A REMEDY FOR EVERY MELODY: THE PROCEDURAL POSITIVES AND NEGATIVES OF THE COPYRIGHT CLAIMS BOARD AND WHY THIS NEW TRIBUNAL WILL BENEFIT MUSIC COPYRIGHT HOLDERS

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I. INTRODUCTION

Music is bursting with creation. In today's digital age of music, there is a never-ending flow of new songs, remixes, and compilations, whether it comes from a widespread streaming platform like Spotify or a hub for independent artists like SoundCloud. Seemingly, anyone with a simple, cognizable musical idea can utilize any sound-mixing computer application to create a new work or remix an old one and upload it to various music platforms all in a matter of days—even hours. With such ease and frequency of musical creation, originality becomes an increasingly difficult objective to achieve. The more musical works being made or composed, the higher the likelihood that components and elements of each track will begin to overlap with others, whether intentionally or unintentionally. With so many new musical works being produced, adequate copyright protection and enforcement is needed to prevent unauthorized individuals from inappropriately using an artist's creation as a whole or its copyrightable elements.

Copyright is the legal mechanism that protects artists' original works of authorship.[1] This property right applies to musical works that are fixed in a tangible medium and provides the copyright holder with the exclusive rights to "reproduce, adapt, distribute, perform, and display the work."[2] One violation of these rights is copyright infringement, meaning that someone commits an act (or acts) that

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[1] *Copyright*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] *Id.*

interferes with any one of the aforementioned exclusive rights a copyright owner holds.[3] Copyright law is federal law,[4] and infringement litigation in federal court is both expensive and time consuming. These costs are exacerbated (1) when the matter results in smaller amounts of infringement damages against a less-prominent music artist and (2) when the relief sought or ultimately obtained is based on statutory violations that do not award large amounts of damages. A recent report from the American Intellectual Property Law Association showed that the average litigation cost for a single copyright infringement action from pretrial to appeal is $278,000.[5] What should be considered a straightforward remedy for a violated right is beyond the financial means of many copyright holders who do not have the adequate resources to bring suit in federal court.[6]

Recognizing the financial and temporal issues with copyright litigation, Congress enacted the Copyright Alternative Small-Claims Enforcement Act ("CASE Act"), which established a small claims tribunal "to address the challenges of litigating copyright cases in federal court, including the significant costs and time required."[7] The CASE Act established the Copyright Claims Board (CCB), a voluntary, alternative forum for dispute resolution covering all categories of copyrighted works.[8] The CCB is a three-officer panel that began hearing claims in June 2022.[9] The general sentiment in the small copyright field is that a tribunal like the CCB provides many artists with a much needed method to enforce their rights, where previously such creators felt that they were being harmed without an adequate remedy.[10] The CCB is rooted in the principles of federal civil

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[3] *Infringement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[4] U.S. CONST. art. I, § 8, cl. 8 (empowering Congress "[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").

[5] Terrica Carrington, *A Small Claims Court Is on the Horizon for Creators*, COPYRIGHT ALL. (Oct. 4, 2017), https://copyrightalliance.org/small-claims-court-on-the-horizon.

[6] *See id.*

[7] Copyright Alternative in Small-Claims Enforcement (CASE) Act Regulations: Expedited Registration and FOIA, 86 Fed. Reg. 21990, 21991 (effective Apr. 26, 2021) (to be codified at 37 C.F.R. pts. 201, 203, 221).

[8] Copyright Alternative Small-Claims Enforcement Act of 2020, 17 U.S.C. § 1502(a).

[9] *Id.* § 1502(b).

[10] *See The Copyright Small Claims Enforcement (CASE) Act of 2019*, SOUND EXCH., https://www.soundexchange.com/artist-copyright-owner/registration-membership/member-benefits/advocacy-2/the-copyright-alternative-in-small-claims-enforcement-

procedure as well as current copyright laws. As an alternate forum and an extension of the federal court system, the CCB has notable procedural implications in taking what normally would be federal litigation and condensing it into a simplified process while still aiming to achieve the same justiciable result.

This Comment proceeds as follows: Part II will provide a brief overview and history of notable music copyright law precedent, assessing how the legal landscape has changed leading to contemporary music copyright and the hurdles that creators currently face. In addition, it will provide background on the technological age of music and how it relates to the prevalence of small copyright claims. Part III will provide an overview of the goals of the federal court system and the goals of federal civil procedure. It will also include a summary of the CCB's function as well as the various rules and components of a CCB claim. Part IV will discuss and analyze both the positive and negative procedural implications of the CCB in its overall pursuit of efficiency and other federal court system goals. This Part will also argue for amendments to certain procedural components of the CCB and for maintenance of other components, despite scholarly criticisms. Part V features a predictive analysis on why the CCB will be successful and benefit music copyright holders, tying in the procedural analysis of Part IV and applying it to the music copyright setting. Part V also discusses how the CCB addresses concerns that artist groups and scholars have with the existence of a small copyright claims tribunal. Further, the CCB will be particularly beneficial for the droves of smaller, independent, or self-publishing artists. Part VI will briefly conclude.

II. BRIEF OVERVIEW OF MUSIC COPYRIGHT: HISTORY, SEMINAL CASES, AND DEVELOPING NORMS FOR THE MODERN DAY

A quick flyover of the relationship and development of copyright law within the music industry is important for understanding the legal parameters and creative boundaries that music creators face. This Part outlines a few impactful cases that have set the legal stage for what constitutes music and songwriting copyright infringement from a creative standpoint. These decisions interpreted together signal that music creations will rise in frequency and similarity, thus increasing

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case-act-of-2019 [https://web.archive.org/web/20211022095447/https://www.soundexchange.com/artist-copyright-owner/registration-membership/member-benefits/advocacy-2/the-copyright-alternative-in-small-claims-enforcement-case-act-of-2019] (last visited Sept. 17, 2021).

the chances of infringement due to overlapping musical elements and components.

A marquee copyright case involving the iconic George Harrison of The Beatles concerned similar, conflicting musical motifs in Harrison's "My Sweet Lord" and a song that came before it by Ronald Mack entitled "He's So Fine."[11] Mack claimed Harrison plagiarized and infringed on his copyright.[12] Despite the difference in words, the songs share nearly identical motifs, notes, rhythms, and harmonies, except for a particular variation of one phrase and a grace note addition in Harrison's tune.[13] Indeed, Harrison was aware that "He's So Fine" existed prior to creating "My Sweet Lord."[14] When Harrison outlined his composition process, however, it became clear that neither he nor other producers or musicians involved consciously utilized the theme and elements of "He's So Fine."[15] Nevertheless, the court held that Harrison, in his composer state, "subconsciously" chose the "He's So Fine" musical theme because he had heard it before and knew, based on its success, that it was something listeners would want to hear.[16] The court held that Harrison committed copyright infringement through subconscious composition.[17]

More recently, the widely publicized case of Robin Thicke and Pharrell Williams versus the Estate of Marvin Gaye describes the next element modern music creators need to be aware of: how copyright infringement can result from unauthorized use of a work's "vibe."[18] Robin Thicke and Pharrell Williams recorded the track "Blurred Lines" in 2012 and released it in 2013, and it became the best-selling single in the world.[19] While many readers today no doubt remember

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[11] Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 178 (S.D.N.Y. 1976).

[12] *Id.*

[13] *See id.*

[14] *Id.* at 179.

[15] *Id.* at 179–80.

[16] *Id.* at 180.

[17] *Bright Tunes Music Corp.*, 420 F. Supp. at 178–80.

[18] Michael Kreiner, *Song Sound-Alike Suits: Recent Music Copyright Cases Strike a Different Note*, PILLSBURY INTERNET & SOC. MEDIA (May 26, 2020), https://www.internetandtechnologylaw.com/song-sound-alike-lawsuits-music-copyright-cases ("With the looming threat of an infringement suit for "copying" even the basic feeling or vibe of an earlier song, artists and songwriters are justifiably concerned about crossing the minefield this area of law has become."); *see generally* Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).

