

**Before the
United States Copyright Office
Library of Congress
Washington, D.C. 20559**

In the Matter of:)
Copyright Claims Board:) Docket No. 2021–9
Representation by Law Students)
and of Business Entities)

**Comments of Technology and Intellectual Property Clinical Law Professors
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Amanda Levendowski · Phil Malone · Art Neill · Vicki Phillips · Jef Pearlman
Blake E. Reid · Jason Schultz · Erik Stallman**

The above-listed technology and intellectual property clinical law professors respectfully comment on the Office’s December 30, 2021 Notice of Proposed Rulemaking (NPRM) in the above-referenced docket on law student participation in Copyright Claims Board (CCB) proceedings.¹

As directors of a diverse group of clinics that often represent clients on matters involving copyright law and policy and often before the Copyright Office,² we have a range of concerns that likely will limit our willingness and ability to participate in CCB proceedings. While we have a wide array of perspectives on the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act)³ and the Office’s implementing regulations as a matter of sound policy, we write here for the sole purpose of expressing our shared agreement that CCB proceedings are not well-suited to clinic participation for reasons that go beyond the NPRM’s specific questions on student eligibility requirements and a clinic directory.⁴

More specifically, our concerns center on the CASE Act’s opt-out mechanism,⁵ which can yield outcomes ranging from immediately bringing a dispute to a halt to escalation of a case into complex, high-stakes federal court litigation with the possibility of

¹ 86 Fed. Reg. 74,394 (Dec. 30, 2021) (“NPRM”), <https://www.govinfo.gov/content/pkg/FR-2021-12-30/pdf/2021-28154.pdf>.

² See generally Cynthia L. Dahl and Victoria F. Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 Clinical L. Rev. 95 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184486 (providing a detailed survey of tech and IP law clinics).

³ Pub. L. No. 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

⁴ See NPRM, 86 Fed. Reg. at 74,395–96.

⁵ See 17 U.S.C. § 1506(i).

significant statutory damages. The dynamics around the opt-out mechanism pose significant limitations on the kinds of clients that clinics can represent in CCB proceedings and the possibilities for pedagogically sound learning opportunities for law student attorneys.

While tech and IP clinics have a wide range of goals and criteria in choosing which clients to represent *pro bono* given clinics' limited resources, most clinics consider the financial circumstances of clients.⁶ Many tech and IP clinics typically do not represent clients with the resources to finance the complex federal court litigation required to prosecute and defend copyright infringement and non-infringement claims. Tech and IP clinics also typically lack the resources to handle such litigation in any significant volume.⁷

Clinics typically also consider whether a particular representation will afford a challenging but reasonable and constructive learning opportunity for a law student attorney with limited experience to meaningfully represent a client. A representation of a claimant or respondent that ends shortly after it begins with a rote opt-out notice is likely to be of only limited pedagogical use, while a representation that escalates to full-fledged copyright litigation in federal court is typically beyond the reasonable pedagogical boundaries for our clinics and the associated learning objectives for law student attorneys.

The CASE Act's opt-out provision makes it unlikely that cases regularly will arise that satisfy these considerations. Instead, we suspect that the following scenarios are likely to recur:

- **Need-Based Infringement Claimant as Client versus Well-Resourced Respondent.** Where a client with limited resources seeks to bring an infringement claim⁸ against a well-resourced respondent, the most likely outcome is that the respondent will simply opt out of CCB proceedings on the presumption that the claimant will not be able to sustain federal court litigation. As a result, it is not clear that clinics would be likely to advise clients to bring such actions in the first instance, nor that law student attorneys preparing such matters would gain meaningful experience as their cases typically would evaporate as a matter of course.

⁶ The Office also proposes to require that law student participation in CCB proceedings be *pro bono*. NPRM, 86 Fed. Reg. at 74,395.

⁷ See Dahl and Phillips, *supra* note 2 at 112, 117 (explaining that only about 30% of surveyed tech and IP clinics did any kind of state or federal litigation, which accounted on average for only about 11.6% of surveyed clinics' dockets, and which often focuses on a range of other non-copyright issues).

⁸ See 17 U.S.C. § 1504(c)(1).

- **Need-Based Infringement Claimant as Client versus Limited-Resource Respondent.** On the other hand, if a client with limited resources were to bring an infringement claim against a respondent who lacks the resources to retain counsel, a clinic then would be providing *pro bono* assistance to one party against an unrepresented party, knowing that the respondent likely would choose to opt out if they had access to representation and good legal advice. Our clinics typically seek to avoid the moral and ethical quandaries that arise from providing *pro bono* representation in adversarial proceedings against other parties that lack access to counsel,⁹ and particularly where another party's continued participation hinges significantly on their lack of information about their rights.
- **Need-Based Infringement Respondent as Client versus Limited-Resource Claimant.** Where a claimant brings an infringement claim but appears to lack the resources to sustain federal court litigation, the likely advice to a respondent client in most cases would be to opt out. In addition to the aforementioned problems of representing a client *pro bono* against an unrepresented party, filing a *pro forma* opt-out notice provides little opportunity for law student attorneys to learn and lacks meaningful pedagogical value.
- **Need-Based Infringement Respondent as Client versus Claimant with Unclear or Significant Resources.** If an infringement claimant's resources are unclear or significant, law student attorneys with little experience would be put in the position of immediately advising a need-based respondent on potentially the most consequential decision of the representation: whether to opt out. If the client follows the law student attorney's advice to opt out, the client risks the possibility of full-fledged litigation in federal court, for which the clinic likely will be unable to provide assistance, and ruinous statutory damages the client likely cannot afford.¹⁰ On the other hand, if a client follows the law student attorney's advice to defend themselves before the CCB, they still risk significant damages that they likely cannot afford.¹¹
- **Need-Based Declaratory Judgment Claimant as Client.** If a client chooses to proactively pursue a declaratory judgment of noninfringement before the CCB,¹² they risk the likelihood of a limited-resource respondent bringing an

⁹ See, e.g., Colorado Rule of Professional Conduct 4.3 (describing the various ethical obligations of attorneys in dealings with third parties).

