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Death by a Thousand Paper Cuts: High-Volume, Low-Value Creators; the Copyright Claims Board; and Lessons Learned from State Small Claims Courts

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— Note —

DEATH BY A THOUSAND PAPER CUTS:
HIGH-VOLUME, LOW-VALUE
CREATORS; THE COPYRIGHT CLAIMS
BOARD; AND LESSONS LEARNED FROM
STATE SMALL CLAIMS COURTS

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INTRODUCTION

Insect photographer Kathy Keatley Garvey did not know what she was setting in motion when she pulled out her Nikon D700 to capture a honeybee stinging her colleague’s wrist.¹ In just four frames, Garvey captured an award-winning photograph that would be lauded by critics and co-opted by copyright infringers. “The Sting” spread like wildfire after the *Huffington Post* named it one of the “most amazing photos of

1. See Kathy Keatley Garvey, *The Sting*, BUG SQUAD (June 14, 2012), <https://ucanr.edu/blogs/blogcore/postdetail.cfm?postnum=7735> [<https://perma.cc/W9LG-5JZ4>] [hereinafter Garvey, *The Sting*].

the year.”² To Garvey’s dismay, it soon appeared without her permission on everything from coffee cups to pornography websites.³

Until recently, photographers like Garvey had little recourse against those who stole their work for commercial purposes. Creators had two main options under U.S. copyright law: they could submit time-consuming takedown notices or sue in federal court, which often cost more than their claims were worth.⁴ But the new Copyright Claims Board (CCB) offers a third option.

Congress directed the U.S. Copyright Office to create the CCB when it passed the Copyright Alternative in Small Claims Enforcement Act⁵ (CASE Act). The purpose of the CCB is to provide an accessible and efficient “alternative forum” for parties to resolve copyright disputes worth less than \$30,000.⁶ Three copyright claims officers, appointed by the Librarian of Congress, oversee disputes. Barring exceptional circumstances such as fraud or neglect, the officers’ determinations are final; once a claim is decided by the CCB, parties are precluded from litigating the same claim in federal court.⁷ The CCB began reviewing claims in June 2022 and issued its first final determination on the merits on February 28, 2023.⁸

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2. *The Buzz on Bees*, U.C. NEWS (Apr. 25, 2016), <https://www.universityofcalifornia.edu/news/buzz-bees> [<https://perma.cc/7JPX-BY42>].
 3. Kathy Keatley Garvey, “*The Sting*” Revisited, BUG SQUAD (Aug. 26, 2015), <https://ucanr.edu/blogs/blogcore/postdetail.cfm?postnum=18785> [<https://perma.cc/4G3J-4RED>] [hereinafter Garvey, “*The Sting*” Revisited] (“It’s appeared unauthorized and uncredited on coffee cups, iphone covers, t-shirts, tote bags, posters, games, YouTube videos, album covers, avatars and is available for ‘free downloads’ on shady websites hoping to draw in more traffic—and spread a few viruses. Yes, it’s even on porn sites to draw in prospective clients. If you Google ‘bee sting photo’ you’ll find it.”); Teresa O’Connor, *Seeing the Beauty in Pollinators*, UC FOOD OBSERVER (Apr. 19, 2016), <http://www.ucfoodobserver.com/2016/04/19/seeing-the-beauty-in-pollinators/> [<https://perma.cc/VP6B-8Z2N>].
 4. *See infra* Part I.
 5. Pub. L. No. 116–260, § 212, 134 Stat. 1182, 2176–2200 (2020) (codified at 17 U.S.C.A. §§ 1501–1511 (West Supp. 2021)).
 6. *See id.* 17 U.S.C. § 1502(a); *About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., <https://ccb.gov/about/> [<https://perma.cc/3VK4-QALN>] (last visited Mar. 15, 2023).
 7. 17 U.S.C. §§ 1502(b)(1), 1507(a), 1506(w)–(x), 1508(c); *see also id.* § 1503(g) (limiting judicial review to circumstances where (1) determinations were “issued as a result of fraud, corruption, misrepresentation, or other misconduct”; (2) the CCB “exceeded its authority or failed to render a final determination”; or (3) a “default or failure was due to excusable neglect,” as provided under § 1508(c)).
 8. *See Copyright Office Announces Claims Board Is Open for Filing*, U.S. COPYRIGHT OFF. (June 16, 2022), <https://www.copyright.gov/newsnet/2022/969.html> [<https://perma.cc/2986-EGJA>]; Oppenheimer v. Prutton,

Because the CCB is a brand-new forum, there are unresolved questions about its effectiveness. At the outset, critics questioned whether claimants would abuse the system and whether the process would be fair to the parties involved.⁹ While it is still too early to tell, much can be learned from state small claims courts, which were established over a century ago for a similar purpose: to serve as “an official and enforceable means of resolving disputes” over sums “that were too small to justify the expense and delay of a formal civil proceeding.”¹⁰ This Note examines equity issues that defendants face in state small claims courts and ultimately determines that copyright respondents will face the same issues if the U.S. Copyright Office does not take action to correct for an imbalance favoring copyright claimants.

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- No. 22-CCB-0045 (CCB, Feb. 28, 2023); *see also* Eileen McDermott, *Copyright Claims Board Finds for Photographer on Infringement but Curbs Damages in First Final Decision*, IPWATCHDOG (Mar. 5, 2023, 12:15 PM), <https://ipwatchdog.com/2023/03/05/copyright-claims-board-finds-photographer-infringement-curbs-damages-first-final-decision/id=157397/> [<https://perma.cc/F37K-Y7MZ>] (analyzing the CCB’s first decision).
9. *E.g.*, Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 691 (2018). There are several questions regarding the CCB’s constitutionality. First, some scholars are concerned that the CCB’s procedures will make it too easy to obtain default judgments against defendants, which may violate their due process rights. Samuelson & Hashimoto, *supra*, at 694–97. Second, Article III courts have exclusive jurisdiction over copyright disputes, and scholars are concerned that Congress exceeded its Article I power by enabling the Copyright Office to establish the CCB. *Id.* at 691–94. Third, some believe that it is unconstitutional for the copyright claims officers to render decisions that are not subject to judicial review. *See* Samantha Handler, *Supreme Court’s Patent Judge Ruling May Bedevil Copyright Board*, BLOOMBERG L. (Sept. 7, 2021, 5:00 AM), <https://news.bloomberglaw.com/ip-law/supreme-courts-patent-judge-ruling-may-bedevil-copyright-board> [<https://perma.cc/XD83-N8R3>]. Finally, some may argue the selection of copyright claims officers violates the Appointments Clause. *See* Russell W. Jacobs, *The Copyright Claims Board and the Appointments Clause*, 2021 U. ILL. L. REV. ONLINE 85, 95 (2021) (anticipating such claims). For further discussion of default judgments in the CCB, *see infra* Part II.B.1. The second, third, and fourth concerns are beyond the scope of this Note and have been discussed extensively in other scholarship. *E.g.*, Jacobs, *supra*, at 85–86. Even if the Supreme Court finds the current iteration of the CCB unconstitutional, the pressing need for a forum in which individual creators can resolve low-value claims means that there will be some version of the CCB in the future. The issues that this Note examines will be present even if the CCB is restructured; it is therefore vital to begin the discussion of potential solutions now.
10. Steven Weller, John C. Ruhnka & John A. Martin, *American Small Claims Courts*, in *SMALL CLAIMS COURTS: A COMPARATIVE STUDY* 5, 5 (Christopher J. Whelan ed., 1990).

Part I describes traditional methods of copyright enforcement in the United States and provides an overview of the CCB's function. It also examines fair use—an important defense. Part II provides a brief history of state small claims courts; examines two equity issues that defendants face in state small claims courts: corporate assignees and a lack of educational materials; and argues that these same issues will affect CCB respondents if the Copyright Office does not actively correct for them. Part III presents two solutions to these equity issues: automatic application of the fair use defense and increased respondent education.