[19] *Williams*, 885 F.3d at 1160.

this hit song, not many know of its so-called "predecessor." Shortly after the song's release, the Estate of the great Marvin Gaye claimed copyright infringement of his 1976 track "Got To Give It Up."[20] The basis for the sharp comparison between "Blurred Lines" and "Got To Give It Up" came from the similar hooks, drums, keyboard parts, bass lines, and phrases, as well as other structural similarities.[21] At trial, the jury found that the intrinsic test of copyright was satisfied.[22] The intrinsic test bases finding infringement on whether the "total concept and feel of the works [are] substantially similar."[23] The court did not find reason to overturn the jury finding that Thicke and Williams infringed Gaye by unauthorized use of the "feel" of "Got To Give It Up."[24] It is this "feel" determination that posed problems for music creation and copyright, so much so that many notable musicians filed amicus curiae briefs in support of Thicke and Williams, as they felt a ruling in Gaye's Estate's favor would open the floodgates for copyright infringement suits and deter creation.[25] When it comes to musical genres and composition, "feel," in the general sense, is important and something that many composers use as a foundation to create a new work. Therefore, the court's holding—that a song's "feel" was copyrightable—is a troubling sign for new works to pass the originality requirement needed to survive a copyright claim.

The tides turned; musical creators received a boost in copyright protection and creative incentive from the outcome of Marcus Gray's suit against pop superstar Katy Perry.[26] Gray claimed Perry infringed

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[20] *Id.* Interestingly, Gaye's recording was not covered by the Copyright Act of 1976 and instead was under the 1909 Copyright Act, which only protected sheet music compositions (not sound recordings). *See id.* at 1165–66. This, like many other areas of copyright law, phased out and adapted to modern times.

[21] *Id.* at 1161–62, 1172.

[22] *See id.* at 1171–72.

[23] *Id.* at 1164.

[24] *See id.* at 1172.

[25] Ben Kesslen, *Robin Thicke, Pharrell Williams to Pay $5 Million to Marvin Gaye Estate for 'Blurred Lines,'* NBC NEWS (Dec. 13, 2018, 3:24 PM), https://www.nbcnews.com/pop-culture/music/robin-thicke-pharrell-williams-pay-5-million-marvin-gaye-estate-n947666 ("In 2016, more than 200 musicians, including Jennifer Hudson and Hans Zimmer, filed an amicus brief in support of Thicke and Williams appeal, claiming the verdict would be "very dangerous" to the music industry.").

[26] Scott J. Sholder, *Gray v. Perry: The Pendulum Swings on Copyright Infringement Verdict Against Katy Perry*, CDAS (Mar. 24, 2020), https://cdas.com/gray-v-perry-the-pendulum-swings-on-copyright-infringement-verdict-against-katy-perry (The decision helps "solidify certain aspects of copyright law that may help musicians rest and write a bit easier.").

on his copyright of "Joyful Noise" with her smash hit "Dark Horse."[27] Plaintiffs sued Perry for using a particular ostinato pattern, a short phrase in music that is repeated throughout a particular section.[28] Plaintiffs claimed that this pattern was an unauthorized usage of a significantly similar ostinato in "Joyful Noise."[29] The jury, finding that Perry's track infringed on Gray's original expression, returned a verdict for the plaintiffs.[30] The court, however, granted Perry's renewed motion for judgment as a matter of law following the verdict.[31] The court held that the elements of the ostinato in "Joyful Noise" were not sufficiently original to warrant copyright protection.[32] Different from the intrinsic test in *Gaye*, the verdict here was overturned on extrinsic grounds that look more towards the objectively similar expressive and technical elements between the two works at issue.[33] Further, the issue in this case dealt with a particular isolated pattern and motif within the song, not the whole song itself, like in *Gaye*.[34] The court found the "Joyful Noise" ostinato to be comprised of elements common to the creation of pop music, such as the particular short length of the notes, the rhythm, and the pitch sequence.[35] Because elements in a work need to be considered together when assessing infringement, the court pooled these various, seemingly generic, components together to determine that there was insufficient originality in the "Joyful Noise" ostinato.[36] This case gave a protective tool to songwriters in creating new material. The copyright boundaries here seemed to expand because isolated structural elements, even at times when pooled together, are not considered infringement. This is a particularly relevant consideration in the digital age of music where there is widespread access to works that contain similar musical elements.

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[27] Gray v. Perry, No. 2:15-CV-05642, 2020 U.S. Dist. LEXIS 46313, at *3 (C.D. Cal. Mar. 16, 2020).

[28] *Id.* at *2 n.1.

[29] *Id.* at *3.

[30] *Id.* at *3–4.

[31] *Id.* at *54–55.

[32] *Id.* at *31–32.

[33] *See Gray*, 2020 U.S. Dist. LEXIS 46313, at *13.

[34] *Compare Gray*, 2020 U.S. Dist. LEXIS 46313, *with* Williams v. Gaye, 885 F.3d 1150 (9th Cir. 2018).

[35] *See Gray*, 2020 U.S. Dist. LEXIS 46313, at *20–22.

[36] *Id.*

The final case that helps paint a picture of the current compositional copyright landscape involves one of the greatest rock bands of all time, Led Zeppelin, and their iconic song "Stairway to Heaven." While many have likely listened to, or at least heard of, "Stairway to Heaven," not many know of the song "Taurus" by a band called Spirit. Nonetheless, the estate of Spirit's songwriter sued Led Zeppelin for copyright infringement stemming from Led Zeppelin's classic opening guitar theme of "Stairway to Heaven."[37] The infringement allegations in this case were that the melody in "Taurus" and the opening of "Stairway to Heaven" share certain musical elements such as chordal progression, melodic line, and use of the chromatic scale and arpeggiated chords in all three of those components, thus constituting copyright infringement of the "Taurus" composition.[38] The court held that these elements were not copyrightable and instead were limited sets of notes that were "common property music material."[39] Leaving such "common or trite"[40] musical elements intact for borrowing and use by new composers encourages creation and does not threaten the public domain since it likely falls in the *de minimis* domain of usage.[41] Like the Katy Perry case, this decision is a win for music creators. It encourages creation by not allowing the copyright of common musical elements and structures that are essential to composing a principally sound work. If these cases instead held that those basic musical elements were copyrightable, the result would be a weakened incentive to compose music—against policy goals to promote creation and the arts.

Together, these seminal decisions spark a troubling, and potentially prominent, creation trend in the digital music age: the common musical structures and elements being non-copyrightable spur creation, but so much access to music—from streaming platforms and technology at large—makes subconscious composition and the

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[37] Skidmore v. Led Zeppelin, 952 F.3d 1051, 1057 (9th Cir. 2020).

[38] *Id.* at 1057–59.

[39] *Id.* at 1070–71.

[40] *Id.* at 1069.

[41] *See id.* at 1071; *see also* Dayton Dunbar, Comment, *Another Cog in the Machine: Digital Music Sampling and an Evaluation of Its Existing Regulatory Mechanisms in Light of the Case Act*, 24 TUL. J. TECH. & INTELL. PROP. 181, 191 (2022) (In the digital sampling context, discussed *infra*, "the de minimis approach to sampling may be oversimplified as the sampling of lyrics or vocals from popular songs would likely be recognized, unless they were manipulated to the point of being ineligible. This does not account for whether those vocals or lyrics were sufficiently transformed.").

copying of "feel" almost inevitable. As this dynamic plays out, there should be an increase in copyright infringement disputes, whether or not someone created a song from their couch on Garage Band or at the helm of Capitol Studios. These creative barriers and inevitabilities are of particular concern to smaller independent artists. As more and more music enters the ever-expanding song pool, it is more likely that elements, feels, and vibes begin to overlap when someone copies even a small part of a composition. This issue goes back to the very core of the George Harrison case where he came up with a tune because, subconsciously, he had heard something similar and knew it was successful.

