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No Equitable Relief: The Failings of the CASE Act to Protect Middle-Class Creatives from Copyright Infringement

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NO EQUITABLE RELIEF: THE FAILINGS OF THE CASE ACT TO PROTECT MIDDLE-CLASS CREATIVES FROM COPYRIGHT INFRINGEMENT

ELIZA JAMES UNREIN*

ABSTRACT

Copyright law in the United States incentivizes creative activity for the public benefit by granting creators an exclusive right to control their original works. Many individuals and small businesses rely on this right and the protection of copyright law to build their reputations as artists, create a market for their work, and secure a livelihood for themselves and their families. When someone violates this right and infringes on these individuals' and small businesses' copyrights, the forum for seeking redress and preventing future infringement is a lawsuit in federal court. But bringing a copyright infringement claim in federal court is expensive. And advancements in technology create new sources of potential copyright infringement. As early as 2006, Congress recognized that the combined escalating costs of copyright litigation and the increasing number of copyright infringements prevented many lower-income individual creators ("middle-class creatives") and small businesses from enforcing their copyright. The result was that, for many of these individuals, their livelihood and incentive to create died by a thousand small cuts, with societal respect for copyright law suffering the same fate.

Because copyright law was only protecting the exclusive rights of copyright holders with the financial resources to bring a copyright claim in federal court, in 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act). The CASE Act aims to remedy copyright law's inequity by

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creating the Copyright Claims Board, an inexpensive dispute resolution process for small copyright claims under \$30,000. Ideally, middle-class creatives and small businesses will be able to protect their exclusive rights to control their copyright by pursuing their copyright claims in this less-expensive forum. However, for a copyright holder who can afford to bring a copyright infringement claim in federal court, their copyright may be protected by an arsenal of legal and equitable remedies. In contrast, those individuals whose sole option is to bring a copyright infringement claim under the CASE Act will only be protected by legal remedies. This Note argues that the lack of injunctive relief available to copyright holders under the CASE Act will limit its effectiveness in protecting middle-class creatives' and small businesses' exclusive copyrights.

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INTRODUCTION

An independent artist makes a living by drawing whimsical illustrations of her dog, selling posters and T-shirts on her website, and donating a percentage of the proceeds to dog rescue organizations.¹ One day, a large retailer begins selling T-shirts and socks bearing the artist's illustrations without her consent, refusing to either compensate the artist for using her illustrations or cease selling the merchandise.² A group of musicians who believe having their music used for product advertisements is "a form of selling out" has their music used in a video advertisement without their consent.³

The Constitution and the Copyright Act secure for the above artist and musicians, as well as authors and other creators of creative works, a system of exclusive rights for the benefit of the individual's livelihood and, ultimately, the overall public good.⁴ Ideally, because the copyright system seeks to promote and protect their exclusive rights, the independent artist and the group of musicians above can seek redress for the unauthorized use of their works by utilizing the set of enforcement provisions laid out in the Copyright Act.⁵ That is, unless the \$270,000 to \$350,000 average cost of bringing a copyright claim in federal court all the way to appeal stands in their way.⁶ Unfortunately for many independent artists and small businesses, the cost of enforcing their constitutionally secured copyrights, which frequently involve small-to moderate-size copyright claims, is too steep, particularly as digital culture and the desire for content have grown, making infringement easier and more frequent.⁷

¹ Kate Lucas, *Kohl's Becomes the Latest Retailer to Face Accusations of Copyright Infringement*, GROSSMAN LLP: ART L. BLOG (Oct. 13, 2016), <https://www.grossmanllp.com/kohls-becomes-latest-retailer-facing-copyright-infringement> [<https://perma.cc/MZ33-BXFA>].

² *Id.*

³ *Beastie Boys v. Monster Energy Co.*, 87 F. Supp. 3d 672, 677–78 (S.D.N.Y. 2015).

⁴ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 106.

⁵ U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHT 1 (2013) [hereinafter COPYRIGHT SMALL CLAIMS].

⁶ *Id.* at 8; Terrica Carrington, *A Small Claims Court is on the Horizon for Creators*, COPYRIGHT ALLIANCE (Oct. 4, 2017), <https://copyrightalliance.org/small-claims-court-on-the-horizon/> [<https://perma.cc/2UZ6-TFJ5>].

⁷ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1–2.

Concerned that the effect of the inability of the “creative middle class”⁸ to enforce their exclusive rights under the current copyright system was a “[weakening of the] pillars of the copyright law, and [an erosion of] public respect for our nations creativity,”⁹ in 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act).¹⁰ The CASE Act creates the Copyright Claims Board (CCB), a tribunal made up of three Copyright Claims Officers¹¹ within the U.S. Copyright Office to resolve small copyright claims under \$30,000.¹² The CASE Act creates a less formal, less expensive, and streamlined proceeding for individuals and small businesses, occasionally referred to as the “creative middle class,” to seek redress for the unauthorized use of their creative work.¹³

However, to create a straightforward and expedited copyright resolution process, Congress limited the remedies the CCB can grant middle-class creatives under the CASE Act to monetary damages alone.¹⁴ The CCB may not grant the equitable remedy of injunctive relief to prevent future infringement of a plaintiff’s work unless the infringing party voluntarily agrees to cease using the work.¹⁵ In so doing, Congress pulled the teeth out of the CASE Act, limiting its ability to protect the exclusive rights of individual creators and small businesses guaranteed by the Copyright Clause of the Constitution and the Copyright Act.¹⁶ Congress

⁸ See Press Release, H.R. Judiciary Comm., Collins, Jeffries Introduce Bipartisan Legislation to Protect Middle-Class Creators from Copyright Infringement (May 1, 2019), <https://judiciary.house.gov/media/press-releases/collins-jeffries-introduce-bipartisan-legislation-to-protect-middle-class> [<https://perma.cc/K5GZ-6AU5>].

