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## THE CASE ACT REDIVIVUS

In the 2018 *CCCC Intellectual Property Annual*, I reported on legislation introduced in the House of Representatives in 2017 that would have had implications for fair use and remix culture. This proposed bill, the Copyright Alternative in Small-Claims Enforcement (CASE) Act, died at the conclusion of the 115th Congress, but I noted that it would probably be re-introduced. The CASE Act was indeed revived in 2019 and ultimately folded into a combined COVID stimulus relief package and omnibus spending bill, the Consolidated Appropriations Act of 2021, that was passed and signed into law in December of 2020. This article will review the arguments for the bill and will summarize the concerns of its opponents.

### RATIONALE FOR THE CASE ACT

The argument most often offered for the CASE Act is that there has been no *practical* way for independent creators without substantial resources to protect their intellectual property from infringement, particularly in this internet era when copying and redistributing content may require little more than the ability to click a mouse. For this reason, organizations like the North American Nature Photography Association, the National Press Photographers Association, and the Graphics Arts Guild encouraged their members to support the Act because it purports to provide an avenue for independent creators and small businesses that otherwise would have no realistic recourse as photographs, graphic designs, illustrations, animations, comic books, and cartoons are copied and pasted and recopied and pasted without payment of commissions or fees. For the same reason, independent authors, composers, lyricists, and performers are numbered amongst supporters of the Act (Calzada and Osterreicher; Graphic Arts Guild; North American Nature Photography Association).

Pursuing copyright claims can be a profitable business for copyright trolls who target naïve users who are unaware of how to parry predatory attacks; conversely, it can be an expensive business for legitimate copyright owners. As reported by Terrica Carrington, the American Intellectual Property Lawyer's Association (AIPLA) regularly surveys its members on the cost of intellectual property litigation and reports that cases that go to trial may cost the copyright owner hundreds of thousands of dollars. Unless the copyright owner has deep pockets, and unless the expense of pursuing the infringer is likely to result in a return on investment, so to speak, it may be fiscally impractical to protect one's intellectual property:

...the average cost of litigating a copyright infringement case in federal court from pre-trial through the appeals process is \$278,000. To put that number in perspective, on average, a full-time book author made only \$17,500 from writing in 2015. Combine that with the fact that most copyright attorneys will not take on a case with a likely recovery of less than \$30,000, and it's clear that as long as federal court continues to be the sole option, small creators and the works they contribute will remain at the mercy of infringers.

(Carrington)

The reluctance of intellectual property lawyers to take on certain clients is understandable in the face of cases like that of photographer Daniel Morel, who in 2013 was awarded \$1.2 million dollars for infringement by Getty Images and the AFP news agency. The law firm's expenses and billable hours totaled \$2.5 million, most of which the law firm would have to write off (Zhang).

The above paragraphs describe the situation up to 2017. Subsequently it became even more challenging for a copyright owner to pursue infringers. For U.S. artists (but not, because of a wrinkle in the law, international ones) two Supreme Court rulings in 2019 both increased the costs of filing copyright lawsuits and made it impossible to recover some of the filing expenses:

Artists used to face a cost of \$435.00 to file a copyright infringement case, with that amount comprised of a \$400.00 court filing fee and a \$35.00 copyright registration charge. Overnight, assuming the artist does not want to wait more than half-a-year for the Copyright Office to act, that cost ballooned to \$1,200.00. While this sum is not enormous, it is enough to dissuade independent artists from filing suit.

(Burroughs)

In addition, the litigation expenses have ballooned since Carrington's report on the AIPLA's calculations of the cost of taking a case from pre-trial through appeals in the federal courts. By 2019, the AIPLA was calculating an average cost of \$397,000 for copyright litigation (Giovanetti).