When one considers emergent norms in music composition and their intersection with copyright law, sampling is a major component of modern-day music creation, whether you are an unknown SoundCloud artist or Jay-Z. Sampling is the act of reusing a specific portion or component of another creator's sound recording in a new work.[42] It is essentially the equivalent to copying and pasting something from an existing work into your own.[43] What exactly constitutes a sample is circumstantial and difficult to determine; it could be a few seconds, minutes, a particular iconic part or element of a song, or it could satisfy a *de minimis* exception, meaning the sample is "too small to require licensing."[44] Sampling is becoming an increasingly prevalent practice in modern music.[45] To sample without incurring liability or committing infringement, the new songwriter needs licensing and a sample clearance.[46] This requires overcoming two hurdles: (1) a license for the recording itself and (2) a license to use the composition.[47] Given the sometimes difficult nature and inconvenience of getting in touch with copyright holders, whether

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[42] Justin M. Jacobson, *Music Sampling: Breaking Down the Basics*, TUNECORE (Aug. 9, 2016), https://www.tunecore.com/blog/2016/08/music-sampling-breaking-down-the-basics.html.

[43] *See id.*

[44] *Id.*; *see also* Dunbar, *supra* note 41, at 189 (noting the strong relevance of a sample's substantiality, requiring a departure from the original in order to invoke fair use).

[45] *See* Jacobson, *supra* note 42.

[46] *Id.*; *see also* Dunbar, *supra* note 41, at 193 ("Licensing is a preventative tool that can be used to protect the digital sampler from copyright infringement actions, while preserving some of the exclusive rights of the copyright holder.").

[47] Chris Robley, *How to Legally Clear Samples to Copyrighted Music*, DIY MUSICIAN (July 10, 2019), https://diymusician.cdbaby.com/music-rights/clear-samples-to-copyrighted-music; *see also* Dunbar, *supra* note 41, at 194.

they be record labels, publishing groups, or smaller independent artists who handle both, a sample's use will often be unauthorized.[48]

Today, "[m]ore people than ever before have access to affordable recording and sampling tools,"[49] which makes for easy and widespread distribution. This could make it more difficult for the copyright owner to monitor usage of their works.[50] With such ready and easy access to sample a never-ending array of recordings, unauthorized sampling will be increasingly prominent and threaten to result in growing amounts of infringement suits. In addition, an increase in accessibility of recordings and a consistent stream of new musical material poses problems in light of the songwriting copyright principles outlined earlier in this Part.[51] While basic music structural elements like rhythmic figures and chordal arpeggios remain protected, the broader prohibitions—like copying a song's "feel" and avoiding subconscious composition—suggest that more creations will fall under a copyrightable umbrella. With such broad protections, more songs will have protection and require appropriate licensing and clearance for sampling and other uses, increasing the likelihood of infringement on both a large and small scale. If there is to be a rise in all manners of music copyright infringement disputes, enter the CCB to play an increasingly important and frequent role in adjudicating claims.

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[48] *See* Robley, *supra* note 47; Dunbar, *supra* note 41, at 194–95 ("Although artists *can* obtain a license, that does not guarantee they *will*. . . . [I]t is no surprise why so many artists forego licensing and rely on their knowledge of fair use or de minimis sampling."); *see also* Lennon Cihak, *Enforcing Rights Just Got Much Easier for Copyright Owners: Rights-holders May Be Awarded Damages by Submitting an Infringement Notice with the Copyright Claims Board*, EDM.COM (June 23, 2022), https://edm.com/industry/copyright-claims-board-united-states (If anybody other than someone who is authorized and legally able to do so carries out any of those actions, they may be subject to a copyright infringement case, which could have severe implications. In fact, they can cost up to $250,000 in damages *per infringement*. This is especially true—and runs rampant—for those who sample other artists' music without permission.").

[49] Robley, *supra* note 47.

[50] *See id.* ("And we have access to easy (and independent) distribution, which means it's harder for publishers and record companies to monitor and control what's being released, because it's no longer being exclusively channeled through that major label system.").

[51] *See generally* Part II.

III. THE COPYRIGHT CLAIMS BOARD ROLE IN THE FEDERAL SYSTEM AND PROCEDURAL OVERVIEW

In providing an equitable remedy for music copyright holders, the CCB will not deviate from the established and important principles of copyright law in federal courts. This Part will (1) provide an overview of the goals and procedure of federal courts, as well as copyright law, and (2) summarize the CCB in its role and function within the federal judicial system.

A. *The Goals, Procedure, and Monetary Issues of Federal Courts and Copyright Law*

The federal court system and judiciaries of the United States have certain goals and core values that allow it to pursue and achieve "fair and impartial justice."[52] Particularly relevant to this Comment is the core value of service. In pursuit of this goal, courts are "dedicat[ed] to meeting the needs of jurors, court users, and the public in a timely and effective manner."[53] In addition, the core value of equal justice strives for fairness and impartial justice while providing for accessible court venues and processes.[54] Also relevant here is the core value of excellence, pursuant to which the courts strive for high administrative standards and provide for the "availability of sufficient financial and other resources."[55]

In considering the functionality of the federal court system, the goals of civil procedure are "to provide a fair and just means of resolving disputes, while also creating an efficient method for processing cases."[56] The federal system needs a way to judge the quality of procedure.[57] The metric of procedural efficiency is valued by its effect on the social costs of litigation.[58] In aiming to tradeoff costs of error and those costs that safeguard against error, the ideal procedural system "minimizes the sum of error costs and process costs."[59] Because copyright infringement claims are adjudicated in federal court

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[52] *Strategic Plan for the Federal Judiciary*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary (last visited Sept. 17, 2021).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] CIVIL PROCEDURE 225 (Jones and Bartlett Publishers, LLC).

[57] Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919 (1999).

[58] *Id.*

[59] *Id.*

systems, they stand to benefit from positive procedural efforts to enhance quality service, equal justice, and excellence.

In assessing the effects and implications a federal copyright suit has, it is important to note the difference in the forms of monetary damage relief from infringement actions, in particular the award of statutory damages versus actual damages. Before a final judgment is entered in a copyright action, a plaintiff can recover statutory damages between $750 and $30,000 per work.[60] Alternatively, a plaintiff can recover up to $150,000 if they fulfill the higher burden of proving willful infringement.[61] However, if the infringer proves that they were unaware that their actions constituted infringement, damages can be reduced to as low as $200 per work.[62] Statutory damages are a strategic, beneficial choice for a plaintiff because proving actual damages can be hard to achieve; requiring evidence of the copyright holder's loss of profits, and any profits that the infringer sustained, is a difficult showing.[63] Nonetheless, statutory damage awards are not high enough to justify the rise in copyright litigation expense. The general expenses for any litigant to file a copyright infringement suit in federal court have nearly tripled as a result of the holdings of two recent Supreme Court decisions and adjustments in court filing fees.[64] In particular, federal courts require a registered copyright in order to bring suit.[65] Copyright registration can be a lengthy process and only expedited through paying an $800 fee.[66] Thus, in many cases, copyright

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[60] 17 U.S.C. § 504(c)(1).

[61] *Id.* § 504(c)(2).

[62] *Id.*

[63] *What Are Statutory Damages and Why Do They Matter?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/statutory-damages-why-do-they-matter (last visited Aug. 28, 2022).

[64] *See* Scott Alan Burroughs, *Copyright Litigation: Now More Expensive and with More Delay Than Ever Before!*, ABOVE L. (Mar. 13, 2019, 11:14 AM), https://abovethelaw.com/2019/03/copyright-litigation-now-more-expensive-and-with-more-delay-than-ever-before/?rf=1.

