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The Copyright Claims Board: Good News or Bad News for Communication Scholars?

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The U.S. Copyright Claims Board (CCB), created in 2020 by the Copyright Alternative in Small-Claims Enforcement Act, creates a nonjudicial administrative venue to resolve copyright infringement claims up to $30,000. Supporters claim it will help "little guy" creators protect their work. Detractors claim that it will increase corporate intimidation and copyright trolling. We surveyed communication and Internet scholars to assess appetite for risk when challenged for an appropriate fair use and legally permitted reuse of copyrighted material. We found that the CCB does not serve its stated purpose because of scholars' fear of legal entanglements. Nor will it offer scholars a way to protect copyrighted work because well-informed defendants are most likely to opt out of the venue. We believe the actions of the nascent CCB deserve scrutiny from communication and Internet scholars particularly because the Copyright Office must report to Congress on its effectiveness after three years.

Keywords: copyright, communication, scholarship, fair use, Copyright Claims Board, right to research, freedom of expression

Copyright policy is inextricably entangled with the work of communication researchers (Sinnreich & Aufderheide, 2015). Copyright restrictions can limit scholars' topics, sources, and methods (Ad Hoc Committee on Fair Use and Academic Freedom, International Communication Association, 2010). Even in territories, such as the United States, where the copyright doctrine of fair use prevails, researchers experience difficulty in doing their research around copyright. Recent legislation may worsen the situation.

Here we examine a new U.S. law, the Copyright Alternative in Small-Claims Enforcement (CASE) Act (17 USC §§ 1501–1511), now part of the Copyright Act. The CASE Act creates a new venue for resolving copyright disputes for up to $30,000, the Copyright Claims Board (CCB), located within the Library of Congress at the Copyright Office. Using results from a survey asking Internet scholars how much financial risk they were willing to assume in doing their academic research, we analyze how the CASE Act affects academics both as plaintiffs and defendants in copyright infringement cases. We conclude that in both situations, academics are likely to be negatively affected, without enjoying the purported benefits of the new law. Comparisons with administrative and special courts in other territories do not mitigate our concern. We recommend that academics participate in ongoing policy processes shaping the CASE Act, to minimize

harm and preserve academic freedom. We also alert non-U.S. intellectual property scholars to the threat of harmonization attempts in the future.

Framework for Discussion

The analysis we provide here is informed by legal scholarship on the chilling effects of both copyright infringement prevention and resolution processes, both in the legal structures and processes involved (Bridy, 2016; Seltzer, 2010) and also in the way that potential creators understand their rights under the law (Aufderheide & Jaszi, 2018; Sinnreich, Latonero, & Gluck, 2009; Tushnet, 2011). The internalization of exaggerated risk assessment for copyright infringement, for instance, is prevalent both among communication scholars (Sinnreich & Aufderheide, 2015) and in other fields (Burkart, 2009; Lessig, 2004; McLeod, 2007; McLeod & Kuenzli 2011; Tushnet, 2011; Vaidhyanathan, 2001). We also draw on a historical analysis of the evolution of the ever-more expansive copyright monopoly in the United States (Patterson & Lindberg, 1991) and on the history of corporate intimidation of potential users and consumers (Gillespie, 2009; McLeod, 2007).

Thus, we approach the creation of a new venue for copyright disputes primarily with questions about the ways this venue may or may not contribute to chilling effects, including the inhibition of new cultural creation.

The Importance of Fair Use and Related Exceptions for Academics

One way to assess the value and implications of the CCB is to see what effect it might have on the copyright doctrine of fair use. Fair use is the right under U.S. law (as well as Israeli, Philippine, and South Korean laws) to reuse copyrighted material without licensing it or getting permission, in certain circumstances. It applies to vast areas of routine academic work, including selecting copyrighted material to use in experiments, as illustrations, as demonstrations, to quote for reference in an academic argument, and to use for "nonconsumptive" (sometimes referred to as "big data") research. It has become ever-more valuable to creators, consumers, and scholars, as copyright monopolies have become longer, covered more material, and as copyright has become the default on creation (Aufderheide & Jaszi, 2018).

