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COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT (CASE) ACT OF 2019

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Mr. GRAHAM, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 1273]

The Committee on the Judiciary, to which was referred the bill (S. 1273) to amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT (CASE) ACT OF 2019

Despite the existing remedies for copyright infringement and misrepresentation in conjunction with a Section 512 notice provided for in Title 17, there have been repeated complaints regarding their effectiveness in deterring and penalizing such actions. For copyright infringement cases, copyright owners have argued that the existing remedies are only effective for larger copyright owners with higher value claims who have more financial resources to spend on litigation expenses including attorney fees. Small busi-

ness and individual copyright owners with lower value claims often cannot afford the prohibitive expenses associated with initiating and maintaining copyright claims in federal court. Even if they go forward with such suits they must consider the chances of a Pyrrhic victory in court with an award of damages that may cover the lost licensing fee, but not the expenses including attorney fees. Even a complete award of damages may not generate enough of a financial award to attract an attorney willing to work on a contingency fee basis. Similarly, Section 512(f) provides for a rarely utilized cause of action for misrepresentations since the damage amounts are difficult to quantify and the litigation expenses can also be significant. This makes retaining an attorney as challenging as it is for copyright owners facing lower value infringement of their works.

In 2011, the U.S. Copyright Office was requested to study these concerns and issue a report with its recommendations to Congress. After several public comment periods, hearings, and roundtables held over a two-year period, the Copyright Office issued its “Copyright Small Claims, A Report of the Register of Copyrights” in September 2013.¹ The opening paragraph of the Executive Summary states:

*It appears beyond dispute that under the current federal system small copyright claimants face formidable challenges in seeking to enforce the exclusive rights to which they are entitled. The Copyright Office therefore recommends that Congress consider the creation of an alternative forum that will enable copyright owners to pursue small infringement matters and related claims arising under the Copyright Act.*²

The 161-page report first details the operation of the existing remedies system; its challenges; the constitutional issues involved in creating an alternative system; existing State small claims systems for non-copyright claims; and other existing Article I tribunal models such as the Copyright Royalty Board, Patent Trial and Appeal Board, and the U.S. Tax Court, in addition to the non-federal the Uniform Domain Name Dispute Resolution Policy. The Register then recommended either an opt-in or opt-out system housed within the Copyright Office with specific criteria for the types of claims that would be eligible to be heard (infringement claims that do not exceed \$30,000 in statutory damages, declarations of non-infringement, misrepresentations for Section 512 notices, and associated counterclaims) as well as operational procedures. The first legislation based upon the report was introduced in the House in the 114th Congress with additional legislation in the 115th Congress.³ Congress has consistently chosen an opt-out model due to the minimal burden of a respondent to using a prepaid opt-out selection form designed by a Government agency to exercise their opt-out rights. Other Federal agencies have used non-voluntary Article I tribunals to make initial dispute determinations before allowing

¹ *Copyright Small Claims, A Report of the Register of Copyrights*. September 2013. Page 3. Available at www.copyright.gov/docs/smallclaims/usco-small/copyrightclaims.pdf

² *Ibid*, page 3.

³ H.R. 5757 and H.R. 6496 were introduced in the 114th Congress and H.R. 3945 was introduced in the 115th Congress. A hearing on H.R. 3945 was held before the House Judiciary Committee on September 27, 2018.

parties to enter an Article III court. This creates a mandatory financial burden upon all parties to a case. Under the opt-out approach for S. 1273, respondents will actually be able to decide whether they wish to use an Article I tribunal with lower damage caps and likely lower legal costs or remain in an Article III proceeding with potentially much higher damage awards along with much higher legal costs and potential liability.

The process set forth in S. 1273 is intended to be completely voluntary for both claimants and respondents. Neither party should be coerced into participating. Consequently, no party may, by contract or agreement, relinquish or abridge their right to pursue or not to pursue a claim, counterclaim, or defense before the Copyright Claims Board or their right to opt out of a proceeding before the Copyright Claims Board.