[65] *Id.* ("Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC addressed the question of when an artist can file suit. The Supreme Court held that an artist cannot file suit until the U.S. Copyright Office approves the artist's copyright registration.").

[66] *See id.*; *see also The Copyright Small Claims Enforcement (CASE) Act of 2019*, *supra* note 10 (noting, in the musical context, "[t]he high cost of litigation causes many copyright infringements to go unchallenged, meaning music creators often have no practical option for protecting their work."); Dunbar, *supra* note 41, at 193; Cihak, *supra* note 48.

infringement litigation continues to be an unrealistic temporal and financial venture,[67] especially when the monetary relief sought is small.

B. *How the Copyright Claims Board Works, Its Role, and Function in the Federal System*

The CCB strives to be a useful alternative forum to litigating a copyright infringement suit in federal court that "will provide an efficient and user-friendly option to resolve small copyright claims."[68] The CCB was originally scheduled to begin hearing claims on December 27, 2021.[69] If the Register of Copyrights determined that there was good cause for delay, however, the opening day would be pushed to June, 2022, which is now the case.[70] Once the CCB is underway, there should be a noticeable efficiency improvement for the discovery phase of adjudication. Due to a more streamlined form of motions and discovery, this type of small claims proceeding should be far more efficient than litigating in federal court. Proponents argue that the CCB will save parties time and money.[71]

Given that this is a tribunal for "small" copyright claims, naturally there is a cap on damages. Similar to the range found in the statutory damages of 17 U.S.C. § 504(c)(1), the CCB caps total relief at $30,000,[72] but the limit for statutory damages on each individual work is $15,000.[73] Actual damages on its own can achieve the maximum $30,000 relief for a single work.[74] There is the potential for an additional allocation of damages resulting from bad faith: the CCB could determine that a party acting in bad faith is responsible for up to $5,000 of the opposing party's attorney fees, or up to $2,500 in fees if the opposing party is self-representing.[75]

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[67] *See* Dunbar, *supra* note 41, at 193 ("For small time artists who produce music entirely on their own, with little to no revenue from their early productions, that cost is significant. It is no surprise that many small and upcoming music artists do not pursue copyright litigation against those who infringe their works.").

[68] U.S. COPYRIGHT OFF., COMING SOON: COPYRIGHT CLAIMS BOARD TO HEAR SMALL COPYRIGHT CLAIMS 1 (2021), https://copyright.gov/about/small-claims/quick-facts.pdf.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Copyright Claims Board Frequently Asked Questions*, U.S. COPYRIGHT OFF., https://ccb.gov/faq (last visited Sept. 17, 2021) [hereinafter *CCB FAQ*].

[75] *Id.*

What makes the CCB unique in resolving small copyright disputes is its voluntary nature.[76] Plaintiffs are not required to use the CCB and are free to bring any of their small copyright claims in federal court, if they so choose.[77] On the other side of the action, alleged infringers and respondents in a CCB proceeding are free to opt out of the process, thus forcing the plaintiff to bring their claim in federal court.[78] This opt-out right is necessary to remain consistent with the Constitution, in particular a defendant's right to a jury trial and proper due process of law.[79] Plaintiffs, however, cannot simultaneously bring a claim or counterclaim in both federal court and the CCB, unless the CCB proceeding came first and the defendant opted out.[80] Once the plaintiff is able to move forward with the CCB as the forum, the proceedings are entirely remote and virtual.[81] Importantly, a party bringing a claim in the CCB is not required to be represented by an attorney.[82] This creates a pleading scenario where the unrepresented claimant will fill out a type of material facts form or questionnaire which a CCB officer—an attorney—will review to make sure it satisfies procedural requirements.[83] In assessing these pleadings with statements of material fact, the claimant will have "multiple opportunities to correct any deficiencies," should the reviewing attorney find any noncompliance.[84]

Once it is determined that the pleading requirements have been met, the claimant may serve process.[85] Once served, the alleged infringer has sixty days to opt out, leaving the federal courts as the only

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[76] *See id.* ("The CCB is a streamlined alternative to federal court, but it is a voluntary option in which both parties must agree to participate.").

[77] *Id.*

[78] *Id.*

[79] *Id.*; *but see* Dunbar, *supra* note 41, at 202 ("[C]ongress should amend [the CASE Act] to remove the opt-in requirement. Doing so would guarantee judicial accessibility for small artists, with limited resources, who seek redress for misappropriation of their work. Furthermore, amending the act to require participation would promote judicial efficiency because the effort put into filing a claim before the Board would not be wasted should the defendant opt out.").

[80] *CCB FAQ*, *supra* note 74.

[81] Michael Barer & Nisha Gera, *The Nuts and Bolts of the Copyright Claims Board*, JD SUPRA (Aug. 24, 2021), https://www.jdsupra.com/legalnews/the-nuts-and-bolts-of-the-copyright-4072521.

[82] *Id.*

[83] *See id.*

[84] *Id.*

[85] *See id.*

remaining venue for the claim.[86] If the respondent does not opt out within the sixty-day period, they forfeit their right to have an Article III court hear the claim, waive their right to a trial by jury, and effectively consent to the CCB proceeding.[87] The CCB may enter a default judgment against a respondent who does not opt out and does not make an appearance, but this default determination must be made in accordance with the procedural requirements of the Copyright Act.[88] Such an adherence to the principles and procedures of the Copyright Act is further evidence of respecting and intertwining its overarching values into the CCB and deference to the federal system. Another noteworthy and distinguishing facet of the CCB is that a copyright application may either be registered *or* pending in order to bring an infringement claim.[89] Unlike a copyright infringement claim in federal court, where the copyright must be registered in order to commence suit, the application process need only be in effect in order to file a claim with the CCB.[90] If a claim is filed with the CCB while the copyright application is pending and the application is subsequently rejected, the claim is dismissed without prejudice.[91]

CCB decisions do not create binding legal precedent within their specific tribunal system and have a limited preclusive effect, but federal copyright principles and case law still apply in adjudicating a claim.[92] The CCB's decisions and determinations are "subject to limited judicial review."[93] In such cases, the main avenue for appeal is CCB reconsideration, and if that fails, then the issue is raised to the Register

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[86] *Id.*

[87] 17 U.S.C. §§1506(h)(1), 1506(h)(2), 1506(i).

[88] *CCB FAQ*, *supra* note 74.

[89] Barer & Gera, *supra* note 81.

[90] Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 886 (2019).

[91] 17 U.S.C. § 1505(b)(3).

[92] Barer & Gera, *supra* note 81. In common law copyright jurisprudence, a plaintiff pursuing an infringement claim needs to show (1) ownership of a valid, enforceable copyright; and (2) the defendant copied the original, actionable elements of the work. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Originality means that the creator independently created the work and that the work itself contains a minimal degree of creativity. *Id.* at 358; *see* Dunbar, *supra* note 41, at 202 ("Given that the [CCB] will not be creating its own system of precedent, and instead adhering to the law of the jurisdiction in which the claim would have been brought in federal court, the [CCB] will apply varied rules and afford varied relief to claimants in different jurisdictions.").

[93] Barer & Gera, *supra* note 81.

of Copyrights.[94] Review is limited, however, to abuse of discretion in denying reconsideration.[95] At that point, a federal court could only step in for review in cases of fraud, misrepresentation, misconduct, exceeding authority to render a final judgment, or if a default judgment is null due to excusable neglect.[96] The CASE Act established certain CCB safeguards to protect against various forms of procedural abuse. For example, "[t]he Copyright Office can cap the number of claims a party can bring before the CCB per year to hinder serial abuse. Therefore, if a party repeatedly files frivolous or harassing claims, the CCB can bar such claimants from bringing claims for [twelve] months."[97] These general provisions set the stage to argue for both amending and maintaining certain components of the CCB's current structure and assessing the CCB's eventual effect on the music industry.