I. COPYRIGHT ENFORCEMENT IN THE UNITED STATES

Article I, Section 8 of the U.S. Constitution empowers Congress to promote creative expression by establishing a system of exclusive rights for creators.¹¹ Congress passed the first Copyright Act¹² in 1790, three years after the Constitution was adopted.¹³ The 1790 Act was replaced by the Copyright Act of 1909,¹⁴ which was replaced by the Copyright Act of 1976.¹⁵ The 1976 Act constitutes the backbone of U.S. copyright law today and sets out protections for “original works of authorship,” which include, among other things, photographs, architecture, books, songs, movies, and plays.¹⁶ Generally, copyright protection begins from a work's creation and expires seventy years after the creator's death.¹⁷ Creators who wish to sue for copyright infringement must apply for registration with the Register of Copyrights, and the Copyright Office must have either registered the work or explicitly refused to register it before the copyright holder can sue.¹⁸

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11. U.S. CONST. art. I, § 8, cl. 8 (Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).
 12. Copyright Act of 1790, Pub. L. No. 1–15, 1 Stat. 124, 124–26 (repealed 1831).
 13. Laura N. Gasaway, *Copyright Basics: From Earliest Times to the Digital Age*, 10 WAKE FOREST INTELL. PROP. L. J. 241, 241, 244–45 (2010).
 14. Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075, 1075–88 (repealed 1976).
 15. Copyright Act of 1976, 17 U.S.C. §§ 101–1301; Gasaway, *supra* note 13, at 245–46.
 16. 17 U.S.C. § 102(a).
 17. *Id.* § 302(a).
 18. *See id.* §§ 409, 411 (describing the copyright registration requirement and process). Recovery is limited to actual damages if the work is not registered within three months after its first publication or one month after the creator learned of the infringement. *Id.* §§ 412, 504(b).

In theory, U.S. copyright law strikes a balance between giving exclusive property rights to creators, which incentivizes them to produce more work, and allowing the public to access that creative work.¹⁹ This is a counterintuitive, delicate balance. Giving creators the right to exclude public access to their work costs the rest of society because members of the public cannot view and experience the work without paying for it. But the right to exclude incentivizes creators to make more art, which can offset the social costs of exclusivity.²⁰

To illustrate the necessity of this balance, imagine a three-piece rock band that earns income from charging the public to attend its shows. Members of the public are excluded from a show unless they pay for a ticket, and the band's right to exclude is enforced by the venue's employees working the door. The income generated from ticket sales allows the band members to focus on their music and spend their free time rehearsing and writing new songs.

Now imagine that all the door people go on strike, and venues cannot enforce their ticket policies. Anyone who wants to see a concert can walk right in. Members of the public who may have otherwise paid for tickets to see the band's shows can view the concert for free, and without ticket sales the drummer starts working at a call center to make ends meet. The guitarist starts doing Instacart deliveries, and the bass player goes back to school to get his accounting degree. Between full-time work, odd jobs, and school, the band is not able to practice regularly and falls apart. Not only is the band harmed when its exclusive property rights are unenforceable, but so are the members of the public who would have paid to enjoy the band's future shows.

While there are no signs that door people will go on strike anytime soon, the hypothetical example above reflects an unfortunate reality: many creators struggle to enforce their exclusive rights. Photographers are hit especially hard by copyright infringement because of their high-volume, low-value business model.²¹ High-volume, low-value creators

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19. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009) (“[T]he exclusionary control that copyright confers interferes with the extent to which others may access and use that resource Copyright thus has to balance the benefits of its incentive structure against its access- and use-limiting functions, which are costs that it imposes on society as a whole.”).
 20. *Id.* (quoting WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 20–21 (2003)).
 21. Adelaide Dunn, *The New Copyright Small Claims Bill: A Ray of Hope for Independent Photographers*, CTR. FOR ART L. (Oct. 17, 2016), <https://itsartlaw.org/2016/10/17/the-new-copyright-small-claims-bill-a-ray-of-hope-for-independent-photographers/> [<https://perma.cc/N8CL-S5QU>] (citing Professional Photographers of America, *Understanding the Need for a Copyright Small Claims System*, YOUTUBE (June 8, 2016), <https://www.youtube.com/watch?v=1ZM-YCyAx3A&t=34s> [<https://perma.cc/TMX5-97D6>]).

earn income from many smaller projects, like the hundreds of photographs a photographer takes during one session. On the other hand, “low-volume, high-value creators,” like filmmakers, earn income from discrete large projects.²²

This Part discusses current U.S. copyright enforcement mechanisms and analyzes whether those mechanisms are accessible to high-volume, low-value creators. First, it explores traditional copyright enforcement mechanisms, which consist of a process called “notice and takedown” and federal litigation. Next, it examines the CCB in depth and reviews the CCB’s activity since it became fully operational in June 2022. Finally, it explains the evolution of the fair use defense.

A. Traditional Enforcement Mechanisms

Macro photographer Alex Wild’s battle with infringers illustrates the failure of traditional copyright enforcement mechanisms to protect high-volume, low-value creators’ exclusive rights. Wild’s detailed photographs of insects have been featured by the *National Geographic*, the *New York Times*, and the *Discovery Channel*.²³ Like Garvey, he has also found his photographs on infringing websites and products.²⁴

Prior to June 2022, photographers like Garvey and Wild who saw their work exploited online had two statutory enforcement mechanisms to choose from: they could ask the Online Service Provider (OSP) hosting the infringing work to take it down (a process called “notice and takedown”) or they could sue the infringer in federal court. These enforcement mechanisms are insufficient for high-volume, low-value creators. At the same time, they allow fraudulent claims against non-infringing content, which harms the creators of that content and the public at large.

1. Notice and Takedown

Notice and takedown originated in the 1998 Digital Millennium Copyright Act²⁵ (DMCA), which amended the Copyright Act of 1976 to better fit the emerging digital landscape and address OSPs’ concerns about secondary liability for hosting infringing content.²⁶ Under the

22. *Id.*

23. *About Alex*, ALEX WILD PHOTOGRAPHY, <https://www.alexanderwild.com/About-Alex-Wild> [<https://perma.cc/9VWY-Y9H8>] (last visited Mar. 17, 2022) [hereinafter Wild, *About Alex*].

24. Alex Wild, *Bugging Out: How Rampant Online Piracy Squashed One Insect Photographer*, ARS TECHNICA (Sept. 24, 2014, 9:00 PM), <https://arstechnica.com/tech-policy/2014/09/one-mans-endless-hopeless-struggle-to-protect-his-copyrighted-images/> [<https://perma.cc/YY74-4EHC>] [hereinafter Wild, *Bugging Out*].

25. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

26. Gasaway, *supra* note 13, at 258–59.

DMCA, an OSP can avoid secondary liability for hosting infringing content if it (1) does not benefit from the infringing activity and (2) either does not have actual or circumstantial knowledge of the infringing activity or “acts expeditiously to remove, or disable access to” the allegedly infringing material once it has notice.²⁷

The notice that a creator gives must adhere to strict requirements. Among other things, the notice must include enough information for the OSP to identify the infringing material and a statement under the penalty of perjury that the information in the notification is accurate.²⁸ If the copyright owner provides adequate notice, then the OSP must “act[] expeditiously” to remove the infringing content.²⁹ There is no consensus over how fast removal must be to be “expeditious,”³⁰ but some courts indicate that even forty-eight hours could be too long to qualify.³¹

At first blush, notice and takedown presents as a swift extrajudicial enforcement mechanism that allows creators to avoid protracted legal battles. And while there is some evidence that the fear of secondary liability motivates OSPs to act quickly to remove infringing content, notice and takedown is ultimately ineffective and insufficient.³² It is ineffective because even if OSPs remove infringing content, infringers can repost the content on other websites.³³ And it is insufficient because the notice and takedown process does not provide any monetary compensation to creators whose work is infringed.³⁴

27. 17 U.S.C. § 512(c)(1).

28. *Id.* § 512(c)(3)(A)(iii)–(vi).

29. *Id.* § 512(c)(1)(A)(iii).

30. See James Rickard, Note, *Going Live: The Role of Automation in the Expedient Removal of Online Content*, 96 B.U. L. REV. 2171, 2183 (2016).

31. See *Square Ring, Inc. v. UStream*, No. 09-563, 2015 WL 307840, at *7 (D. Del. Jan. 23, 2015) (suggesting that forty-eight hours could be too long, depending on what the defendant did between the time it received the notice and the time it took the infringing content down).

32. See *Google Search Removals Due to Copyright Infringement FAQs*, GOOGLE, <https://support.google.com/transparencyreport/answer/7347743?hl=en#zippy=%2Chow-quickly-do-you-remove-search-results-after-a-request-is-made> [<https://perma.cc/GB5W-VVSC>] (last visited Mar. 26, 2023) (stating that the average time it takes Google to remove infringing content is six hours).

33. Wild, *Bugging Out*, *supra* note 24.

34. See Marti Cuevas & Carlos Martin Carle, *Creators in Support of the CASE Act—It’s a No Brainer*, COPYRIGHT ALL. (July 1, 2020), <https://copyrightalliance.org/support-of-the-case-act-its-a-no-brainer/> [<https://perma.cc/NHH8-Y9AV>].