A. ESTABLISHMENT OF THE COPYRIGHT CLAIMS BOARD PURSUANT TO S.1273

The members of the Copyright Claims Board are to be appointed by the Librarian of Congress in consultation with the Register of Copyrights. As the head of the agency of record, the Register is best positioned to identify the proper individuals to serve as Copyright Claims Officers. The Register should ensure that those who are considered for the position do not bring pre-existing biases to the Board since each claim requires independent judgement of its merits, or lack thereof, in addition to an independent judgement of the amount of damages that should be awarded, if any. The Register is also responsible for hiring attorneys to assist the operation of the Board.

Once hired, a Copyright Claims Officer may not be removed before the expiration of their term as a result of a particular determination, nor may a performance review be based upon a determination with the exception being how a claim was handled. Independence of Copyright Claims Officers is key, making any violation of this requirement by an Officer grounds for immediate removal. Gross unprofessionalism is also grounds for removal. Although the Copyright Claims Officers and Attorneys are not governed by the Code of Conduct for United States Judges, its canons are instructive for how the Board should identify and avoid potential ethics issues. The Code should also assist the Register and Librarian of Congress in determining whether the actions of an individual Board member rise to the statutory threshold for their removal. Concerns about temperament, professionalism, and the ability to work with other members of the Board and its staff, as well as the Copyright Office and general public, may result in a poor performance appraisal. The Register and Librarian are encouraged to reasonably provide remedial training, if there is a reasonable possibility of its success, in order to keep a qualified individual in service. However, if unprofessionalism continues or rises to the extent that it violates an ethical standard of conduct, the Librarian should remove the Officer.

Once a potential claimant decides to pursue a claim before the Board, they will need to file a claim with the Board along with the

required filing fee.⁴ In recognition that a respondent may opt-out and therefore not require much involvement by Board staff, the initial filing fee itself should be smaller than the fee charged later when a proceeding becomes active. Filing fees that are set too high would discourage potential claimants from considering using the Board to resolve their disputes since respondents who exercise their right to opt-out would result in the loss of the filing fee by the claimant. Board staff will review each claim to ensure it complies with applicable regulations before permitting service to occur. Should a claim not meet the terms of Copyright Office regulations, parties shall have two 30-day opportunities to correct any errors before a claim will be dismissed without prejudice. The Board may dismiss a claim without prejudice if it is unsuitable for determination by the Board. Within 30 days of service, the respondent has the right to opt-out in writing of the proceeding. In the event a proceeding becomes active, limited discovery is permitted. In-person appearances by parties before the Board in Washington, D.C. are not required. The Board may hold oral hearings that will be transcribed for the record. All findings of the Board will be made on a preponderance of evidence standard. Default determinations are permitted, but only after notice to the failure of the party to respond.

Parties are not required to have legal representation since the process is simplified and it is expected that many will forego them in order to reduce overall costs. Parties may also rely upon law school legal clinics to represent them before the Board. The Patent and Trademark Office offers law school clinics a limited number of “priority” filings under their Law School Clinic Certification Program and the Register could consider this as an option to encourage the use of pro-bono law school clinics while giving law school students real life training in copyright dispute resolution.

The claimant or counterclaimant will elect whether to recover damages or not. A claimant or counterclaimant may choose not to pursue damages as a way to encourage the other party to not opt-out or to agree to cease certain activity if the claimant or counterclaimant prevails. If the claimant or counterclaimant elects to recover damages, the claimant can elect whether to recover either actual damages and profits or statutory damages. To mirror the process used in copyright infringement claims before Federal courts, the legislation does not require the claimant or counterclaimant to elect between the two types of damages until the point right before a final determination is rendered by the Board.

There are specific maximum award amounts set forth in the legislation. This amount is not an automatic amount of damages for proven claims. For copyright infringement cases, as a baseline amount the Board should look to the parties’ previously agreed upon licensing fee (if one was agreed to). The Board should consider what damages multiple is appropriate based upon the circumstances of the specific claim and the evidence presented including whether or not the respondent ignored requests for payment on the one hand or quickly accepted responsibility for the infringement on the other. If a respondent entered into negotiations with

⁴Since not all claims will proceed to being considered active either due to settlement or opting out, the Register should consider establishing a two-tier fee structure such that an initial fee is due upon filing of the claim followed by an additional fee once a claim is deemed active.

the claimant seeking to license the work and was then presented with a standard licensing fee amount by the claimant and the respondent then used the work without any payment whatsoever, the quoted licensing fee should be considered the appropriate baseline amount. If there was no previously agreed upon licensing fee or even a rate negotiation, the most comparable licensing fee that would have been charged by the claimant that they can reasonably demonstrate to the Board is the appropriate baseline from which a multiple should be applied. The Board may not issue injunctions, but may include in its determination an agreement for a party to cease certain activity if the party so agrees. In determining a proper damage award, the Board may consider whether the party has agreed to cease certain activity, and may increase or decrease the award accordingly.

