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# Opinion: CASE Act will Harm Researchers and Freedom of Inquiry

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## Abstract

The Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act) was swept into law during the final days of 2020 as a part of the 5,500 page federal spending bill. In theory, the CASE Act aims to provide a venue for individual creators (such as photographers, graphic artists, musicians) to address smaller copyright infringement claims without spending the time and money required to pursue a copyright infringement lawsuit in Federal court. In reality, however, this additional bureaucratic structure created outside of the traditional court system is fraught with problems that will mostly incentivize large, well-resourced rightsholders or overly litigious copyright owners to take advantage of the system. At the same time, it will confuse and harm innocuous users of content, who may not understand the complexities of copyright law, and who do not know whether or how to respond to a notice of infringement via this small claims process. From our perspective, it will chill users who rely on crucial statutory exceptions to copyright, such as fair use, in their research and teaching activities.

Keywords: copyright, CASE Act, advocacy, legislation

*Note: This op-ed is part of a series of short articles addressing current copyright legislation, issues, and advocacy affecting academic libraries and their users. They are written by Sara Benson, Assistant Professor and Copyright Librarian at the University of Illinois Urbana-Champaign, and Timothy Vollmer, Scholarly Communication and Copyright Librarian at the University of California, Berkeley. Sara and Tim are members of the American Library Association Policy Corps.*



## **Opinion: CASE Act will Harm Researchers and Freedom of Inquiry**

The Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act) was swept into law during the final days of 2020 as a part of the 5,500 page federal spending bill. In theory, the CASE Act aims to provide a venue for individual creators (such as photographers, graphic artists, musicians) to address smaller copyright infringement claims without spending the time and money required to pursue a copyright infringement lawsuit in Federal court. In reality, however, this additional bureaucratic structure created outside of the traditional court system is fraught with problems that will mostly incentivize large, well-resourced rightsholders or overly litigious copyright owners to take advantage of the system. At the same time, it will confuse and harm innocuous users of content, who may not understand the complexities of copyright law, and who do not know whether or how to respond to a notice of infringement via this small claims process. From our perspective, it will chill users who rely on crucial statutory exceptions to copyright, such as fair use, in their research and teaching activities.

### **What is the CASE Act?**

At the end of 2020 Congress passed the CASE Act by appending it to a must-pass [appropriations bill](#), which gave legislators no time to engage in meaningful debate about the legislation. It provides for the creation of a Copyright Claims Board (CCB) as a way to adjudicate smaller alleged copyright infringement claims. The CCB will be set up within the U.S. Copyright Office, staffed by three full-time Copyright Claims Officers. The Officers will be appointed by the Librarian of Congress, in consultation with the Register of Copyrights. Copyright Claims Officers are not judges, but will be tasked with interpreting existing copyright law and precedent in making their rulings. The CCB will begin operations within a year of the enactment of the legislation, with the potential for an additional 6-month extension before it starts hearing claims.

Participation in a Copyright Claims Board proceeding is voluntary. If a user accused of a small claims copyright infringement does not wish to engage in the proceeding, they can opt out. This means that the copyright holder would need to pursue a copyright infringement lawsuit through the typical path—filing a lawsuit in Federal court. But if a respondent does not opt out of the proceedings within 60 days of receiving a notification of a claim through the CCB, the respondent “loses the opportunity to have the dispute decided by a court created under Article III of the Constitution of the United States [...] and waives the right to a jury trial regarding

the dispute” (Copyright Alternative in Small-Claims Enforcement Act of 2020, 106-107).

The CCB can award actual damages and/or statutory damages. Statutory damages are limited to \$15,000 per work infringed if the work was registered in a timely fashion with the Copyright Office, and \$7,500 per work infringed if the work was not timely registered with the Copyright Office. Strangely, this means that claimants could receive more in statutory damages via the copyright small claims proceeding than they could if the same case was brought via a typical infringement lawsuit, where plaintiffs may not be awarded any statutory damages if a work was not registered with the Copyright Office prior to filing the infringement suit. The cap on total monetary damages awarded during a single proceeding will be \$30,000. The parties involved in the copyright small claims proceeding agree to pay for their own attorneys’ fees and costs.

An individual may be notified of a copyright small claims proceeding against them through a summons, by delivering it to them in person, or by delivering it to the individual’s residence. A respondent can opt out of the small claims proceeding by providing a written notice within 60 days. But, if a respondent does not submit an opt out notice, “the proceeding shall be deemed an active proceeding and the respondent shall be bound by the determination in the proceeding” (112).