⁹ See COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1.

¹⁰ See Copyright Alternative in Small-Claims Enforcement Act of 2020, 17 U.S.C. §§ 1501–1511 (2020).

¹¹ The Copyright Claims Officers are attorneys with at least seven years of legal experience and experience in copyright infringement claim evaluation, litigation, and adjudication. 17 U.S.C. § 1502(b).

¹² *Id.*

¹³ 17 U.S.C. §§ 1502(a), 1504(e)(1)(D); Kyle Jahner, *House Panel Advances Bill for Copyright Small Claims Tribunal (1)*, BLOOMBERG L. (Sept. 11, 2019, 5:35 PM), <https://news.bloomberglaw.com/ip-law/house-advances-bill-to-create-copyright-small-claims-tribunal> [<https://perma.cc/62GK-BXWT>].

¹⁴ 17 U.S.C. § 1504(e)(1).

¹⁵ § 1504(e)(2).

¹⁶ See *infra* Section III.A.

thus limited the CCB's ability to adequately fulfill the role of a copyright judicial body, disallowing it from providing remedies that would further the purpose of copyright law on a case-by-case basis and adapt to a rapidly changing area of law.¹⁷

The lack of injunctive relief available under the CASE Act limits the Act's effectiveness in reducing the inequity of the current U.S. copyright right system as applied to individual creators and small businesses who cannot afford to protect their creative work by pursuing a federal copyright infringement suit.¹⁸ This Note begins by discussing the history, development, and purpose of copyright law and equitable remedies, primarily injunctive relief, in copyright law.¹⁹ Part II details the creation of the CASE Act of 2020, its purpose of providing an efficient and inexpensive copyright infringement forum for the "creative middle class," and the remedies available to copyright holders under the Act.²⁰ Part III argues that the limited remedies available under the CASE Act will cause it to fall short of its goal of protecting middle-class creative's exclusive rights and diminish its ability to withstand the test of time in a rapidly developing area of law, and ultimately argues for the inclusion of the equitable remedy of permanent injunctive relief in the Act.²¹

I. THE HISTORY OF INJUNCTIVE RELIEF IN COPYRIGHT LAW

A. *The Purpose of Copyright Law*

The concept that an author has an economic or property interest in his work and a right to require compensation for its use has existed since before ancient Rome.²² Fast forward a couple thousand years, and copyright law begins to take the statutory form recognizable in western law today: the Statute of Anne.²³

¹⁷ See *infra* Section III.B.

¹⁸ See *infra* Sections III.A–B.

¹⁹ See *infra* Part I.

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

²² EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATIONAL AGE 7 (1980).

²³ *Id.* at 12–13.

Effective in England in 1710, the Statute of Anne replaced the right of stationers to publish works in perpetuity with statutory protection of an author's exclusive property right to control the printing, reprinting, and publishing of their work for a limited time.²⁴ The courts then clarified through case law that the Statute of Anne supplanted natural authorial copyright and, in so doing, affirmed that the purpose of statutory copyright law was to incentivize learning.²⁵

B. Early Copyright Remedies

The Statute of Anne in 1710 provided copyright holders the equitable remedy of requiring the infringer to forfeit infringed work and outlined a penalty associated with infringement but did not provide for monetary damages.²⁶ Consequently, by 1789, copyright infringement suits were litigated in the Court of Chancery, a court of equity.²⁷ The norm was for the court to grant an injunction for copyright infringement.²⁸ Based on the property law

²⁴ BETHANY KLEIN ET AL., UNDERSTANDING COPYRIGHT: INTELLECTUAL PROPERTY IN THE DIGITAL AGE 10 (2015). The preamble of the Statute of Anne specifically stated the purpose of the act and statutorily recognized the copyright of authors:

An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned. Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families.

The Statute of Anne, April 10, 1710, YALE L. SCH.: THE AVALON PROJECT (2008) [hereinafter *Statute of Anne*], https://avalon.law.yale.edu/18th_century/anne_1710.asp [<https://perma.cc/KY9C-BJ9Z>].

²⁵ See *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837, 847; *Statute of Anne*, *supra* note 24.

²⁶ *Statute of Anne*, *supra* note 24.

²⁷ See H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1200, 1225–28 (2008) (describing how plaintiffs brought early copyright cases before the Court of Chancery).

²⁸ *Id.* at 1237.

idea of an owner's right to exclude individuals from using their property, an injunction is an equitable remedy that stops the current or future interference with an owner's property.²⁹ Unlike today, the adequacy of remedies at law did not appear to factor into the Court's decision about whether to grant an injunction.³⁰ Rather, borrowing from common law courts, on a case-by-case basis, the Court of Chancery determined whether the merits of the case warranted granting an injunction.³¹ Historical studies suggest that remedies at law, such as monetary awards, were considered "categorically inadequate" to remedy an infringement of an author's copyright, despite their deterrent effect.³² Not until 1801 would statutory monetary damages become available to British copyright holders.³³

C. The Formation of the Purpose of Copyright Law in the Early United States

The English concept of copyright significantly influenced early United States copyright law.³⁴ Prior to 1787, twelve states modeled their copyright laws on the language and form of the Statute of Anne.³⁵ The purpose of the state laws was to protect the rights of authors, encourage learning, restrict market monopolization, and establish order in book sales.³⁶

Providing uniformity to the multiplicity of state copyright laws, the United States Constitution included an intellectual property clause that stated, "the Congress shall have the power

²⁹ Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 595–96 (2008).