For photographers, the notice and takedown process is like playing “whack-a-mole.”³⁵ Before he quit working as a full-time photographer (in part because of the rampant copyright infringement he faced), Wild sent an average of five takedown notices to OSPs per day.³⁶ Wild found unlicensed use of his photographs on pesticide spray bottles, trading cards, advertisements for pet ants, greeting cards, t-shirts, stickers, phone cases, website banners, novel covers, dietary supplement labels, coupons, Etsy prints, and a small Caribbean island’s commemorative one-cent piece.³⁷ Wild spent ten hours a week fighting infringement—time that he could have been out taking photographs—but his efforts were necessary to stay relevant in the search results. If he did not send notices to OSPs, his own website would be buried by the infringing images, and potential customers would not be able to find his website “in the search soup of . . . uncredited images.”³⁸

Notice and takedown also has a high potential for over-enforcement and abuse, which can negatively affect the public. For example, YouTube blocked Lofi Girl, a popular instrumental hip-hop channel, from streaming after a record label submitted a false infringement claim. Subscribers who enjoyed the channel flocked to Twitter to express outrage over the takedown and commented on the YouTube stream “expressing their gratitude for the online community that Lofi Girl’s stream . . . created through music and the in-stream chat function.”³⁹ YouTube has since restored Lofi Girl’s channels and acknowledged that the false infringement claim was “abusive,” but YouTubers believe that protections for users who are falsely accused of copyright infringement are still inadequate.⁴⁰

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35. DEP’T OF COM. INTERNET POL’Y TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 56 (2013); see also Garvey, “*The Sting*” Revisited, *supra* note 3 (“Filing a DMCA (Digital Millennium Copyright Act) complaint to prevent [The Sting’s] illegal commercial use is time-consuming. And, it’s like ‘whack a mole’: take one down and 100 more crop up.”).
36. Wild, *Bugging Out*, *supra* note 24.
37. *Id.*
38. *Id.*
39. Phoebe Liu, *Lofi Girl Returns: YouTube Apologizes for Removing Popular Music Stream Due to “Abusive” Copyright Notice*, FORBES (July 12, 2022, 3:12 PM), <https://www.forbes.com/sites/phoebeliu/2022/07/12/lofi-girl-returns-youtube-apologizes-for-removing-popular-music-stream-due-to-abusive-copyright-notice/> [<https://perma.cc/CHN6-WAHV>].
40. See Lofi Girl (@lofigirl), TWITTER (July 11, 2022, 5:04 PM), <https://twitter.com/lofigirl/status/1546601378436599808> [<https://perma.cc/USB5-938S>] (“We’re shocked and disappointed to see that there’s still not any kind of protection or manual review of these false claims. At the end of the day, it was entirely out of our control, and the sad part is that there was no way to appeal beforehand/prevent it from happening.”).

Abusive notice and takedown practices also have the potential to suppress the public's access to information. For example, OSPs hosting content from news outlets in South Africa and the United Kingdom received false DMCA complaints when journalists published articles criticizing a politician's relationship with an oil and gas lobbyist.⁴¹ The news outlets had to remove the articles in question while communicating to the OSPs that the complaints were fraudulent, limiting their readers' access to information about corrupt lobbying practices in Equatorial Guinea.⁴²

2. Litigation in Federal Court

Notice and Takedown is insufficient, ineffective, and has a high potential for abuse, but federal litigation presents its own set of problems. Litigating in federal court is complicated and expensive. Federal courts have exclusive jurisdiction over copyright disputes,⁴³ so aggrieved creators must attempt to navigate the complex federal court system if they wish to sue infringers.⁴⁴ This is difficult to do *pro se*,⁴⁵ but hiring an attorney is expensive. The median cost to litigate copyright claims worth less than \$1 million dollars through appeal is \$350,000, with \$15,000 of that accounting for initial case management alone.⁴⁶ And that is assuming that an attorney is even willing to take the case: many attorneys reject copyright cases worth less than

41. Jay Yuno, *How Fake Copyright Complaints Are Muzzling Journalists*, BBC, <https://www.bbc.com/news/world-africa-64798469> [<https://perma.cc/B9GC-WWE7>] (last visited Mar. 26, 2023); *Fake Copyright Complaints Seek to Remove Reports on Minister and Lawyer*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (Mar. 1, 2023), <https://www.occrp.org/en/daily/17370-fake-copyright-complaints-seek-to-remove-reports-on-minister-and-lawyer> [<https://perma.cc/23CK-6YJZ>].

42. *See* sources cited *supra* note 41.

43. 28 U.S.C. § 1338(a) (“No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.”).

44. *See* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS 12 (2013).

45. For instance, before litigation even begins, the copyright holder must determine which venue and method of service is proper under the Federal Rules of Civil Procedure—a complex analysis for someone without legal training. *See id.*

46. AM. INTELL. PROP. L. ASS'N, REPORT OF THE ECONOMIC SURVEY 64 (2021). Filing and administrative fees alone total \$402. *See* 28 U.S.C. § 1914(a) (requiring a filing fee of \$350); *District Court Miscellaneous Fee Schedule*, U.S. CTS., <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule> [<https://perma.cc/E4VV-TVH7>] (last visited Mar. 26, 2023) (requiring an additional administrative fee of \$52 for civil cases filed in district courts).

\$40,000.⁴⁷ There are intangible costs to litigation as well. Like the notice and takedown process, litigation takes up valuable time that creators could be spending making new work.⁴⁸

Copyright litigation costs are high, but potential awards are comparatively low, especially if the work was not registered on time. Copyright holders who registered their copyrights within three months of publication (and before the infringement occurred) may walk away with between \$750 and \$30,000 in statutory damages per infringing act and may receive their attorneys' fees.⁴⁹ Copyright holders who registered their copyrights late are limited to actual damages, which are difficult to calculate.⁵⁰

Federal court is not a realistic enforcement mechanism for most low-value, high-volume creators like photographers. Photographers report that most claims for infringement of individual photographs are worth less than \$3,000.⁵¹ But these infringements add up to negatively affect photographers' bottom lines. Back in 2012, when Wild was working full-time as a professional photographer, he needed to receive income from 400 image licenses per year, with an average of \$105 per license, in order to cover his expenses.⁵² Wild's photographs require "significant time, travel, equipment, and research costs."⁵³ As Wild put it, he "did not travel to rural Argentina, spend weeks processing images and identifying the animals, and purchase \$10k worth of camera gear to give . . . [companies] free marketing materials."⁵⁴ He currently charges between \$40 and \$400 to license individual images for

47. U.S. COPYRIGHT OFF., *supra* note 44, at 25 (citing ABA SECTION OF INTELL. PROP. L., COMMENTS SUBMITTED IN RESPONSE TO U.S. COPYRIGHT OFFICE'S AUG. 23, 2012 NOTICE OF INQUIRY 7 (2012)).

48. *Id.* at 1.

49. 17 U.S.C. §§ 412, 504.

50. *See id.* § 504(b) (explaining that actual damages are calculated by looking at the gross revenue generated from the infringement and subtracting the infringer's deductible expenses and revenue generated from "factors other than the copyrighted work").

51. Dunn, *supra* note 21.

52. Alex Wild, *This Photo Is Not Free, But How Much Should It Cost?*, SCI. AM. (Feb. 14, 2012), <https://blogs.scientificamerican.com/compound-eye/this-photo-is-not-free-but-how-much-should-it-cost/> [<https://perma.cc/7MKE-9PR8>].

53. Alex Wild, *So Your Company Has Been Found Using My Photos Without Permission. What Next?*, PETAPIXEL (Apr. 3, 2015), <https://petapixel.com/2015/04/03/so-your-company-has-been-found-using-my-photos-without-permission-what-next/> [<https://perma.cc/Q3XM-NNFA>] [hereinafter Wild, *What Next?*].