¹⁰ See 17 U.S.C. § 504(c)(1)–(2) (providing statutory damages up to \$150,000 per work infringed).

¹¹ See 17 U.S.C. § 1504(e)(1)(D) (allowing up to \$30,000 in damages per proceeding and attorneys' fees of up to \$5,000 or even more under 17 U.S.C. § 1506(y)(2)).

¹² See 17 U.S.C. § 1504(c)(2).

infringement counterclaim¹³ from which the claimant apparently cannot opt out,¹⁴ or putting a well-resourced respondent on notice of a possible controversy and handing the respondent the ability to opt out and bring an infringement suit in federal court with which the clinic cannot assist.¹⁵

Even when cases present a viable set of representational and pedagogical circumstances to proceed to adjudication before the CCB, we are concerned that the degree of complexity may be beyond the capacity of our clinics to handle without taking matters out of our law student attorneys' hands. While a full accounting of the CCB's procedure and substance is beyond the scope of this comment, we note that adequately representing a client before the CCB will require law student attorneys to be trained in the full range of copyrightability, infringement, defense, and other issues that arise under substantive federal copyright law,¹⁶ an array of federal evidence¹⁷ and civil procedure concepts,¹⁸ and the complex administrative and constitutional law concepts that may be necessary to lay a record to pursue post-adjudication appeals to the federal

¹³ See 17 U.S.C. § 1504(c)(4).

¹⁴ See 17 U.S.C. §§ 1506(i) (limiting opt-out rights to “respondents”), 1501(4) (defining “respondents” to include claimants under 17 U.S.C. § 1504(c)(1)–(3) and not including the targets of “counterclaims” under 17 U.S.C. § 1504(c)(4)).

¹⁵ We presume similar dynamics may persist for misrepresentation claims under 17 U.S.C. § 1504(c)(3).

¹⁶ See 17 U.S.C. § 1504(c)(1) (permitting infringement claims under 17 U.S.C. § 106), (2) (permitting claims for declaration of non-infringement), and (5) (allowing all “legal and equitable defenses” under Title 17 or “otherwise permitted by law” in response to a claim or counterclaim).

¹⁷ See 17 U.S.C. § 1506(o) (allowing all relevant documentary and non-testimonial evidence) and (p) (allowing all relevant testimonial evidence, including expert witnesses upon a showing of good cause); *Copyright Claims Board: Active Proceedings and Evidence*, Notice of Proposed Rulemaking, Docket No. 2021–8, 86 Fed. Reg. 69,890, 69,896, 69,905, 69,908–09 (Dec. 8, 2021) (“Active Proceedings and Evidence NPRM”) (allowing the “flexible” acceptance of evidence in CCB proceedings but also permitting “persuasive” arguments under the Federal Rules of Evidence under proposed Rule 222.1 and adding numerous ad hoc rules of evidence under Proposed Rule 222.19).

¹⁸ See 17 U.S.C. § 1506 (importing various civil procedure concepts including commencement of proceedings, initial review by a quasi-judicial official of claims and counterclaims, service of notice and claims, opt-out, discovery, dismissal, and settlement); *Active Proceedings and Evidence NPRM*, 86 Fed. Reg. at 69,896, 69,904–17 (similarly permitting “persuasive” arguments under the Federal Rules of Civil Procedure under Proposed Rule 222.1 and proposing some 15,000 overall words of procedural and evidence rules).

courts.¹⁹ The extent of these topics may limit students' ability to participate meaningfully and may further preclude the participation of clinics.

Finally, many clinics aim to square their public service missions with their limited capacity to serve deserving clients by taking on those whose cases are likely to advance the state of the law more broadly and advance the interest of others by setting precedent. The non-precedential nature of cases under the CASE Act, even for future CCB proceedings,²⁰ means that the limited number of adjudications that proceed to completion will be of limited value to the claimants and respondents whom clinics are unable to serve. Completed adjudications nevertheless will divert resources from other clinic projects that more directly serve marginalized communities that include rightsholders and fair users of copyrighted works, among others.

To whatever extent the Office is contemplating proceedings that will require a large number of CCB litigants to seek *pro bono* counsel from clinics, the Office should be mindful of the fact that clinics likely will be unable to fill the significant access-to-justice gap that the opening of proceedings before the CCB may create. The Office should instead coordinate with Congress to develop a proceeding that is narrowly tailored to allow copyright "small claims" to proceed as they do in many typical small claims tribunals: without complex procedures and requirements that create a need for participants to engage sophisticated legal representation.

Should the Office nevertheless choose to proceed on its current track, it should ensure that law students and clinics can participate in the same way they would in most federal courts—without having to navigate burdensome ministerial barriers to participate—and that clinics can choose whether to be listed in a directory of participating clinics separate from their ability to appear in any given proceeding.

¹⁹ See generally Pamela Samuelson and Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Claims Tribunal*, 33 Berkeley Tech. L.J. 689 (2018), https://btlj.org/data/articles2018/vol33/33_3/Samuelson_Web.pdf.

²⁰ See 17 U.S.C. § 1507(a)(3) (noting that "any determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board" except for limited purposes related to relitigation and appeal).

Respectfully submitted,

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