Thus, while it might be worth the while of deep-pocketed copyright owners to go after infringers, and for law firms to take them on as clients, it would seem that independent creators do indeed have no realistic recourse. Presumably the CASE Act is meant to provide an avenue of redress for that population. Keith Kupferschmid, the CEO of the Copyright Alliance, a strong proponent of the Act, argues that the beneficiaries will be "small copyright holders, small creators, your songwriter, your

artists, your authors, your blogger, your YouTuber” and that the act “isn’t about the big movie studios or the big record labels” (Ulaby). The Copyright Alliance, whose web site describes it as “The Unified Voice of the Copyright Community,” reports that it “represents the copyright interests of over **1.8 million** individual creators and over **13,000** organizations in the United States” (bolding in original). Member organizations whose logos are featured at the site include some of the big players that Kuperschmid declares the Case Act is “not about,” such as Adobe, Disney, Getty Images, the NBA, NBCU Universal, Netflix, NFL, Nike, Oracle, Sony Pictures, ViacomCBS, and WarnerMedia; and the influence of the big players is visible on the Board Directors, with members from ViacomCBS, WarnerMedia, Adobe, NBCUniversal, and the Oracle Corporation. None of the above information suggests that the CASE Act would not provide recourse to independent creators or small businesses with shallow pockets, but it may be disingenuous to imply that the big players would not themselves be highly invested in a system that would allow them to bypass expensive litigation.

## **THE PATHWAY TO INITIATING A CLAIM UNDER THE CASE ACT**

The Act will establish a Copyright Claims Board that will be “an alternative forum in which parties may voluntarily seek to resolve certain copyright claims” (*CASE Act of 2020* § 1502(a)). The Board will have three full-time officers who will be recommended by the Registrar of Copyrights but appointed by the Librarian of Congress. Participation by any party to a potential claim is voluntary, and any party has “the right...to instead pursue a claim, counterclaim, or defense” in a federal court (§ 1504(a)). The statute of limitations for bringing claims to the Board is three years from the date of the alleged infringement. The Board will render judgements on claims of infringement, but the Board can also rule on claims of noninfringement. Additionally, the Board can rule on claims for “misrepresentation in connection with a notification of claimed infringement” and on any “counter notification seeking to replace removed or disabled material” (§ 1504(c)(3)) (a mechanism that allows a response to erroneous or abusive DMCA takedowns). In the case of both claims and counterclaims, the Board can rule on requests for damages. Actual damages may be awarded. Alternately, the Board may award statutory damages. The amount of statutory damages will depend upon whether or not the work at issue was timely registered, that is registered before the alleged infringement or no more than three months after the work was first published. The maximum award for timely registered works is potentially double that of works that fall outside those parameters. The Board will not consider whether or not “the infringement was committed willfully in making an award of statutory damages,” but the Board can consider “whether the infringer has agreed to cease or mitigate the infringing activity” (§ 1504(e)(1)). Damages in any given proceeding will be capped at \$30,000 regardless of how many

instances of infringement (or claims of noninfringement) were at issue. The amount awarded would not routinely include legal expenses; instead, participants would be responsible for their own costs “except in the case of bad faith conduct” (§ 1504(e)(2)).

No claim will be adjudicated by the Board until the Copyright Office has issued a certificate for the registration of a copyright. The claim can be filed, but if the claimant does not already have certificate in hand, they must submit an application for copyright to the Copyright Office, accompanied by a deposit and registration fee. If the copyright application is turned down, the case will be dismissed. If a year has passed without resolution of the copyright issue, the case also will be dismissed, although without prejudice; that is, nothing prevents the claimant from filing a case in another forum. In addition to paying the Copyright Office deposit and registration fee, bringing a claim before the Board will require payment of a filing fee to be determined by the Register of Copyrights.

Beyond registration and fees, the Board specifies another bar that must be cleared before it will adjudicate a claim. A Copyright Claims Attorney will review the filing and notify the claimant if it is flawed. Thirty days will be allowed for the submission of amended filing. If the filing is still deficient, another thirty days will be allowed for submission of a second amended filing, which will again be reviewed by a Copyright Claims Attorney. If the filing is still flawed, it will be dismissed, but without prejudice. The Board also may dismiss a case if it “is unsuitable for determination” by the Board. Such a situation would arise if adjudicating an issue required “essential witness[es], evidence, or expert testimony” that would be unavailable to the Board, or “determination of a relevant issue of law or fact [that] could exceed” the administrative resources or the “subject matter competence” of the Board (§ 1506(f)(3)).