CCB claims may not be brought against a Federal or State governmental entity. This would include most public universities and colleges that are typically state-run institutions. Therefore, a school such as the University of Illinois Urbana-Champaign, and its library, cannot have a small claims action brought against it via the CCB. In addition, there is a preemptive opt out mechanism for libraries and archives that qualify as institutions covered by [17 U.S.C. § 108](#). So, even academic libraries situated within private institutions will not be subject to CCB actions, as long as they apply for the preemptive opt out. These libraries and archives may not be charged a fee to preemptively opt out, and are not required to renew their decision to opt out.

### **How will the CASE Act Impact Libraries and Library Patrons?**

Copyright is always a balance between the rights of authors and the rights of the public, researchers, and society in general. Current laws seeking to maintain that balance are frequently abused by overly aggressive rightsholders ignoring clear fair uses of works, companies employing bots to scour the web to send frivolous take-



down notices, and more.<sup>1</sup> With the addition of a small claims board, even more questionable copyright complaints would undoubtedly ensue, and it could have serious negative repercussions for scholars, educators, and students.

The CASE Act would have a chilling effect on research and teaching because scholars could more easily be sued for making fair uses of copyrighted content. Researchers necessarily include portions of others' copyrighted works within their scholarship. They are empowered to do so, even without specific permission from the copyright holder, when their incorporation of these materials constitutes a fair use ([17 U.S.C. § 107](#)). Such uses for teaching and scholarship are not an infringement of copyright.

The CASE Act's small claims tribunal would make it too easy for litigious rightsholders to sidestep the traditional Federal court system and send out thousands of small claim notices to unsuspecting scholarly authors. For as little as \$100, a copyright holder can send a notice to a faculty member or student demanding they comply with the small claims process even though their use of the work would normally be protected under limitations and exceptions to U.S. copyright law, such as fair use. Overeager rightsholders will be given free rein to issue demands with little repercussion, and respondents who lose their CCB proceeding are unable to appeal in a similar fashion as would be granted during a typical judicial process. Within 30 days of a ruling, a respondent who is found to have infringed may request that the Copyright Claims Board reconsider its final determination, and the Board "shall either deny the request or issue an amended final determination" (122). A U.S. District Court only gets involved if a "party has failed to pay damages, or has failed otherwise to comply with the relief" (130).

And even though libraries and archives have been given the option to permanently opt out of the small claims process, individuals like students and researchers likely will not know that they can also opt out of the process (but on a case-by-case basis). The legislation provides a variety of ways in which to serve notices to alleged infringers, such as "leaving a copy of the notice and claim at the individual's dwelling or usual place of abode" (108). But if a student maintains their permanent address as their home address rather than their address on campus, will they simply miss the notice, thus locking them into the proceeding?

<sup>1</sup> Urban, et al. (2017) noted that in a study of automated copyright takedown requests under DMCA § 512, "About 30% of takedown requests were potentially problematic. In one in twenty-five cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material" (2).

If researchers are threatened with the possibility of a small claims judgment against their scholarship, they might think twice the next time they wish to use copyrighted content in a scientific article or online course. Alternatively, scholarly authors will agree to pay licensing fees to rightsholders for uses that would normally fall under fair use because they are worried about the possibility of infringement lawsuits.

### **What Happens Next?**

The legislation requires that the CCB commence operations within 12 months of the bill's enactment. But the Copyright Office could take advantage of a six-month extension to that deadline, meaning that the CCB must be up and running by June 2022 at the very latest.

Between now and then, academic libraries should work to educate and prepare their audiences. First, they can consult with library leadership and this institution's legal counsel so that these stakeholders are aware of the legislation and its potential impact on library and university users. It will be important to communicate that while state institutions (and their employees) are not subject to small claims proceedings, there are others on campus who could receive notices, such as faculty, students, and researchers. Academic libraries situated within private institutions (thus not exempted like their public counterparts) can look into the process for securing a preemptive opt out, as is the right for all libraries and archives that qualify under Section 108 of the Copyright Act.

Second, librarians, especially those involved with providing information on copyright issues to audiences at colleges and universities, can play a role in educating faculty, students, and researchers on their rights and options if they receive a notice to a CASE Act proceeding. Library staff should do so in consultation and guidance from university counsel.



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