54. *Id.*

commercial use.⁵⁵ If Wild does nothing to enforce his copyrights, he will no longer be able to generate income from these licenses, because “[w]ho wants to pay for an image that is already everywhere?”⁵⁶

The expense of litigating in federal court and the likelihood of comparatively low awards prevent many individual creators from pursuing infringement claims.⁵⁷ Copyright claims represent just 1 percent of all complaints filed in federal court, but this number only represents claims brought by copyright owners with claims big enough to justify the expense.⁵⁸ And like the notice and takedown process, federal copyright litigation has the potential for abuse. Unscrupulous third-party agencies, referred to colloquially as “copyright trolls,” send out “mass wave[s] of threat letters” to people who may or may not have actually infringed the copyright holder’s work in the hopes that the letter will scare the person into paying, whether or not there was actually infringement.⁵⁹ Defendants often end up paying after they weigh the risk of litigating and determine that the possibility of losing in court is not worth the financial risk.⁶⁰

Working with third-party agencies does have the potential to be lucrative for some creators. For instance, one adult film production company made millions over a two-year period by filing copyright infringement suits—more than it made licensing its videos.⁶¹ But film companies are low-volume, high-value creators. Alex Wild’s experience working with a third-party enforcement agency paints a different picture for high-volume, low-value creators. After spending thousands of dollars per year fighting infringers with cease-and-desist letters and removal requests, Wild decided to take pest control companies to court.⁶² In 2014, Wild started working with a copyright enforcement agency called ImageRights International. ImageRights International

55. *Image Use*, ALEX WILD, <https://www.alexanderwild.com/Image-Use> [<https://perma.cc/39BP-JGZL>] (last visited Mar. 28, 2023). “[C]ommercial use” includes displaying his photographs on company websites, books, product labels, apps, and merchandise. *Id.*

56. Wild, *Bugging Out*, *supra* note 24.

57. *CASE Act Implementation*, COPYRIGHT ALL., <https://copyrightalliance.org/trending-topics/copyright-small-claims/> [<https://perma.cc/62V4-FUX8>] (last visited Nov. 6, 2021); *see also* U.S. COPYRIGHT OFF., *supra* note 44, at 1 (“The problem . . . appears to be especially acute for individual creators.”).

58. U.S. COPYRIGHT OFF., *supra* note 44, at 8.

59. Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77, 79, 84 (2020).

60. *Id.* at 85 (quoting Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 571 (2018)).

61. *Id.* at 83.

62. Wild, *What Next?*, *supra* note 53.

contracted with law firms, which started sending cease-and-desist letters on Wild's behalf.⁶³

Since 2014, Wild has filed numerous lawsuits against pest control companies that used his photographs on their websites or products.⁶⁴ Awards are sometimes much lower than what he filed for. For instance, one court awarded Wild just \$7,500 in statutory damages when Wild asked for \$150,000 (the statutory limit for willful infringement) and attorney's fees.⁶⁵ In another case, Wild was awarded \$47,000 after asking for the statutory limit—less than one-third of what he filed for.⁶⁶ Compared with what it costs to litigate copyright cases, it does not appear that Wild is making a substantial profit from these lawsuits. And while Wild has been able to settle some of his lawsuits against corporate infringers,⁶⁷ he still advocates for a different copyright enforcement system because it is so expensive to litigate copyright disputes in federal court.⁶⁸

Wild exemplifies creators who have the resources and ability to hire an outside enforcement agency. Creators who are not able to enforce their copyrights themselves or pay an agency like ImageRights International to enforce their copyrights on their behalf are left with valid but unenforceable copyrights. They have the right to exclude the public from their work, but no mechanism to enforce that exclusion. Some, like Garvey, place watermarks on their photographs in an attempt to signal their right to exclude. But this does little to prevent infringement—any infringer with basic computer skills can crop the watermark out.⁶⁹

63. *Id.*

64. *See, e.g.*, Complaint at 3–4, *Alex Wild Photography v. Zap Pest Control*, No. 2:22-CV-00416 (E.D. Pa. filed Feb. 1, 2022) (suing Zap Pest Control for using his bedbug photograph to promote their extermination services).

65. *Wild v. Peterson*, No. 2:15-cv-2602, 2016 WL 3854242, at *5 (E.D. Cal. July 15, 2016); Complaint at 5, *Wild v. Peterson*, No. 2:15-cv-2602, 2016 WL 3854242 (E.D. Cal. July 15, 2016).

66. Unopposed Motion to Vacate the Default Judgment at 3, *Wild v. JASCO, Inc.*, No. 1:17-cv-00344, 2017 WL 6998667 (W.D. Tex. filed Dec. 6, 2017).

67. *See Wild v. Preventative Pest Control Mesa*, No. 2:19-cv-04500 (D. Ariz. dismissed June 19, 2020).

68. Wild, *What Next?*, *supra* note 53.

69. Compare Garvey, *The Sting*, *supra* note 1 (watermark included on images), with *Bee Sting Remover (The Original)* by New York's Safest LLC, EBAY, <https://www.ebay.com/itm/114960462654> [<https://perma.cc/J847-FNTA>] (last visited Mar. 15, 2023) (watermark cropped and image used to sell plastic bee-sting remover tool), and *Are Honey Bees Dangerous to Humans?*, BUSY BEEKEEPING (June 29, 2022), <https://busybeekeeping.com/are-honey-bees-dangerous-to-humans/> [<https://perma.cc/7G9V-WLDV>] (watermark cropped on beekeeping blog).

Individual instances of infringement may not significantly decrease a creator's income, but viewed collectively, low-value infringement is "death by a thousand paper cuts" for most artists.⁷⁰ Rights that are unenforceable eliminate the purpose of copyright in the first place: to encourage the production of creative works by giving creators a property right that they can monetize.⁷¹ High-volume, low-value creators who have little recourse against infringers may be forced to give up their full-time work as creators and instead seek more stable employment. That is exactly the choice that Wild made. He currently works at the University of Texas as the Curator of Entomology and photographs insects in his spare time.⁷²

B. The Copyright Claims Board

The U.S. Copyright Office recognized that high-volume, low-value creators would cease creating if they could not realistically enforce their copyrights using the traditional enforcement mechanisms and spent nearly a decade investigating potential solutions.⁷³ After years of research, public hearings, and reviewing comments from creators, the Copyright Office presented the idea of a small copyright claims court to Congress.⁷⁴ The CASE Act was highly anticipated and highly controversial.⁷⁵ But it was finally passed in 2020 as part of the Omnibus COVID-19 Relief Bill.⁷⁶

The CCB streamlines the copyright claims process by providing efficient mechanisms for resolution. For example, parties can appear via internet conference, and discovery is limited to "the production of relevant information and documents, written interrogatories, and

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70. Wild, *Bugging Out*, *supra* note 24 ("Too little copyright protection carries a pervasive chilling effect We simply do not see the creative works that are not shared.").
71. *See supra* notes 19–20 and accompanying text; *see also* U.S. COPYRIGHT OFF., *supra* note 44, at 1.
72. *See* Wild, *Bugging Out*, *supra* note 24; Wild, *About Alex*, *supra* note 23.
73. *See* U.S. COPYRIGHT OFF., *supra* note 44, at 5.
74. *Id.* at 3–7.
75. *See id.* at 1–2 (describing groups of creators and lawyers' associations that called for an alternative copyright enforcement mechanism); Mitch Stoltz & Corynne McSherry, *Congress Shouldn't Turn the Copyright Office into a Copyright Court*, ELEC. FRONTIER FOUND. (Nov. 29, 2017), <https://www.eff.org/deeplinks/2017/11/creating-copyright-court-copyright-office-wrong-move> [<https://perma.cc/52BF-NFLV>] (expressing concerns that the structure of the CCB favors plaintiffs).
76. Andrew Albanese, *CASE Act Set to Pass as Part of Omnibus Bill*, PUBLISHERS WKLY. (Dec. 22, 2020), <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/85202-case-act-set-to-pass-as-part-of-omnibus-bill.html> [<https://perma.cc/4J2C-RTAM>]; *see also* Pub. L. No. 116–260, § 212, 134 Stat. 1182, 2176–2200 (2020).

written requests for admission.”⁷⁷ Additionally, parties may ask a copyright claims officer to oversee settlement negotiations.⁷⁸

Under the CASE Act, copyright owners who wish to bring a claim at the CCB must first apply for registration with the Copyright Office, and the CCB may make a determination only after registration has been granted.⁷⁹ Copyright holders may pursue actual damages or statutory damages.⁸⁰ Either way, the most a copyright holder can recover in a CCB proceeding is \$35,000.⁸¹ The CCB also has an abbreviated, “even more streamlined” system for deciding claims worth less than \$5,000.⁸² Infringement proceedings are initiated by claimants, but respondents may bring misrepresentation claims: counterclaims that a plaintiff “knowingly” and “materially” misrepresented that the work was infringing.⁸³

To initiate a proceeding, a claimant must file a claim with the CCB that includes “a statement of material facts in support of the claim,” a certification of accuracy and truthfulness, and a filing fee.⁸⁴ A copyright claims attorney will then review the claim to determine whether it meets the formal requirements for CCB proceedings.⁸⁵ If the claim is compliant, the copyright claims attorney will notify the claimant, at which point the claimant has ninety days to serve the alleged infringer

77. 17 U.S.C. § 1506(n) (2020).

78. *Id.* § 1506(r).