IV. THE PROCEDURAL POSITIVES AND NEGATIVES OF THE COPYRIGHT CLAIMS BOARD IN PURSUIT OF EFFICIENCY, BENEFICIAL SOCIAL COSTS, AND JUSTICE

There are promising aspects of the CCB as well as some that raise concerns. These components are important in assessing how the CCB will impact music copyright because the CCB will use the same mechanisms regardless of the copyright area being adjudicated. This Part will (1) demonstrate the CCB positivity in relation to judicial efficiency; (2) address concerns of opt outs while noting the justification to keep this provision; (3) address pleading concerns and implications and argue for amendments; and (4) argue for the positive incentive for copyright holders to pursue small claims by comparing the CCB to similar small claim tribunals.

A. *The CCB Promotes Efficiency and Accessibility*

The first relevant federal court system goal that the CCB must cater to is that of dedication in meeting the needs of the people in a timely and efficient manner.[98] Such a streamlined tribunal like the CCB is in line with this goal.

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[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See* discussion *supra* Part II A.

Discovery is the most time-consuming part of any civil suit, thus hindering litigation efficiency both temporally and financially.[99] Even in the best-case scenario, the discovery process can take several months.[100] In addition, ordinary pretrial motions have the potential for long, drawn-out response times and court-approved extensions that can lead to smaller disputes within the suit itself.[101] To combat this oft-maligned issue in the interest of time efficiency, the CCB is constructed with a streamlined motion and discovery process.[102] The CCB will not include formal, traditional motion procedures.[103] Instead, a request can be made to the board for inquiries into any apparent case management issues, or the board officers themselves may reach out to parties to clarify case-specific questions.[104] CCB discovery will also be limited to written inquiries, written requests for admission, and what the Copyright Office describes as relevant information and documents.[105] That standard definition of relevant CCB discovery materials remains to be seen, but this first step is a consistent effort to make this part of the small copyright claims process both user friendly and time-efficient.

It is worth noting that proceedings with limited discovery in something like arbitration can bring mixed results. To increase efficiency of proceedings (a goal that the CCB shares), arbitration avoids traditional discovery, cutting time and costs. Normally, an arbitrator will rely on either the terms in the parties' agreement or (if the agreement's arbitration clause and the agreement as a whole are silent on discovery) general applicable arbitration rules to craft a discovery plan that is ultimately still much more limited than that of federal court proceedings.[106] These types of limited discovery

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[99] *See Why Does a Lawsuit Take So Long?*, HG.ORG LEGAL RES., https://www.hg.org/legal-articles/why-does-a-lawsuit-take-so-long-31734 (last visited Sept. 20, 2021) ("The discovery phase is easily the most time consuming portion of most cases, and can literally last for several years in complex cases, and usually a minimum of several months in the best of cases.").

[100] *See id.*

[101] *See id.*

[102] *See* Barer & Gera, *supra* note 81; Dunbar, *supra* note 41, at 200 ("By limiting the scope of discovery, the additional costs accrued in traditional litigation will be stunted.").

[103] Barer & Gera, *supra* note 81.

[104] *Id.*

[105] *CCB FAQ*, *supra* note 74.

[106] *See* Janice L. Sperow, *Discovery in Arbitration: Agreement, Plans, and Fairness*, ABA (Apr. 10, 2019), https://www.americanbar.org/groups/litigation/committees

proceedings can save time and money, but they can also allow a party to obfuscate and disadvantage the other side through lack of understanding and lack of resources. This, to a degree, could possibly happen in the CCB as well when it comes to a small claimant who might be at a disadvantage and would otherwise benefit from actual, formal discovery rules. The distinction, however, is that arbitration is mandatory, if the parties' agreement provides for it, whereas the CCB is *voluntary*. Therefore, CCB parties should have more control and say over what type of discovery they will be subject to for copyright infringement, should the claim ultimately need to be brought in federal court after an opt out.

Discovery is also a mechanism largely driven by the work of attorneys, who, in an ordinary lawsuit, conduct depositions and prepare interrogatories. For a tribunal like the CCB, where self-representation is a viable claimant option, the simpler such a procedure is, the better. In a broader sense of the overall efficiency effect on the federal court systems, the CCB will open the doors for small copyright claims and, in turn, lighten the load on the federal courts. While it remains to be seen just how many claims are brought with the CCB, the mere fact that there is this alternative streamlined forum should decrease the size of various dockets throughout the federal districts. The only scenario where there would be absolutely no possibility to lighten the current system is if every single claim bound for the CCB is one that each claimant is predisposed to bring in federal court. On the other hand, the only situation where there would be no change in the current state of the system is if no claims were filed with the CCB; every single CCB claim would be one that each claimant is predisposed to never bring in federal court. Such circumstances, where the CCB docket gets either every possible small claim or none at all, seem highly unlikely.

The second federal court system goal that the CCB addresses is ease of accessibility to courts of process; the CCB should excel at this goal. The CCB, as a remote and virtual platform, recognizes the ever-changing technological world and the widespread convenience of video conferences. This allows for the filing of various pleadings and CCB determinations to be handled from the comfort of one's home, even if represented by an attorney. This type of legal process should be all-too familiar in a COVID-19 world where so many legal

/alternative-dispute-resolution/practice/2019/discovery-in-arbitration-agreement-plans-and-fairness.

proceedings are now held virtually.[107] Even for individuals who are unfamiliar with virtual legal proceedings, COVID-19 rendered many facets of work, school, and social life to virtual capacities, so a legal proceeding in this form should not be a drastic technological adaptation for an individual to access and use.

In intertwining the goal of accessibility into achieving efficiency, the CCB advances the federal systems' core value of excellence. With this goal, the federal courts look to provide court users with effective resources and sound standards of adjudication.[108] The CCB is an effective resource because it will provide any copyright holder, especially those in the music industry (discussed *infra* Part V), with an easily accessible forum to enforce protections and dispute resolutions for their property rights. Further, the CCB maintains a strong, consistent administrative standard because of the manner in which the three-officer tribunal is configured. The Library of Congress will appoint the three officers with recommendations from the Register of Copyrights.[109] Two officers will possess "substantial experience in evaluation, litigation, or adjudication of copyright infringement claims."[110] The remaining officer will have extensive experience in copyright law as well as alternative dispute resolution.[111] The officers will receive assistance from a legal team consisting of other copyright attorneys, paralegals, and assistants (one of each administrative assistant per claim).[112] This combination of experienced copyright professionals, both with the officers adjudicating the claims and those supporting them, will ensure a high legal standard of resolving disputes in the CCB. It is important that this configuration produces consistent adjudication because the CCB's appeal options are limited.[113] In this sense, another arbitration similarity is drawn where there is limited appeal and arbitrators have the potential to not apply law the same way every time, producing inconsistencies. This configuration, however, should not fall into a similar trap because the team adjudicating the dispute is more robust and narrower in its scope

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[107] *See, e.g.*, *As Pandemic Lingers, Courts Lean Into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology.

[108] *See* U.S. COURTS, *supra* note 52.

[109] *CCB FAQ*, *supra* note 74.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See* sources cited *supra* notes 93–96.

since the CCB deals with limited types of copyright disputes. Due to the CCB's adherence to existing federal copyright laws, principles, and a multiple-officer tribunal, the means to adjudicate these small copyright claims should be a consistent and predictable metric.

