

The Copyright Claims Board: Key Considerations in This Alternative Venue for Small Copyright Disputes

Individuals involved in relatively small or specialized copyright infringement disputes now have an alternative to potentially costly and time-consuming lawsuits in federal district court.

It is anticipated that by mid-2022, select disputed claims can be brought to the Copyright Claims Board (CCB), which was established by Congress through the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020. The forum is expected to be efficient, cost-effective and easy to navigate compared to traditional copyright litigation as it features streamlined processes that limit the scope of discovery and motions. In addition, the maximum damages a party can be awarded is capped at \$30,000.

Cases That Can Be Heard By The CCB

The CCB will consider infringement claims that do not exceed \$30,000 in actual damages per work; declarations of noninfringement; counterclaims related to the same transaction or acts in the original claims; legal and equitable defenses of the parties; notices to take down material under the Digital Millennium Copyright Act (DMCA); and DMCA counter-notice issues.

Key Considerations When Deciding Venue Selection

There are many factors to consider before parties involved in a copyright dispute choose to proceed before the CCB. For example, if a copyright owner is seeking statutory damages for infringement, as opposed to actual damages that are limited to the \$30,000 cap, then damages at the CCB will be limited to \$15,000 per work—which is

much less than the \$150,000 per work in statutory damages that may be available before a federal district court. (Statutory damages for copyright infringement range from \$750 to \$30,000 per work infringed, with the possibility of recovering up to \$150,000 per work for willful infringement. If the infringement is deemed innocent, however, statutory damages can be reduced to a minimum of \$200 per work.) And if a copyright owner has not promptly registered the work(s) at issue within the time frames established in Section 412 of the Copyright Act, then statutory damages at the CCB will be limited to \$7,500 per work.

Despite the potential for greater statutory damages in federal court, the time frames in Section 412 of the Copyright Act may prevent the availability of statutory damages for some claims in federal court. This is because statutory damages are not always available for ongoing infringement that started before a work is registered.

The CCB also allows a copyright owner to simultaneously file a claim of infringement and an application to register the work, which is an advantage the forum has over federal courts. Thus, unlike filing a copyright infringement action in a federal district court, the copyright owner will not need to have a registration in hand before bringing a claim.

While some works can be preregistered prior to publication, and an expedited process for registration can be obtained for a significant fee, it usually takes about three months for a copyright to be registered. Regulations have not yet been adopted, but the CASE Act directs the Copyright Office also to have an expedited



registration process in place for works that are the subject of CCB claims.

The CCB Claim Process

To bring a claim before the CCB, a party will file a pleading that includes a statement of material facts to support the claim or counterclaim, and pay a filing fee. If the claim is deemed appropriate by the CCB, then the responding party will need to be properly notified of the proceeding by the claimant and the CCB. As the process is voluntary, the notices must include information on how the responding party may opt out of the proceeding as well as the consequences of not doing so.

If a responding party decides to opt out, the other party may proceed with filing the claim in federal court. Opting out of the CCB proceeding will not be held against the responding party in an action subsequently filed in federal court.

The CCB may enter a default determination against a responding party that does not opt out and fails to appear, or against a party that continually fails to appear. When circumstances are appropriate and the CCB decides a default is proper, it also can dismiss a defaulting party's counterclaim and direct that damages be paid to the other party. Findings of default can be canceled or modified by the CCB in the interests of justice, or by a federal district court if there was excusable neglect by the defaulting party.

If a copyright owner or alleged infringer chooses to proceed before the CCB, there is no right to a jury trial or due process protections. This is because the same claim or counterclaim cannot be filed in both the CCB and a federal district court where these Constitutional protections apply. The CCB also can dismiss a claim or counterclaim for any number of reasons, including:

- failing to provide appropriate notice to the responding party or join a necessary party
- the responding party opts out of participating in the proceeding
- lack of an essential witness, evidence, or expert testimony
- registration of the work at issue is refused by the Copyright Office

Appeals

When considering whether to bring or defend against a CCB proceeding, it is also important to take the appeals process into account. Although any decision of the CCB will be reviewable by either the Copyright Office or a federal court, the review

process will be much more limited in scope than appealing the decisions of a federal court, which may consider issues of law and fact.

Enforcement

Another important point to examine is enforcement. For example, if a party is awarded damages by the CCB and the other party fails to pay, then the prevailing party will have to ask a federal court to confirm the award and enter judgment against the other party. Moreover, unlike a federal district court, the CCB cannot issue traditional injunctive relief to require that infringement activity cease. Nevertheless, the CCB can require that an infringing party cease or mitigate such activity, but only when the party that opted in to the CCB consents to do so.

Legal Counsel

Parties do not need to be represented by an attorney to participate in a CCB proceeding. However, having legal counsel can be very helpful with navigating the nuances of copyright law and analyzing the procedural issues and appropriate defenses to copyright infringement claims. Additionally, in certain cases, the CCB will be able to award attorneys' fees and costs. For example, the CCB will be able to direct a bad faith party to pay the other party's attorneys' fees and costs of up to \$5,000 and will be able to award even higher amounts in extraordinary situations. Any attorneys' fees or costs awarded, however, are not included in the caps on damages noted above.

For additional information, please contact:

Robert D. Michaux
Intellectual Property Law
cblaw.com/intellectual-property
rmichaux@cblaw.com | 804.697.4119

Christian & Barton, LLP
cblaw.com | 804.697.4100 | Richmond, Virginia

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