The notice and takedown provisions of Section 512 have been used on numerous occasions by copyright owners who have alleged infringement of their works. While many of these notices are properly issued, Federal courts have seen comparatively fewer cases involving misrepresentations in conjunction with Section 512 where the notice filer has made no effort to verify that infringement has actually occurred or has sent a notice simply to take down speech that they disagree with.⁵ Both situations are likely to prove challenging for the Board to determine the appropriate financial damages. Congress did not provide for statutory damages for sending bad faith notices in Title 17, leaving it up to the courts to determine the financial penalty for stopping speech, engaging in commercial advantage, and other bad faith uses. Where commercial advantage has occurred or sought, some higher multiple of the actual harm or potential benefit (whichever is higher) would more than likely be appropriate.

Where speech has been taken down and not for commercial advantage, the Board should take into account the size of the audience of the speech, the deliberateness of the action, and whether or not the party that has engaged in bad faith has agreed to post an online public apology of their actions for an extended period of time in order to determine an appropriate financial award. However, the legislation does not include such acts in the jurisdiction of the Board in order for no damages to be awarded under the mistaken view that taking down speech through misrepresentation results in little to no harm. As the Committee of jurisdiction for Constitutional issues generally and the First Amendment specifically, the Committee recognizes the value of freedom of expression and the harms caused to its removal by bad faith actors. Upon a final determination of such misrepresentation by the Board, sufficient damages to penalize the immediate behavior in question and to deter similar behavior in the future should be awarded.

With the exception of bad-faith prosecution, no award of attorney fees or costs shall be made. For bad-faith prosecutions, it is not the requirement of the Board or the Copyright Office to re-educate the responsible parties, but simply to provide the entity with notice of their bad faith behavior and, after giving the party an opportunity to contest such determination, impose appropriate sanctions. The

⁵The few cases include *Online Policy Group v. Diebold, Inc.*, *Lenz v. Universal Music Corp.*, and *Automattic Inc. et al., v. Steiner*.

limit of attorneys' fees and costs of \$2,500/\$5,000 for bad faith actions can be exceeded in extraordinary circumstances. Since all extraordinary circumstances may be difficult to define prospectively, qualifying behavior should be of such nature that few besides the bad faith party would not consider the behavior or actions improper. Although the Committee expresses its hope that the statutory authority of the Board to ban parties who have engaged in bad-faith conduct more than once in a 12-month period is never needed, the Board should not hesitate to use such authority where warranted.

Parties have the right to seek a reconsideration of a ruling of the Board within 30 days. The fees for such reconsideration shall be uniform for all similarly situated parties. If the Board then denies such a request, a party may seek further review within 30 days of denial by the Register of Copyrights on the grounds that the Board abused its discretion in denying reconsideration. The fees for such review shall be uniform for all similarly situated parties. In both situations, the other parties to a claim have the right to contest the request.

B. THE ROLE OF U.S. DISTRICT COURTS

Only after the reconsideration and review processes have concluded may a party seek to challenge a determination by the Board in U.S. district court. One of the grounds for a court order vacating, modifying, or correcting a Board determination is excusable neglect. Excusable neglect does not refer to a respondent who has been properly served with an official notice from the Board and fails to opt-out due to a disbelief in the validity of the notice. The fact that the Copyright Office and the Copyright Claims Board are official Government entities can be quickly confirmed with the slightest of Internet searching or by contacting the Office directly. State small claims courts with parties often not represented by legal counsel regularly face questions concerning what is, and what is not, "excusable neglect". Rulings on this question in such cases should prove instructive for a district court facing a claim of excusable neglect. District courts should recognize the burden that would be created by reopening a default determination or determination based on a failure to prosecute upon parties who did in fact meet all of the associated requirements and deadlines. A high bar should exist for what would effectively create a new burden upon parties that have paid attention to deadlines and requirements.