Fair use cannot be asserted affirmatively, only used as a defense against claims of infringement—which has led some scholars (Lessig, 2004) to criticize it as too risky to be of consistent use. This critique is misguided since the user's right of fair use is in a category of rights that only need to be invoked when challenged, such as the right to self-defense. Further, fair use interpretation is reliable in the contemporary legal environment. Interpretation of fair use by the courts has been increasingly consistent since the publication of a groundbreaking article by judge Pierre Leval (1990), which significantly clarified how the four factors described in the fair use statute should be interpreted and balanced against one another. This consistency has been demonstrated in the robustness of several codes of best practices in fair use created by academic organizations, including by the Association of Research Libraries, Program on Intellectual Property and the Public Interest, Washington College of Law, and Center for Media & Social Impact (2012), the College Art Association (2015), International Communication Association (2010), open courseware specialists (Bays et al., 2009), Sinnreich and Aufderheide (2015), software preservationists (Association of

Research Libraries, Center for Media & Social Impact, & Program on Intellectual Property and the Public Interest, Washington College of Law, 2018), and a coalition of memory institutions (Program on Information Justice and Intellectual Property, Washington College of Law, Center for Media & Social Impact, & Berkeley Digital Library Copyright Project, 2014). All these codes are grounded in today's consistent fair use logic, rooted in established case law, and none has ever been challenged.

Best practices codes have, by educating academics, affected scholarship. Scholars have employed fair use to persuade publishers to allow them to publish unlicensed illustrations and demonstrations in academic publishing. Academic publishers, including Yale University Press' art history line, have changed their guidelines to permit fairly used illustrations. Librarians have been able to expand student and researcher access to copyrighted material within learning management systems. Dozens of courses have been made available worldwide, under open access terms, because of the increased clarity around how fair use works. Archives have also expanded remote access to entire collections, including for videos, photographs, and software (Aufderheide & Jaszi, 2018).

As scholarship is performed increasingly using digital records, analyzing large bodies of data, and/or sharing via digital publication platforms (Handke, Guibault, & Vallbé, 2021), access to the user's right of fair use becomes ever-more central to scholarly practice.

In jurisdictions where fair use is not encoded in law, similar exceptions are highly valuable to scholars. Canadian fair dealing is possibly the most robust of the fair-dealing regimes common throughout the Commonwealth. In some areas, the right of quotation also functions to provide scholars ways to both access and share work that incorporates copyrighted material.

How the CASE Act Came to Be

Despite the importance of limits on copyright monopolies to incentivize both the free flow of information and the production of new work building on previous work, large publishers have primarily spent the Internet era attempting to expand copyright protection to discourage and punish copying (Sinnreich, 2013). Fair use is inevitably an innocent bystander in these efforts to shore up pre-digital business models and to expand copyright control by publishers. Although all large media companies routinely employ fair use, they discourage its use by other actors and even conduct misinformation campaigns (Gillespie, 2009).

For years, publishers have heavily promoted the CASE Act (Authors Guild, 2019). Among the industry trade groups that supported the bill, as recorded by the Open Secrets website, are the National Academic of Recording Arts and Sciences, the U.S. Chamber of Commerce, the Motion Picture Association of America, the Association of Magazine Media, and the Recording Industry Association of America. Trade associations representing photographers, songwriters, and social media creators also joined the Authors Guild and Copyright Alliance in supporting the passage of the bill (Olson, 2020).

The CASE Act creates a nonjudicial small-claims resolution space at the Copyright Office, whose position within the separation of power is unclear. Some argue that it is in the executive branch, others that it is in the legislative branch. Assuredly, it is not in the judicial branch, and neither is this venue.

Publishers argued using a rhetorical strategy that purports to advance justice and equity in the creative industries. They addressed a genuine problem in copyright enforcement: Litigation is prohibitively expensive for all but the wealthy and for those whose gains will be more than the sizeable cost. This does affect many small businesses, including sole proprietors. Creators indeed face problems under existing copyright law if their work gets used unfairly and without permission (Samuelson & Wheatland, 2009). Among communication scholars, these might be authors, curriculum creators, or multimedia creators. They may not have the resources to engage a lawyer, and they may not even know their rights under the law.