If the Board does agree to take up a case, the claimant has ninety days to properly serve the respondent. The notice must “set forth the nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out, and the consequences of opting out.” Regarding the opt out, there must be “a prominent statement” explaining that a respondent who does not opt out within sixty days after receiving the notice “loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States; and waives the right to a jury trial” (§ 1506(g)(1)). Moreover, service must conform to state law applicable to the person to be notified, and the notice must be either delivered to the individual personally or it must be left with a responsible adult at the respondent’s home or with someone that they have designated as their agent. The Act also itemizes what the claimant must do if they wish to ask the respondent to waive personal service. If the

claimant does not serve the respondent within the ninety days, the claim against that respondent is dismissed without prejudice. The entire process also comes to a halt if the respondent informs the Board within sixty days of being served that they wish to opt out. In that case, the claim is dismissed without prejudice. (The Board may allow additional time “in exceptional circumstances...in the interests of justice” [(§ 1506(i)).] However, if the respondent does not reply to the notice or misses the deadline and is not granted an extension, they have opted in by default. From that point, practically the only way the process could be derailed would be as a result of the claimant missing procedural deadlines, in which case the claim would be dismissed, and with prejudice.

## **QUESTIONS AND CONCERNS ABOUT THE CASE ACT**

Critical responses to the CASE Act range from the f-bomb fiery to the sedately scholarly. Mike Masnick, founder of the blog Techdirt, described the introduction of the CASE Act (and the Felony Streaming bill) into the omnibus package as a hasty act—“jammed through in [a] manner [that] is a total and complete travesty”—that left “people...scrambling to find out what’s actually in the fucking bill” and accused Congress of “sucking up to Hollywood at the expense of the public.” Brian L. Frye, writing for Jurist, somewhat cynically opined, “It’s a truism that when lobbyists push a bill supposedly intended to help the disadvantaged, the real beneficiary is someone else,” and predicted that the CASE Act would “just help predatory law firms extract even more unjustified settlements from unsuspecting businesses and charities.” Senator Ron Wyden of Oregon cautioned that the legislation would create “an extrajudicial, virtual unappealable tribunal,” one that “could impose statutory damages of \$30,000 on an individual who posts a couple of memes on social media, even if the claimant sustained little or no economic harm” (Liu). The American Civil Liberties Union warned of the impact the legislation might have upon freedom of expression, arguing that the proposed process would generate a “chilling effect with respect to speech online” and pointing to abuse of the Digital Millennium Copyright Act to illustrate the potential for harm. Katharine Trendacosta and Cara Gagliano, writing for the Electronic Frontier Foundation, described the legislation as “at best, a huge waste of time and money,” but at worst, something that “will hover unconstitutionally like a dark cloud over everyone attempting to share anything online.” These and other critics of the Act raise several objections. Opponents question the Act’s constitutionality and also raise issues of jurisdiction, express concerns about process ranging from adequacy of notice to limited rights to appeal, and warn about the potential to abuse the process. They also caution that the Act may cast too wide a net and ask whether alternatives are possible that would be more focused on legitimate small claims and not raise the issues above. Pamela Samuelson and Kathryn Hashimoto, reporting on a workshop devoted to the CASE Act, ask “whether

copyright is so special that it should have a tribunal of its own, given that many federal laws are underenforced because of the high costs of litigation” (689). (For an explicit point-by-point response to this point and other points, raised in the workshop, see Aistars.)

Some critics who raise constitutional objections point to the fundamental issue of separation of powers. Writing for Mozilla’s Open Policy & Advocacy blog, Ferras Vinh and Daniel Nazer argue that “the creation of a board to decide infringement disputes between two private parties would represent an overextension of its authority into an area traditionally governed by independent Article III courts.” The Constitution is famously divided into three Articles, the first describing legislative powers, the second executive powers, and the third judicial ones. According to several Supreme Court rulings, Congress would overstep the separation of powers if it created administrative boards to adjudicate “private rights” instead of “public rights.” To illustrate the distinction, with regard to public rights, the power of the Patent Trial and Appeal Board (PTAB) “to review the validity of patent claims...and to extinguish erroneously issued patent claims” was upheld by the Supreme Court because the PTAB was reviewing an action of another government body, the United States Patent and Trademark Office (Samuelson and Hashimoto 692). However, claims involving disputes between private entities, such as infringement claims, have been reserved for courts operating under Article III of the Constitution. As Samuelson and Hashimoto observe, “Adjudicating infringement claims is exactly what Article III courts are supposed to do” (693).