³⁰ Gómez-Arostegui, *supra* note 27, at 1236–37.

³¹ *Id.* The case's merits consisted of whether the plaintiff had title or a "plain" right to the copyright, whether infringement occurred, whether the defendant would suffer too great a hardship, and whether the plaintiff had exhibited unclean hands. *Id.* at 1237, 1240–41.

³² *Id.* at 1249.

³³ *Id.*

³⁴ JERRY JIE HUA, TOWARD A MORE BALANCED APPROACH: RETHINKING AND READJUSTING COPYRIGHT SYSTEMS IN THE DIGITAL NETWORK ERA 51 (2014).

³⁵ GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 76–77 (2d ed. 2002).

³⁶ *Id.* at 78.

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.”³⁷

In 1790, three years after the Federal Convention,³⁸ Congress passed the first federal copyright statute.³⁹ The Copyright Act of 1790 contained basic ideas regarding the function of copyright law similar to those outlined in the Statute of Anne.⁴⁰ These ideas included the protection of copyright to promote learning, to benefit the author, and to impose a limited term of copyright to prevent harmful perpetual monopolies.⁴¹

Further, similar to the English courts’ finding of the legislative intent behind the Statute of Anne, the Supreme Court’s decision in *Wheaton v. Peters*,⁴² in conjunction with the Copyright Act of 1790, framed the purpose of statutory copyright law in the United States.⁴³ Since that time, the goal of U.S. copyright law has been to further the public welfare by incentivizing the progress of science and useful arts by protecting, for a limited period, an author or creator’s exclusive right to control and reap the rewards of their creative works.⁴⁴

³⁷ U.S. CONST. art. I, § 8, cl. 8.

³⁸ The Federal Convention occurred in 1787. 16 AM. JUR. 2d *Constitutional Law* § 10 (2020). In response to disappointment with the confederation of states, the Convention drafted the Constitution. *Id.*

³⁹ DAVIES, *supra* note 35, at 77.

⁴⁰ *Id.* at 78.

⁴¹ *Id.*

⁴² 33 U.S. (8 Pet.) 591, 661 (1834) (holding that Congress, through the provisions of the Act of 1790, created in an author a secured copyright for a limited time rather than sanctioning an existing perpetual right).

⁴³ DAVIES, *supra* note 35, at 80–81; HUA, *supra* note 34, at 52. The Copyright Act of 1790 advanced public welfare because, once published, an author had exclusive protection rights over their work for a limited time. *Id.* Upon expiration of the fourteen years, the work would enter the public domain unless the owner renewed the copyright. *Id.* Copyright Act of 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124.

⁴⁴ See REG. OF COPYRIGHTS, 87TH CONG., REP. OF THE REG. OF COPYRIGHTS ON THE GEN. REVISION OF THE U.S. COPYRIGHT L. 5 (Comm. Print 1961) (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”); *Mazer v. Stein*, 347 U.S. 201, 219

1. Remedies Following the Copyright Act of 1790

To ensure individual cases of copyright infringement comport with the purpose of copyright law, Congress and the courts attempted to balance property law principles with furthering the public interest in forming and justifying both legal and equitable copyright remedies.⁴⁵ In 1819, Congress conferred on the circuit courts “[O]riginal cognisance as well in *equity* as at law of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries.”⁴⁶

This equitable provision gave the circuit courts authority to grant injunctions “according to the course and principles of courts of equity.”⁴⁷ Injunctive relief provided a preventative remedy against continued or future infringement, while monetary remedies provided a form of restorative relief and also worked as further deterrence against infringement for some defendants.⁴⁸ The courts’ power to grant equitable relief reduced the rigidity of a system of monetary remedies, providing plaintiffs with a form

(1954) (“[Copyright law] is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements: ‘to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.’”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“But the ultimate aim [of copyright law] is . . . to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’”); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.”).

⁴⁵ See REG. OF COPYRIGHTS, 87TH CONG., *supra* note 44, at 6 (“The ultimate task of the copyright law is to strike a fair balance between the author’s right to control the dissemination of his works and the public interest in fostering their widest dissemination.”); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

⁴⁶ Act of Feb. 15, 1819, ch. 19, 3 Stat. 481 (1819) [sic] (emphasis added).

⁴⁷ *Id.*

⁴⁸ Balganes, *supra* note 29, at 639–40.

of relief when monetary damages were inadequate or the plaintiff's harm irreparable, resulting in a system that could adapt to the needs of individual cases or future changes in the law.⁴⁹

D. Campbell & eBay—A Shift Away from Presumptive Remedies

As stated in the above section, since at least 1819, victims of copyright infringement have protected their constitutionally guaranteed copyright by seeking an equitable remedy as well as a monetary remedy from the courts.⁵⁰ The Copyright Act of 1976 expressly conferred on the courts the power to enjoin copyright infringement, implying the use of judicial discretion in determining whether such an equitable remedy is “reasonable” to prevent future infringement.⁵¹ However, the statute's limited verbiage and legislative history created ambiguity as to when the facts of a case warranted the award of injunctive relief.⁵²

The courts resolved this ambiguity by utilizing case law and traditions of equity.⁵³ Historically, courts treated copyright law analogously to property law by equating the right to exclude with an exclusionary remedy: an injunction.⁵⁴ This led to an assumption that if a plaintiff could prove copyright infringement existed and was continuing, or a likelihood of success on the merits, denying the remedy of an injunction would render the copyright holder's right to exclusivity meaningless.⁵⁵ As a result,

⁴⁹ See *id.* at 640 (“As a historical matter, equity developed to alleviate the rigidity and inadequacy of the common law's system of remedies.”).