District courts should consider informing parties coming before them with qualified claims of the option of using the Copyright Claims Board in order to provide parties with a more informal and quicker dispute resolution process. Section 1509(b) deems the Board as a qualifying alternative dispute resolution process.

C. EXPECTATIONS OF THE COPYRIGHT OFFICE AND THE COPYRIGHT CLAIMS BOARD

It is expected that the Copyright Office will develop clear regulations and practices to fairly balance the competing interests of claimants and respondents. Given the history of copyright litigation, it would not be uncommon for a respondent in one claim to be the original claimant in an altogether different matter such that a fairly balanced system will be of benefit to all potential parties.

The Committee highlights two concerns in particular for special attention by the Copyright Office and the Board—claim management workflow and potential bad faith behavior by parties to a claim. The first concern stems from the fact that it is initially unknown how many potential claims will be brought before the Board, how many respondents will opt out, and how long on average the Board will take to hear a claim. It will take several years for the Board to have a complete understanding of these statistics. However, the legislation authorizes only three Copyright Claims Officers who will be working regular hours to process active claims. If each active claim takes exactly two hours of the Board's time, this will result in a maximum number of active claims decided per year of 1,000. It may be that fewer than 1,000 claims per year become active. However, if this is not the case or if the average time spent on each active claim is more than two hours, the Board could quickly become backlogged. In such a scenario, claimants who have invested in preparing their claim and paid the necessary filing fees would not have their claim decided for some time. Similarly, respondents would be faced with a claim against them that would not be decided for some time. These delays have become all too common in Article III courts and should be avoided by the Board and Register. Section 1504(f) gives the Register the discretion to impose filing limits in both the startup phase as well as the ongoing phase of the Board to better manage Board workflow.⁶

For both startup and ongoing phases of the Board, the Register should publicly identify an average claims processing timing goal that is then used to determine appropriate claim management efforts and to signal to interested parties a realistic estimate of how long the Board will take to process claims. An initial goal of concluding claims deemed active within six months to one year from the date of initial filing to the Board's initial determination would be appropriate. In order to gauge the actual interest in using this new system while maintaining a timely process, the Register should strongly consider either an initial fixed limit of one claim per claimant or a ranked priority system of claims by the same claimant for the first several months of operation. With a 60-day opt-out process, it will take at least until the third month of operation to initially determine the percentage of respondents that are likely to opt-out. A ranked priority system may help to better enable a higher filing limit per claimant immediately upon an increase in the per claimant limit. However, the legislation does not require such a ranked system to be enabled, especially if it proves burdensome on the Copyright Office or the Board. This decision is left to the Register.

The second issue of particular concern to the Committee is the potential for abuse of the system by parties or their representatives acting in bad faith. This bad faith could potentially arise from a one-off action by a party to a claim or as part of a more concerted effort to abuse the system as a whole. As a new dispute resolution process, the success of the Board will depend upon how it is viewed by both potential claimants and respondents. If claimants view the

⁶Other provisions in Sections 1510(a) and 1506(z) give the Register authority to adjust the maximum amount of damages that can be recovered per claim and to establish a one Claims Officer micro-court. The use of this authority must be balanced against its impact upon the Board's workflow and timeliness in claims processing.

Board poorly, they are likely to avoid filing claims before it. If respondents view the Board poorly, they are likely to simply opt-out. Abuse of the system that goes unpunished will undercut the reason for Congressional action—an alternative system to resolve small value copyright claims is not effective if no one uses it in the first place because they have no faith in it.

One potential avenue for abuse is copyright trolling. Fortunately, copyright trolling has been far less common than patent trolling. In the most notorious case, the principals of a Chicago based law firm operating under several names including Prenda Law were sanctioned by several Federal courts and two attorneys were convicted of felonies for actions related to their trolling activities. More recently, Judge Cote of the Southern District of New York recently described one attorney in a published opinion as a copyright troll due to their over 700 copyright infringement lawsuits.⁷ It is the Committee's strong desire that the Register and Board work together to deter and appropriately sanction any bad faith behavior, especially copyright trolling. Since *pro se* parties may be less constrained with pushing the envelope of acceptable conduct, the Board and Register should consider sample videos of how parties to the proceeding should act. Nothing in the legislation prevents the imposition of a requirement that parties to a claim acknowledge in writing that they have reviewed the procedural rules and/or watched such videos prior to the filing of a claim or responded to claim.