79. *Id.* § 1505(a)–(b). However, if the copyright owner does not register the work within the time limits set out by section 412, the statute limits damages for each work to \$7,500. *Id.* § 1504(e)(1)(A)(ii)(II). In contrast, a copyright owner who wishes to bring a claim in federal court does not need to obtain registration—she can sue based on the Copyright Office’s refusal. If her lawsuit is based on a refusal, she will be limited to obtaining actual damages and cannot obtain statutory damages or attorneys’ fees. *Id.* § 412.

80. *Id.* § 1504(e)(1).

81. The \$35,000 would consist of the \$30,000 cap for damages for counterclaims plus a \$5,000 award for attorneys’ fees (which the CCB will award only if the original claim was brought in bad faith). *Id.* §§ 1504(e)(1), 1506(y)(2).

82. See SMALLER CLAIMS, COPYRIGHT CLAIMS BOARD HANDBOOK 1, 3 (2022), <https://www.ccb.gov/handbook/Smaller-Claims.pdf> [<https://perma.cc/S6QF-2F9Q>] (emphasis omitted).

83. 17 U.S.C. § 1504(c); *id.* § 512(f); see also *id.* § 1504(c)(4) (describing the types of counterclaims that a party can bring in a copyright proceeding). If the CCB finds that a party misrepresented that the work was infringing, the party may have to pay damages. *Id.* § 1504(c)(3).

84. *Id.* § 1506(e). The filing fee must be between \$100 and \$402 (the current cost of filing in federal court). *Id.* § 510(c); see also *supra* note 46 (calculating the cost of filing in federal court).

85. *Id.* § 1506(f).

with a copy of the claim and “notice of the proceeding.”⁸⁶ The notice must explain that the CCB process is not mandatory and that the respondent may opt out.⁸⁷

To opt out, the respondent must send written notice to the CCB within sixty days of service explaining that she wishes to opt out.⁸⁸ Barring exceptional circumstances, which the CASE Act leaves up to the copyright claims officers to determine, the CCB must dismiss a claim if a respondent properly opts out. The claimant must then bring the claim in federal court if she wishes to recover.⁸⁹ If respondents fail to opt out within sixty days, they lose their right to litigate the claim in federal court and their right to a jury trial.⁹⁰ In addition to notice in the complaint, the CCB is required to send a notice to the respondent that contains the same information about the consequences of failing to opt out.⁹¹

Overall, response to the CCB has been largely positive since it started reviewing claims in June 2022.⁹² In its first six-and-a-half months of operation, the CCB reviewed nearly 300 claims.⁹³ Over half of the infringement claims concerned visual works, with most claimants representing themselves, and only 20 percent of respondents opted out of the CCB process.⁹⁴ But like any new process, there is still room for improvement. Part III, below, suggests potential improvements.

C. The Fair Use Defense

The fair use doctrine evolved as courts began to recognize that “[s]ome copying was necessary to promote the very creativity that

86. *Id.* § 1506(f)–(g). Service methods include serving the notice and claim on the individual personally; leaving a copy of the notice and claim at the individual’s residence, or with someone “of suitable age and discretion who resides there”; delivering a copy of the notice and claim to a designated agent; or using another method authorized by the state in which service is made. *Id.*

87. *Id.* § 1506(g)(1).

88. *Id.* § 1506(i).

89. *Id.* §§ 1506(i), 1507(f). The CASE Act suggests that “exceptional circumstances” are those that would lead to injustice and leaves that determination up to the copyright claims officers. *Id.*

90. *Id.* § 1506(g)(1). Libraries and archives can opt out preemptively, and the Copyright Office is required to maintain a list of libraries and archives that successfully opted out. *Id.* § 1506(aa).

91. *Id.* § 1506(h).

92. See Riddhi Setty, *New Copyright Venue Fields Hundreds of Claims, Evoking Optimism*, BLOOMBERG L. (Jan. 13, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/new-copyright-venue-fields-hundreds-of-claims-evoking-optimism> [<https://perma.cc/XG38-4ZUV>].

93. *Id.*

94. *Id.*

copyright law was designed to promote.”⁹⁵ The defense is codified in section 107 of the Copyright Act, which contains a nonexclusive list of purposes that potentially qualify for the defense: “criticism, comment, news reporting, teaching . . . scholarship, or research.”⁹⁶ In order to determine whether the fair use defense applies, courts balance the following factors: (1) “the purpose and character of the use,” (2) “the nature of the copyrighted work,” (3) “the amount and substantiality” of the work “used in relation to the copyrighted work as a whole,” and (4) “the effect of the use on the potential market for or value” of the original.⁹⁷ These factors are nonexclusive; that is, courts also consider non-statutory factors such as whether the defendant acted in good faith.⁹⁸

Fair use is a complicated, amorphous defense, and courts vary wildly in their application of it.⁹⁹ But it is also vital to U.S. copyright law, because it “provides a guarantee of ‘breathing space within the confines of copyright’”¹⁰⁰ and allows an artist to “create something new and different using someone else’s creation as an ingredient, a single element in a new mix.”¹⁰¹ If a use is fair, then the defendant has not infringed the plaintiff’s work.¹⁰² In other words, the plaintiff has failed to meet the burden of proof for her infringement case and the claim will be dismissed.¹⁰³

Fair use is an important tool for those accused of copyright infringement but is unfortunately ignored in some situations. For instance, copyright trolls often fail to analyze whether a use is fair, and as a result, individuals end up paying for uses that would not otherwise require licenses under U.S. copyright law.¹⁰⁴

Some copyright enforcement mechanisms already involve the automatic application of the fair use defense. For instance, the Ninth Circuit requires the copyright holder to evaluate whether the infringing use is subject to a fair use exception before sending a takedown

95. MICHAEL C. DONALDSON & LISA A. CALLIF, *CLEARANCE & COPYRIGHT* 22 (4th ed. 2014).

96. 17 U.S.C. § 107.

97. *Id.*

98. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 93 (2014).

99. *Id.*

100. Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 686 (2015) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

101. DONALDSON & CALLIF, *supra* note 95, at 22.

102. Greenberg, *supra* note 98, at 56.

103. Loren, *supra* note 100, at 698.

104. Goodyear, *supra* note 59, at 80.

notification.¹⁰⁵ In *Lenz v. Universal Music Corp.*,¹⁰⁶ a Universal employee tasked with enforcing Prince's copyrights came across a mother's YouTube video of her children dancing to "Let's Go Crazy." He sent a takedown notification to YouTube (the OSP), which required the mother to remove the video. The mother sued, claiming that Universal did not consider whether the snippet of "Let's Go Crazy" in her video was a fair use before sending the takedown. The Ninth Circuit held that copyright holders must analyze whether the use is a fair use before sending the notice to the OSP.¹⁰⁷

II. LESSONS FROM STATE SMALL CLAIMS COURTS

While the CCB is the first copyright small claims court of its kind, it is not without precedent. State small claims courts offer a useful, though imperfect, analogy. This Part first gives an overview of the history of state small claims courts. It then discusses some of the challenges that state small claims respondents face and examines whether respondents will face the same challenges at the CCB.

A. A Brief History of Small Claims Courts

Although they have been around for over a century,¹⁰⁸ there is a lack of empirical evidence about small claims courts.¹⁰⁹ Most scholars who analyze small claims courts "gather their own data and use relatively small data sets."¹¹⁰ As a result, the analysis in this Part draws primarily on studies that are limited to one jurisdiction,¹¹¹ a detailed (but dated) survey of fifteen state small claims courts,¹¹² and a sociologist's interviews of landlords and tenants participating in housing

105. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1157 (9th Cir. 2016).

106. 815 F.3d 1145 (9th Cir. 2016).

107. *Id.* at 1148–51, 1157.

108. Weller et al., *supra* note 10, at 5 ("The first small claims courts in the United States were developed in the early decades of the twentieth century . . .").

109. Victoria J. Haneman, *Bridging the Justice Gap with a (Purposeful) Restructuring of Small Claims Courts*, 39 W. NEW ENG. L. REV. 457, 458 & n.7 (2017) ("[D]ata regarding small claims court claimants and the cases they file is often not tracked or compiled.").

110. *Id.*

111. *See, e.g.*, Arthur Best, Deborah Zalesne, Kathleen Bridges, Kathryn Chenoweth, Lisa Fine, Jonathan L. Miller & Kimberly White, *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343 (1994) (Colorado); Bruce Zucker & Monica Her, *The People's Court Examined: A Legal Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315 (2003) (California).

112. *See* JOHN C. RUHNKA, STEVEN WELLER & JOHN A. MARTIN, *SMALL CLAIMS COURTS: A NATIONAL EXAMINATION* (1978).

court in Milwaukee, Wisconsin.¹¹³ Still, much can be learned from this limited empirical data.