However, the pre-CASE Act situation was not hopeless for the little guy. Creators who do know their rights have been successful in recovering payment and even damages from corporate infringers, as has happened to filmmakers who had created their own code of best practices in fair use (Anonymous, personal communication, March 17, 2018, August 4, 2020; Center for Social Media, Association of Independent Video and Filmmakers, International Documentary Association, & Program on Intellectual Property and the Public Interest, 2005). Since this recovery of payment and damages typically happens in a settlement, rather than in a court decision, little is known publicly about the specifics of such arrangements.

The publishers' proposal to solve the small-actor problem was to create a venue where small claims could be brought for low cost (Rasberger, 2019). Copyright-flexibility advocates, including some authors and creators (Sheehan, 2019), argued against the creation of such a venue. They foresaw that such a venue would exacerbate an already fraught atmosphere of intimidation surrounding copyright industries, by creating one more legal option for rights holders to threaten users with. They feared that large corporations already notorious for blanketing platforms such as YouTube with unverified infringement claims would be able to turbo-charge their demands.

They also argued that would also encourage and empower "copyright trolls," law firms that find copyrighted material on the Internet and threaten users with lawsuits (Greenberg, 2014). These firms may work directly for rights holders, often for a large percentage of the potential award or settlement, or they may go on fishing expeditions of their own. The recipients of such threatening e-mails and notices often do not know whether their use falls under the fair-use clause of the Copyright Act, and frequently settle such disputes with hundreds or thousands of dollars rather than spending money to defend their rights while risking further economic harm if they do not prevail (Electronic Frontier Foundation, 2018). With the lower costs of bringing an infringement suit to this alternative venue, critics argued, such trolls would be incentivized to threaten and initiate a far larger volume of infringement suits, placing academics, artists, and other users of third-party copyrighted content at a much greater risk of being sued, regardless of their fair-use rights.

Despite these critiques and concerns, the CASE Act had strong Congressional support, as has been routine for copyright holder-friendly legislation in the United States for decades. In 2019, the House overwhelmingly passed the CASE Act, and the Senate mirrored it (Hickey, 2019). In late December 2020, without discussion in either House of Congress, the CASE Act was quietly slipped into must-pass, COVID-19 relief-related legislation (Electronic Frontier Foundation, 2020).

Terms of the CASE Act

The CASE Act proposes a new venue to bring claims of copyright infringement, the CCB. To a certain degree, this creation can be seen as part of a worldwide trend in the creation of specialized intellectual property (IP) courts, typically focused on patents but sometimes also trademarks. Germany's Federal Patent Court is an early precursor, extant since 1961 (Lee & Zhang, 2017). Such courts have been created, as Guttel, Harel, and Procaccia (2022) nicely summarize, for reasons that include a need for specialized knowledge, a concern to centralize and/or make more consistent judicial decision making and efficiency. Among the problems researchers have identified with them are isolation from larger legal developments, capture by special interests, and ideological tendentiousness. Chinese specialized IP courts have addressed inconsistency and the need for expertise; they have also presided over a rapid increase in cases (Ning, GEN Law Firm, & He, 2022) although this may reflect a growing concern about IP rights in a nation that has been increasingly producing IP-rich products (Zhang, Li, & Xu, 2022). India's Copyright Board failed, in part because of questions about the executive control of judicial processes (Agarwal, 2017; Basheer, 2016).

The CCB is distinctive from these specialized courts because it is not a court. As well, it is a venue only for claims up to a certain level, and its decisions cannot be appealed. Instead of going through the judicial system, it creates an extrajudicial tribunal located within the Copyright Office (an institution that is ambiguously either in the executive or legislative branch, depending on how you argue, but definitely not the judicial branch) rather than the federal courts. As the law makes clear, the venue will be available for claims up to $30,000 (a little less than half the median income of an American household), and only for works registered at the Copyright Office. For claims up to $5,000, the process will be summary judgment (that is, there is no redress, no appeal process within the CCB). The process is an administrative one. The decision makers are currently Copyright Office lawyers, and probably will be in the future. Because it is a nonjudicial venue, judges will not be involved.