Beyond these two areas of high concern, the Register is expected to prudently use the standing authority in subsection 1506(z) to create a micro-claim process in which one Copyright Claims Office will hear the claim with a maximum damage award of \$5,000. The micro-claims process was created in recognition that the Copyright Office might be able to expend less money and resources on even smaller claims. The Register is expected to maintain as much as the existing regulatory framework established for the rest of Chapter 15 as possible. The statutory requirements applicable to claims heard by three Officers cannot be waived, but they can be added onto. Regulations can be tailored to a micro-claim process. For example, the Register may consider an additional initial notice that advises parties to a claim of the existence of a micro-claim process, but may not modify the statutory requirements for notice format, opt-out deadlines, etc. The legislation does not require micro-claim regulations to be issued concurrently with the other required regulations, or even at all. Since the Register is likely to face an initially high workload burden in establishing the Copyright Claims Board regulations and hiring process, and will want some experience in operating with a three Claims Officer system before creating a one Claims Officer system, the Register should consider waiting for at least several months of final claim determinations under a three Claims Officer system before determining whether to proceed with collecting public comments on proposed regulations for a one Claims Officer micro-claim system.

Section 1510(a) allows the Register to consider whether adjustments to the limits on monetary recovery or attorneys' fees and costs to be made. This would be a major change to the earlier rec-

⁷ *McDermott v. Monday*, 17cv9230 (DLC), 2018 WL 1033240 (S.D.N.Y Feb. 22, 2018).

ommendations of the Copyright Office report and what the Committee has considered appropriate at this time. Before considering changes to these limits, the Register should have a complete understanding of the Board's initial operation as well as the clearly demonstrated need for changes before proceeding with any. Since the legislation's short title contains the key words "small claims", the Copyright Claims Board is not to become a replacement for claims involving all damage amounts. It is a small claims tribunal by its very title. In consultation with the respective Committees of the Judiciary, the Register should consider at appropriate intervals whether the damage award amounts should be increased or decreased before proceeding with a public rulemaking on the issue. The upper bounds of the award amount are effectively limited by the notion of "small", while the lower bounds are effectively limited by the statutory authority in Section 1506(z) to create a one Claims Officer approach for awards below \$5,000. As noted earlier, changes to the amounts should also be considered in relation to the workload of the Board since a backlogged Board should not be burdened with even more claims. The legislation does allow the micro-claim damage cap to be adjusted.

D. EXPECTATIONS OF PARTIES TO A CLAIM AND THEIR REPRESENTATIVES

Parties should adhere to the statutory and regulatory requirements at all times. Although parties may wish to proceed *pro se*, hiring an attorney or seeking the assistance of a *pro bono* law clinic should be considered if a party has any concern about their ability to represent themselves before the Board.

The Committee is aware of concerns that the Board will be faced with situations in which the behavior of a party to a claim departs from the established norms of a district court to the detriment of other parties. The Committee has established this alternative dispute resolution process to be an effective way of resolving small value claims. The Board cannot be effective if it is burdened by those who ignore the rules of the Board or engage in abusive tactics. The Committee has strongly encouraged the Board to utilize its standing authority to penalize abusive behavior, including an outright dismissal of a claim with an imposition of financial sanctions, in order to allow those who do follow the rules of the Board to have their claims heard more quickly instead. Parties and their representatives should be on notice that improper behavior will cost them more than a proverbial "slap on the wrist."

E. EXPECTATIONS OF THE COPYRIGHT CLAIMS BOARD

Over time, the Board will hear claims that will be similar in nature to other claims. Although each claim deserves and requires an independent review, the Board needs to be consistent, but not necessarily formulaic, in how it treats similar claims as well as how it awards damages. This will help give guidance to those who are choosing whether to utilize this new process or not as either a claimant or respondent. It may also help to deter cases from arising in the first place.

