

ENSURING ONLY GOOD CLAIMS COME IN SMALL  
PACKAGES: A RESPONSE TO SCHOLARLY CONCERNS  
ABOUT A PROPOSED SMALL COPYRIGHT CLAIMS  
TRIBUNAL

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INTRODUCTION

Jenna Close is a freelance commercial photographer who has been in business full-time for ten years. She works primarily in the industrial, commercial, and advertising sectors providing still images and video to both domestic and international clients. Like many professional photographers, she operates a small business with her partner, Jon Held. Their workweeks can run sixty to eighty hours, composed of booking work, shooting, billing, accounting, marketing, and continuing to develop and maintain their skills. Jon is a licensed flight instructor, and together they shoot images that are impossible for the earthbound.

Jenna's images are widely infringed. Even though she registers at least some of her images for copyright, and thus would be entitled to statutory damages and attorney's fees for those images in the event of a court victory, she does not generally pursue claims against her infringers because it is too expensive and time consuming to do so. It is not worth the cost. Prior to attending a research workshop for this article, Jenna ran a reverse image search on four of her most frequently infringed images. The search returned 110 certain infringements, some of them egregious. Jenna does not document the foibles of celebrities. Her most infringed images are aerial views of large arrays of solar panels and a portrait of a metal worker engaged in his craft.

The infringements vary in nature. Some appear on the websites of Jenna's competitors purporting to represent their own work. Others appear as illustrations to accompany articles in which the images should have been licensed. Still others appear on websites falsely advertising that the photographs are free to use. In some cases, companies Photoshop their own products into Jenna's images. Jenna also has encountered her images being used by her clients' competitors at trade shows—not only in brochures but, on one

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occasion, enlarged as the backdrop to a competitor's booth, while her client was rightfully using the same artwork at the tradeshow in their own booth. Based on the licensing rates she charges for the four images she searched, Jenna calculates that her lost licensing fees range between \$5,500 at the very low end to \$136,400 at the high end, depending on the uses that should have been licensed. And that was for only four images, searched on one day.

Jenna wrote me an email after the workshop stating the following:

Looking at the revenue lost from just these 4 images, I would venture that photographers' income has been at least halved . . . I can say for certain, based on that data, that mine has. Even if one took the very center of the range I presented from those 4 images, that would be the equivalent of [a] typical year's income for me. Copyright and the ability to enforce it is so important because without taking steps to make individual creators whole, we risk losing a large part of the creative class because they will be unable to make and maintain a modest living from their work. It's not about working harder or marketing more, it's about making up in volume of new work what we lose in licensing . . . and that is not possible no matter how hard one tries. Losing an entire swath of independent innovators would be a great tragedy when looked at from the point of view of progressing in the areas of science and art.<sup>1</sup>

Jenna's experience is far from unique. For more than a decade, small businesses and individual artists facing similar problems have sought to create an alternate forum in which to enforce copyright claims of modest economic value.<sup>2</sup> The need to address this so-called "small copyright claims problem" was first articulated in a submission by the visual arts community to the U.S. Copyright Office in an unrelated proceeding in 2005.<sup>3</sup> Copyright claims are governed by federal law, and by statute, such claims may only be brought only in federal district courts.<sup>4</sup> The cost and complexity of doing so are often daunting to individuals and small businesses that have suffered infringements of their work.<sup>5</sup> Frequently, individuals and small businesses are seeking relatively modest damages, which are dwarfed by the expense of hiring an attorney and pursuing a claim in federal court.<sup>6</sup> As a result, these claims go unaddressed, leading to the dual misperceptions that creative

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<sup>1</sup> Email from Jenna Close, P2 Photograph, to author (Feb. 29, 2018, 13:51 EST) (on file with author) (second alteration in original).

<sup>2</sup> See generally *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006) (hearing on alternative dispute resolution options for copyright owners).

<sup>3</sup> See Professional Photographers of America, Opinion Letter on U.S. Copyright Office Study on Orphan Works and Mass Digitization 11–13 (Mar. 25, 2005) [hereinafter Orphan Works], <http://www.copyright.gov/orphan/comments/OW0642-PPA.pdf>.

<sup>4</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 8 (2013) [hereinafter REPORT], <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

<sup>5</sup> *Id.* at 8–9.

<sup>6</sup> *Id.*

works are free for the taking on the internet and that the copyright system serves only large corporate copyright owners.<sup>7</sup>

Seeking to rectify this situation, Congress asked the Copyright Office to study

1) the extent to which authors and other copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system; and 2) furnish specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution.<sup>8</sup>

After conducting an extensive study, the Copyright Office proposed creating a small claims tribunal within the Copyright Office to adjudicate such claims to end the historic inequity in our copyright system.<sup>9</sup> The Copyright Office included in its report a draft of legislative language.<sup>10</sup> Subsequently, several members of Congress introduced legislation largely based on the Copyright Office's draft to implement that proposal.<sup>11</sup> While the legislation has not drawn the usual polarized response that much intellectual property legislation seems to attract, on February 3, 2017, eighteen professors (hereafter the "Critics") gathered at the Berkeley Center for Law and Technology to discuss their "reservations" about the "profound effects on copyright" that the legislation might have.<sup>12</sup>

Because no academic proponents of the proposal, representatives of the Copyright Office, or relevant legislative offices appear to have been invited to the Berkeley workshop, this Article responds to the concerns expressed in their summary, from the perspective of a clinical professor and practicing copyright lawyer of more than two decades, who for the past several years has devoted her career entirely to representing individuals and small businesses in the arts on a pro bono basis. This response is informed by those experiences and a deeper understanding of the challenges many creators face in obtaining legal representation in all aspects of their work—but, in particular, with respect to enforcing their copyrights against infringers—due primarily to the exorbitant costs and burdensome nature of litigation in federal

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<sup>7</sup> See *id.* at 1–2.

<sup>8</sup> Letter from Lamar Smith, Chairman, U.S. House Judiciary Comm., to Maria Pallante, Register of Copyrights, U.S. Copyright Off. (Oct. 11, 2011) [hereinafter Smith Letter], *reprinted* in REPORT, *supra* note 4.

<sup>9</sup> REPORT, *supra* note 4, at 4.

<sup>10</sup> *Id.* at 133–61.

<sup>11</sup> See, e.g., Copyright Alternative in Small Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. (2017).

<sup>12</sup> See Pamela Samuelson & Kathryn Hashimoto, Scholarly Concerns About a Proposed Small Copyright Claims Tribunal 1 (Oct. 15, 2017) (unpublished manuscript 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3060796](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3060796).

court. The inability to enforce infringement claims—especially in the digital marketplace—drives many of these small businesses toward a skeptical view of the value of the copyright system, and therefore to avoid the costs—including in time, opportunity, mental energy, and financial expense—of registering their works. This drain on the copyright ecosystem harms all users of the Copyright Office, but especially the general public, who wish to learn the ownership of works and whose tax dollars are used to fund the operations of the Copyright Office via appropriations in far higher amounts than would be necessary if more individuals and small businesses found it worthwhile to register their works.<sup>13</sup>

Moreover, practitioners who work in clinical settings are often unable to assist with enforcement matters if litigation is required. This is especially so if they are funded through donations and similarly lack the funding to litigate federal lawsuits unless they can partner with outside counsel. This creates a catch-22 situation, since the creator has turned to the clinic precisely because he or she cannot find litigation counsel willing to take on the matter.