⁵⁰ See *supra* notes 46–49 and accompanying text.

⁵¹ Pub. L. No. 94-553, 90 Stat. 2541, 2584 (1976) (codified as 17 U.S.C. § 502(a)); see Andrew F. Spillane, Comment, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INTELL. PROP. L. REV. 257, 262 (2011) (discussing that the use of the word “may” in § 502(a) as opposed to the use of the word “shall” confirms that courts have the discretion to issue injunctions).

⁵² Spillane, *supra* note 51, at 267–68.

⁵³ *Id.* at 258.

⁵⁴ See Balganesch, *supra* note 29, at 648 (“[E]quity came to treat intellectual property analogously to real property. Once title (*validity*) and trespass (*infringement*) were established, the grant of injunctive relief seemed to follow naturally.”).

⁵⁵ See 2 Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1261 (W.H. Lyon Jr. ed., 14th ed.,

similar to the eighteenth century Court of Chancery, the majority of U.S. courts presumed the inadequacy of legal remedies for copyright infringement and automatically awarded injunctive relief when the plaintiff had proven infringement or likelihood of success on the merits.⁵⁶

However, by presuming that a copyright holder who proves copyright infringement is automatically entitled to injunctive relief, the courts began to limit their flexibility and discretion in determining the appropriate remedy.⁵⁷ When issuing or affirming an injunction, many courts' analysis of the equitable factors warranting the issuance of such a remedy was perfunctory and lacking in detail.⁵⁸ For example, in *Wainwright Secs. v. Wall St. Transcript Corp.*, the Second Circuit affirmed the granting of a

1918) ("It is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.").

⁵⁶ See, e.g., *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986) ("Copyright law has long held that irreparable injury is presumed when the exclusive rights of the holder are infringed."); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990) ("When a copyright plaintiff has established a threat of continuing infringement, he is *entitled* to an injunction."). Compare *Am. Code Co. v. Bensinger*, 282 F. 829, 834 (2d Cir. 1922) ("In cases of infringement of copyright, an injunction has always been recognized as a proper remedy, because of the inadequacy of the legal remedy. The remedy by injunction exists independently of express provision therefor in the copyright statutes; it being granted on the well-established equitable principle that a court of equity will protect a legal right where the remedy at law is inadequate."), with *Hogg v. Kirby*, 8 Ves. 215, 225, 32 Eng. Rep. 336, 340 (1803) ("The principle of granting the injunction in [copyright] cases is, that damages do not give adequate relief . . ."). With the exception of the Fifth Circuit, all circuit courts presumed irreparable harm if a plaintiff showed likely success on the merits. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:44, Westlaw (database updated Mar. 2022).

⁵⁷ See *Spillane*, *supra* note 51, at 267–69; *Balganesh*, *supra* note 29, at 648–49.

⁵⁸ See, e.g., *Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498–99 (10th Cir. 1993) ("In copyright cases we think [the public interest] factor normally weighs in favor of the issuance of an injunction because the public interest is the interest in upholding copyright protections. . . . The issuance of the injunction clearly was not adverse to the public interest."), *overruled on other grounds by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1499–1500 (11th Cir. 1984).

preliminary injunction when the plaintiff showed irreparable injury and a probability of success on the merits of the case.⁵⁹ Few courts considered whether the presumptive remedy would provide an equitable result or further the purpose of copyright by providing an appropriate remedy.⁶⁰

1. *Campbell v. Acuff-Rose, Inc.: Shifting Away from Presumptive Remedies to Further the Goals of Copyright Law*

The Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.* is famous for its profound impact on the doctrine of fair use in copyright law.⁶¹ However, the decision is also notable because of the Court's support for exercising judicial discretion to withhold injunctions in close fair use cases in footnote ten of its opinion.⁶²

In the footnote, the Supreme Court stated that courts should bear in mind the goal of copyright law: "to stimulate the creation and publication of edifying matter."⁶³ While the vast majority of copyright infringement cases are simply piracy and justify an injunctive remedy,⁶⁴ in cases where there is a strong public interest, monetary damages may be an adequate remedy for infringement.⁶⁵ Footnote ten largely went overlooked until

⁵⁹ *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977).

⁶⁰ *See, e.g., Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990); *Pacific & Southern Co.*, 744 F.2d at 1499–1500.

⁶¹ 510 U.S. 569, 579 (1994). *See, e.g., Pamela Samuelson, Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818–24 (2015) (discussing the influence of *Campbell* on the fair use doctrine in U.S. copyright common law).

⁶² Jeff Toole, *Campbell v. Acuff-Rose Music, Inc.: The Rap on Remedies*, 29 IND. L. REV. 467, 475–77 (1995).

⁶³ *Campbell*, 510 U.S. at 578 n.10 (citing Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990)).