Due process is another constitutional issue raised by critics. Samuelson and Hashimoto enumerate several problematic process issues: (1) the “assertion of nationwide personal jurisdiction”—the prospect that proceedings would take place in Washington, DC, regardless of the location of respondents, (2) questions about how notice of alleged infringement would be served, (3) limits on both the opportunity and the grounds to appeal, (4) availability of documents at each stage of the process, and (5) abrogation of the right to trial by jury in civil cases that is guaranteed by the Seventh Amendment (694). On the matter of how notice would be served, for example, Samuelson and Hashimoto wrote, “The scheme envisioned by the statute may not satisfy the baseline due-process requirements of notice and opportunity to be heard, particularly if it appears likely that notice will not always reach the putative defendants” (694 n. 19). Above all, they found that the “most substantial due process issues” arose from the reliance on an “opt-out” method to establish that the alleged infringers were voluntarily submitting to participation in the tribunal. Samuelson and Hashimoto suggest

that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster. A significant consequence of nonresponse in an opt-out model would be a high proportion of cases in which the Tribunal would enter default judgments and damage awards. Following such defaults, claimants could ask a federal court for an order to enforce the Tribunal's ruling against the defaulting party. A large number of judicially enforceable default judgments could result, which would be difficult to overturn given the restrictions...on grounds for appeal and overturning default judgments.

(Samuelson and Hashimoto 696)

There are only three categories under which alleged infringers can appeal rulings by an administrative board that will be established on the basis of what Ferras Vinh and Daniel Nazer describe as “a more coercive model that will disadvantage defendants who are unfamiliar with the nuances of this new legal system”: alleged infringers can appeal based on the claim that “the board exceeded its authority; failed to render a final determination; or issued a determination as a result of fraud, corruption, or other misconduct” (Vinh and Nazer). Appeal on the grounds that the administrative board misinterpreted or misapplied copyright law—for example, that the user was protected by fair use—is not allowed for by the Act. In short, for all practical purposes, there is no appeal of a finding by the administrative board.

The criticisms based on due process concerns are partly grounded in arguments as to how to apply constitutional principles, partly on predictions as to how implementation will play out in practice. Also grounded in concerns about how implementation will play out in practice are warnings that the Act will encourage trolls. Joshua Lamel and Sasha Ross, digital rights activists, write that the Act “combine[s] the worst elements of the abusive legal tactics of patent trolls, with the pain and absurdity of the file-sharing copyright lawsuits.” Matthew Sag and Jake Haskell, in an article in the *Iowa Law Review*, report that in spite of legal setbacks experienced by trolls such as Malibu Media and the Prenda Law firm, “between 2014 and 2016 copyright trolling account for 49.8% of the federal copyright docket” (577). Sag and Haskell were documenting a “wave of file-sharing lawsuits” that qualified as “copyright trolling because of the opportunistic way in which they seek to monetize assertions of infringement” and “because the plaintiffs’ claims of infringement rely on poorly substantiated form pleadings and are targeted indiscriminately at noninfringers as well as infringers” (636).

Sag and Haskell describe a system in which trolls file lawsuits “primarily to generate a list of targets for collection” even though many cases “are unlikely to withstand the scrutiny of contested litigation.” The trolls do so because

Even when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to \$150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling. The plaintiffs play a numbers game, targeting hundreds or thousands of defendants and seeking quick settlements priced just low enough that it is less expensive for the defendant to pay than to defend the claim. This game is profitable, whether the lawsuits are targeted at actual infringers or not.

(Sag and Haskell 636)

Lamel and Ross warn that process mandated by the CASE Act, which allows as much as \$30,000 in statutory damages, as well as legal fees and costs, would facilitate similar “trolling business models.” Respondents will be disadvantaged at every point. They may not have known that they would be liable to a charge of infringement (“a registration merely needs to be pending and awaiting certification for a claim to be brought”); they may need a lawyer to help them understand and navigate the process (“an expense they will face with or without actually having done something wrong”); they may face expenses if they wish to appear on their own behalf (unless they opt to participate remotely).