Critics' comments regarding the small-claims proposals fall into three broad categories. First, Critics complain that the legislation raises constitutional concerns under Article III by establishing an alternative dispute-resolution forum within an executive agency.<sup>14</sup> These concerns are unfounded, however, because the controlling precedents allow Congress to offer alternatives to Article III courts to parties who voluntarily elect to use them; the legislation here offers that alternative. Second, Critics raise a variety of civil procedure-type issues, many of which are well considered.<sup>15</sup> Some of these issues are already anticipated by the legislation or addressed in the Copyright Office's Report.<sup>16</sup> Third, Critics express a variety of opinions on the structure and scope that a small-claims forum should take, if one were created.<sup>17</sup> Most, if not all, of these ideas are repetitive of views previously considered—and presumably rejected by the Copyright Office and drafters of the pending legislation—in the course of more than a decade of public proceedings on the matter.<sup>18</sup> Therefore, it is neither worthwhile nor efficient to relitigate these matters.

Accordingly, after a brief legislative and regulatory overview of the idea of providing an alternative forum to resolve small copyright claims,<sup>19</sup> this Article responds to Critics' constitutional arguments,<sup>20</sup> comments on several

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<sup>13</sup> This situation stands in stark contrast to the financial standing of the United States Patent and Trademark Office (“USPTO”), which is self-funded by fees.

<sup>14</sup> Samuelson & Hashimoto, *supra* note 12, at 2–3.

<sup>15</sup> *Id.* at 7–11.

<sup>16</sup> REPORT, *supra* note 4, at 12–26.

<sup>17</sup> Samuelson & Hashimoto, *supra* note 12, at 7–11.

<sup>18</sup> See REPORT, *supra* note 4, at 43–50; *Remedies for Copyright Small Claims*, COPYRIGHT.GOV, <https://www.copyright.gov/docs/smallclaims/> (last visited Aug. 11, 2018).

<sup>19</sup> See *infra* Part I.

<sup>20</sup> See *infra* Part II.A.

civil-procedure suggestions,<sup>21</sup> and offers a few additional thoughts and examples for the legislative drafters and Copyright Office to consider.<sup>22</sup>

## I. LEGISLATIVE AND REGULATORY BACKGROUND

The idea of providing an alternate forum for resolving copyright claims of relatively modest economic value has been discussed in one form or another on Capitol Hill since at least 2005, when the request was formally advanced by representatives of photographers' organizations in the context of a Copyright Office study of "orphan works."<sup>23</sup> Orphan-works legislation introduced in 2006 and 2008 included language directing the Copyright Office to conduct a study on the issue of small claims, but that legislation never passed.<sup>24</sup> Finally, in 2011, then-House Judiciary Committee Chairman Lamar Smith tasked the Copyright Office with conducting a study to evaluate the issue and to make specific recommendations to Congress.<sup>25</sup>

The Copyright Office conducted thorough investigations on the topic, which included three Notices of Inquiry ("NOIs") and attendant opportunities for public comments, a roundtable jointly organized with the United States Patent and Trademark Office ("USPTO") and George Washington University Law School, and two multiday public hearings on the east and west coasts.<sup>26</sup> Among the issues covered by the various NOIs and hearings were the nature of an alternative tribunal or process, qualifications of the adjudicators, discovery parameters, available relief, treatment of frivolous claims, appeal mechanisms, constitutional concerns, claims and defenses, practice and procedure, litigation alternatives, and relief and appeals.<sup>27</sup>

All the constitutional issues reflected in the summary of the February Berkeley workshop were exhaustively discussed in the Copyright Office's recommendation concerning the creation of a small-claims forum. Those included:

- \* the Seventh Amendment right to a trial by jury (which can be voluntarily waived);

- \* the proper structure of a specialized tribunal if it is not an Article III court;

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<sup>21</sup> See *infra* Part II.C.

<sup>22</sup> See *infra* Conclusion.

<sup>23</sup> See Orphan Works, *supra* note 3, at 11–13.

<sup>24</sup> Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. § 5 (2008); Orphan Works Act of 2008, H.R. 5889, 110th Cong. § 6 (2008); Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 4 (2006).

<sup>25</sup> Smith Letter, *supra* note 8, at 2.

<sup>26</sup> REPORT, *supra* note 4, at 6–7. A complete record of the Small Claims Policy Study may be found on the Copyright Office website at <https://www.copyright.gov/docs/smallclaims/>.

<sup>27</sup> REPORT, *supra* note 4, at 6.

\* the selection and supervision of the decisionmakers in any copyright small-claims forum to ensure compliance with the Appointments Clause; and

\* various due process issues (including personal jurisdiction, service of process, and conduct of proceedings).<sup>28</sup>

In September 2013, the Copyright Office issued its report making the following recommendations:

\* Congress should create a centralized tribunal within the Copyright Office, which would administer proceedings through online and teleconferencing facilities without the requirement of personal appearances. The tribunal would be staffed by three adjudicators, two of whom would have significant experience in copyright law—with the third to have a background in alternative dispute resolution.

\* The tribunal would be a voluntary alternative to federal court. Its focus would be on small infringement cases valued at no more than \$30,000 in damages. . . .

. . . .

\* Claimants who initiated a proceeding would provide notice of the claim to responding parties, who would need to agree to the process, either through an opt-out mechanism or by affirmative written consent. Respondents would be permitted to assert all relevant defenses, including fair use, as well as limited counterclaims arising from the infringing conduct at issue. Certain DMCA-related matters relating to takedown notices, including claims of misrepresentation, could also be considered, and parties threatened with an infringement action could seek a declaration of noninfringement.

\* Parties would provide written submissions and hearings would be conducted through telecommunications facilities. Proceedings would be streamlined, with limited discovery and no formal motion practice. A responding party's agreement to cease infringing activity could be considered by the tribunal and reflected in its determination. The tribunal would retain the discretion to dismiss without prejudice any claim that it did not believe could fairly be adjudicated through the small claims process.

\* Determinations of the small claims tribunal would be binding only with respect to the parties and claims at issue and would have no precedential effect. They would be subject to limited administrative review for error and could be challenged in federal district court for fraud, misconduct, or other improprieties. Final determinations could be filed in federal court, if necessary, to ensure their enforceability.<sup>29</sup>

During the 114<sup>th</sup> Congress, two bills essentially implementing the Copyright Office's recommendations were introduced in the House of Representatives and referred to the House Judiciary Committee.<sup>30</sup> No further legislative action was taken on either bill, and the 114<sup>th</sup> Congress ended without progress on the issue. The main authors of those bills combined efforts in the 115<sup>th</sup> Congress and in October 2017 introduced House Bill 3945, the Copyright Alternatives in Small-Claims Enforcement Act of 2017 ("CASE Act").<sup>31</sup>

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<sup>28</sup> See *id.* at 27–47.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> H.R. 6496, 114<sup>th</sup> Cong. (2016); H.R. 5757, 114<sup>th</sup> Cong. (2016).

<sup>31</sup> H.R. 3945, 115<sup>th</sup> Cong. (2017).

## II. RESPONDING TO THE CRITICS' CONCERNS

The Critics' comments regarding the small-claims proposals raise three main concerns: (1) constitutional concerns under Article III, (2) concerns regarding the structure and scope of a small-claims copyright tribunal, and (3) other procedural concerns regarding the form such a tribunal should take. This Part responds to each in turn.