⁶⁴ *See, e.g., Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1024, 1030, 1047 (9th Cir. 2013) (a permanent injunction issued to prevent BitTorrent infringement); *Elsevier Inc. v. Siew Yee Chew*, No. 17CIV6225JGKGWG, 2019 WL 74606, at *11–12 (S.D.N.Y. Jan. 2, 2019), *report and recommendation adopted*, No. 17-CV-6225 (JGK), 2019 WL 10947099 (S.D.N.Y. Jan. 23, 2019) (granting an injunction to stop the distribution of counterfeit textbooks).

⁶⁵ *Campbell*, 510 U.S. at 578 n.10.

the Supreme Court relied on *Campbell* to support its decision in *eBay, Inc. v. MercExchange, L.L.C.*: that courts must exercise judicial discretion when deciding to issue an injunction in intellectual property cases.⁶⁶

2. *eBay v. MercExchange, L.L.C.: The Equitable Four-Factor Test for When a Court Should Grant an Injunction*

MercExchange sued eBay for infringement of its patented method of conducting online sales.⁶⁷ The jury found that eBay infringed on MercExchange's valid patent.⁶⁸ Consistent with the Copyright Act, the Patent Act indicated that patents have the "attributes of personal property" and that "injunctions 'may' issue in 'accordance with the principles of equity.'"⁶⁹ The district court, however, denied MercExchange's motion for a permanent injunction, finding that the plaintiff's lack of commercial activity in practicing the patents did not establish that irreparable harm would occur absent an injunction.⁷⁰ The Court of Appeals for the Federal Circuit reversed, applying its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."⁷¹

On certiorari, the Supreme Court rejected the Court of Appeals for the Federal Circuit's categorical rule and the district court's ruling.⁷² The Court held that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the courts, and that such discretion must be exercised consistent

⁶⁶ See Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of eBay*, 63 WM. & MARY L. REV. 773, 813 (2022). *eBay* was explicitly regarding patent infringement cases, but the Court's reliance on copyright cases in forming its decision implied that the ruling applied to copyright cases as well. *Id.* at 813–14.

⁶⁷ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

⁶⁸ *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003), *aff'd in part, rev'd in part sub nom. MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded sub nom. eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), *and judgment entered*, 660 F. Supp. 2d 653 (E.D. Va. 2007).

⁶⁹ *eBay*, 547 U.S. at 392.

⁷⁰ *MercExchange*, 275 F. Supp. 2d at 712.

⁷¹ *eBay*, 547 U.S. at 391.

⁷² *Id.* at 391, 393–94.

with traditional principles of equity”⁷³ The Court ruled that the traditional principles of equity a plaintiff must prove are:

(1) that it has suffered an irreparable injury;⁷⁴ (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁷⁵

At the bottom, the Court rejected the trend in the federal circuits of issuing the presumptive remedy of an injunction in intellectual property cases in favor of reinstating equitable discretion and flexibility to determine an appropriate remedy based on the individual facts of a case.⁷⁶ Justice Kennedy, in his concurrence, observed that equitable discretion over whether to award injunctions “allow[ed] courts to adapt to rapid technological and legal developments in the patent system.”⁷⁷ Further, Chief Justice Roberts’s short concurrence acknowledged the “difficulty of protecting the right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee’s wishes,” but noted that requiring courts to decide whether to issue a remedy pursuant to the four-factor test would help to ensure judicial consistency between cases.⁷⁸

Despite the facts of *eBay* involving the issuance of a permanent injunction in a patent infringement case, the Court’s opinion has been considered applicable to copyright law because the Court relied on *Campbell* and other copyright case law.⁷⁹ The Court later clarified in *Winter v. Natural Resources Defense Council, Inc.*⁸⁰ that the four-factor test for deciding whether to grant an

⁷³ *Id.* at 394.

⁷⁴ The Court later clarified that the focus should not be on whether the plaintiff has suffered an irreparable injury but whether the plaintiff will suffer an irreparable injury absent the issuance of a permanent injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also* Samuelson, *supra* note 66, at 816 n.290.

⁷⁵ *eBay*, 547 U.S. at 391.

⁷⁶ *See id.* at 392–94.

⁷⁷ *Id.* at 397 (Kennedy, J., concurring).

⁷⁸ *Id.* at 396 (Roberts, J., concurring) (emphasis added); Balganesch, *supra* note 29, at 654.

⁷⁹ *eBay*, 547 U.S. at 392–93; Spillane, *supra* note 51, at 279.

⁸⁰ 555 U.S. 7 (2008).

injunction also applies in cases involving preliminary injunctions.⁸¹ However, in such cases, the plaintiff must show a likelihood of success on the merits rather than actual success.⁸²

3. *Injunctions in Copyright Law Post-eBay*

After several years, all but one federal circuit supplanted their precedential presumption of irreparable harm and automatic granting of an injunction in copyright cases with *eBay*'s four-factor test.⁸³ The result is that, in modern copyright cases, courts are deliberate in their exercise of equitable discretion and mindful of the roles of injunctive relief and monetary remedies in preventing harm to copyright holders and furthering the purpose of copyright law.⁸⁴

This exercise of equitable discretion leads courts to become more willing to award damages in lieu of automatically granting an injunction.⁸⁵ For example, courts have denied granting an injunction when a plaintiff fails to prove the inadequacy of a compensatory remedy;⁸⁶ prove irreparable harm caused by the infringement;⁸⁷ or in cases where the public interest would be better served by allowing access to the infringed material.⁸⁸

⁸¹ *Id.* at 32.