In the face of a process that may seem rigged against respondents, Lamel and Ross call the opt-out provision a “panacea” and indeed warn that many recipients of infringement notices will not understand their import or “will just ignore the notices, thinking they are yet another addition on the long list of scams that have propped up over the last decade.” Failure to opt out will then lead to a default judgment that will be unappealable. Conclude Lamel and Ross,

We have seen massive bad behavior by attorneys with the history of patent trolling and the current rise of copyright trolling. We have seen individuals during the file-sharing days face copyright lawsuits that are a public relations nightmare because of the power of statutory damages in copyright and excessive damages threat they place on so many of us. The CASE Act would create an expedited, non-appealable procedure that would combine the worst elements of both these worlds.

(Lamel and Ross)

Most critics of the Act describe respondents as copyright naïve and therefore at a disadvantage. For example, Kerry Maeve Sheehan, Copyright Research Assistant for the Authors Alliance, argues that “authors, educators, and small creators without



sophisticated legal knowledge or representation may not fully understand the implications and may ignore the notice—ending up on the hook for substantial damages awards.” Not all critics view the procedure as disadvantaging respondents, however. Brandon Vogts, writing in *Apalmanac: Architectural Photography Almanac*, opposes the CASE Act in part because in his view it is the claimant who is disadvantaged. The fact that the respondent can opt out results in the claimant “go[ing] through all the work of filing the claim, pay[ing...] at least some kind of filing fee, and with one opt-out notice from the defendant, hav[ing] all your efforts automatically rendered for naught.” At that point the claimant could turn to a federal district court, which would require them to hire a lawyer. But, Vogts observes, that avenue is not available to the claimant unless their work had been timely registered. According to Vogts, that the claimant will file in a federal district court is “unlikely to happen, and the defendant likely knows it.”

Vogts sees respondents as vastly more knowledgeable about their options than do many critics of the Act. He describes individuals and small businesses as having access to the information they need to make an informed decision as to whether to participate in the process:

Since the advent of image discovery/recovery services who identify infringing uses of photographers’ work online and attempt monetary recovery on behalf of the photographer, there are now entire user forums dedicated to helping infringers fend off inquiries from organizations like Copytrack or Pixsy attempting to resolve such infringement disputes. I expect it will not take long for these same folks to figure out that if the works in question were not timely registered, a CASE Act claim has no more teeth than the empty threat of litigation, as long as they opt out within the 60-day timeline and verify the works were not timely registered.

(Vogts)

If Vogts is correct, some of the fears that the Act will “supercharge a ‘copyright troll’ industry” (Falcon) may be mitigated. Moreover, in addition to the possibility that respondents may be knowledgeable enough to recognize when it is in their best interest to opt out, the Act incorporates procedures that may deter misuse of the process by trolls. Before a claim can be taken up by the Board, the claimant must front the cost both for registering the copyright and for filing a claim. The filing must survive the scrutiny of the Board’s Copyright Claims Attorneys before the claimant is given permission to serve the respondent with the claim. The claimant must pay their own legal expenses unless the respondent acts in bad faith. The claimant may become responsible for the costs and legal expenses of the respondent, up to \$5,000, or even

more in “extraordinary circumstances,” if they are judged to have filed a claim for “harassing or other improper purpose, or without a reasonable basis in law or fact.” The Register of Copyrights can limit the number of claims that any one person or business may file in a year. Moreover, a person or business can be barred from pursuing claims for a year “if the Board finds such party to have pursued a claim, counterclaim, or defense in bad faith on two or more occasions within a 12-month period” (§ 1506(y)(2)).

The proof, of course, will be in the implementation. The Copyright Office has until one year from the enactment of the legislation, which was signed on December 27, 2020, to get the Board up and running, with the possibility of a 180-day extension beyond that point. Then we will see whether the Board will allow independent creators and small businesses to defend their intellectual property without simultaneously facilitating copyright trolls. Likewise, we will see whether respondents are as savvy as Vogts suggests or whether naïve users will be left on the hook for as much as \$30,000 per proceeding for their participation in the copying and sharing that has become second nature in today’s remix culture.

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