Like the CCB, small claims courts in the United States were developed to provide individuals with an efficient mechanism to pursue claims.¹¹⁴ Small claims courts originated in the twentieth century, when the intricacies of civil procedure and the expense of hiring counsel “made it virtually impossible for wage earners and small businessmen to use the court system to collect wages or accounts which they were owed.”¹¹⁵ Small claims courts were developed to be simple and less formal, with little paperwork.¹¹⁶

The types of claims plaintiffs bring in small claims court include contract claims, tort actions, disputes over insufficient checks, and claims for unpaid rent or failure to return security deposits.¹¹⁷ Today, nearly half of all civil cases concern eviction or debt collection, and many of these cases are adjudicated in small claims courts.¹¹⁸

B. Potential Problems

Small claims courts have the potential to benefit both plaintiffs and defendants, but there is evidence that defendants are at a disadvantage. In debt collection cases specifically, consumers are at a disadvantage because of the tactics that corporate assignees use. Corporate copyright holders could potentially misuse the CCB in a similar way if the copyright claims officers do not enforce the protections in the CASE Act.

In debt collection and other small claims cases, defendants are at a disadvantage because they face plaintiffs who have greater access to legal knowledge. Studies of small claims courts offer solutions to level the playing field for defendants, many of which the CCB could implement to protect respondents.

1. Corporations and Corporate Assignees

Some scholars are concerned that allowing corporations to bring small claims in front of the CCB will undermine the CCB’s effectiveness

113. See MATTHEW DESMOND, *EVICTED* (2016).

114. See RUHNKA ET AL., *supra* note 112, at 1.

115. *Id.* at 2.

116. See *id.* at 1.

117. Zucker & Her, *supra* note 111, at 335–36. A 1980 booklet aimed at consumers encourages them to bring small claims for improperly repaired cars, lost luggage, and defective aluminum windows. U.S. DEP’T OF JUST., *CONSUMERS TELL IT TO THE JUDGE: SMALL CLAIMS COURTS AND CONSUMER COMPLAINTS* 5–6 (1980), https://www.google.com/books/edition/Consumers_Tell_it_to_the_Judge/eg3oTjpHiUQC?hl=en&gbpv=0 [<https://perma.cc/JJ68-AL6S>].

118. Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1591, 1601–03 (2018).

for individual creators.¹¹⁹ This issue is not unique to the CCB. For the past sixty years, critics have argued that small claims courts fail to serve the individuals they were designed to protect and instead serve corporate interests.¹²⁰ Critics point to the high number of corporate plaintiffs in small claims courts and infer from this that individual defendants are inherently disadvantaged.¹²¹ But it is not the fact that a plaintiff is corporate that disadvantages a defendant.¹²² Small claims courts were, after all, designed to help the small business owner collect his accounts.¹²³

A docket filled with corporate plaintiffs does not prevent individuals from bringing claims, and allowing corporate plaintiffs to bring claims can actually benefit defendants.¹²⁴ Many corporate plaintiffs can afford to bring a claim in federal court but choose small claim claims court because it is more cost effective for their businesses.¹²⁵ The flexibility of appearing pro se in a small claims hearing benefits defendants who would not be able to afford a lawyer to defend them in traditional court.¹²⁶ Additionally, several small claims courts allow defendants to pay damages in installments—a benefit that defendants would lose if they were forced to defend themselves in traditional court.¹²⁷

Although allowing corporate plaintiffs in small claims courts has its benefits, defendants in debt collection cases are frequently at a disadvantage because of the pervasive and unethical tactics that debt collection companies use.¹²⁸ In the past, creditors collected debts

119. See Samuelson & Hashimoto, *supra* note 9, at 703.

120. See Weller et al., *supra* note 10, at 6; Steinberg, *supra* note 118, at 1600–01 (describing small claims courts as venues for corporate interests).

121. Weller et al., *supra* note 10, at 6; Steinberg, *supra* note 118, at 1600–01 (pointing to a study showing that 85 percent of small claims in Boston were filed by debt collectors). Critics also point to the fact that corporate plaintiffs often win their cases as evidence that they have an inherent advantage. But there is a simple explanation for this: corporate plaintiffs may be better at assessing whether a claim is worth pursuing in the first place. RUNHKA ET AL., *supra* note 112, at 45–46.

122. See Weller et al., *supra* note 10, at 10 (“The argument that permitting collection agencies as plaintiffs tends to ‘chill’ the use of small claims courts by individuals is . . . not supported by the data.”).

123. See *supra* note 115 and accompanying text.

124. See RUNHKA ET AL., *supra* note 112, at 43–45.

125. *Id.* at 45.

126. *Id.*

127. See *id.* at 192.

128. Steinberg, *supra* note 118, at 1584.

themselves or used a third party to collect on their behalf.¹²⁹ In recent years, however, creditors have turned to a third option: selling the debt to a debt buyer.¹³⁰ Debt buying is a profitable industry based on a “high-volume business paradigm.”¹³¹ The debt buyers file lawsuit after lawsuit, counting on the fact that some the defendants will fail to respond.¹³² The debt buyers can then easily obtain default judgments against them in court.¹³³

Debts are typically bundled and sold multiple times, with important information lost along the way.¹³⁴ Debt buyers will often “robo-sign[]” affidavits stating that they personally verified a debtor’s records, when in fact they had only a printout of the purported debtor’s name and the amount of the debt.¹³⁵ This leads to default judgments for claims that should have been barred by the statute of limitations or for debts that have already been resolved through bankruptcy proceedings.¹³⁶ Additionally, some debt buyers engage in a tactic called “sewer service”—a practice where debt buyers assert to the court that they properly served defendants when in fact they intentionally failed to serve them.¹³⁷ Defendants who were not served do not appear in court because they are unaware of the lawsuit against them, which leads the court to enter a default judgment in the debt buyer’s favor.¹³⁸ Another issue with corporate debt buyers is that the defendant is unfamiliar with the name on the complaint and may not respond for that reason alone.¹³⁹

Similar to debt buyers, copyright enforcement agencies make a profit by enforcing rights that were not theirs to begin with. Scholars are concerned that corporate assignees of copyrights will “abuse the

129. FED. TRADE COMM’N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 11 (2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> [<https://perma.cc/2C4P-S4QL>].

130. *Id.* Creditors may elect to sell their debts because it doesn’t require coordination with a third-party collection agency and eliminates uncertainty. *Id.* at 12.

131. Ariel Cook & James Millard, *Targeting the Poor—How Debt Collectors Help Perpetuate the Poverty Cycle*, 17 FLA. COASTAL L. REV. 449, 457 (2016).

132. *Id.*

133. *Id.*

134. Steinberg, *supra* note 118, at 1601.

135. *Id.*

136. *Id.* at 1582.

137. *Id.* at 1584.

138. *Id.*

139. Cook & Millard, *supra* note 131, at 466.

Tribunal procedure by buying up small claims and seeking excessive damages before Tribunal panels.”¹⁴⁰ Critics believe that the CASE Act “open[ed] the door widely, welcoming in large corporations, corporate assignees, and entities that buy up others’ copyright claims and profit from litigation.”¹⁴¹ These third parties could use the CCB as a “‘default judgment mill,’ where big content companies and copyright trolls can churn out a mass of default judgments and high damages awards against unsophisticated individuals” who ignore the notice.¹⁴²

Default judgments by the CCB could potentially be exploited the same way that debt buyers exploit default judgments in debt collection cases. Under the CASE Act, the CCB may enter a default judgment against a party who fails to opt out or fails to appear.¹⁴³ This could lead to claimants “abusing the system to obtain inexpensive default judgments that will be hard to appeal.”¹⁴⁴ Because the CASE Act allows claims against individuals,¹⁴⁵ claimants could potentially obtain \$30,000 default judgments against individuals who merely circulated memes—judgments that are “small” as the CASE Act defines them, but are anything but “small” to individuals.¹⁴⁶

However, unlike small claims courts, the CASE Act has built-in protections that may prevent copyright trolls from exploiting the system. First, it allows the Copyright Office to create limitations on the number of cases that the same party can file each year.¹⁴⁷ Second, the CCB has discretion to impose monetary sanctions on parties. For instance, the CCB may award a respondent up to \$5,000 in attorneys’ fees if it determines that the claimant filed its claim for a “harassing or other improper purpose, or without a reasonable basis in law or fact.”¹⁴⁸ Parties who pursue more than one such improper claim within a twelve-month period will be banned from using the CCB process for one year, and if a party “demonstrate[s] a pattern or practice of bad faith

140. Samuelson & Hashimoto, *supra* note 9, at 703.

141. Kerry Maeve Sheehan, *Copyright Law Has a Small Claims Problem. The CASE Act Won’t Solve It*, AUTHORS ALL. (June 4, 2019), <https://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it%E2%80%A2%BB%BF/> [<https://perma.cc/M4A8-YHYV>].