⁸² *Id.* at 21–22.

⁸³ Samuelson, *supra* note 66, at 814. The Sixth Circuit is the only federal circuit to continue to apply the presumption of irreparable harm in copyright cases. *Id.* at 823.

⁸⁴ See *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981–82 (9th Cir. 2011) (discussing each element of the four-factor test from *eBay*); *Salinger v. Colting*, 607 F.3d 68, 79–83 (2d Cir. 2010) (discussing each element of the four-factor test from *eBay*).

⁸⁵ Samuelson, *supra* note 66, at 821–31.

⁸⁶ *Frerck v. John Wiley & Sons, Inc.*, 850 F. Supp. 2d 889, 894 (N.D. Ill. 2012) (finding that the plaintiff failed to show the unlicensed use of his photographs constituted inadequate remedy at law because the plaintiff centered his claim on the loss of money, specifically the loss of fees per photograph).

⁸⁷ *Williams v. Bridgeport Music, Inc.*, No. LACV1306004JAKAGR, 2015 WL 4479500, at *39–42 (C.D. Cal. July 14, 2015), *aff'd in part, rev'd in part sub nom.* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), and *aff'd in part, rev'd in part sub nom.* *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

⁸⁸ See *Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. 2015) (finding a mandatory injunction incompatible with the First Amendment because it suppressed the public's ability to view a politically significant film).

Courts have also explicitly considered the First Amendment when deciding whether to deny injunctive relief.⁸⁹

However, while *eBay* and *Winter* disposed of the presumption of irreparable injury and required plaintiffs to satisfy the four-factor test for awarding injunctive relief, the equitable remedy has in no way disappeared from copyright law.⁹⁰ Recall that the *eBay* Court criticized not only the court of appeals for its presumption of irreparable harm but also the district court for its adoption of a principle that precluded injunctive relief from issuing in a large swath of cases where compensatory remedies were inadequate.⁹¹ Rather, *eBay* emphasized a flexible system of awarding remedies that furthered the goal of copyright law on a case-by-case basis based on the court's equitable discretion.⁹²

Today, injunctions still play an essential role in incentivizing the creation of creative works.⁹³ First, money alone is an inadequate incentive to create work for many artists and creators.⁹⁴ A 2019 economic study from the World Intellectual Property Organization found that a wide range of factors, like reputational non-monetary rewards, recognition for work, and returns from altruistic behavior, are important sources of motivation for artists to create new work rather than monetary income alone.⁹⁵

Second, there are many situations in which copyright courts are unable to calculate an appropriate damage award and require an equitable remedy to protect the plaintiff's property interest.⁹⁶ A copyright holder's loss may be difficult to replace, measure, or "is a loss that one should not be expected to suffer."⁹⁷

⁸⁹ *Id.*

⁹⁰ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–94 (2006); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see Samuelson, *supra* note 66, at 848–49.

⁹¹ See *eBay*, 547 U.S. at 393.

⁹² *Id.* at 391–92.

⁹³ See Samuelson, *supra* note 66, at 850; Leval, *supra* note 63, at 1132.

⁹⁴ Alexander Cuntz, *Copyright and the currency of creativity: beyond income*, WIPO MAG. (June 2019), https://www.wipo.int/wipo_magazine/en/2019/03/article_0003.html [<https://perma.cc/XV52-RKR6>].

⁹⁵ Angie L. Miller & Alexander Cuntz, *Unpacking predictors of income and income satisfaction for artists*, 11–13 (World Intell. Prop. Org., Working Paper, No. 50, 2018).

⁹⁶ See *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

⁹⁷ *Id.*

For example, a court may struggle to assess adequate damages for infringement that leads to market confusion as to which work is the copyright holder's and which is the infringing copy.⁹⁸ Or a copyright holder may be unwilling to license their work for a particular purpose or to a particular person or entity because of the effect on their reputation or goodwill.⁹⁹ In such a context, granting only legal remedies can undermine the creator's limited monopoly and exclusive right to decide when they license, to whom they license, and the terms of the licenses they issue for the use of their copyrighted works.¹⁰⁰ Third, the Supreme Court has also recognized copyright holders have a First Amendment right not to speak, and thus, "infringement of the right *not* to speak, 'for even minimal periods of time,' unquestionably constitutes irreparable injury."¹⁰¹

Cases involving repeat infringers undeterred by the prospect of paying damages for their infringement are also instances when courts award injunctions.¹⁰² Further, courts frequently issue injunctions in "simple piracy" cases where infringers have directly copied a copyright owner's work and sold cheaper versions.¹⁰³ This illegal copying also creates market confusion if the infringing copy is of such poor quality that prospective buyers turn to competitors rather than purchasing the work of the infringer or the copyright holder.¹⁰⁴ Alternatively, if the infringed copy is of decent

⁹⁸ *Id.*

⁹⁹ *See* *Beastie Boys v. Monster Energy Co.*, 87 F. Supp. 3d 672, 677–78 (S.D.N.Y. 2015) (permanently enjoining defendant from infringing because plaintiffs were unwilling to license their music for product advertising).

¹⁰⁰ *See id.* at 78–79.

¹⁰¹ *Salinger*, 607 F.3d at 81.

¹⁰² *Seoul Broad. Sys. Int'l, Inc. v. Young Min Ro*, No. 1:09CV433 LMB/IDD, 2011 WL 3207024, at *6 (E.D. Va. July 27, 2011); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990) ("When a copyright plaintiff has established a threat of continuing infringement, he is *entitled* to an injunction.").