### A. *Responding to Constitutionality Concerns*

#### 1. Powers to Adjudicate Claims Under Articles I & III of the Constitution

Article III of the Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>32</sup> It further says that the judges serving in those courts must hold office “during good Behaviour” and that their salaries may not be “diminished.”<sup>33</sup> Despite this constitutional directive for separation of powers and a judiciary independent of political influence, over the last century and a half, innumerable institutions and agencies have been created by Congress to adjudicate a variety of disputes in special tribunals and agencies outside the federal court system.<sup>34</sup> In large measure, the validity of these institutions has been upheld.<sup>35</sup> As the late Professor Paul Bator notes in one of his final lectures on the topic:

There is a sense in which the strongest argument for the validity of legislative and administrative courts is history. For two hundred years our legislature has acted on the assumption that it has power to create these institutions. For two hundred years, it has been sustained in this by the very courts whose independence and integrity is supposedly subverted by its actions . . . . Virtually all of the great figures of the American judicial pantheon—Marshall and Hughes, Brandeis and Holmes, Frankfurter and Jackson—have participated in this process of validation. A large number of eminently useful and successful institutions have been created by virtue of this; and these are now deeply imbedded in the texture of our political and economic life. In a word, the body of precedent and experience validates our legislative and administrative tribunals.<sup>36</sup>

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<sup>32</sup> U.S. CONST. art. III, § 1.

<sup>33</sup> *Id.*

<sup>34</sup> See *infra* notes 53–56 and accompanying text.

<sup>35</sup> Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 260 (1990).

<sup>36</sup> *Id.* Although Professor Bator goes on to express discomfort that this history alone is sufficient justification to rely on, he provides compelling reasons why invalidating and reconstituting the administrative state in accordance with a narrow reading of Article III would be naïve and undesirable, and he provides a straightforward justification and test that the Supreme Court appears to be moving toward in

The court has developed numerous and vexing doctrines, often decided by a plurality, to justify upholding specialized agency tribunals. The constitutionality of non–Article III tribunals was first considered in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>37</sup> That case originated the “public rights” doctrine, which, when first announced, consisted of matters that Congress “may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”<sup>38</sup> The doctrine evolved in *Crowell v. Benson*<sup>39</sup> to include matters “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>40</sup>

Eventually, however, the Court moved away from a formal categorical approach that classified rights as either public or private<sup>41</sup> and adopted a more pragmatic balancing approach that recognized Congress’s right to “adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.”<sup>42</sup> More recently, the Supreme Court has clarified that “what makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action,”<sup>43</sup> and that with the consent of the parties, intertwined state and common-law claims can also be heard by non–Article III tribunals.<sup>44</sup> The consent of the parties must be truly voluntary; the procedures established to encourage consent cannot amount to the legislature essentially putting a thumb on the scale to encourage the parties to consent to proceed in the tribunal.<sup>45</sup> And Article III courts

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recent jurisprudence, such as in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). Bator, *supra* note 35, at 265–68. Among the reasons Professor Bator gives that it is unwise to reconstitute agency tribunals as Article III courts hearing administrative claims is this amusing quip:

Law professors, who possess tenure and think it natural, tend to forget that tenure is a problematic and anomalous institution. It would not be unmixedly wonderful to be blessed with thousands of bureaucrats who could not be fired or demoted no matter how lazy or incompetent or cynical or abusive, without impeachment by the House of Representatives and trial in the Senate.

*Id.* at 261.

<sup>37</sup> 59 U.S. (18 How.) 272 (1855).

<sup>38</sup> *Id.* at 284.

<sup>39</sup> 285 U.S. 22 (1932).

<sup>40</sup> *Id.* at 50.

<sup>41</sup> Professor Bator, along with some other scholars, criticized the public/private right distinction as hollow and the reasoning as circular, due to how it evolved. Bator, *supra* note 35, at 248–50. While public rights may have begun in *Murray’s Lessee* as rights for which no judicial review at all was required, the doctrine was eventually divorced from that concept to avoid casting doubt on the validity of hundreds of administrative agencies. *See generally id.* at 246–62. Thus evolved, the doctrine essentially became: “article I courts are valid if they adjudicate public rights cases; public rights cases are cases that need not be adjudicated in an article III forum.” *Id.* at 249.

<sup>42</sup> *Thomson v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

<sup>43</sup> *Stern v. Marshall*, 564 U.S. 462, 490 (2011).

<sup>44</sup> *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986).

<sup>45</sup> *Id.* at 850–51.

must still retain supervisory authority (e.g., the ability to review matters on appeal).<sup>46</sup>

The participants in the Berkeley workshop raise concerns that Congress does not have the power to establish tribunals to adjudicate certain types of claims in Article I tribunals.<sup>47</sup> Critics appear to raise the constitutional issues merely as a rhetorical device, because they do not devote serious attention to them. To the extent they discuss the case law, Critics' articulation of the law is misleading, and their concerns are misplaced. Ignoring hundreds of years of nuanced Supreme Court analysis, they assert that "[b]oiled down to its essence, the Court has held that Article I tribunals can adjudicate claims involving 'public rights,' but not those involving 'private rights.' Whether copyrights are 'private' or 'public' rights is, under this jurisprudence, not entirely clear."<sup>48</sup> Given the evolution of the Supreme Court's approach to Congress creating alternative dispute-resolution venues described above, Critics' concerns cannot be taken seriously based on this distillation alone.

Critics then jump to the *Oil States Energy Services, LLC v. Green's Energy Group, LLC*<sup>49</sup> case that was, at the time, pending before the Supreme Court and urge that "[u]ntil the Supreme Court has resolved the issue whether determining the validity of issued patents is the exclusive jurisdiction of an Article III court in a patent case, it may be premature to proceed with legislation and formation of the copyright Tribunal."<sup>50</sup>

The Critics' expressed concerns will be taken in order: as the Copyright Office observed in its report, the public rights doctrine is not nearly as clear-cut or rigid as Critics suggest. Thus, there is no reason to believe that the Supreme Court would find a small copyright-claims board within the Copyright Office unconstitutional:

[T]he Supreme Court has moved away from the rigid interpretation of the "public rights" exception to Article III espoused by the *Northern Pipeline* plurality, which – drawing on the early case *Murray's Lessee* – posited that outside of territorial and military courts, public rights cases should be limited to those in which the government is a party. Since *Northern Pipeline*, the Court has generally embraced a more pragmatic approach to evaluating the public rights exception. The Court has acknowledged – most notably in *Thomas* and *Schor* – that even if a claim derives from or resembles a traditionally private cause of action, *if the claim is closely tied to a federal statutory or regulatory scheme, it may nonetheless be amenable to determination by a non-Article III body.*<sup>51</sup>

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<sup>46</sup> *Id.* at 855.

<sup>47</sup> Samuelson & Hashimoto, *supra* note 12, at 2.

<sup>48</sup> *Id.* (footnote omitted).

<sup>49</sup> 138 S. Ct. 1365 (2018).

<sup>50</sup> Samuelson & Hashimoto, *supra* note 12, at 3. The Supreme Court handed down its decision in *Oil States* in April 2018, holding that inter partes review of a patent falls squarely within the public-rights doctrine, so it need not be adjudicated in an Article III court. *Oil States*, 138 S. Ct. at 1373–74.

<sup>51</sup> *Id.* at 39 (emphasis added).

Numerous situations exist in which Congress has assigned an adjudicatory role to specialized, non–Article III courts or administrative agencies. Examples include the Tax Court,<sup>52</sup> the Court of Federal Claims,<sup>53</sup> the Social Security Appeals Council,<sup>54</sup> and the Commodities Futures Trading Commission,<sup>55</sup> to name only a few.

