

## Client Alert

### The CASE Act of 2020—New Board to Provide Low-cost Resolution of Copyright Small Claims

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The Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 creates a new, inexpensive claims resolution process that may provide copyright holders with previously unavailable recovery opportunities. Copyright holders continuously struggle with the costs of defending their intellectual property rights. Earlier government publications have assessed that while typical infringement claims are valued below \$3,000, litigating a copyright case through appeal costs about \$350,000 on average. In such cases, there is no monetary incentive to sue, even for obviously meritorious claims. Victims of small-scale infringement should consider whether to utilize this new process, while larger clients should take note of the CASE Act's unique provisions and should prepare for a potential increase in copyright small claim litigation that was previously cost-prohibited.

The CASE Act was enacted on December 27, 2020. The Act seeks to address cost-based non-adjudication of copyright small claims by creating a "Copyright Claims Board" (Board), which will effectively operate as a small claims court within the U.S. Copyright Office in the Library of Congress. The Board will resolve claims primarily through phone calls and other remote submissions, without the requirement of in-person appearances or legal representation. Importantly, the CASE resolution process operates on an opt-out basis. Respondents may demand that the claim instead be brought in federal court, where litigation costs are higher for all parties. However, they must do so specifically and in accordance with the Act's procedures, or they will be bound by the CASE proceeding and forfeit certain additional rights.

Eligible CASE claimants include holders of exclusive registered copyrights bringing the following civil claims: (a) infringement claims, (b) claims for declarations of non-infringement, (c) claims for misrepresentation related to notifications of alleged infringement or counter notifications seeking to replace removed or disabled material, or (d) certain counterclaims against the original claimant in a CASE proceeding. Notably, claims may not be asserted against a person or entity residing outside the United States, unless that party initiated the CASE proceeding and is subject to counterclaims under the Act. Additionally, because respondents may opt out of Board resolution in favor of federal court adjudication, an otherwise eligible claim also requires a willing defendant.

Claim eligibility under the CASE Act further requires consideration of claim value. The small claims-focused CASE Board may not exceed an award of \$30,000 per proceeding, exclusive of attorneys' fees and costs, regardless of the number of claims at issue. The Board also may not award more than \$15,000 in statutory damages per work and may not consider whether infringement was willful in making awards. Default judgments, which are permitted under the Act, are presumably subject to the same caps.

Claimants who meet these requirements may commence a CASE proceeding by filing a certified statement of material facts in support of the claim(s) with the Board as well as a filing fee. The Board may dismiss claims for failure to comply with the Act or, more generally, where the Board believes the matter would be better resolved in federal court. It is not yet known whether the Board will accept cases implicating unsettled areas of law or judicial balancing tests like fair use. After receiving notice that the claim has been accepted, claimants have 90 days to serve respondents. Proper service of process must notify the respondent of the right to opt out and consequences of failing to do so. Respondents have 60 days after receiving notice to opt out. A respondent who declines or fails to do so waives the right to have the issue adjudicated by an Article III court and the right to a jury trial.

The Board itself consists of three Copyright Claims Officers who must issue written decisions, by a majority, setting forth their factual findings and legal conclusions. Board decisions have preclusive effect only as to the parties and the claims actually asserted and resolved therein. In instances of conflicting judicial precedent on substantive copyright law issues, the Board will apply the law of the federal jurisdiction where the action could have been brought in federal district court. While the Board is bound by all applicable judicial precedent, Board decisions do not create precedent—even for the Board itself. In fact, the Board is prohibited from expressly citing or relying on its own decisions as legal precedent. This said, while the Board may not formally rely on its prior findings as precedent, it is reasonable to believe the Board may rely informally on its previous decisions or at least that it is likely to make consistent determinations in similar cases.

Of significant importance, particularly for prospective defendants, is the CASE Board’s relationship to the historically pro-claimant Copyright Office. The CASE Act prohibits officers from consulting with the Register of Copyrights (Register) on the facts of a particular matter before the Board or on the application of law to those facts. However, Board decisions must comply with regulations issued by the Register, and the Board may consult with the Register on general issues of law. Board officers will also be appointed by the Librarian of Congress at the recommendation of the Register, while non-officer Board attorneys will be hired by the Register. Given the close relationship between the CASE Board and the Copyright Office, it seems likely that the Board will prove to be a similarly pro-claimant body.

Finally, opportunities for relief from a Board decision are extremely limited. A party may file a request for reconsideration within 30 days of a final Board decision, based on (a) a clear error of law or fact material to the outcome, or (b) a technical mistake. If the Board denies the request, the party may request review of the final determination by the Register within 30 days of the denial. The Register will review only for abuse of discretion. Within 90 days of the final Board determination or Register review, whichever is later, a party may seek an order from a federal district court vacating, modifying, or correcting the Board’s determination. Appeal to a federal district court is limited to instances where the Board (a) issued a determination resulting from fraud, corruption, misrepresentation, or other misconduct, (b) exceeded its authority or failed to render a final judgment, or (c) issued a determination based on default or failure to prosecute due to excusable neglect. These are extremely narrow grounds for appeal.

The CASE Act requires the Board to commence operations no later than December 27, 2021, one year after enactment. The Register may extend this deadline by up to 180 days. The Act also authorizes the Register to

implement regulations establishing Board procedures prior to this commencement, so it remains uncertain how exactly the Board will operate. However, it appears clear from the Act itself that the CASE Board creates the opportunity for significantly increased litigation of otherwise cost-prohibited or cost-deterred claims—a possibility for which clients should carefully prepare.

Crowell & Moring will provide additional information as such updates become available.

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