¹⁰³ *See, e.g., Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1024, 1030, 1047 (9th Cir. 2013) (a permanent injunction issued to prevent BitTorrent infringement); *Elsevier Inc. v. Siew Yee Chew*, No. 17CIV6225JGKGWG, 2019 WL 74606, at *11–12 (S.D.N.Y. Jan. 2, 2019), *report and recommendation adopted*, No. 17-CV-6225 (JGK), 2019 WL 10947099 (S.D.N.Y. Jan. 23, 2019) (granting an injunction to stop the distribution of counterfeit textbooks).

¹⁰⁴ *Clonus Assocs. v. DreamWorks, LLC*, 417 F. Supp. 2d 248, 256 (S.D.N.Y. 2005).

quality but priced lower than the original work, consumers have no reason to buy the copyright holder's work.¹⁰⁵ Such infringers "free-ride on the copyright owner's publicity, undercut the market, and deprive the copyright owner of the rewards of his creation . . . [destroying] the incentive to create and thus [depriving] the public of the benefits copyright was designed to secure."¹⁰⁶

II. THE COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT

A. *The Difficulties of Bringing a Copyright Suit in the Pre-2020 Copyright Litigation System*

As noted in the above sections, the Copyright Clause of the Constitution and the 1976 Copyright Act established for authors and creators a limited monopoly in the control of their created property to "promoting the Progress of Science and the Useful Arts."¹⁰⁷ Unfortunately, the Copyright Act proved ill-equipped to handle the onslaught of copyright infringement in the post-1976 technologically advanced future.¹⁰⁸ The dominance of digital culture and the prevalence of the internet created an insatiable desire for content and a means for users to freely acquire, copy, and disseminate such content with little or no regard for the creative author's property rights.¹⁰⁹ Because the Copyright Clause and Copyright Act firmly place copyright law under federal law, the forum to pursue a copyright infringement claim is in federal court.¹¹⁰ But, new technology has made infringement easier, driving up the number of claims, increasing the length

¹⁰⁵ *See id.*

¹⁰⁶ Leval, *supra* note 63, at 1132.

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 106, 201(a).

¹⁰⁸ *See* Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?*, 25 COMM. L. & POL'Y 1, 1 (2020) ("Calls for American copyright reform have grown steadily since the enactment of the 1976 Copyright Act, which, while itself a major overhaul of the law at the time, did not do enough to address existing technologies, much less anticipate the digital future. Authors and artists suffer economically as digital technology, the Internet and social media make the free copying and dissemination of their creative works by others easy to do and hard to prevent.").

¹⁰⁹ *Id.* at 1–2; COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1–2.

¹¹⁰ *Id.* at 8.

and complexity of litigation, and rocketing the cost of bringing a copyright suit in federal court.¹¹¹

In 2006, the Copyright Office observed that the high cost of copyright infringement litigation left many individual creators with little practical recourse in obtaining relief through the court system, particularly for infringements involving small amounts of damages.¹¹² Following a request by Congress to assess the problems preventing copyright owners from pursuing copyright claims of low economic value and a series of hearings on the same subject, the Copyright Office issued a report in 2013 regarding potential remedies for small copyright claims.¹¹³

The report stated that, as of 2010, the median cost of a copyright infringement lawsuit with less than \$1 million at stake seen through to appeal was \$350,000.¹¹⁴ The median cost of a lawsuit only seen through discovery was \$200,000.¹¹⁵ However, at the time of the report, the average professional photographer earned less than \$50,000 a year,¹¹⁶ and the median annual income for writers and authors was \$55,420.¹¹⁷ Thus, the report found that the cost of a copyright lawsuit was utterly disproportionate to what most individual creators and small businesses with small to moderate claims could afford to invest in pursuing a claim or hope to recover.¹¹⁸

¹¹¹ Olson, *supra* note 108, at 1–2. Federal court litigation takes longer to resolve than state court litigation because of a backlog in federal courts and a requirement that federal courts resolve criminal matters before civil matters when reasonable. Anthony Ciolli, *Lowering the Stakes: Toward A Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1001–02 (2008).

¹¹² U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 11 (2006).

¹¹³ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1.

¹¹⁴ *Id.* at 25.

¹¹⁵ *Id.*

¹¹⁶ Per the U.S. Bureau of Labor Statistics Occupational Outlook Handbook, as of 2021, the median income of an individual professional photographer was \$38,950 a year. *Occupational Outlook Handbook*, U.S. BUREAU OF LAB. STATS. (Sept. 8, 2021), <https://www.bls.gov/ooh/media-and-communication/photographers.htm> [<https://perma.cc/76T8-V53Q>].

¹¹⁷ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 8 n.29.