The CCB process has an important opt-out clause. A defendant can freely opt out of this nonjudicial venue although they may then be vulnerable to the risk of facing a federal lawsuit. They have to announce their intention to do so within 60 days. This opt-out clause, in previous debating over the bill, was frequently used, during the passage of the legislation, to justify any other concerns about the plan.

Throughout 2021–2022, the Copyright Office worked out specifics and logistics to implement the law through an open process. Among the issues it addressed, with input from multiple stakeholders (including all the stakeholders who conducted arguments before passage), are the requirements for initial filing; the language of the notice of the opt-out clause; who decides what is "unsuitable"; how people are to be notified that they are being charged with infringement; how the putatively infringing work should be referenced in charging documents; exactly how people can opt out; and other procedural steps (U.S. Copyright Office, Library of Congress, 2021). These terms may be revised over time. In three years, the Copyright Office must provide a report to Congress about the effectiveness of the CCB.

Will the CCB Work for Communication and Internet Researchers?

We wanted to test the premise of the publishers that the small-claims venue would benefit the small actor. We asked two research questions:

RQ1: What are the likely consequences of the CASE Act for U.S.-based Internet researchers who rely on fair use as a routine element of their professional practice?

RQ2: What are the likely consequences of the CASE Act for U.S.-based Internet researchers who may seek to bring an infringement suit against a large company for unpermissioned use of their own work?

Methods

Although fair use is widely employed across a broad array of creative industries and professions, and although the CCB is a new venue for any plaintiff seeking damages for infringement below $30,000, we chose to focus here specifically on communication and Internet researchers as a population. We made this decision for several reasons. First, because we are communication and Internet scholars, and thus able to speak directly to the needs and expectations of these professionals. Second, because communication and Internet research focus frequently on digital production platforms, consumption behaviors, and distribution networks. And, finally, because communication Internet researchers are typically not full-time employees of large, copyright-centered corporations, which makes them the ostensible principal beneficiaries of the new procedures and venues established by the CASE Act.

To answer RQ1, we fielded a brief survey of communication and Internet research scholars (n = 199). For this study, because we focused on a specific dimension of American copyright law, we only considered responses by U.S.-based scholars (n = 139). The survey was fielded via the Web-based Qualtrics platform, and respondents were recruited via professional networks such as the Association of Internet Researchers and the International Communication Association's Communication Law and Policy division, as well as via the authors' personal networks and social media accounts. Though the sample is hardly random, it is fairly representative of different institutional positions (and, therefore, risk profiles), including substantial representation by students and post-docs (19.4%), nontenure track faculty (13.7%), tenure-track faculty (14.4%), tenured faculty (41.0%), and non-university affiliated researchers (11.5%). We were granted expedited Institutional Review Board review by our own research institution for this survey, based on its lack of personally identifiable information, focus on working adults, and absence of potentially incriminating information (such as criminal activity).

In addition to the two demographic questions regarding nationality and institutional position, we only asked two substantive questions related to the CASE Act:

RQ1: If you used a copyrighted work for your research or scholarly activities without licensing it, under a legal exception such as Fair Use, Fair Dealing, or Right of Quotation, how much financial risk would you feel comfortable with, in case someone decided to sue or threaten to sue you anyway? (In USD)

RQ2: How confident are you about the rights of researchers and scholars to use copyrighted work without explicit permission in your country, via legal provisions like Fair Use, Fair Dealing, or Right of Quotation?

Though this issue has many nuances and would merit further investigation with a more elaborated survey instrument as well as a larger and more generalizable sample of creative and scholarly professionals, we decided to keep this iteration of the project simple by essentially reducing the research question/RQ1 to a single key metric. First, we sought to establish whether Internet researchers report any amelioration of perceived risk as defendants under the terms of the CASE Act in contrast to the traditional judicial venue for a copyright infringement case. Second, we also aimed to discover whether confident knowledge of fair-use rights would play a role in mediating perceived risk.