However, it is arguably not even necessary to consider the details of the public-rights exception to Article III in the context of the small-claims proposal because, as the Supreme Court made clear in its recent opinion in *Wellness International Network, Ltd. v. Sharif*,<sup>56</sup>

the cases in which this Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court. The Court has never . . . h[e]ld that a litigant who has the right to an Article III court may not waive that right through his consent.<sup>57</sup>

*Wellness International* synthesizes decades of Supreme Court jurisprudence considering the constitutionality of various powers of the bankruptcy courts and other non–Article III tribunals, which, until then, many observers and members of the Supreme Court itself had found muddled.<sup>58</sup> Writing for the Court, Justice Sotomayor explained:

The lesson of *Schor, Peretz* and the history that preceded them is plain: The entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver. Article III also serves a structural purpose, barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other. But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.<sup>59</sup>

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<sup>52</sup> 26 U.S.C. § 7441 (2012).

<sup>53</sup> 28 U.S.C. §§ 2672, 2675–76.

<sup>54</sup> 42 U.S.C. § 405.

<sup>55</sup> 7 U.S.C. §§ 1–2.

<sup>56</sup> 135 S. Ct. 1932 (2015).

<sup>57</sup> *Id.* at 1947.

<sup>58</sup> *See id.* at 1942–49.

<sup>59</sup> *Id.* at 1944. Justice Thomas’s dissent also adds important elements to the understanding of the development and evolution of the Court’s thinking as to when Article I courts may adjudicate cases. Justice Thomas began his dissenting opinion by observing that “[e]very violation of the separation of powers . . . involves an exercise of power in excess of the Constitution. And because the only authorities capable of granting power are the Constitution itself and the people acting through the amendment process, individual consent cannot authorize the Government to exceed constitutional boundaries.” *Id.* at 1961 (Thomas, J., dissenting). He went on to explain, however, that “[a]lthough it may not authorize a constitutional violation, consent may prevent one from occurring in the first place.” *Id.*

Turning to a discussion of the history of the public-rights exception, Justice Thomas explained that historically, public rights were understood as “rights belonging to the public at large,” whereas private rights were rights vested in a particular individual. *Wellness Int’l*, 135 S. Ct. at 1965. Citing William Blackstone

Consequently, the proper inquiry is this: (1) Is the small-claims process voluntary? And (2) if so, does the transfer of jurisdiction encroach on the judiciary to aggrandize another branch of government, or is it *de minimis*, and is this transfer of adjudicatory power to the Copyright Office closely related to the statutory scheme that Congress created and the Copyright Office administers?

With these clearly articulated questions in mind, it is easy to conclude that the small-claims proposal passes constitutional muster. The proposal is entirely voluntary to both parties.<sup>60</sup> And, rather than emasculating the judiciary, the impact on Article III courts is at most *de minimis*, as the proposal addresses a class of cases that the federal judiciary is not hearing—and indeed will never hear—because of the aforementioned obstacles facing individual creators and small businesses. Moreover, as the Supreme Court has repeatedly noted, “copyright law is a creature of statute,”<sup>61</sup> and “[n]o one can deny that [Congress] . . . ha[s] the power to prescribe the conditions on which such right shall be enjoyed.”<sup>62</sup> Indeed, the Copyright Clause “empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.”<sup>63</sup> It is entirely reasonable, therefore, for Congress to conclude that the purpose of the Copyright

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and John Locke, Justice Thomas referred to the rights to life, liberty, and property as the three “‘absolute rights,’ so called because ‘they appertain[ed] and belong[ed] to particular men . . . merely as individuals.’” *Id.* (alterations in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119 (1765)). And he pointed to patents as the quintessential example of a private right, once granted: “the patent ‘[u]ndoubtedly’ constituted ‘a vested right’ and consequently could ‘only be divested according to law.’” *Id.* at 1966 (alteration in original) (quoting *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 84–85 (1871)). As the modern doctrine of separation of powers evolved, Justice Thomas explained, the courts became identified with enforcing private rights while agencies executed public policy. *Id.* at 1965.

The history cited by Justice Thomas provided powerful support for the broad-based principle that individuals may be deprived of their property rights (including copyrights and patents) only by Article III courts that provide all the protections of an independent judiciary, unaffected by political influences. However, Justice Thomas also explained that “the Government has a freer hand when private rights are not at issue” and that “[p]arty consent . . . may have the effect of lifting that ‘private rights’ bar, much in the way that waiver lifts the bar imposed by the right to a jury trial. Individuals may dispose of their own private rights freely, without judicial intervention.” *Id.* at 1968. Turning to the bankruptcy claims at issue in *Wellness International*, Justice Thomas concluded that section of his analysis by stating that

[a] party who consents to adjudication of a *Stern* claim by a bankruptcy court is merely making a conditional surrender of whatever private right he has on the line, contingent on some future event—namely, that the bankruptcy court rules against him. Indeed, it is on this logic that the law has long encouraged and permitted private settlement of disputes, including through the action of an arbitrator not vested with judicial power.

*Id.* Based either on the majority opinion, which does not engage in the historical and constitutional analysis undertaken by Justice Thomas, or the reasoning in his dissent, the small-claims court proposal would pass constitutional muster.

<sup>60</sup> H.R. 3945, 115th Cong. § 2 (2017).

<sup>61</sup> *Stewart v. Abend*, 495 U.S. 207, 251 (1990) (Stevens, J., dissenting).

<sup>62</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663–64 (1834).

<sup>63</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

Clause is not being served if copyrights cannot be enforced by a large segment of authors constitutionally entitled to enjoy those protections and that it is essential to vest authority in a board within the Copyright Office to remedy the situation.

Furthermore, in many instances where constitutional concerns are raised concerning a tribunal, the issue is not whether the forum created by Congress is itself constitutional but whether the tribunal should be empowered to hear certain claims and defenses arising under state or common law related to the area in which the tribunal specializes.<sup>64</sup> The small-claims tribunal is empowered to hear only copyright claims or claims arising under the Digital Millennium Copyright Act—both federal issues, and both particularly within the expertise of the Copyright Office—and it may decline to hear cases better suited for the federal courts.<sup>65</sup>

With respect to Critics' second suggestion that the challenge to the work of the Patent Trial and Appeals Board ("PTAB") at issue in *Oil States* is somehow dispositive of the proposal at issue in the CASE Act, nothing could be further from the truth. Most significantly, unlike the proposed small-claims process in House Bill 3945, and bearing in mind the opinion in *Wellness International*, the PTAB is not consensual in nature, nor does it provide litigants protections akin to those of Article III courts.<sup>66</sup> Notably, in *Oil States*, the defendant effectively removed a case from federal court—after it was already actively being litigated there for over a year and without the consent of the plaintiff-petitioner—to a venue the plaintiff-petitioner did not choose, affording him none of the protections of an Article III court.<sup>67</sup>

Moreover, as patent scholars have pointed out, the PTAB also has other deep structural flaws that further underscore its constitutional infirmities.<sup>68</sup> It has no meaningful standing requirements, so anyone can challenge a patent there for any reason, including to manipulate a company's stock price, or simply out of animosity.<sup>69</sup> It applies different and conflicting legal standards than federal courts hearing the same claims;<sup>70</sup> both phases of administrative review of PTAB proceedings are delegated to the same judges;<sup>71</sup> and the director of the USPTO may intervene in proceedings by altering panels to

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<sup>64</sup> This has been the case in much of the litigation concerning bankruptcy courts. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 504 (2011) (Scalia, J., concurring) (explaining seven different reasons why an Article III judge is required to adjudicate such lawsuits).