Since parties to a claim may not be represented by counsel, the Board will need to operate in a manner easily navigable by those who are not familiar with traditional courtroom procedure. How-

ever, there is a limit that the Board will need to identify for how far it should tolerate errors by a party. An appropriate line between acceptable and non-acceptable may be that actions which impose burdens upon other parties to a claim should be taken more seriously than a one-time diversion from the traditional expectations found in other courts. However, just as it is not the responsibility of the Board to provide legal advice or assistance with particular claims, it is not the responsibility of the Board to babysit parties who have the means to properly engage with the Board with some effort of their own.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. INTRODUCTION OF THE BILL

S. 1273 was introduced on May 1, 2019 by Senator Kennedy with Senators Durbin, Tillis and Hirono as original cosponsors and was referred to the Judiciary Committee.

B. COMMITTEE CONSIDERATION

The Committee considered S. 1273 on July 18, 2019. No amendments were offered. The Committee then voted to report the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019, without amendment, favorably to the Senate by voice vote.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section of the bill provides that the legislation may be cited as the “CASE Act of 2019” or the “Copyright Alternative in Small-Claims Enforcement Act of 2019”.

Section 2. Copyright Small Claims

This section of the bill creates a new Chapter 15 within Title 17 of the U.S. Code entitled “Copyright Small Claims” as follows:

§ 1501 Definitions

This section creates definitions for the purposes of the new Chapter 15 for the terms ‘party’, ‘claimant’, ‘counterclaimant’, and ‘respondent’.

§ 1502 Copyright Claims Board

This section establishes a new Copyright Claims Board housed within, and supported by, the U.S. Copyright Office. Three full time Copyright Claims Officers who are appointed by the Librarian of Congress after consultation with the Register of Copyrights will serve on the Copyright Claims Board. Specific skills and background criteria are listed for the Board members. The Register shall also hire no fewer than two Copyright Claims Attorneys with specific backgrounds to assist the Copyright Claims Board. The pay rates for the Officers and attorneys are specified along with a staggered initial term of 4, 5, and 6 years for the Officers in order to provide continuity for the Board as each term ends. All future terms are for 6 years with a specified process for filling vacancies either at or prior to the expiration of the associated term. Interim appointments are permitted in case of a temporary inability of an

Officer. The Librarian has standing authority to sanction or remove an Officer subject to Section 1503(b).

§ 1503 Authority and duties of the Copyright Claims Board

This section sets forth the authority and duties of the Board. Eleven functions of the Officers are specified along with four functions of the Attorneys. All Board determinations shall be made independently although the Officers and Attorneys may consult with the Register on general issues of law, but not in regards to the fact of a particular matter unless that matter is the subject of a review by the Register under § 1506(x). The Officers and Attorneys are barred from inconsistent duties, subject to mandatory recusal, and are barred from *ex parte* communications. The Officers and the Attorneys serve under the general direction of the Register of Copyrights. All actions of the Board and Register in connection with a determination are subject to judicial review as specified in § 1508(c).

§ 1504 Nature of proceedings

This section specifies that participation in a Board proceeding is voluntary and that any party may instead pursue a claim, counterclaim, or defense as well as seek a jury trial in a U.S. district court or other appropriate court. There is a three-year statute of limitations for all claims and the time for an action in district court is tolled during the time a proceeding is pending before the Board. Permissible claims and counterclaims are identified in Subsection (c) including infringement of an exclusive right in a copyrighted work by the owner or beneficial owner, a claim for a declaration of non-infringement, and claims under Section 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter-notification (usually referred to as a DMCA Section 512 notice and takedown claim). Subsection (d) further identifies impermissible claims.

Subsection (e) identifies the permissible remedies. For infringement claims only, allowable monetary recovery is limited to actual damages, profits, and statutory damages which are capped at either \$7,500 or \$15,000 per work depending upon timely copyright registration. Willfulness is not to be determined although the Board may consider in assessing damages whether the infringer has agreed to cease or mitigate the infringing activity.

For all proceedings, the total monetary recovery excluding any costs or attorneys' fees that may be awarded due to bad faith conduct is capped at \$30,000. Joint and several liability may be found by the Board.

