

RELIEF FOR COPYRIGHT OWNERS: COVID-19 RELIEF BILL CONTAINS A SIGNIFICANT CHANGE TO THE COPYRIGHT ENFORCEMENT PROCESS

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Tucked into the end-of-year COVID-19 relief Consolidated Appropriations Act enacted on December 27, 2020 was a significant piece of copyright legislation that could have a big impact on copyright enforcement proceedings – especially for smaller businesses.

Creation of a Copyright Claims Board

The Copyright Alternative Small-Claims Enforcement Act of 2019 (“CASE Act”) has been percolating in Congress since early 2019 (and in previous proposed forms prior to that). But it wasn’t until lawmakers included it in the last-minute COVID-relief and funding bill that it became law.

The CASE Act creates a Copyright Claims Board to provide a simpler, more efficient, and less expensive process for enforcing smaller claims of copyright infringement. The Board will consist of three officers chosen by the Librarian of Congress and the Register of Copyrights who will essentially act as arbitrators for smaller scale copyright disputes.

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Until now, federal courts have had exclusive jurisdiction over copyright infringement claims, and copyright litigation is often very expensive and complex to navigate. Professional creators and small businesses often simply cannot afford to enforce their rights when someone infringes their copyrighted works. The CASE Act is intended to address these obstacles by creating an affordable alternative to federal court for certain smaller copyright claims.

The CASE Act will require further rulemaking by the Copyright Office to effectuate its provisions, and some features could change somewhat during that process, but below, I summarize its key provisions:

Eligible Claims

The CASE Act identifies the following main categories of claims that can be adjudicated by the Board:

- Infringement of an exclusive right in a copyrighted work provided under Section 106 (§1504(c)(1));
- A declaration of non-infringement of an exclusive right in a copyrighted work provided under Section 106 (§1504(c)(2));
- A claim under Section 512(f) for misrepresentation in connection with a DMCA notification of claimed infringement or a counter notification seeking to replace removed or disabled material (§1504(c)(3));
- A counterclaim that arises under Section 106 or Section 512(f) and out of the same transaction or occurrence that is the subject of the claim of infringement or non-infringement (§1504(c)(4));
- A legal or equitable defense under the Copyright Act or otherwise available under law in response to a claim or counterclaim (e.g., Fair Use, First Sale, Implied License, etc.) (§1504(c)(5)).

Limitation on Total Monetary Recovery

The CASE Act is meant to address smaller monetary claims. ***No matter the theory, the total monetary recovery the Board can award is \$30,000*** (exclusive of any attorney's fees that may be available under certain bad faith circumstances).

Subject at all times to that maximum recovery limit, a successful claimant can recover either:

- **Actual damages and profits** under §504(b) of the Copyright Act, or
- **Statutory damages** under §504(c) of the Copyright Act.

If a work is timely registered under §412 of the Copyright Act, the statutory damages cannot exceed \$15,000 for each work infringed (subject to the overall maximum award of \$30,000).

Notably, if a work is NOT timely registered under §412 (which normally eliminates the possibility of statutory damages), a claimant can still recover statutory damages from the Board, but those cannot exceed \$7,500 per work infringed (with a maximum of \$15,000).

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Registration Requirement Satisfied by Filed Application

A copyright registration is still a jurisdictional requirement to ultimate recovery from the Board, but in a departure from established case law, **a claimant can initiate a claim once he or she has filed an application for registration** (§1505(a)(1)). The registration would still have to issue prior to the final Board determination, but this alone could dramatically speed up the process.

Voluntary / Opt-Out Procedure

Participation in a proceeding before the Board is voluntary – any party with a valid copyright infringement claim and a registration can still go straight to federal court – and a respondent who is served in a Board proceeding has the right to refuse to submit to this process. **But respondents need to be careful and act quickly – they must affirmatively opt-out of the Board proceeding in writing within sixty (60) days of receiving service.** (§1506(i)).

If a respondent does not submit the opt-out notice within that 60-day period, the proceeding will be deemed active and the respondent loses the right to have the case heard in federal court (with evidentiary and discovery rules and appeals) and waives the right to a jury trial. (§1506(h)).

Simplified Process / No Right to Appeal on the Merits

Proceedings before the Board will not resemble typical federal court litigation. There will be no in-person appearances by parties or counsel, proceedings will consist entirely of written submissions and internet-based conferences, there will be no formal motion practice or formal discovery (although the Board will consider requests for certain types of discovery) and submissions will NOT be subject to the Federal Rules of Evidence. (§1506 (a) - (o)). Determinations by the Board will not be precedential (§1507(a)(3)).

And very importantly, the right to appeal the Board's determination is extremely limited to only claims of fraud, corruption, misrepresentation or other misconduct – but NOT on the merits of the decision. (§1508(c)).

Business Impact

Once fully operational, the CASE Act is likely to increase the number of copyright infringement claims brought in the United States. Once a rights holder applies for a copyright registration, the barriers to bringing and adjudicating an infringement matter before the Board are low. For many smaller creators of copyrighted works who have found the federal court process expensive and daunting, the CASE Act may finally provide a meaningful alternative.

That means businesses that create, license, distribute, or host content should begin to prepare for Board proceedings. If others are stealing your works, you'll have a new, easier way to combat that theft. If you use third-party content (e.g., photographs, videos, music, artwork), the CASE Act could

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seriously impact your liability exposure because it will be much easier for owners of third-party works to sue for infringement – making it even more important to understand your rights, obtain releases, and establish a strategy for mitigating such risks.

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