



The CASE Act of 2019: Establishing a Small-Claims Process for Copyright Disputes

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On October 22, 2019, the House passed [H.R. 2426](#), the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 by a vote of [410-6](#). Several Members have introduced an identical bill ([S. 1273](#)) in the Senate, which the Senate Judiciary Committee [reported favorably](#) on September 12, 2019.

The CASE Act [seeks](#) to help copyright holders enforce lower-value claims by establishing a Copyright Claims Board to resolve copyright disputes with damages totaling less than \$30,000. This Sidebar reviews the enforcement issues that the CASE Act seeks to address, describes the provisions of the CASE Act, and analyzes the [legal concerns](#) that some scholars and stakeholders have raised about the legislation.

Challenges to Enforcing Lower-Value Copyright Claims

Copyright law [grants](#) creators of original works of authorship (e.g., books, movies, photographs, computer code, and visual art) a set of [exclusive rights](#) in their works, such as the right to reproduce, distribute, perform, and display the work, or prepare derivative works from it. Anyone who takes one of those actions without the permission of the copyright owner—subject to certain exceptions, such as [fair use](#)—is a [copyright infringer](#) and potentially legally liable. Once a copyright is [registered](#), the copyright holder may sue in federal court to obtain legal relief from the infringement, including judicial [injunctions](#) (i.e., a court order to cease infringement) and monetary [damages](#).

Copyright cases are an area of [exclusive](#) federal jurisdiction—that is, litigants must bring copyright lawsuits in federal (not state) courts. Federal litigation can be costly and is [difficult to navigate](#) without an attorney’s assistance. The American Intellectual Property Law Association has [estimated](#) that the median cost to litigate a copyright claim through appeal is \$278,000. Although courts [may](#) award attorneys’ fees and costs to prevailing parties in copyright suits (in addition to actual or statutory [damages](#)), such relief is not available as a matter of course, but instead [entrusted](#) to the court’s discretion.

Many copyright stakeholders have therefore expressed [concerns](#) that the high costs of litigation deter copyright holders from bringing meritorious lower-value copyright claims. In a 2013 report, the Register of Copyrights (the Register), who heads the Copyright Office, [found](#) that “under the current federal system lower-value copyright claimants face formidable challenges in seeking to enforce the exclusive rights to which they are entitled.” The Register therefore [recommended](#) that Congress create a centralized,

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voluntary tribunal within the Copyright Office to handle lower-value copyright infringement cases. Prompted by these concerns, the CASE Act thus **aims** to provide a lower cost and more efficient means of resolving lower-value copyright disputes than traditional federal court litigation.

The CASE Act: Establishing the Copyright Claims Board as an Alternative Dispute Resolution Forum

The Copyright Claims Board

The CASE Act would **create** a Copyright Claims Board (the Board) within the Copyright Office as an alternative forum to resolve certain copyright claims. As envisioned by the Act, the Board would **consist** of three full-time Copyright Claims Officers, appointed by the Librarian of Congress (the Librarian), who **would** be attorneys with legal experience in either copyright law or alternative dispute resolution. The Officers would **serve** in staggered, renewable six-year terms, and would be **removable** by the Librarian. The **duties** of the Board would include: rendering determinations on claims and counterclaims filed with the Board; facilitating settlement of such claims; managing proceedings before the Board; conducting hearings and conferences as necessary; and awarding monetary relief to claimants and counterclaimants.

The Act provides that the Board would have **nonexclusive jurisdiction**, “on a voluntary basis,” over **claims** of copyright infringement, claims for declarations of noninfringement, claims for misrepresentations in takedown notices under the **Digital Millennium Copyright Act** (concerning infringing material on the Internet), and certain counterclaims related to the same transaction at issue. Recovery would be **limited to** actual damages or statutory damages capped at \$15,000 per work infringed (or \$7,500 for works not timely registered), with total recovery **capped** at \$30,000, exclusive of fees and costs. (By comparison, statutory damages of up to \$150,000 per work for willful infringements **are available** in federal court, with no cap on total recovery.) Injunctive relief would generally not be available, **although** the Board could include a “requirement to cease conduct” in its determination, if the parties so agree. Attorneys’ fees and costs would only be available for “**bad faith conduct**.”