To answer RQ2, we relied on our own domain expertise, based in large part on previous empirical research into copyright attitudes and practices among creative professions, to develop a thought experiment, subjecting the claims of CASE Act proponents to logical scrutiny.

Results: Scholar as Defendant

We considered first the scholar as a potential defendant in a copyright infringement case—the most likely scenario. As described above, our survey sought to gauge what level of financial risk communication and Internet scholars deemed acceptable in a scenario where they believed they were within their fair-use rights. We deliberately elected not to differentiate between *personal* and *institutional* financial risk, for two reasons: First, because most institutions do not share liability associated with faculty and student copyright infringement, and second, because if there is any potential institutional support in such cases, it is unknown to many faculty members and students, making it impossible to distinguish the two forms of risk analytically when answering a survey question.

The results were stark. Nearly half of the respondents (43.1%) were unwilling to take on *any* financial risk, even in a hypothetical scenario contingent on a confident fair use while most of the rest (43.8%) were only comfortable with a risk level below $10,000. The difference between liability risk levels of $30,000 (the CASE Act maximum) and $150,000 (the maximum trial award for statutory damages for one act of infringement) was functionally nil, with 2.2% of respondents selecting values in this range.

About 71% of U.S. scholars said that they are confident or somewhat confident employing fair use (n = 99)—a figure that is higher than the general population, but still one that demonstrates that even members of an association that created its own fair-use best practices guide could learn how to empower their research practice with a crucial copyright doctrine (Sinnreich & Aufderheide, 2015). Even for confident scholars, the risk tolerance is still very low. Of these respondents, 39% would not accept any financial risk for an established fair use, and another 44.4% said they would only take on a risk level below $10,000. Among these scholars confident of fair-use, only 3.3% said that they felt comfortable at the $30,000 risk level but uncomfortable at the $150,000 risk level. We believe this shows that understanding the law does not improve the perceived benefits of the CASE Act venue relative to traditional copyright infringement litigation.

Job security did not improve risk tolerance much among our respondents either. Among U.S.-based tenured faculty (n = 57), 35.1% said they were not comfortable with any financial risk while exercising their fair-use rights, and another 50.9% said they would only accept a risk below the level of $10,000. Not a single one of these respondents said that the distinction between a potential liability level of $30,000 and $150,000 made a difference in their willingness to exercise their fair-use rights to pursue their scholarship. In other words, for the most financially secure Internet scholars, the CASE Act provides zero measurable benefits through its reduction in the maximum level of awards for copyright infringement.

Results: Scholar as Plaintiff

As we have established, there is no evidence that the CASE Act's purported benefits to defendants translate to actual confidence among communication and Internet scholars in exercising their fair-use rights. But scholars can also be rights holders, and the new law putatively also offers help to creators seeking to protect their work from infringement because it potentially lowers the costs associated with bringing a suit.

However, it is extremely unlikely that communication and Internet scholars, or any other small and independent creators, will see such benefits because of the clause in the CASE Act allowing defendants to opt out of the nonjudicial venue. Thus, any corporate actor challenged by a scholar would merely have to opt out. Typically, corporate actors are represented in such decisions by well-informed lawyers, unlike the situation of the average communication or Internet scholar. They will be able to make informed calculations not only about the seriousness of the infringement but also about the real risk of continuing to an actual lawsuit. As was the case before the passage of the CASE Act, the potential for a scholar to pursue a federal lawsuit against anyone allegedly infringing on their work is vanishingly small since the costs of litigating would be prohibitively high and the outcome uncertain.

Initial Filings

At the time of writing, in July 2022, we have only a month of results from initial filings at the CCB. They generally confirm our hypothesis that this venue is valuable to corporate actors, but cannot confirm more than that. Within a month, the CCB received 58 complaints, which bespeaks an awareness of the process that shows close watching. As Eric Goldman (2022), who analyzed the available (but sparse) data, noted, the biggest group of claimants was photographers, a group that was highly vocal in supporting the CASE Act. Music, artwork, movies, and literary works made up almost all the rest. Several law firms familiar with other copyright legislation were early users (Goldman, 2022). The Copyright Office has not, to date, been timely in posting even the data that it has committed to revealing.