<sup>65</sup> See H.R. 3945 § 2.

<sup>66</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1940 (2015) ("[Bankruptcy courts] may 'hear and determine' such proceedings, and 'enter appropriate orders and judgments,' only 'with the consent of all the parties to the proceeding.'" (quoting 28 U.S.C. § 157(c)(2) (2012))).

<sup>67</sup> See *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018).

<sup>68</sup> Adam Mossoff & David Lund, *The Problems with the PTAB*, IAM MEDIA, Nov.–Dec. 2017, at 29, 29, <http://www.iam-media.com/Magazine/Issue/86/Features/The-problems-with-the-PTAB>.

<sup>69</sup> *Id.* at 30.

<sup>70</sup> *Id.* at 31–32.

<sup>71</sup> *Id.* at 32.

ensure the outcome she desires.<sup>72</sup> Indeed, scholars have noted that the operation of the PTAB stands in stark contrast to the Anglo–American tradition of protecting private property rights that dates back to the Magna Carta.<sup>73</sup> These are among the reasons the PTAB has come to be known as the “patent death squad.”<sup>74</sup>

In contrast, the CASE Act proposes a small-claims tribunal, participation in which would be completely voluntary to both parties.<sup>75</sup> Although not an Article III court, the tribunal would follow procedures intended to provide the parties with protections consistent with those they would enjoy in federal courts.<sup>76</sup> Moreover, unlike the PTAB, which can strip parties of vested private property rights, the small-claims tribunal would be empowered to award money damages only at a level capped well below the statutory damages level available in federal courts.<sup>77</sup>

## 2. Due Process Issues

Critics likewise raise questions about due process, including concerns regarding venue and personal jurisdiction.<sup>78</sup> They do not elaborate on most of their concerns, but to the extent these relate to the alleged burden that will be imposed on parties if they need to travel to Washington, D.C. to participate in proceedings, it bears repeating that participation in the tribunal would be purely voluntary for both parties. Likewise, as in the Article III analysis, under the Federal Rules of Civil Procedure, personal jurisdiction is waived when a defendant voluntarily submits.<sup>79</sup> Thus, there are no apparently valid venue or personal jurisdiction challenges.

Furthermore, contrary to the Critics’ assertions that “[t]he Office is located in Washington, D.C., and adjudications would presumably take place there, although some proceedings might be carried out online,”<sup>80</sup> section 2 of the Bill (in what would become 17 U.S.C. § 1405) makes clear that proceedings will be conducted “without the requirement of in-person appearances by parties or others and shall take place by means of written submissions and

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<sup>72</sup> *Id.*

<sup>73</sup> *E.g.*, David Pridham, *Patent Rights Are Property Rights, and We Must Protect Them*, THE HILL (Dec. 19, 2017, 7:40 AM), <http://thehill.com/opinion/judiciary/365476-patent-rights-are-property-rights-and-we-must-protect-them>.

<sup>74</sup> Mossoff & Lund, *supra* note 68, at 32.

<sup>75</sup> H.R. 3945, 115th Cong. § 2 (2017).

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> Samuelson & Hashimoto, *supra* note 12, at 4.

<sup>79</sup> Fed. R. Civ. P. 12(b)(2); *BAC Home Loans Servicing, LP v. Mitchell*, 6 N.E.3d 162, 166 (Ill. 2014) (“Personal jurisdiction is established either by effective service of process or by a party’s voluntary submission to the court’s jurisdiction.”).

<sup>80</sup> Samuelson & Hashimoto, *supra* note 12, at 4.

hearings and conferences accomplished via Internet-based applications and other telecommunications facilities.”<sup>81</sup> Thus, as the bill plainly states, there is no reason to presume, as Critics apparently do, that either the parties or their representatives would need to travel.

Critics reserve the bulk of their discussion for what they characterize as reservations about the degree of voluntariness, but the true disagreement is over whether defendants should be required to opt in or opt out of the forum when properly served.<sup>82</sup> As Critics acknowledge, the reason individuals and small businesses need this forum in the first place is that infringers, knowing that there is effectively no remedy for claims of modest economic value, do not bother to reply to cease-and-desist letters or other legal demands.<sup>83</sup> There is no reason to believe that they would do otherwise if there was no obligation to appear before the forum or take some action to opt out of a proceeding when properly served.

Although Critics complain that the potential exists that the small-claims forum will issue default judgments in instances where a defendant claims not to have received service,<sup>84</sup> the circumstances in which such judgments may be issued are entirely consistent with the Federal Rules of Civil Procedure. It is unclear how Critics could assert that “[b]ecause the Office has yet to establish rigorous standards for filing claims and serving them on respondents, due process concerns loom large,”<sup>85</sup> because the CASE Act itself sets standards for service requirements that are exactly the same as Rule 4 of the Federal Rules of Civil Procedure.<sup>86</sup>

Additionally, pursuant to the bill, a default judgment cannot be issued merely because a defendant fails to respond.<sup>87</sup> A plaintiff must still carry the burden of proof to establish his or her case to the satisfaction of the tribunal, and to enforce a default judgment, the judgment must be brought to a federal district court, which may act as a further check ensuring only meritorious judgments are issued.<sup>88</sup> Finally, such judgments may be appealed by the defendant and may be vitiated if the defendant proves that the default judgment resulted from excusable neglect.<sup>89</sup>

It is important that the benefits of a streamlined system not be eliminated by an elaborate appeals process. The Copyright Office recognized as much in its report:

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<sup>81</sup> H.R. 3945, 115th Cong. § 2 (2017).

<sup>82</sup> See Samuelson & Hashimoto, *supra* note 12, at 5.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 5–6.

<sup>86</sup> Compare Fed. R. Civ. P. 4(c) (requiring service of process within ninety days by a person who is at least eighteen years old and not a party), with H.R. 3945, 115th Cong. § 2 (2017) (also requiring service of process within ninety days by a person who is at least eighteen years old and not a party).

<sup>87</sup> H.R. 3945, § 1405(t)(1).

<sup>88</sup> *Id.* at §§ 1405(t)(1), 1407(a).

<sup>89</sup> *Id.* at § 1407(e)(1)(C).

While presumably the outcome of a small claims proceeding should be subject to some form of review, the benefits of a streamlined system would quickly evaporate if decisions could be extensively reconsidered, especially by an Article III court. Losing parties with substantial resources could essentially seek to relitigate the matter in federal court.<sup>90</sup>

The review process proposed by the Copyright Office and incorporated in the legislation therefore strikes a reasonable middle ground allowing litigants to challenge and correct faulty determinations based on fraud, misconduct, or similar grounds or to have an award set aside due to excusable neglect. These are the same standards by which arbitration awards are judged under the Federal Arbitration Act.<sup>91</sup>

### B. *Breadth of Jurisdiction*

Many of the other views expressed by the Critics fall into the category of preferences or opinions about the structure and scope of a small-claims forum, should one be created.<sup>92</sup> Given the lengthy public record of comments, hearings, and public proceedings—in which the Critics were welcome to participate—all of these issues have been extensively discussed and carefully considered by the Copyright Office and the proponents of the legislation.<sup>93</sup> Hence, much of the commentary—which is relayed in the form of statements to the effect of “[w]orkshop participants reached consensus that,” “[w]orkshop participants also expressed skepticism about,” or “[t]here was also general agreement that”<sup>94</sup>—reflects merely that the Critics represent one perspective on a given issue, a perspective that was apparently considered and rejected by the Copyright Office and the bill drafters during the lengthy public proceedings.

