult to overturn. These two due process and procedural concerns were only a few of the many raised during the workshop.

Another concern about potential abuses was the possibility that a board intended to serve the “individual, independent author who is struggling to make a living” would be attractive to corporate owners and copyright assignees as a way to sidestep the litigation costs required to pursue cases in federal court (703). As Samuelson and

Hashimoto observe, “Assignees of copyrights, whether individual or corporate, may abuse the Board procedure by buying up small claims and seeking excessive damages before Board panels” (703). The availability of statutory as well as actual damages would be an incentive for such trolling. Samuelson and Hashimoto predict that copyright owners would seek the maximum in statutory damages and that “[w]hile the total statutory damages risk would be less than in federal court, the risks of excessive and arbitrary awards” would still be “quite substantial” (703). Currently, the mix of statutory damages with corporate and assignee claimants “has given rise to opportunistic claims in federal court that are used to extract settlements from alleged infringers who choose to pay a few thousand dollars rather than having to undergo the expense of litigating a case in federal court” (704). Observes Samuelson and Hashimoto:

If corporate owners and assignees can demand maximum statutory damages in Board proceedings and obtain default judgments unless a person alleged to infringe affirmatively opts out, there will be a new venue in which this kind of opportunistic behavior will likely be manifest. There are at present insufficient mechanisms for deterring this opportunistic (and perhaps extortionate) conduct and possibly unfair settlements in the shadow of the risk of excessive statutory damages awards. (704)

In a separate article, Ben Depoorter, one of the participants in the workshop, likewise argues that the high potential that alleged infringers will fail to respond will encourage trolling. The troll has little to lose by filing frivolous claims and much to gain in instances where an alleged infringer fails to opt out:

...an opportunistic plaintiff could file dubious infringement claims and withdraw claims whenever a respondent reacts. The resulting default judgements might present a new income stream to copyright trolls and other malign enforcement intermediaries. (725)

As Filak argues, in the end “[s]ophisticated defendants – the kind of repeat infringers that artists express the most concern about” are not the ones most likely to be caught in the trawl net of a Copyright Claims Board. Such sophisticated defendants will opt out and benefit both from the procedural safeguards in federal court and the fact that the costs of litigation will deter claims against businesses and organizations savvy enough to refuse to submit to the judgment of the Copyright Claims Board.

Although the CASE Act died at the conclusion of the 115th Congress, there is every reason to believe that it will be reintroduced. The impetus for the bill itself dates back to 2013, with the release of *Copyright Small Claims: A Report of the Register of Copyrights*, which called for the establishment of a copyright small claims board. An earlier version of the Copyright Alternative in Small-Claims Enforcement was then introduced in 2016 during the 114th Congress. Like its successor, it died at the end of the term. A related bill, the Fairness for American Small Creators Act, also was introduced

during the 114th Congress and like its companion expired at the end of that Congress. Given the introduction of proposals in two successive Congresses, scholars and educators with an interest in IP should be on the lookout for a sequel to the CASE Act.

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