Subsection (f) authorizes the Register of Copyrights to cap the number of proceedings brought by the same claimant each year in order for the system to run effectively. The same claimant is defined as the same real party in interest as defined in Section 1501.

§ 1505 Registration requirement

For claims or counterclaims involving alleged infringement, claim or counterclaim cannot be asserted before the Board unless the legal or beneficial owner of the copyright has filed a copyright application, deposit and required fee with the Copyright Office and a registration certificate has been issued or has not been refused.

While the Board may hold a proceeding with respect to the pending claim(s) where a registration certificate is pending before the Copyright Office, the Board may not render a determination until the registration certificate is issued by the Copyright Office and shared with the other parties.

If there is more than a one year delay before a certificate is available, the Board may dismiss the proceeding without prejudice. The Register may establish expedited proceedings to process registration applications for works that are the subject of a Board proceeding. Proceedings may be held in abeyance automatically for up to one year pending submission of a registration certificate. After one year, the Board may dismiss the proceeding without prejudice upon notice and a 30 day response period to the parties. The same presumption under Section 410(c) applies for works registered not less than 5 years after the date of publication. The Register is directed to establish regulations concerning expedited registration procedures for works before the Board.

§ 1506 Conduct of proceedings

This section sets forth the Board proceedings in detail. In general, the Board is directed to follow the legal precedents applicable in the jurisdiction most applicable to the claim. Subsection (b) requires the Board to maintain records to document all proceedings. Subsection (c) notes that no in-person appearances are required and that video conferencing is encouraged. Subsection (d) states that parties are not required to have legal representation, but may choose to have an attorney or a *pro bono* legal clinic represent them.

Pursuant to subsection (e), a proceeding is commenced only after a statement of material facts is filed by the claimant along with the filing fee specified by the Register. Before a claim is heard, subsection (f) requires that it must first be reviewed by a Copyright Claims Attorney who has the authority to require a refile with specified deadlines if the original filing does not comply with applicable regulations. Claims shall be dismissed without prejudice if a claim cannot be heard by the Board due to the failure to join a necessary party; the lack of an essential witness, evidence or expert testimony; or the determination of the claim imposes too great a burden upon the Board or is beyond the subject matter competence of the Board. Counterclaims are permissible after a similar review by a Claims Attorney.

Pursuant to subsections (g) and (h), claims must be served within 90 days of approval of the claim by a Board Attorney using a standardized process and notice format established by the Register. The notice shall contain a prominent statement concerning a 60 day opt-out mechanism and the impact of not opting out. Several requirements govern the service of the notice and waivers of personal service. The Board may maintain its own list of designated agents that have been submitted by corporations, partnerships, or unincorporated associations. Personal service may also be waived via a prepaid option of returning a signed form to the Board. However, waiver of personal service does not constitute waiver of the right to opt-out. All service of a claim and waiver of personal service may only occur within the United States. The means of service

for other documents are governed by regulations established by the Register of Copyrights pursuant to subsection (j).

The opt-out procedure in subsection (i) sets forth that respondents have 60 calendar days to opt-out of the small claims process after being served with the claim.

After the respondent does not opt out, the proceeding is considered to be active pursuant to subsection (k) allowing for scheduling of the proceeding in addition to conferences and discovery authorized in subsection (l) to occur.

Subsections (m), (n), and (o) govern the materials and evidence to be considered by the Board. Discovery shall occur pursuant to regulations established by the Register. There is no formal motion practice before the Board, although the Board may request submissions *sua sponte* or at the request of parties to the proceeding. Mandatory submission of discovery materials is limited to the parties in the proceeding although the Board may request voluntary submissions from non-parties. Any confidential information may be covered by a protective order to limit public disclosure. The Board may consider relevant evidence to the claims in a proceeding including sworn testimony. Expert witnesses are not permitted unless the Board agrees that good cause can be shown for them.

Subsections (p), (q), (r), (s), and (t) provide the statutory framework for how hearings are conducted including potential voluntary dismissals and settlements. Conferences may be held by one or more Officers which may be recorded or transcribed to assist the other Board members as well as being part of the claim record. Board determinations shall be made by a majority of the Officers, in writing and based upon a preponderance of the evidence standard. All determinations shall be made publicly available although confidential information shall be redacted. Information related to the proceedings are exempt from FOIA.