In some instances, the Critics repeat shop-worn arguments against effective copyright remedies or seek to limit the utility of the forum for plaintiffs. For instance, “[w]orkshop participants reached consensus that Tribunal awards should be compensatory only. That is, a successful claimant should get monetary compensation for her lost profits (e.g., the license fee she was owed), but not be able to disgorge the defendant’s direct or indirect profits.”<sup>95</sup>

It is telling that the participants “reach[ed] consensus” that a successful plaintiff should be entitled after bringing an action to *only the original license*

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<sup>90</sup> REPORT, *supra* note 4, at 129.

<sup>91</sup> See 9 U.S.C. § 10(a) (2012) (grounds to vacate).

<sup>92</sup> See Samuelson & Hashimoto, *supra* note 12, at 6–11.

<sup>93</sup> See, e.g., American Photographic Artists, Comment Letter on Proposed Rule for Remedies for Small Copyright Claims Under the Copyright Act, (Apr. 12, 2013), [https://www.copyright.gov/docs/smallclaims/comments/noi\\_02263013/APA.pdf](https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/APA.pdf); Graphic Artists Guild, Comment Letter on Proposed Rule for Remedies for Copyright Claims Under the Copyright Act, (Apr. 10, 2013), [https://www.copyright.gov/docs/smallclaims/comments/noi\\_02263013/Graphic-Artists-Guild.pdf](https://www.copyright.gov/docs/smallclaims/comments/noi_02263013/Graphic-Artists-Guild.pdf).

<sup>94</sup> Samuelson & Hashimoto, *supra* note 12, at 6.

<sup>95</sup> *Id.*

*fee she would have been owed.* One wonders why anyone seeking to use a work would ever pay a license fee under such circumstances, rather than wait and see if he is caught. Certainly, such a remedy would not make the plaintiff whole or serve as any deterrent to infringement. In fact, this apparent “consensus” position is so extreme that it draws into question the credibility of the remainder of the critique. It goes beyond even the views that opponents of punitive and statutory damages have expressed in other proceedings, in which they have inevitably conceded that some additional penalty over and above the cost of the unpaid license fee must be assessed if a remedy is to be effective; otherwise, why would any party ever pay for a license?

Nevertheless, the Critics also raise some seemingly meritorious points, which appear to be aimed at improving the utility and availability of the forum for individuals and small businesses.<sup>96</sup> Critics note:

The most sympathetic “use case” for a small claims process for copyright infringement are those individual creators who are trying to make a living from their creative work; a small claims process would enable these individuals to seek a remedy for infringing uses of their photographs, images, or stories. Currently, many potential infringers are not deterred from infringing copyrights because they know that individual creators cannot afford to sue to get the \$1500 license fee that they would have charged. A more narrowly drawn proposal designed to address this type of use case would have found more support among workshop participants.<sup>97</sup>

To the extent that Critics appear at least somewhat supportive of a structure that restricts claimants to individual creators and small businesses, their suggestions have some initial appeal. However, their proposed approach is unworkable because denying access to the tribunal to corporate work-for-hire owners of works or assignees of works would eliminate many small businesses, including photography studios, bands (which are often incorporated and may take assignments of copyrights such as of the sound recordings of their members), independent filmmakers (who likewise frequently operate through individually owned production companies and must be work-for-hire owners of various elements of the film to effectively distribute it), indie musician-owned labels, and “mom and pop” book and music publishers (who may be self-publishing through a family business). There are other means of discouraging claims by major corporate plaintiffs based on fee levels that should be considered instead.<sup>98</sup>

Critics suggest that a variety of cases be excluded from consideration, such as secondary liability and nonliteral infringement claims, section 512(f) claims for bad-faith assertions of copyright infringement, or abuse of the notice-and-takedown system.<sup>99</sup> While it is hard to predict precisely what sorts of claims are likely to dominate the tribunal’s docket, one might anticipate

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<sup>96</sup> *See id.* at 7.

<sup>97</sup> *Id.*

<sup>98</sup> *See infra* Part II.C.

<sup>99</sup> Samuelson & Hashimoto, *supra* note 12, at 6.

that neither the tribunal nor the parties would wish to resolve cases requiring complex and burdensome fact-finding. Accordingly, Critics' suggestions seem reasonably likely to be accommodated as a matter of fact, whether or not the CASE Act explicitly anticipates them.

### C. *Responding to Process Concerns Regarding Claiming & Adjudication*

The Critics focused “[m]uch of the workshop discussion . . . on civil procedure-related issues raised by the propos[al].”<sup>100</sup> Some of their recommendations of this kind warrant further discussion. Some are, in fact, already addressed by the legislation or the Copyright Office report, and others could be expected to be part of regulations that the Copyright Office would enact to effectuate the proposal once it passes. Some of these issues include the facial validity of claims and response documents,<sup>101</sup> filing fees,<sup>102</sup> and a public record of transparency.<sup>103</sup>

#### 1. Facial Validity of Claims and Response Documents

It is anticipated that many, if not most, of the claims filed will be submitted by unrepresented parties.<sup>104</sup> The CASE Act and the Copyright Office report both suggest ways in which the process should be molded to ensure that documents submitted are adequate, complete, and sufficient to create a fair process for all parties.<sup>105</sup> Among those methods are access to counsel, including pro bono representation by law students should a party desire representation, and review and assistance by specialists at the Copyright Office before documents are filed.<sup>106</sup> Critics suggest that the process could be improved in several respects, including by ensuring both that plaintiffs' and defendants' documents are reviewed and that advice is given on adequacy and responsiveness before filing, and by ensuring that the staff of the tribunal who tests filings for adequacy is not the same staff who hears the cases once filed.<sup>107</sup> They likewise note that the tribunal should be isolated from the Copyright Office's policymaking work.<sup>108</sup> All of these are reasonable suggestions.

In addition, the filing process might benefit from automation and standardization, where possible. For instance, it would be helpful if each party

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<sup>100</sup> *Id.* at 7.

<sup>101</sup> *See infra* Part II.C.1.

<sup>102</sup> *See infra* Part II.C.2.

<sup>103</sup> *See infra* Part II.C.3.

<sup>104</sup> Samuelson & Hashimoto, *supra* note 12, at 7.

<sup>105</sup> H.R. 3945, 115th Cong. § 1405(d) (2017); REPORT, *supra* note 4, at 55–57.

<sup>106</sup> H.R. 3945, § 1405(d); REPORT, *supra* note 4, at 55.

<sup>107</sup> Samuelson & Hashimoto, *supra* note 12, at 8.

<sup>108</sup> *Id.* at 16.

were asked to submit a form that aids the tribunal in identifying the type of claim, asks questions intended to elicit the elements of a claim, and establishes whether a defense is likely to exist. Such a form could well aid in molding more predictable submissions from parties and help the tribunal determine which claims are appropriate for it to consider. To encourage settlements, the tribunal should likewise consider requiring a conference of the parties to seek to resolve the matter through settlement prior to the beginning of discovery or dispositive-motions practice, if any is permitted. This would likely limit the costs to all parties, as well as the burden on the tribunal.