B. *Concerns with the Opt-Out Nature of a Voluntary Forum*

The most glaring and controversial issue with the CCB is the opt-out provision. Such a situation where a defendant or respondent can freely say "no" to an infringement action against them is certain to turn some heads and beg further questions. If the respondent does opt out, the only course left for the claimant is to bring the suit in federal court,[114] an expensive alternative. In that situation, the fact that a then-defendant opted out would not be held against them.[115]

The "problem for creative people is that the infringer will roll the dice and opt out, hoping that a federal suit will not be filed."[116] This tension should tip in the plaintiff's favor if they have equal or greater financial resources.[117] On the other hand, when a defendant has more resources than the plaintiff, it can be expected that the defendant will opt out,[118] effectively taking a gamble on litigation actually being filed even when some infringement has occurred. The opt-out favors the defendant because it is possible that the plaintiff is not financially equipped to litigate in federal court, but the defendant is.[119] Implementing such an opt-out design could be problematic by consistently creating a scenario akin to the game of chicken: claimant files a small infringement claim with the CCB, respondent opts out—possibly strategically, whether or not infringement was committed—which effectively challenges the claimant to bring the matter in the expensive, time-consuming federal district court. This would leave room for alleged infringers to exploit the financial weakness of

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[114] *Id.*

[115] *Id.*

[116] William Honaker, *The New Copyright Small Claims Board Presents Problems for Copyright Owners and Small Businesses*, IP WATCHDOG (Mar. 2, 2021), https://www.ipwatchdog.com/2021/03/02/new-copyright-small-claims-board-presents-problems-copyright-owners-small-businesses/id=130343.

[117] *See* Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?*, 25 COMM. L. & POL'Y 1, 18 (2020) ("It seems evident that, while the proposed [CCB] is meant to even the playing field for individual creators and small companies, it maintains the imbalances that exist in the current system because the small players remain at the mercy of better-resourced defendants.").

[118] *See id.*

[119] *See id.*

claimants who are certainly entitled to a remedy for a violation of their smaller-valued, yet equally protected, copyright.

Critics of the CCB, like the Electronic Frontier Foundation ("EFF"), are notably concerned that the CCB's streamlined procedure and opt-out system, rather than opt-in, will lead to a rise in default judgments.[120] These critics feel that opt-outs will be prominent, posing problems with something like fair use.[121] Fair use is a defense to a copyright infringement claim that "permits a party to use a copyrighted work without the copyright owner's permission" under certain circumstances, "such as criticism, comment, news reporting, teaching, scholarship, or research."[122] The EFF is worried about the CCB's limited appeal and review options compared to the levels of appeal available in federal courts, especially for fair use which acts as an important safeguard to repeat offenders like copyright trolls "who will profit from people unintentionally forfeiting their rights."[123]

The suggestion that the CCB could benefit from being opt-in—where both parties agree to the process—rather than needing a respondent to opt out or otherwise face a default judgment may not play out in practice. The CCB will lose its effectiveness if a respondent must agree to have a small claim brought against them—a grievance that many will surely turn away. In noting the similarities of copyright litigation in federal court to the CCB, a defendant cannot opt in to a suit in federal court either, and both the CCB and federal courts have notice and service of process requirements that, if unanswered, result in default judgments.[124] For those respondents, however, who ignore a CCB claim notice or miss it altogether and receive a default judgment, again there will be difficulties in sustaining an appeal.[125]

One potential solution to prevent otherwise legitimate fair uses from being subject to the fallout of a default judgment is to adjust the

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[120] *See generally* Katharine Trendacosta & Cara Gagliano, *Some Answers to Questions About the State of Copyright in 2021*, ELEC. FRONTIER FOUND. (Feb. 5, 2021), https://www.eff.org/deeplinks/2021/02/some-answers-questions-about-state-copyright-2021; *see also* Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711, 714 (2018) (arguing that the current opt-out setup will bring a large amount of plaintiff claims, many defendant opt-outs, and subsequently large amounts of default judgments).

[121] *See* Depoorter, *supra* note 120.

[122] *What is Fair Use?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/what-is-fair-use (last visited Nov. 1, 2021).

[123] *See* Trendacosta, *supra* note 120.

[124] *See* Barer & Gera, *supra* note 81.

[125] *See* Trendacosta, *supra* note 120; *see also* Barer & Gera, *supra* note 81.

subsequent remedy. Rather than implement default monetary damages, under certain circumstances, like smaller uses of existing material, the CCB remedy could be granting the losing party a compulsory license, which "lets a musician record (and sell) a rendition of a previously recorded song by paying royalties to the original composition artist who is the legal copyright holder of the work."[126] This mechanism allows a music creator to pay statutory royalties to the original copyright holder to record and sell a particular rendition or usage of the work.[127] This would be a progressive implementation to the CCB which, for now, only awards monetary damages. A change to the CCB like a compulsory license scheme as a remedy could both encourage and preserve creation rather than dissuade it, since important principles like fair use and new creation should still be preserved in the music industry.

C. *Concerns with the Copyright Claims Board's Procedure for the Statement of Material Fact*

The initial stage of a CCB claim presents an issue that will make early dismissal an infrequency, which could ultimately saturate the claims queue. While it is undoubtedly important to protect any copyright holder's property rights and ensure an adequate means to seek a remedy, the way the "pleading" stage of the CCB is currently configured, signals that it is a low bar to pass. A CCB reviewing attorney provides multiple opportunities for the claimant to amend their pleadings and statements of material fact should they find noncompliance with procedural requirements.[128] As in federal court, the CCB has certain pleading standards that an unrepresented claimant is likely to be unfamiliar with.

The opportunity to amend the pleading statement as it is currently structured, however, does not appear to have any cap or line drawn. If that is the case, many CCB claims will not be dismissed at the outset or early stages of the process. This could inundate the CCB with a large number of claims, diminishing its temporal efficiency. Normally, a judge would oversee this type of pleading issue in federal court, providing more legal supervision. Further, it is possible that claimants with potentially unmeritorious claims get the opportunity to

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[126] Heather McDonald, *What a Compulsory License Is in Music*, BALANCE CAREERS (Feb 2. 2019), https://www.thebalancecareers.com/what-is-a-compulsory-license-in-music-2460357.

[127] *See id.* (defining compulsory licenses).

[128] *See supra* Part III.

continuously amend their statements until they conform, knowing that there is more to do to meet the requirements to move the claim forward. Fortunately, the streamlined discovery process should swiftly eliminate such claims, but an overall view of the CCB "pleading" stage suggests great deference to the claimant by leaving multiple opportunities to amend, thus allowing the claims themselves a chance to be heard and pass this initial step.

D. *Incentives to Bring Small Copyright Claims*

The current CCB structure encourages copyright holders to use it for their small claim remedies. Having the ability to bring a CCB claim while a copyright registration application is pending will be a strong financial incentive on its own. Normally, plaintiffs in federal court who want to sue for copyright infringement but do not yet have a registered copyright have to wait for registration and almost always end up paying an $800 fee to expedite the multiple-month process.[129] Here, the CCB avoids that extra expense, though it likely will not enter final judgment until the status of the application is determined.[130] Nonetheless, this feature saves a claimant ample time by being able to initiate the claim while the application is in the works. This could be an indicator that the idea of copyright registration in this context is an outdated notion and an unnecessary means to protect one's ends. It is worth noting, however, that such an ease of process could break the dam for a flood of small claims being opened.

Due to the claims process being cost-effective and time efficient, the CCB's existence as an alternative forum heavily steers the relief sought towards money damages rather than an injunction. The CCB itself will not issue injunctions.[131] Therefore, small copyright holders will need to hit the infringers where it hurts most—their wallets.[132] There is a strong incentive to protect one's copyrights which have long been without an adequate remedy in the federal courts, largely due to the overall monetary costs outweighing the relief granted. Infringement claims of low economic value are more likely to find a

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[129] *See* Burroughs, *supra* note 64.

[130] *See* Barer & Gera, *supra* note 81.

[131] Honaker, *supra* note 116.