Subsections (u) and (v) address proceedings that are not able to proceed either due to a respondent's default or a claimant's failure to proceed. Unless a justifiable cause can be shown, a respondent can be found in default if they fail to appear or cease to participate in a proceeding. If this occurs, the Board shall prepare a proposed default determination after a showing of sufficient evidence by the claimant and provide a written notice with the proposed finding to the respondent and give the respondent 30 days to provide information in opposition to the proposed default determination. Such default determination may only be challenged pursuant to Section 1508(c). If a claimant fails to complete service, each respondent with failed service shall be dismissed without prejudice. If a claimant fails to prosecute, the Board may dismiss the claim and award attorneys' fees and costs as appropriate.

Requests for reconsideration are permitted in writing to the Board within 30 days after the final determination, pursuant to subsection (w). Pursuant to subsection (x), if the request is refused by the Board, a party may appeal for a review by the Register of Copyrights who shall determine if the Board abused its discretion in denying reconsideration and, if abuse is found, remand the claim to the Board for specific issues identified in the remand.

Subsection (y) authorizes actions by the Register and the Board to take specific actions in order to address bad faith conduct through awarding attorneys' fees, costs, and financial sanctions in

the amount of up to \$5,000 (\$2,500 if the adversely affected party appeared pro se) or higher in cases of extraordinary circumstances or where a pattern or practice of bad faith conduct has occurred. Parties can also be barred from Board proceedings if on more than one occasion within a 12 month period they come before the Board for a harassing or other improper purpose. If such abuse is found by the Board, the party is then banned from initiating a claim before the Board for an additional 12 months from the date of the finding.

The Register of Copyright is also directed to establish regulations to hear claims below \$5,000, exclusive of any attorney's fees and costs, by one Claims Officer. These regulations are to be as consistent as possible with the regulations that apply to larger claims except where reasonably necessary to enable such claims to be heard.

§ 1507 Effect of proceeding

This section sets forth the non-precedential effect of Board determinations and the inability of anyone to use a statement or submission in a claim before the Board in any other forum. The conditions by which a claim before the Board qualifies as an action seeking an order to restrain a subscriber from engaging in infringing activity under Section 512(g)(2)(C) are identified. The non-impact of a proceeding upon class actions is highlighted in addition to the applicability of claims or counterclaims before the Board to Section 512(g)

§ 1508 Review and confirmation by district court

Subject to meeting specified filing procedures, a party that has failed to pay damages awarded by the Board or otherwise complied with the relief awarded in a final determination may seek enforcement in an appropriate U.S. district court. Within 90 days of a final determination by the Board, a party to the proceeding may seek an order vacating, modifying, or correcting a determination of the Board if it was issued as a result of fraud, corruption, or other misconduct; if the Board exceeded its authority; or if excusable neglect causes the issuance of a default determination.

§ 1509 Relationship to other district court actions

This section identifies the nature of the relationship between the Board and other district court actions including the qualification of a proceeding before the Board as an alternative dispute resolution process under Section 651 of Title 28.

§ 1510 Implementation by Copyright Office

The Copyright Office is authorized to establish regulations to carry out this new Chapter 15 of Title 17. The Register is authorized to adjust the limits on monetary relief after a 120-day review period by Congress. The filing fee for a claim is set at a minimum of \$100 and the maximum at the cost of the filing fee for an action in a U.S. district court.

§ 1511 Funding

This section authorizes funding necessary to operate the Copyright Claims Board.

Section 3. Implementation

This section of the bill provides that the Copyright Claims Board shall begin operations within one year of enactment.

Section 4. Study

This section of the bill provides that not later than 3 years after the first determination by the Board, the Register of Copyrights shall conduct a study on the operation of the Board including potential recommendations for changes to the operation.

Section 5. Severability

This section of the bill provides a severability clause incorporated into the legislation.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 1273.

VI. CONCLUSION

The Copyright Alternative in Small-Claims Enforcement Act of 2019, S. 1273, addresses the enforcement challenges faced by small copyright owners with low value claims and claims for misrepresentations under Section 512(f) of Title 17 of the United States Code, the Copyright Law of the United States.

VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law made by S. 1273, as ordered reported.

