

Small Claims, Big Questions: The New Copyright Claims Board Gets Its Debut

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After two years of groundwork, the Copyright Office's new forum for hearing small copyright claims is finally here. The Copyright Claims Board (CCB) began accepting claims on June 16 and seeks to provide a streamlined alternative to resolving copyright disputes in federal court. It is unclear how successful the CCB will be. The CCB's inability to decide cases without the voluntary participation of all parties raises questions about how many disputes it will actually resolve. Add in a lack of injunctive relief, a narrow appeal pathway, and even an annual limit on the number of cases an attorney can bring, and the CCB could raise more hurdles for litigants than it eliminates.

The CCB was created through the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act) and consists of a three-member tribunal based in the Copyright Office. Claimants must pay \$40 to file, plus an additional \$60 if the respondent does not opt out and the claim becomes “active.” If successful, the claimant can recover statutory damages up to \$30,000 (\$15,000 per work) for registered works and up to \$15,000 (\$7,500 per work) for works not yet registered. Injunctive relief is not available. Since federal courts only award statutory damages for registered works, the CCB opens a unique door to statutory recovery for claimants who have started—but not yet completed—the copyright registration process.

The CCB shares some procedural similarities with federal courts. For example, corporations, partnerships, and unincorporated associations can register a dedicated service agent through the CCB’s website. After providing contact information, listing additional trade names, and paying a \$6 fee, the entity’s agent will appear in the CCB’s online directory of agents. Any subsequent claims brought against the entity must then be served on the agent via certified mail (or by email, if the entity has consented to receive electronic service). The CCB agent directory shares no overlap with the DMCA agent directory, so an agent registered in one directory will not automatically appear in the other.

Yet, the CCB also deviates from federal courts in some procedures. Filings are submitted electronically through the CCB’s website, and all hearings are conducted remotely. Additionally, the CCB does not follow the Federal Rules of Civil Procedure or Evidence and instead uses a streamlined—but somewhat analogous—set of rules contained in Title 37 of the Code of Federal Regulations. These rules limit discovery to standard interrogatories and requests for document production in an attempt to simplify the fact-building process for *pro se* litigants.

What may ultimately come to define the CCB, though, is that participation is optional: any party to a CCB claim can opt out by notifying the CCB within 60 days after being served notice of a claim. This automatically terminates the proceeding, and the plaintiff must bring the case again in federal court to pursue the matter further. A special provision also allows libraries and archives preemptively to opt out of any CCB claims against them. All other respondents, however, must opt out on a case-by-case basis by completing an opt-out notification form.

The inability to force parties to litigate their claims in front of the CCB could stifle its effectiveness, but voluntary participation from all parties is necessary to avoid the constitutional concerns that arise when the legislative branch seeks to perform a judicial role. The CCB rules state that, by not opting out, parties lose the opportunity to have an Article III court decide the case and waive their rights to a jury trial. Because the only way to waive these rights is to make participation optional, the CCB is forced to give parties the choice to opt-out.

If parties do agree to litigate in front of the CCB, they can only appeal its decision to a federal court on narrow grounds. The first line of appeal is to request that the panel reconsider its decision for a clear error of law, a clear error of material fact, or a technical

mistake. Next, a party can ask the Register of Copyrights to review the panel's decision for abuse of discretion. Getting external review is harder—the only path to review by a federal district court is by alleging fraud, corruption, misrepresentation, or misconduct. This high hurdle may make it difficult to correct erroneous findings that could have been avoided with more thorough discovery and briefings.

To address concerns of copyright trolls flooding the system, the CCB contains some defensive measures to combat unmeritorious claims. First, a CCB attorney must pre-approve all claims before they can be served, throwing out any that clearly do not state a claim upon which relief can be granted. Additionally, bad faith conduct is punishable with fines up to \$5,000 (including attorneys' fees), and repeated instances of such conduct can trigger a bar on bringing future claims before the CCB.

Bad faith conduct is not the only limitation on bringing claims, however. The CCB rules place limits on the number of cases anyone can bring over a 12-month period. Individuals and corporations can bring up to 30 claims, while this limit is raised to 40 for solo practitioners and 80 for law firms (opt-outs still count towards the limit). Will these limits ultimately serve the CCB's objectives of discouraging trolls and increasing access to justice? The caps could be simultaneously too high to keep out all frivolous claims, but too low to incentivize lawyers and firms to specialize in CCB-claims.

Time will tell how large the CCB's docket may ultimately grow (there were 36 open cases as of June 30, 2022), but there are plenty of questions to ask as the program gets underway. Will defendants choose to proceed in the CCB when they have the ability simply to opt-out? Will plaintiffs find it worthwhile to wait 60 days for defendants to decide to participate, knowing there is no prospect of injunctive relief? Will attorneys bother focusing on the CCB when they face fewer restrictions in federal court? More fundamentally, will the CCB actually *simplify* anything? The streamlined rules of procedure and evidence adopted by the CCB are designed to facilitate litigation by *pro se* parties. But the Copyright Office admits it "must allow for some degree of complexity in those situations where complexity is inherent in the factual context." And the CCB has the authority to dismiss cases it thinks are unsuited to its administrative capacity or expertise. Will the CCB overcomplicate proceedings or punt on cases it does not want to hear? These unanswered questions suggest it will be some time before the true advantages and shortcomings of the CCB become apparent.