Adjudication Procedures Before the Board

To initiate a case before the Board, a claimant (i.e., the plaintiff) would **file** a certified statement of material facts and pay a filing fee. After an initial **screening** of the claim, the claimant would **proceed** to formally **serve** notice and a copy of the claim on the respondent (i.e., the defendant) within ninety days by “personal service or pursuant to a waiver of personal service.” In addition, the Board itself would need to **provide** written notice of the claim to the respondent.

Both the claimant’s service and the Board’s notice would **inform** the respondent that, by not “opting out” of Board adjudication within sixty days of service, the respondent would lose the opportunity to have an Article III court hear the claim, and would waive the right to a jury trial on the claim. If the respondent chooses to opt out of the proceeding through timely written notice to the Board, the Board would **dismiss** the claim without prejudice, and the case would not proceed further before the Board. If the respondent does not opt out, however, the case would proceed before the Board and the parties would be **bound** by the Board’s determination.

Proceedings before the Board would be relatively informal, as compared to traditional federal court litigation. **Motion practice** and **discovery**, for example, would be limited. The Board **would be able to** hold hearings and receive evidence from the parties. Ultimately, a majority of the Board would make a published, written **determination** resolving the claims and counterclaims, based on the applicable law and **factual findings** under a preponderance of the evidence standard.

Appeals of Board Determinations

Subsequent review of the Board's determination would be limited. The usual [standards](#) for judicial review of agency adjudications under the Administrative Procedure Act [would not](#) apply to the Board. Instead, the parties could request [reconsideration](#) of the Board's final determination; if the Board denied that request, the Register could [review](#) the determination, but only for an abuse of discretion (i.e., an unreasonable error) in denying reconsideration. Further review by an Article III court [would be limited to](#) claims that: (1) the Board's determination was based on "fraud, corruption, misrepresentation, or other misconduct"; (2) the Board exceeded its legal authority; or (3) in the case of a default determination (e.g., when the respondent fails to respond to the claim), that the default was due to excusable neglect.

Does the CASE Act Raise Constitutional Concerns?

The CASE Act could lead to more efficient and less expensive resolution of certain lower-value copyright claims. Efficiency, however, is not the [only consideration](#) at stake in a dispute resolution system. Some [commentators](#) have raised concerns that a copyright small-claims adjudication system, depending on how it is structured, may run afoul of various constitutional guarantees. In particular, some have raised [concerns](#) regarding: (1) the Seventh Amendment; (2) Article III; (3) the Fifth Amendment's Due Process Clause; and (4) the Appointments Clause.

Right to Adjudication of Certain Suits in an Article III Court

[Article III](#) of the Constitution vests the "judicial Power of the United States" in the federal courts. Under the CASE Act, the Copyright Claims Officers would *not* be appointed pursuant to, and subject to the protections of [Article III](#). That is, unlike federal judges, Copyright Claims Officers would not be nominated by the President and confirmed by the Senate, nor guaranteed lifetime tenure "[during good Behavior](#)." The Board would therefore be considered a [non-Article III court](#) (a.k.a. a legislative, Article I, or administrative court).

Non-Article III courts generally [may not](#) adjudicate "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." However, non-Article III courts [may](#) adjudicate matters involving "[public rights](#)," which [include](#) (at a minimum) cases "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." In 2018, for example, the Supreme Court [held in *Oil States Energy v. Greene's Energy Group*](#) that certain patent validity issues are public rights that may be adjudicated in a non-Article III court (i.e., before the Patent Trial and Appeal Board). Because both copyrights and patents stem from the [same grant](#) of constitutional authority, *Oil States'* analysis would likely [inform](#) whether Congress may constitutionally commit copyright validity or infringement determinations to a non-Article III forum.

The Supreme Court's "public rights" doctrine is not [easily synthesized](#), and it is not entirely clear whether the Court, under the line drawn in *Oil States*, would view copyright *infringement* (as opposed to invalidity, which relates to the propriety of the government's initial grant of the intellectual property right) as a matter involving "public rights." Notably, the decision in *Oil States* [specifically stated](#) that it did not address whether "other patent matters, such as infringement actions, can be heard in a non-Article III forum." This dicta may suggest that the Court could be inclined to view patent or copyright infringement issues as distinct from validity issues for Article III purposes.