142. *Id.*

143. 17 U.S.C. § 1506(u).

144. Stoltz & McSherry, *supra* note 75.

145. *See* 17 U.S.C. § 1504(c) (not limiting claimants to pursuing claims against corporate respondents).

146. Patreon, Comment Letter on Implementation of the “CASE” Act Regulations (Apr. 27, 2021), <https://www.regulations.gov/comment/COLC-2021-0001-0037> [<https://perma.cc/K59F-4BUN>].

147. 17 U.S.C. § 1504(g).

148. *Id.* § 1506(y)(2).

conduct,” the CCB has discretion to award more than the \$5,000 limit for attorneys’ fees and costs.¹⁴⁹

One solution to this issue is to ban copyright enforcement agencies from filing claims with the CCB. However, this is likely unnecessary because of the protections built into the CASE Act. Unscrupulous enforcement agencies will likely be banned from using the process for an entire year after filing their first improper claim and may be deterred from filing such claims in the first place because the CCB may require them to pay more than \$5,000 in attorneys’ fees. Additionally, this may not be an issue because the purpose of the CCB is to offer creators an alternative enforcement mechanism. Creators currently paying to use copyright enforcement agencies would hopefully not need to continue working with them, because the CCB would be an accessible alternative.

2. Claimants with Greater Access to Information than Respondents

Another issue in small claims courts is that defendants who lack access to legal information, either because they do not have the means to hire an attorney or because courts do not provide them with adequate resources to prepare them for trial, often lose their small claims cases.¹⁵⁰ To win, a defendant needs to either prove that the plaintiff’s claim is invalid or present a valid defense to the plaintiff’s claim.¹⁵¹ A defendant who is not aware of defenses or the steps she needs to take to disprove a plaintiff’s claim typically loses, especially if the judge does not intervene and raise a defense on the defendant’s behalf.¹⁵²

This issue is especially prevalent in eviction cases. Eviction cases are essentially breach of contract claims; landlords sue tenants for violating the terms of their leases—usually for failing to pay rent.¹⁵³ However, many tenants are not aware that their leases include the implied warranty of habitability and that they can use substandard living conditions as a defense or to mitigate the amount of rent they owe to their landlords.¹⁵⁴ Instead, small claims courts, which operate at

149. *Id.*

150. RUHNKA ET AL., *supra* note 112, at 192–93. Unrepresented small claims defendants lose even though judges in small claims court have more flexibility “to elicit facts and interrogate the authenticity of claims” than judges in traditional civil courts. Steinberg, *supra* note 118, at 1584. Although they possess these “broad powers,” small claims court judges rarely exercise them. *Id.*

151. RUHNKA ET AL., *supra* note 112, at 70.

152. *See id.*

153. Steinberg, *supra* note 118, at 1592.

154. *Id.* at 1592–93.

a “breakneck speed,” typically authorize evictions while ignoring poor housing conditions.¹⁵⁵

This issue also comes up in debt collection cases, where defendants are not aware that they can raise fraud as a defense. Small claims court judges “rarely question the legitimacy” of robo-signing and sewer service, “even in informal courts that may permit such intervention.”¹⁵⁶ Indeed, a study found that debtors lost 94 percent of consumer debt collection cases, “despite widespread evidence that many collections suits were premised on procedural and substantive law violations.”¹⁵⁷ In another study, 40 percent of debt collectors won their cases, even though their complaints failed to meet proof and pleading standards.¹⁵⁸ This suggests that consumer debtors would win more collection cases if they raised fraud as a defense, or if judges had better scrutinized the creditors’ service practices.

Small claims defendants may fail to raise defenses because they are unrepresented. One study found that fewer than 10 percent of consumers and tenants were represented by attorneys in small claims court, while up to 90 percent of debt collectors and property owners had representation.¹⁵⁹ Another study of courts in ten urban counties found that 80 percent of plaintiffs in small claims cases were represented by counsel while only 13 percent of defendants were represented.¹⁶⁰ Defendants facing eviction would be more likely to raise substandard living conditions as a defense if they had counsel to guide them.¹⁶¹ Likewise, represented defendants would be more likely to point out procedural defects in consumer debt collection cases.¹⁶²

Attorneys in small claims court cases are controversial.¹⁶³ Some small claims courts ban attorneys for both plaintiffs and defendants, with the idea that unrepresented defendants will fare poorly when facing represented corporate plaintiffs.¹⁶⁴ But studies show that

155. *Id.*

156. *Id.* at 1584.

157. *Id.* at 1595.

158. *Id.*

159. *Id.* at 1582–83.

160. Paula Hannaford-Agor, *The Landscape of Civil Litigation in State Courts: Examining Debt Collection, Landlord/Tenant and Small Claims Cases*, CT. STAT. PROJECT at 7 (Nov. 2019), https://www.courtstatistics.org/__data/assets/pdf_file/0027/53658/caseload-highlights.pdf [<https://perma.cc/R6J8-CRXQ>].

161. *See* Steinberg, *supra* note 118, at 1597.

162. *See id.*

163. Weller et al., *supra* note 10, at 11.

164. *Id.*; *see also* Zucker & Her, *supra* note 111, at 324–28 (describing California’s ban on attorneys in small claims courts in most circumstances).

unrepresented defendants fare poorly in general—whether or not the plaintiff is represented—which an outright ban on attorneys would not correct for.¹⁶⁵ Represented defendants win more often when they face unrepresented plaintiffs or plaintiffs who consulted an attorney for pre-trial advice but were unrepresented at trial.¹⁶⁶ Represented defendants are also better able to reduce plaintiffs’ awarded damages, even when the plaintiffs are represented at trial.¹⁶⁷

Unrepresented defendants who face unrepresented plaintiffs may be at a disadvantage when plaintiffs are familiar with the court system. In eviction proceedings, the landlord plaintiff often has an advantage over the tenant defendant. Landlords are repeat players: they gain knowledge about the small claims process with each eviction.¹⁶⁸ In debt collection cases, debtors find it difficult to navigate the small claims process, making the small claims system “a tool by which debt collectors are able to exploit unrepresented defendants—the very people the system was designed to assist.”¹⁶⁹ It follows that someone familiar with the small claims court system would have a competitive advantage over someone using it for the first time.

High-volume, low-value creators are running a business, just like landlords, and they will likely use the CCB the way landlords use small claims courts. Landlords use small claims courts to evict nonpaying tenants so that they can turn the property over to new tenants and continue to earn income from it.¹⁷⁰ Photographers like Wild will use the CCB to enforce their copyrights so that they can continue to earn income from photograph licenses. Like landlords, who are familiar with the small claims system because it is a routine part of doing business, high-volume, low-value creators will soon become familiar with the CCB. Unrepresented respondents may thus be at a disadvantage, even when facing unrepresented claimants.

The CASE Act also allows claimants and respondents to hire or consult attorneys, which may disadvantage respondents who are

165. Weller et al., *supra* note 10, at 12.

166. RUHNKA ET AL., *supra* note 112, at 69.

167. *Id.*

168. *See* DESMOND, *supra* note 113, at 100 (“Sherrena . . . remembered her first eviction . . . Everything went her way. Soon after, she filed another eviction, then another. When filling out the court papers, Sherrena learned to put ‘et al.’ after a tenant’s name so that the eviction judgment covered everyone in the house . . . She learned that the correct answer on the documents asking her to estimate damages was ‘not over \$5,000,’ the maximum amount allowed; learned that commissioners frowned on late fees in excess of \$55; learned that dragging slow-paying tenants to court was usually worth the \$89.50 processing fee because it spurred many to find a way to catch up.”).

169. Cook & Millard, *supra* note 131, at 462.

170. *See* DESMOND, *supra* note 113, at 100.

individuals, not corporations.¹⁷¹ Unlike tenants, who are at a disadvantage from the outset because they lack the financial resources to hire counsel,¹⁷² many corporate infringers will have the funds to hire an attorney. The pest control companies that Wild sued, for instance, were all represented by counsel.¹⁷³ But individuals may lack the resources to hire counsel, which will put them at a disadvantage unless the Copyright Office takes measures to correct for this.

The CASE Act anticipated that law students would be central to the process—providing free legal services to both parties¹⁷⁴—but this is not likely an effective solution. Law clinic professors believe that representing clients in front of the CCB will require extensive knowledge of complicated legal concepts that are “beyond the capacity of [their] clinics to handle without taking matters out of [their] law student attorneys’ hands.”¹⁷⁵ As of the writing of this Note, only four law school clinics and eight pro bono organizations have signed up to assist copyright claimants and defendants.¹⁷⁶ Therefore, the Copyright Office will need to provide other resources to level the playing field for respondents.