[132] *See* Randy Taylor, Transcript at 144:03-09, COPYRIGHT DEF. LEAGUE (Nov. 15, 2012) ("[T]he statutory damage [award] is the primary tool by which the infringer is likely settled. So if statutory damages are limited or removed from any type of alternative core process, the effectiveness is going to be dramatically reduced.").

place with the CCB.[133] It is also possible that small monetary relief amounts would beg the question for, and lead to, the need for an additional remedy, perhaps a compulsory licensing scheme as mentioned in Section B. Still, regardless of the damage amount or remedy sought, infringement is a violation of a copyright holder's rights and guarantees under federal law, and they are entitled to efficient justice and remedy.

E. *Comparisons to Similar Small Tribunals*

Between 2009 and 2011, the United Kingdom experienced an issue similar to the one the CASE Act is attempting to remedy, mainly that small copyright infringement claims were not being brought in court due to the overall high costs of litigation.[134] The United Kingdom's take on an intellectual property small claims tribunal was established in 2012.[135] This is particularly relevant for the CCB because much of the structure and function of the United States court systems is derived from that of the English courts.[136] Both the United Kingdom and the CASE Act established small claims tribunals to help copyright holders achieve justice in their disputes since they could not ordinarily bring suit in court due to the expensive nature of copyright litigation.[137] The United Kingdom has found this "small claims track" to be successful; by 2015, the United Kingdom saw a large increase in case filings within this tribunal.[138] In particular, the increase of claims showed in both small enterprises and medium-sized enterprises—the small claims track's primary intended beneficiaries.[139] In theory, the modern-day success of a similar copyright tribunal under similar circumstances from our parent court is a strong indicator of the CCB's eventual success as well as its ability to meet efficiency goals.

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[133] *See* Britt Anderson, et al., *Congress Establishes New Copyright Small Claims Court*, JD SUPRA (Jan. 13, 2021), https://www.jdsupra.com/legalnews/congress-establishes-new-copyright-1211224; Cihak, *supra* note 48 (noting the difficulties in affording a multi-year copyright infringement claim).

[134] Olson, *supra* note 117, at 10.

[135] *Id.*

[136] *See Major Differences Between the US and UK Legal Systems,* WASH. U. ST. LOUIS SCH. L. (Apr. 7, 2014), https://onlinelaw.wustl.edu/blog/differences-between-us-and-uk-legal-system.

[137] *See generally* Olson, *supra* note 117.

[138] *Id.* at 11; *see* CHRISTIAN HELMERS ET AL., EVALUATION OF THE REFORMS OF THE INTELLECTUAL PROPERTY ENTERPRISE COURT 2010–2013 2, 34–36 (2015).

[139] HELMERS ET AL., *supra* note 138, at 34–36.

Within our own domestic court system, the Uniform Domain Name Dispute Resolution Policy ("UDRP") could also be an indicator for the CCB's potential success as an intellectual property small claims tribunal.[140] Similar to the CCB, the UDRP is a voluntary form of arbitration with strengths in ease of access and the ability to streamline disputes.[141] While this tribunal handles different substantive legal matters, namely "cybersquatting disputes between domain name registrants and trademark holders," it bears similarities to the CCB, such as self-representation, electronic filings, and lack of personal appearances.[142] Previously, the Intellectual Property Section of the American Bar Association endorsed the UDRP as a successful model towards an eventual small-claims tribunal because it is "a good example of an effective alternative to federal litigation."[143] Even at this early stage, the CCB appears to be positioned for initial success in achieving efficient small copyright claim dispute resolution. Similar past tribunals suggest that such a forum and procedural mechanism provides copyright holders with a chance to seek reasonable remedies without the financial and temporal troubles of federal court litigation. Though the opt-outs and pleading issues present a conceptual challenge, the intention to seek proper justice for copyright infringement is present.

V. THE COPYRIGHT CLAIMS BOARD WILL BE BENEFICIAL FOR PROTECTING MUSIC COPYRIGHT HOLDERS AND RESOLVING MUSIC COPYRIGHT DISPUTES

In the rapidly expanding world of music creation in the digital age, a dispute resolution forum that is affordable and efficient like the CCB will be a positive move. The CCB fills gaps in the substantive concerns of artist groups regarding small copyright claims. Further, the actual rise in musical works and sampling will lead to a larger pool of creations, thus increasing the likelihood of overlap and infringement. The CCB alleviates this potential pressure on the

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[140] *See* Jeffrey Bils, Comment, *David Sling's: How to Give Copyright Owners a Practical Way to Pursue Small Claims*, 62 UCLA L. Rev. 464, 475 (2015).

[141] *Id.*

[142] *Id.* at 475–76.

[143] Letter from Joseph M. Potenza, Section Chair, ABA Section of Intellectual Property Law, to Maria A. Pallante, Register of Copyrights (Oct. 19, 2012), https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf.

federal docket and makes it easier for music creators, especially independent artists, to bring claims and protect their deserved rights.

A. *Addressing Artist Group Concerns*

The CCB positively addresses the concerns that various music artist groups had with small claims copyright and the implementation of a small copyright claims tribunal. In developing the reasons and objectives of the CASE Act, the Register of Copyrights ran an extensive report on copyright small claims.[144] Within this report are certain concerns and doubts that artist groups have with assessing small music copyright claims.[145] Part of the study showed that certain artist groups, as opponents of the creation of a small claims board, were concerned with the complex nature of music copyright lawsuits.[146] They were worried that these suits would eventually lead to breach of contract claims arising within suit and that such claims would need to remain in federal courts.[147] Other artist groups, however, believed that a small copyright claims tribunal would fulfill organization goals at that time, like not wanting the music industry to be unfairly left out of a new streamlined process for copyright infringement claims due to the rise of self-publishing musicians.[148] These groups recognized that as more and more self-represented artists reclaimed their rights under the Copyright Act of 1976, the more they would need access to a self-representation forum which facilitated economic ease in litigation.[149]

The CCB does not meddle with artist group concerns with breach of contract issues stemming from copyright litigation. Breach of contract is not a justiciable action with the CCB; the CCB only handles

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[144] *See generally* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (2013).

[145] *See id.* at 117 ("The National Music Publishers' Association ("NMPA") and the Harry Fox Agency, Inc. ("HFA") . . . ASCAP, BMI, SESAC, the Recording Industry Association of America ("RIAA"), and the American Association of Independent Music ("A2IM"), urged that music should be excluded from any small claims system, at least in the near term.").

[146] *Id.*

[147] *Id.*

[148] *Id.* at 118.

[149] *See* U.S. COPYRIGHT OFF., PUBLIC HEARING ON SMALL COPYRIGHT CLAIMS 73 (2012) (statement of Alma Robinson, California Lawyers for the Arts) ("Again, on behalf of California Lawyers for the Arts, I just want to share the observation that many songwriters and musicians are now self-publishing and distributing their own work and subject to the hazards of the internet. And I think that it would really be important to allow those folks access . . . to whatever potential system we're saying we're thinking about."); *see generally* U.S. COPYRIGHT OFF., *supra* note 144, at 118.

claims for infringement, claims for declaration of noninfringement, claims for misrepresentation, counterclaims related to the same transaction or occurrence, and legal or equitable defenses available under copyright law.[150] While the CCB could amplify the general amount of copyright disputes, addressing any fallouts of breach of contract issues in this small-claims regard could likely be handled through various terms in the agreements themselves as well as any assurances, warranties, or penalties for breach. Therefore, the more complex copyright matters that have breach of contract elements will still have to find a home in federal court, to the satisfaction of those certain artist groups. Simpler, straightforward matters of solo composer A versus solo infringer B are more likely to find the CCB a practical venue for dispute resolution. At the same time, the CCB ensures that music copyright—a rapidly growing and technological field—does not get left behind because it is now equipped with an alternate means for an increasing number of small claims. This means that those who generate less money from their work or who are less monetarily impacted by infringement have a modern means to enforce their rights.[151]

B. *Alleviating Pressure on Federal Courts with the Rise of Copyrighted Musical Works on Streaming Platforms*

The potential for rising numbers of copyright disputes from large amounts of new music in the digital age, coupled with modern day songwriters' financial hurdles and difficulties, will create a massive body of musical works that could overwhelm the federal court system. The CCB is necessary to alleviate this pressure.