Presuming that copyright infringement is a matter that must ordinarily be heard by an Article III court, the more narrow question presented by the CASE Act is whether parties may voluntarily *waive* their constitutional right to adjudicate that matter in an Article III court. In its 2015 decision in *Wellness International Network v. Sharif*, the Supreme Court [made clear](#) that the right to an Article III adjudication

is “‘a personal right’ . . . ordinarily ‘subject to waiver.’” Specifically, *Wellness International* upheld the ability of non-Article III bankruptcy judges to adjudicate certain private-right claims with the parties’ consent. In a slightly different context, the Court held that consent to a magistrate judge—another non-Article III adjudicator—need not be express or written, but may be implied from a party’s conduct.

Even with the parties’ consent, however, the Supreme Court has at times suggested that a broad, categorical assignment of cases to non-Article III adjudicators may violate the structural protections of Article III, if the underlying “congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch.” In *Commodity Futures Trading Commission v. Schor*, the Court identified a number of factors to consider in making that determination, including “the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” The Court has also considered whether the class of claims subject to non-Article III adjudication was “narrow,” and the extent to which the non-Article III adjudicator is subject to the supervision and control of Article III judges.

Because this multifactor inquiry is not governed by “formalistic and unbending rules,” it is difficult to say definitively whether the CASE Act raises substantial structural Article III concerns. Certainly, the class of claims that would be subject to non-Article III adjudication under the CASE Act could be described as narrow. On the other hand, the Board would not be subject to Article III supervision to nearly the same extent as the non-Article III adjudicators at issue in much of the Supreme Court’s case law, such as bankruptcy, administrative law, or magistrate judges. As to the concerns that drove Congress to depart from Article III, the fact that many of these lower-value copyright rights claims would rarely, as a practical matter, be fully litigated in federal court, may be another factor the courts would consider.

Seventh Amendment Right to a Trial by Jury

The Seventh Amendment guarantees the right to a trial by jury in certain civil cases. The Supreme Court has interpreted the Seventh Amendment to provide a right to a jury trial in “suits at common law” and lawsuits “brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.” The Court has squarely held that copyright infringement actions, at least when the plaintiff seeks actual or statutory damages, fall within the latter category; thus, the parties are generally entitled to a jury trial in copyright cases under the Seventh Amendment. As a result, if the CASE Act’s procedures were mandatory, the Act would likely be unconstitutional, because it would compel defendants to forfeit their right to a trial by jury on copyright infringement claims.

However, it is also firmly established that parties may waive their Seventh Amendment right to a jury trial, so long as the waiver is knowing and voluntary. Under Federal Rule of Civil Procedure 38(d), for example, failure to make a written demand for a jury trial within a set time operates as a waiver of the jury trial right. By analogy to Rule 38, the CASE Act’s opt-out system would appear to comport with the Seventh Amendment, so long as the respondent’s waiver is knowing and voluntary.

Fifth Amendment Guarantee of Due Process

To some degree, many of the constitutional concerns with the CASE Act boil down to whether the opt-out system that the CASE Act would create validly waives Seventh Amendment and Article III rights, in a manner that comports with the Constitution’s guarantee of “due process of law.” In other words, does a respondent’s failure to object to the jurisdiction of the Board within sixty days of service suffice to establish a “voluntary” waiver of the respondent’s Seventh Amendment and Article III rights?

Under the procedural aspects of the Due Process Clause, before an individual is deprived of life, liberty or property by adjudication, he **must** be given notice and a meaningful opportunity to be heard. The due process inquiry is generally a “flexible” one, with the level of process required varying “as the particular situation demands.” In determining the level of process due, courts generally **consider** three factors: (1) the private interests affected by the official action; (2) the risk of an erroneous deprivation under the procedure used; and (3) the government’s interest, including the burdens that additional or substitute procedural requirements would entail.