Discussion

Thus, for communication and Internet scholars, we gather that the only meaningful consequence of the CCB's creation is likely greater intimidation in the use of copyrighted material. Further, we know from previous research that actual legal and paralegal actions, such as threats on legal letterheads, are only the tip of the intimidation iceberg, with significant chilling effects on the field at large. The CCB is likely to create further opportunities for trolls and other would-be plaintiffs to exaggerate that hypothetical risks.

Other Viewpoints

Our analysis of the CCB's potential value to communication and Internet scholars both agrees with and differs from others, and so far appears to be the only one supported by data. Olson (2020) proposes that the benefits to individual creators would differ according to the circumstances. In the case of a photographer bringing a case against a company that used an unauthorized image in their Instagram feed, they argue that the company would volunteer for the small-claims venue and the photographer would benefit. We believe that this is likely to be true for a very small company or an individual/sole proprietor, but would, however, be counter to a larger company's interests in many situations since refusing the venue has large intimidation benefits. In the second scenario, a photographer whose photo was used by the Trump Organization, Olson hypothesized that the Trump interests would benefit because they would probably choose to opt out and force the photographer's hand. In a third hypothetical, a large corporation against an individual, Olson believes that the large corporation would have the upper hand.

Benson and Vollmer (2021) foresee ominous consequences for researchers and libraries generally, not because of how actual cases would be resolved but primarily because of the intimidation factor, which because of the low cost of entry is far more believable than a letter threatening a federal lawsuit. They argue that it is too easy for litigious rights holders to sidestep the traditional federal court system and file thousands of small claim notices at the CCB against unsuspecting scholarly authors. For as little as $100, a copyright holder can send a notice to a faculty member or student demanding they comply with the small-claims process even though their use of the work would normally be protected under limitations and exceptions to U.S. copyright law, such as fair use. Overeager rights holders would be given free rein to issue demands, and respondents who lose their CCB proceeding would be unable to appeal, as would be available in a judicial process (Benson & Vollmer, 2021).

Conclusion: Policy and Action Opportunities

Scholars, who we believe have much to lose and little to gain from this new venue, have several points of entry into the CCB as policy. First, they can participate in the Copyright Office process, which is public. Large publishers, as usual, track these processes and vociferously participate. It will be important to document how important fair use is to scholarly practice and to show that typically universities do not carry legal responsibility for their scholars' own work. Our survey research documents the level of intimidation of even what the Copyright Office (and large publishers) regard as "small" claims.

Second, scholars can document the uses to which the CCB is put, and the effects—personal, cultural, and scholarly. We anticipate that the new venue will be used in many areas of interest to communication and Internet scholars, e.g., memes, TikTok videos, and "configurable culture" (Sinnreich, 2010).

Third, scholars can act as public intellectuals. They can educate the public, particularly the creator public, about the implications of a process that operates extrajudicially, to further tilt the legal playing field away from the creator and toward large publishers. Further, they can widely share the fact that defendants have the right to opt out of the CCB proceedings. As one legal scholar, Peter Jaszi, told us repeatedly, "Just say 'no'" (Jaszi, personal communications, February 4 & 5, 2021).

Finally, they can educate themselves, their colleagues, students, institutions, and gatekeepers regarding the low risk of competently exercised fair use, as delineated for instance in the International Communication Association's (2010) Code of Best Practices in Fair Use for Copyright Research.

Non-U.S. scholars as well should take note of this innovation. There is a long history of U.S. copyright maximization strategies being promoted through bilateral and international treaties, in the name of harmonization.

In short, scholars must take on the role of policy actors as well as researchers in the copyright arena. Copyright's biggest issues touch immediately on communication and Internet studies research. Research-based advocacy must go hand in hand with empirical research.

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