Both of these additional suggestions have been tested with some apparent success internationally. Several countries have in recent years established internet courts empowered to hear small claims and in some cases all civil claims, including claims sounding in copyright. China, the United Kingdom, and Canada have instituted or are testing programs that resolve claims entirely online.<sup>109</sup> These internet courts use online programs and questions to guide the parties in outlining their claims and defenses so that the court receives the required information in a more uniform fashion.<sup>110</sup> Each of these internet courts also appears to use a mediation step of some sort prior to a hearing to encourage settlement of claims.<sup>111</sup> Both of these steps are worth considering when the Copyright Office drafts procedural rules for the small-claims tribunal.

Critics have voiced concerns about whether the small-claims tribunal will prove successful due to its voluntary nature.<sup>112</sup> Alternatively, some worry that the tribunal will be overwhelmed and unable to resolve matters quickly.<sup>113</sup> However, the experience thus far in China's Hangzhou Court of the Internet, where participation is likewise voluntary, shows a high likelihood of success.

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<sup>109</sup> Dan Bindman, *Plan for 28-Month Online Court Pilot Emerges as MR Foresees Live-Streaming Court of Appeal*, LEGAL FUTURES (June 23, 2017, 12:07 AM), <https://www.legalfutures.co.uk/latest-news/plan-28-month-online-court-pilot-emerges-mr-foresees-live-streaming-court-appeal/print/>; Shannon Salter, *Small Claims Under \$5,000 Coming to the CRT on June 1, 2017*, CIVIL RESOLUTION TRIBUNAL (Apr. 18, 2017), <https://civilresolutionbc.ca/small-claims-5000-coming-crt-june-1-2017/>; Cao Yin, *World's First Internet Court Goes Online in Hangzhou*, THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, [http://english.court.gov.cn/2017-08/18/content\\_30780292.htm](http://english.court.gov.cn/2017-08/18/content_30780292.htm) (last updated Aug. 18, 2017).

<sup>110</sup> See, e.g., *Getting Started*, CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/>.

<sup>111</sup> See Owen Bowcott, *Online Court Proposed to Resolve Claim of Up to £25,000*, THE GUARDIAN (Feb. 15, 2015, 7:05 PM), <https://www.theguardian.com/law/2015/feb/16/online-court-proposed-to-resolve-claims-of-up-to-25000>; *Hangzhou Internet Court*, THE NATIONAL CENTER FOR TECHNOLOGY AND DISPUTE RESOLUTION (Aug. 18, 2017), <http://odr.info/hangzhou-internet-court/>; *Tips for Successful Negotiation*, CIVIL RESOLUTION TRIBUNAL (July 2017), <https://civilresolutionbc.ca/wp-content/uploads/2017/07/Tips-for-successful-negotiation.pdf>.

<sup>112</sup> Samuelson & Hashimoto, *supra* note 12, at 4.

<sup>113</sup> See *id.* at 12.

The internet court in China has been fully operational since May 2017, and in the first few months, from May to August, it saw 2,605 cases filed with 1,444 already settling.<sup>114</sup> The court hears lawsuits concerning matters such as “online shopping disputes, copyright protection, Internet loans and domain name disputes.”<sup>115</sup> All proceedings from filing, delivery, deposition, and court sessions are performed online.<sup>116</sup> “Each court session lasts an average of 25 minutes, and each case is completed in an average of 32 days.”<sup>117</sup>

To file a case, the “plaintiffs must first have their identity verified either through Alipay (Alibaba’s payment service), or by physically showing an ID to a court clerk in Hangzhou.”<sup>118</sup> Once the case is filed, there is a pretrial mediation held through either the internet, phone, or videoconference; if no resolution is reached at this point, “the suit is formally submitted to the case filing division, which is handled online.”<sup>119</sup> “All data transmissions related to court proceedings are encrypted by Alibaba Cloud.”<sup>120</sup> The lawsuit can be

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<sup>114</sup> See Yang Chengxi, *China Launches First Internet Court in E-Commerce Hub*, CGTN.COM (Aug. 8, 2017, 3:31 PM), [https://news.cgtn.com/news/784d544f7a557a6333566d54/share\\_p.html](https://news.cgtn.com/news/784d544f7a557a6333566d54/share_p.html); Yin, *supra* note 109 (explaining that, prior to opening the court, some “grassroots courts” in Hangzhou successfully launched a pilot program for adjudicating internet-related cases in 2015). It is worth noting that apparently, based on interviews of Chinese lawyers, this court currently covers only one city, and the proceedings are no different than normal civil proceedings in Chinese courts, which proceed on a much faster timeline than similar U.S. proceedings and must be concluded within sixty days. Thus, the primary innovation is that everything occurs online. Nevertheless, the data provide at least some comfort that even large numbers of cases can be efficiently resolved. That the cases heard include all civil claims and not just intellectual property (“IP”) infringement claims should give U.S. policymakers some comfort that this is not just an instance of cynical IP enforcement in China.

<sup>115</sup> Chengxi, *supra* note 114.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Dani Deahl, *China Launches Cyber-Court to Handle Internet-Related Disputes*, THE VERGE (Aug. 18, 2017, 4:33 PM), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

filed in five minutes,<sup>121</sup> and the overall goal is to increase efficiency, save time, and reduce costs.<sup>122</sup>

The judge for these hearings presides over the cases while “stationed in a Hangzhou-based courtroom where members of the public can watch a projection of the live video feed.”<sup>123</sup> The trial is transcribed entirely through a computer program.<sup>124</sup>

China is not the only country that is interested in online hearings. Canada has launched an online tribunal for small-claims disputes,<sup>125</sup> and the

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<sup>121</sup> As described on the court’s website and translated via Google translate, there are six steps to file and respond to a lawsuit. The Plaintiff’s steps are the following:

- (1) Initiate a lawsuit: After getting into the registration area and after his or her real name is verified, the plaintiff files a lawsuit with the court by filling out the form according to the format. After being authorized by the user, the Internet Court can retrieve the case related information of e-commerce, transactions, logistics, small amount loan, intellectual property rights, etc.
- (2) Enter into mediation: After a lawsuit is filed, it is followed by pre-trial mediation. The mediator contacts the parties and then mediates the case through the internet, telephone or videoconference.
- (3) File the case in the court: If the mediation fails, the lawsuit shall be formally submitted to the Case Filing Division of the court. After the case filing is approved, then the plaintiff pays the litigation fee online.

The Defendant’s steps are as follows:

- (1) Bind to cases: After receiving the electronic service information, the defendant logs into “my litigation,” enters the query code and reads the complaint information.
- (2) Enter into mediation: After being sued, the defendant should enter into pre-trial mediation. Within fifteen (15) calendar days, the mediator contacts the parties and mediates the case through the internet, telephone, or videoconference.
- (3) Fill in the information and respond to the lawsuit: If the court approves the case-filing after the mediation fails, it immediately gives the defendant a notice about responding to the plaintiff’s complaint.

*The Operation Process*, THE LITIGATION PLATFORM OF HANGZHOU INTERNET COURT, <https://netcourt.yuncourt.com/portal/main/en/index.htm> (last visited July 2, 2018).

<sup>122</sup> Deahl, *supra* note 118.

<sup>123</sup> Mallory Locklear, *China’s Online Court Heard Its First Case Today*, ENGADGET (Aug. 18, 2017) <https://www.engadget.com/2017/08/18/chinas-online-court-first-case/>.