Although the details of the required notice to respondents under the CASE Act would be set out through Copyright Office regulations, the bill makes clear that those regulations “**shall include**” a number of requirements. These requirements, to a large degree, trace those of the service provisions in the Federal Rules of Civil Procedure, which apply to traditional federal court litigation. For example, the CASE Act would **require** that claimants effect service on an individual respondent using one of the same four means of service allowed under **Federal Rule of Civil Procedure 4(e)**. As the Supreme Court has **described** “[p]ersonal service of written notice within the jurisdiction” as “the classic form of notice always adequate in any type of proceeding,” these notice procedures would appear sufficient, at least as a facial matter, under the Due Process Clause.

The due process concerns raised by commentators have focused primarily on the effects for respondents who fail to respond to this notice, as opposed to the form of the notice itself. Specifically, commentators question whether the “opt-out process” for consenting to the Board’s jurisdiction is “**voluntary enough**” to pass constitutional muster. By analogy, is it **notable** that the Federal Rules of Civil Procedure also attach significant consequences to a failure to respond to proper service; in particular, a party who fails to respond may be subject to a **default judgment**. In the class action context, moreover, the Supreme Court has **concluded** that a procedure whereby absent class members who receive notice of the class action are bound if they do not opt out of the suit, is consistent with the Due Process Clause. Indeed, **Federal Rule of Civil Procedure 23(b)** explicitly contemplates a similar opt-out procedure for certain federal class actions. Of course, given the flexible nature of the due process balancing test and the distinct circumstances of the CASE Act, it is difficult to say with certainty how a court would evaluate this due process argument.

The Appointments Clause

In light of the U.S. Court of Appeals for the Federal Circuit’s **recent decision** that patent administrative judges, who adjudicate certain patent validity challenges, were unconstitutionally appointed, a final **consideration** is whether the Board’s structure accords with the Constitution’s Appointments Clause. The **Appointments Clause** provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States,” but “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” The Clause thus **distinguishes** between “principal officers” of the United States, who must be appointed by the President and confirmed by the Senate, and inferior officers, who may be appointed by, for example, heads of departments.

Under the CASE Act, the Librarian would **appoint** the Board’s Copyright Claims Officers, “after consultation” with the Register. The Librarian, who is **appointed** by the President and confirmed by the Senate, is **considered** to be a “Head of Department” within the meaning of the Appointments Clause. The Librarian, in turn, **appoints** and supervises the Register. Copyright Claim Officers would serve “**under the general direction**” of the Register; however, they would render determinations in individual proceedings “**independently**” and **would not** consult with the Register on the facts or application of the law in “any particular matter.” The Librarian would have the general authority to **sanction or remove** Copyright Claims Officers, but **would be unable** to “consider the substantive result of any individual determination” in appraising their performance.

The first issue in the Appointments Clause analysis is whether Copyright Claims Officers are “Officers of the United States,” as opposed to mere federal employees. Appointees are [generally considered](#) “Officers” if they “exercis[e] significant authority pursuant to the laws of the United States.” Although the Supreme Court recently [declined](#) to elaborate on the meaning of “significant authority,” it has held, for example, that [administrative law judges](#) and [members of the Federal Election Commission](#) are “Officers.” In the intellectual property context, different U.S. Courts of Appeals have concluded that [patent administrative judges](#) and [copyright royalty judges](#) are officers under the Appointments Clause. Given that the Copyright Claims Officers would be able to issue determinations binding upon the parties, including [awards](#) of monetary damages up to \$30,000, their legal authority could well be characterized as “significant.”

Presuming that Copyright Claims Officers are “Officers of the United States,” the second issue is whether they are principal or inferior officers. Generally speaking, [inferior officers are](#) “officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” In the principal-officer determination, courts also consider the [level of supervision](#) and oversight that presidential appointees exercise over the officer, and presidential appointees’ [power to remove](#) the officer without cause. Unlike the comparable provisions for patent administrative judges or copyright royalty judges (which have been held unconstitutional), Copyright Claims Officers are [generally removable](#) by the Librarian and serve under the Register’s [direction](#), although there are [some limits](#) on the Librarian’s and Register’s oversight. So long as Copyright Claims Officers are considered inferior officers, their appointment may be entrusted to the Librarian, consistent with the Appointments Clause.

Author Information

Kevin J. Hickey
Legislative Attorney

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