III. PRACTICAL SOLUTIONS

There are two practical solutions that will help level the playing field for under-resourced respondents. First, the Copyright Office could promulgate a rule that requires copyright claims officers to automatically apply the fair use defense to claims. Second, the Copyright Office could establish a robust education program centered around the fair use defense.

171. 17 U.S.C. § 1506(d). Indeed, of the claimants who filed claims at the CCB in 2022, about a third were represented by counsel. Rachel Kim, *The CCB at Six Months: What We Have Learned About the CCB So Far*, COPYRIGHT ALL. (Dec. 15, 2022), <https://copyrightalliance.org/ccb-six-months/> [<https://perma.cc/N472-XX5N>]. Unfortunately, similar information about respondents does not currently exist. *Id.*

172. Steinberg, *supra* note 118, at 1594–96.

173. *See* lawsuits in Part I.B.

174. 17 U.S.C. § 1506(d)(2).

175. Jonathan Askin, Lynda Braun, Cynthia L. Dahl, Ron Lazebnik, Jack I. Lerner, Amanda Levendowski, Phil Malone, Art Neill, Vicki Phillips, Jef Pearlman, Blake E. Reid, Jason Schultz & Erik Stallman, Comment Letter on Proposed Rule Concerning Representation by Law Students and of Business Entities in Copyright Claims Board Proceedings (2022), <https://www.regulations.gov/comment/COLC-2021-0011-0012> [<https://perma.cc/E6BX-UAJJ>].

176. *See Pro Bono Assistance*, COPYRIGHT CLAIMS BD., <https://ccb.gov/pro-bono-assistance/> [<https://perma.cc/62L4-EEP9>] (last visited Dec. 26, 2023).

A. Automatic Application of the Fair Use Defense

As discussed above, in housing and consumer debt cases, defendants lost when they were not aware of common defenses, such as fraud in debt cases and the warranty of habitability in eviction cases.¹⁷⁷ Had the judges in small claims courts, who are able to intervene more freely than judges in traditional court, raised these defenses on behalf of defendants, the outcome would likely have been different.

Like fraud and the warranty of habitability in small claims cases, the fair use defense is a powerful counter to copyright infringement claims.¹⁷⁸ The CASE Act gives copyright claims officers the discretion to “render determinations with respect to . . . defenses,” which include “[a] legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under [the CASE Act].”¹⁷⁹ The CASE Act does not require a respondent to first raise the defense before a copyright claims officer renders a determination.¹⁸⁰

The CCB must dismiss a claim if it concludes that the claim is “unsuitable for determination” by the board.¹⁸¹ Unsuitability includes a lack of essential evidence.¹⁸² The fundamental argument of the fair use defense is that a complainant has failed to put on essential evidence to prove infringement,¹⁸³ which would fit the CASE Act’s definition of “unsuitability.” Thus, the CASE Act seems to give copyright claims officers the discretion to apply defenses like fair use. Copyright claims officers should therefore proactively apply the fair use defense and dismiss claims that are unsuitable because they target fair uses. This is similar to the Ninth Circuit’s requirement that copyright holders evaluate fair use before asking an OSP to remove content.¹⁸⁴

B. Respondent Education

Another way to remedy the asymmetry between claimants and respondents is to provide robust educational resources for respondents, focused primarily on the fair use defense. Studies show that defendants in small claims courts are unprepared compared to plaintiffs because

177. *See supra* Part II.B.

178. *Id.*

179. 17 U.S.C. § 1504(c).

180. *Id.*

181. *Id.* § 1506(f)(3).

182. *Id.*

183. Loren, *supra* note 100, at 711–12.

184. *See supra* notes 105–107 and accompanying text.

most resources are targeted at plaintiffs.¹⁸⁵ Small claims courts prepare plaintiffs for court by providing printed instructions, clerk help, and even (in some courts) special advisors that plaintiffs can consult with.¹⁸⁶ But defendants, who often have no contact with the court before showing up for trial, do not receive such help.¹⁸⁷ Scholars posit that one way to correct this imbalance is to “actively reach out to defendants” to help them prepare for trial.¹⁸⁸ Simply providing resources at the courthouse is not enough, because “defendants generally do not appear in court until trial day.”¹⁸⁹ Scholars also recommend revising the language on complaint forms to be less threatening toward defendants, letting defendants know that they have a “right to appear to question a claim or to request more time to pay,” giving defendants the information of the court they can contact for more assistance, and writing basic information about how to defend a claim on the back of the complaint.¹⁹⁰

There is already evidence that the CCB is failing respondents the same way state small claims courts fail defendants. The CCB website provides information for claimants and defendants, such as a handbook and webpages that walk the reader through the CCB process step by step.¹⁹¹ But the vast majority of these resources are tailored to claimants. For instance, the only video on the CCB website’s home page is targeted at claimants, and while fair use is mentioned, it is only briefly referenced in the context of discussing a creator’s exclusive rights.¹⁹² The information that is tailored to respondents is sparse and confusing. The guidance for responding to infringement claims contains fewer pages than the guidance for infringement claimants (fifteen pages

185. RUHNKA ET AL., *supra* note 112, at 78. *See generally* U.S. DEP’T OF JUST., *supra* note 117 (providing consumer plaintiffs with fifteen pages of information about how to navigate small claims courts and providing defendants with a scant four paragraphs of relevant information).

186. Weller et al., *supra* note 10, at 12.

187. *Id.*

188. RUHNKA ET AL., *supra* note 112, at 77.

189. *Id.* at 110.

190. *Id.* at 111.

191. *See* SMALLER CLAIMS, *supra* note 82; *see, e.g., CCB Proceeding Phases*, COPYRIGHT CLAIMS BD., <https://ccb.gov/proceedings/> [<https://perma.cc/ED22-CR5J>] (last visited Mar. 15, 2023).

192. *Learn About Copyright: Exclusive Rights*, COPYRIGHT CLAIMS BD., <https://ccb.gov> [<https://perma.cc/35HH-PYSR>] (last visited Mar. 15, 2023) (addressing copyright holders, the video states: “No one else can use your work . . . unless they have permission from you, or their use falls under one of the exceptions or limitations described in the Copyright Act. For example, if their use of the work is a fair use . . .”).

versus twenty pages),¹⁹³ and the section on fair use sets out the complicated four-factor test, links readers to the U.S. Copyright Office's Fair Use Index (a database containing fair use case briefs), and provides only four short examples that are intended to help respondents determine whether the fair use defense applies.¹⁹⁴

To counteract this imbalance, the Copyright Office should design a robust legal education program targeted specifically at respondents. Respondent education should start with the notice that claimants serve to initiate the proceeding. The notice should contain links to animated educational videos that explain in simple terms how the respondent can raise the fair use defense.¹⁹⁵ The CCB should require claimants to send the notice to the respondent by email in addition to serving it by one of the methods specified in the CASE Act. The CCB will then have the respondent's email on file, which will allow the copyright claims attorneys to proactively send educational materials to respondents. If the Copyright Office fails to take such steps, it risks tilting the balancing in claimants' favor.

CONCLUSION

It is clear that high-volume, low-value creators like Wild and Garvey need a forum like the CCB in which they can independently and efficiently resolve infringement claims. But it is equally clear that the CCB will do the public a disservice if it does not actively protect fair uses of copyrighted works. If there is one thing the Copyright Office can learn from state small claims courts, it is that better-educated defendants can increase fairness in abbreviated proceedings. The Copyright Office can increase the effectiveness of the CCB process by

193. *Compare* RESPONDING TO AN INFRINGEMENT CLAIM, COPYRIGHT CLAIMS BD. HANDBOOK (2022), <https://ccb.gov/handbook/Response-Infringement.pdf> [<https://perma.cc/26AW-25DG>], *with* STARTING AN INFRINGEMENT CLAIM, COPYRIGHT CLAIMS BD. HANDBOOK (2022), <https://ccb.gov/handbook/Infringement-Claim.pdf> [<https://perma.cc/RMX5-D43G>].

194. RESPONDING TO AN INFRINGEMENT CLAIM, *supra* note 193, at 11–13; *see also* U.S. Copyright Office Fair Use Index, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/> [<https://perma.cc/5PQY-PTGE>] (Feb. 2023).

195. Studies show that educational materials that incorporate visual imagery increase comprehension. D. James Greiner, Dalíé Jiménez & Lois R. Lupica, *Self-Help Reimagined*, 92 IND. L.J. 1119, 1133 (2017).

requiring copyright claims officers to proactively apply the fair use defense and establishing a robust respondent education program.

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