In today's copyright world, "[t]he internet has forever changed the landscape of the music industry."[152] It is relatively easy to create a new recording or composition in little time and upload it to any

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[150] *CCB FAQ, supra* note 74.

[151] *See CASE Act: Support Independent Music Creators' Rights*, RECORDING ACAD., https://www.recordingacademy.com/advocacy/issues-policy/case-act (last visited Sept. 10, 2022) ("Songwriters are one of the most impacted by the high cost of federal litigation because the individual value of their works or transactions is often too low to warrant the expense of litigation and most attorneys won't even consider taking these small cases.").

[152] Eric Bernsen, *The Top 10 Digital Platforms to Upload, Share, and Promote Your Music*, SONICBIDS (June 29, 2015, 10:00 AM), https://blog.sonicbids.com/the-top-10-digital-platforms-to-upload-share-and-promote-your-music.

number of music sharing or streaming sites.[153] Two of the most popular are SoundCloud and Spotify.[154] SoundCloud is an open streaming music platform known for its droves of independent creators.[155] It is made readily available for uploads of essentially any new musical work from any creator.[156] SoundCloud is particularly prominent among lesser-known and small-time artists, and several famous artists began their careers by uploading early works to SoundCloud.[157] In the last three years, SoundCloud has seen its number of music creators rise each year with anywhere from two to three million new creators, bringing the 2020 total to twenty-five million song creators.[158] As for the songs themselves, since 2015, the number of songs uploaded to SoundCloud have doubled from 100 million to 200 million in 2020, with a twenty-million-song increase from 2019.[159]

The steady increase of both creators and songs on SoundCloud shows no signs of slowing down and speaks to the ease of creation in the digital age. Because SoundCloud is known for its ease of access and upload and used largely by independent artists, ones without representation or other professional publication, there is an ever-increasing chance that anyone can access their work and exploit it. With the rising number of music creators and volume of works on the world's premier streaming and uploading platform, the chances for copyright infringement increase as well. With the federal court standards on subconscious creation—copying of "feel," and disputes over music's structural components as copyright—the more works there are, and the higher the chance that these elements and actions overlap and result in a violated right, intentionally or unintentionally. Opponents could argue that the subconscious standard is too broad and lowers the evidentiary bar far enough that it is hard to have

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[153] *See* Melissa Daniels, *Why Independent Musicians are Becoming the Future of the Music Industry*, FORBES (July 10, 2019, 7:08 PM), https://www.forbes.com/sites/melissamdaniels/2019/07/10/for-independent-musicians-goingyour-own-way-is-finally-starting-to-pay-off/?sh=5c57614914f2 ("For artists, technological advancements that allow them to share their work with the world fuels their ability to make music and build their career at their own pace, and with their own style.").

[154] Bernsen, *supra* note 152.

[155] Sehaj Dhillon, *SoundCloud Revenue and Usage Statistics*, BUS. APPS (July 5, 2022), https://www.businessofapps.com/data/soundcloud-statistics.

[156] *See id.*

[157] *See id.*

[158] *Id.*

[159] *Id.*

originality,[160] thus leading to a problematic influx of CCB infringement claims. In that sense, the hope is that a work's value stays expensive to keep a suit in federal court. Given that many of these works, however, are not economically successful but copyrighted material nonetheless, the CCB is an important, welcome forum to handle a high volume of small infringement claims, whereas federal courts would either be bogged down by a growing docket or too expensive a medium to facilitate for a run-of-the-mill SoundCloud artist.

More people use, and will be more familiar with, Spotify than SoundCloud, and yet the platform still features works from a wide array of artists, from superstars to independents.[161] Spotify has seen its number of creators explode from five million total in 2019 to eight million in 2020, seven million of those being songwriters.[162] Spotify's volume is also growing at a steady rate: the number of tracks uploaded to Spotify per day has increased from 40,000 to 60,000 in that same time span.[163] Coupled with the rise in artist and song volume is the shocking statistic that currently ninety percent of Spotify streams come from a mere 57,000 artists—less than one percent of all Spotify creators.[164] Even more alarming is that only 7,500 artists on Spotify make more than $100,000 per year from streams.[165] This is likely due in part to the low stream payouts: currently, Spotify streams pay anywhere from $0.003 to $0.005 per stream.[166] For Soundcloud, the average per-stream pay is $0.003275.[167]

The Spotify data suggest that lesser-known and/or independent artists (with lower music economic gain) face financial problems

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[160] *See* Robin Feldman, *The Role of the Subconscious in Intellectual Property Law*, 2 HASTINGS SCI. & TECH L.J. 1, 9 (2010).

[161] *See* Dee Lockett, *Spotify Direct Upload Feature, Explained*, VULTURE (Sept. 26, 2018), https://www.vulture.com/2018/09/spotify-direct-upload-feature-explained.html (noting that unsigned artists still have mechanisms to get on Spotify, and after that, any uploads are free for anyone).

[162] Tim Ingham, *Over 60,000 Tracks Are Now Uploaded to Spotify Every Day. That's Nearly One Per Second*, MUSIC BUS. WORLDWIDE (Feb. 24, 2021), https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] Sean Fitzjohn, *Streaming Payouts Per Platform & Royalties Calculator*, PRODUCER HIVE (Aug. 3, 2022), https://producerhive.com/music-marketing-tips/streaming-royalties-breakdown.

[167] *Id.*

under a CCB-less system on two fronts if faced with a copyright infringement issue. First, the whole work itself, as the stream profit data above suggest, is likely not worth much unless an artist is in the top one percent of Spotify creators, since Spotify still welcomes uploads from a large number and variety of artists. Many, particularly independents, struggle to be financially sound in the current music industry.[168] Because the works themselves are not generating a lot of revenue, infringement damages will be either minimal and fall into the statutory relief limits or not be substantial enough to be proven under actual damages as loss of profit to sustain potentially higher relief. Second, before a remedy for infringement can even be reached, the suit itself must be brought and litigated, which as previously stated incurs great expense.

The CCB provides a form of dispute resolution beneficial to music infringement cases in regard to financial affordability. The goal of the CCB is very clear in the sense that it will be a streamlined, efficient, and affordable process. Music works from a seemingly never-ending flow of creators are not always heavy revenue generators, but artists still take great pride in their work, can profit from their creations, and are entitled to copyright protection and remedies for unauthorized usage. The high costs of federal litigation would dwarf the value of many works or damages suffered, so having a better chance of remedy through the CCB is in the best interests of justice.

VI. CONCLUSION

Music creation is expanding at a blistering pace in the digital age, but not every artist enjoys commercial or financial success—far from it. Copyright infringement becomes more likely by the day thanks to an ongoing flood of new musical works, spurred on by technological advances and ease. The federal court system needs to rely on—and retain—a streamlined, procedurally efficient forum like the CCB to handle rising copyright infringement matters that otherwise would be too expensive and impractical to bring in federal court. The CCB has notable implications in procedure—some positive and some negative—but mostly positive from being in line with federal court

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[168] *See* Daniels, *supra* note 153 ("[E]arnings still remain a big obstacle for those who wish to make their living in music—the survey found about eight in 10 musicians do not earn enough from their music careers to not worry about their financial situation. About half of independent and label artists alike say they often have cash flow problems because their income isn't predictable.").

system goals and processes. Overall, the CCB will have a positive effect on protecting musical creators and their works.