<sup>124</sup> *Id.*

<sup>125</sup> The Civil Resolution Tribunal (“CRT”) resolves small-claims disputes up to \$5,000 entirely online. See Salter, *supra* note 109. This includes disputes about insurance claims, personal injury, buying or selling goods or services, residential construction, employment, etc. See *id.* The process starts through the solutions explorer, which involves preset questions to allow the program to understand the problem. See *What Is the Small Claims Solution Explorer?*, CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/> (last visited July 8, 2018). Next, the party may request a hearing or apply for dispute resolution, depending on the resulting summary report from the solutions explorer program. See *Starting a Dispute*, CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/#2-request-a-hearing> (last visited July 8, 2018). Parties get a chance to respond to the dispute, make a third-party claim, or counter-claim. See CIVIL RESOLUTION TRIBUNAL: RULES 13–14 (effective June 1, 2017), <https://civilresolutionbc.ca/wp-content/uploads/2017/05/CRT-rules-effective-June-1-2017.pdf>. The program recommends a negotiating phase, in which the parties reach out to each other to reach an agreement without specific mediation. See *Tips for Successful Negotiation*, *supra* note 111. If this does not work out, the CRT has an organized facilitation process to assist in mediation between the two parties. See CIVIL RESOLUTION TRIBUNAL: RULES, *supra*, at 16–18. The final step, if mediation is unsuccessful, is

United Kingdom began an online court pilot program in July 2017 that will run until the end of November 2019.<sup>126</sup> Therefore, despite some of the Critics' more legitimate concerns, this experience indicates that the small-claims tribunal could still successfully address such issues.

## 2. Filing Fees

Filing fees are another valid concern for individuals and small businesses. The idea of having a fee scale structured according to either the revenue of the creator using the tribunal or the size of the claim is worth exploring. Structuring fees in this fashion would seem to address some of the concerns that Critics have raised about large corporate copyright owners using the forum.<sup>127</sup>

The cost of pursuing a claim in the tribunal can be structured such that it exceeds the filing fees of pursuing a claim in federal court for copyright owners of a certain size or claimants who have claims of a certain value. This might dissuade large corporate copyright owners from using the forum unnecessarily or plaintiffs from bringing more complicated or higher-value claims in the small-claims forum without good reason, while still leaving open the possibility of doing so, should both parties wish to opt for a more streamlined resolution. Since the tribunal is a voluntary forum, any fees paid to the tribunal should be refundable to the plaintiff if the defendant opts out of using the venue. This refund of fees also could be made conditional on the revenue of the filer or the size of the claim, and consideration could be given to limiting availability of such refunds only to parties who do not appear to be bad-faith, opportunistic users of the tribunal. Of course, great care must be taken in defining this type of activity to avoid sweeping in the intended users of the tribunal, many of whom will likely bring multiple claims simultaneously or sequentially for exact or near-exact copying and public performance against entities that illegally distribute their work to internet users.

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presenting the case to the tribunal for a binding decision (known as adjudication). *What Is the Tribunal Decision Process?*, CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/tribunal-decision-process/> (last visited July 8, 2018) (discussing the adjudication process); see also CIVIL RESOLUTION TRIBUNAL: RULES, *supra*, at 20–22 (explaining the tribunal process rules). In an adjudication, one of the CRT tribunal members considers the evidence presented and the party's arguments and then makes a binding decision. See *What Is the Tribunal Decision Process?*, *supra*.

<sup>126</sup> The pilot program will be available for money claims under £10,000. Bindman, *supra* note 109. During the initial beta phase, the program will be run privately and will be open to individuals by invitation only, but in January 2018, the program will transition to public beta, in which it will be opened to all court users with an appropriate claim. *Id.* The early stages of the pilot program will ramp up the number of claims heard from an initial forty in the first two weeks to 200 claims per week in the last few weeks of the pilot. See *id.*

<sup>127</sup> See Samuelson & Hashimoto, *supra* note 12, at 12.

### 3. Public Record Transparency

Public record transparency is an issue that, although not elaborately addressed in the legislation, should be more fully addressed in the legislative history of the bill and ultimately in the regulations establishing the tribunal. Although there seems to be broad agreement among the proponents of the legislation and the Critics that tribunal rulings should be reviewable and not have precedential weight,<sup>128</sup> it will be important that the tribunal issues written orders explaining the reasons for its rulings and that those orders be available online, to build public confidence in the tribunal and ensure that the users of the tribunal are better able to formulate their claims and defenses accurately and effectively. This would be consistent with the Copyright Office's practice regarding registration refusals and appeals, in which the Review Board's opinions are posted online in a searchable database.<sup>129</sup>

### CONCLUSION

While it is impossible to predict with accuracy whether adoption of the small-claims proposal will result in an uptick in registrations, as noted *supra* Introduction, one frequent complaint heard in clinical practice from individuals and small businesses is that there is no value in registering works because the copyright system provides them with no protection in the event a work is infringed. Since copyright protections attach automatically upon fixation of a work in a tangible medium, many like Jenna Close see no need to register unless adequate protection is available in the case of infringement. If these anecdotal reports prove to be true, and the small-claims tribunal, once enacted, is thought to have merit by the individuals and small businesses it is designed for, it would presumably offer an additional benefit: it should generate not just filing fees from cases filed in the tribunal but also many more copyright registrations by individuals not adequately represented in the copyright registration system. Ideally, over time, this not only would improve the public's knowledge about and access to creative works but also would make additional resources available to the Copyright Office through new registrations and reduce its reliance on public appropriations.

Nevertheless, Critics ask, "What's so special about copyright?"<sup>130</sup> They claim that the Copyright Office Report has failed to consider the many other instances in which potential litigants suffer modest harms that are not reasonable to litigate in federal court.<sup>131</sup> Posing the question, and proffering their answer, is revelatory. It is jarring to read arguments by other IP scholars

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<sup>128</sup> See *id.* at 10–11.

<sup>129</sup> See *Review Board Letters Online*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/rulings-filings/review-board/> (last visited July 2, 2018).

<sup>130</sup> Samuelson & Hashimoto, *supra* note 12, at 15.

<sup>131</sup> See *id.*

advocating, essentially, for the continued underenforcement of the law. As a clinical professor of law, this author is proud of the role she and her colleagues play in this branch of legal academia, not only in ensuring that students graduate from institutions with real-world experience and an understanding of how the law affects individual lives but also in providing access to justice and aiming for the efficient, just, and effective enforcement of the law for all clients, regardless of their ability to pay.

But, if a response to the question “what’s so special about copyright?” is required, it first bears noting that the proponents of the CASE Act are not suggesting something unique or unprecedented. Indeed, the body of federal jurisdiction jurisprudence cited *supra* Introduction concerns the question of when Congress may create special tribunals in courts or in agencies to address federal claims in a more efficient manner. Thus, to argue that the proponents of the CASE Act are elevating individuals and small businesses with modest copyright claims above other federal litigants is simply incorrect.

Copyright infringement claims left unenforced are, however, capable of inflicting special harms because they affect more than individual litigants. The Constitution vests Congress with the right to “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.”<sup>132</sup> These exclusive rights, unlike other exclusive rights, are intended not to end with the author but to flow from the benefits the author obtains through licensing and disseminating her works to all of society, not only in the diffusion of knowledge and beauty that naturally comes from publishing a work to the public but also through the ripple effects that occur from that beneficial activity in related and unrelated industries in communities across the country.

That is what is so special about copyright.

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<sup>132</sup> U.S. CONST. art I, § 8, cl. 8.