¹¹⁸ *Id.* at 8. In 2016, Professional Photographers of America reported that more than 70% of its members had experienced infringement of their work in some form, with an estimated value of infringement at less than \$3,000. *Why Do We Need Copyright Small Claims?*, PRO. PHOTOGRAPHERS OF AM. (Feb. 17,

Further, the report cited a survey of American Bar Association IP members, which indicated that an attorney would not file a copyright case in federal court unless the value of recovery exceeded \$40,000.¹¹⁹ Therefore, many small claimants were unlikely to obtain counsel, forcing them to choose between not bringing a claim or proceeding *pro se* and navigating the complex waters of federal copyright litigation on their own.¹²⁰

In sum, the report found that the U.S. copyright system did not provide individual copyright owners who rely on their exclusive rights under copyright law to earn a living or run a small business with a practical and realistic method of enforcing and deterring the violation of those rights.¹²¹ The report further noted: “[w]hile ‘such small claims and random infringement may seem unimportant . . . taken in the aggregate, they affect the livelihoods of individual creators akin to the infamous torture ‘death by a thousand cuts.’”¹²² The result is that these creators often felt disillusioned with the copyright system and disincentivized to create work.¹²³ Not only does the unenforceability of constitutionally guaranteed exclusive rights negatively impact the individuals, but it also negatively impacts the public good by “weaken[ing] the pillars of copyright law and [eroding] public respect for our nation’s creativity. . . .”¹²⁴ The report proposed model legislation

2016), <https://www.ppa.com/articles/why-do-we-need-copyright-small> [<https://perma.cc/X879-5828>].

¹¹⁹ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 25.

¹²⁰ *Id.* at 8–9.

¹²¹ *Id.* at 1. The Report cited multiple comments from organizations representing individual creators, such as Graphic Artists Guild: “[a]s a practical matter, except for large corporate copyright owners, our current copyright laws are virtually unenforceable when it comes to infringement of visual works” and Alliance for Visual Artists: “[t]he traditional method of protecting copyrights . . . is simply impracticable for a small business photographer with limited income.” *Id.*

¹²² *See id.* at 2 (quoting Songwriters Guild of America (“SGA”) & Nashville Songwriters Association International (“NSAI”), Comments Submitted in Response to U.S. Copyright Office’s Oct. 27, 2011 Notice of Inquiry at 1 (undated) (“SGA & NSAI First Notice Comments”)).

¹²³ Terrica Carrington & Keith Kupferschmid, *CASE Act Signed into Law: What This Means*, COPYRIGHT ALLIANCE (Jan. 7, 2021), <https://copyrightalliance.org/case-act-signed-into-law/> [<https://perma.cc/S3T6-99U4>].

¹²⁴ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1.

for creating a CCB within the U.S. Copyright Office as a forum for lower-value copyright disputes.¹²⁵

B. Congress's Solution

At the end of 2020, within the pages of the longest bill in the history of the United States,¹²⁶ Congress attempted to address the unequal application of copyright law through the passage of the CASE Act.¹²⁷ The CASE Act closely followed the proposed legislation in the 2013 report.¹²⁸

The CASE Act establishes a CCB within the Copyright Office to resolve copyright claims under \$30,000.¹²⁹ The CCB consists of three attorneys with extensive copyright experience appointed by the Librarian of Congress.¹³⁰ The CCB may decide copyright infringement claims, declarations of noninfringement, and misrepresentation claims relating to Takedown Notices brought under the Digital Millennium Copyright Act.¹³¹ The CCB may also consider counterclaims and any legal or equitable defenses available under the law.¹³² Further, the CCB is bound by judicial precedent when deciding cases,¹³³ but any decision by the CCB may not be relied upon as legal precedent.¹³⁴

¹²⁵ *Id.* at 133.

¹²⁶ 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 16.01(C) (Matthew Bender, rev. ed. 2022).

¹²⁷ *Id.*

¹²⁸ *Id.* § 16.01(B). The Copyright Claims Board opened to hear claims on June 16, 2022. U.S. Copyright Office, *Copyright Office Announces Claims Board Is Open for Filing*, COPYRIGHT.GOV: NEWSNET ARCHIVE (June 16, 2022), <https://www.copyright.gov/newsnet/2022/969.html> [<https://perma.cc/4CHV-DMG4>].

¹²⁹ 17 U.S.C. §§ 1502, 1504(e)(1)(D).

¹³⁰ *See* § 1502(b). There is much debate as to whether the Copyright Claims Board is constitutional; however, this analysis is beyond the scope of this Note. NIMMER & NIMMER, *supra* note 126, § 16.09 (discussing constitutional questions raised by the CASE Act).

¹³¹ § 1504(c)(1)–(3).

¹³² § 1504(c)(4)–(5).

¹³³ § 1503(b)(1). If there is conflicting judicial precedent in a case, the CCB is required to “follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States” § 1506(a)(2).

¹³⁴ § 1507(a)(3).

One of Congress's main goals with the CASE Act was to create a streamlined and cost-effective process for resolving small-cost copyright disputes.¹³⁵ For this reason, hearings are to be conducted via telecommunication facilities or based on written submissions, discovery is limited, and attorney representation is not necessary.¹³⁶ Significantly, participation in the copyright claim resolution process is voluntary for both parties, allowing the respondent to opt out within sixty days and leave the plaintiff with the only option of pursuing their claim in federal court.¹³⁷

The voluntary nature of the small-claims process led many to question the effectiveness of the CASE Act if the infringing party could always opt out of litigation.¹³⁸ The Copyright Office's and Congress's answer to this question is that the damages that CCB may award, at most \$15,000 per infringed work with a maximum total award of \$30,000, will incentivize defendants to consent to litigate in front of the CCB, rather than risk liability of up to \$150,000 per infringed work by litigating in federal court.¹³⁹

However, most relevant for the purposes of this Note, the CCB may only award monetary remedies to a plaintiff who successfully proves copyright infringement, either in actual damages, statutory damages, or attorney's fees upon a showing of bad faith.¹⁴⁰ Additionally, while the CCB can limit the number of small claims brought by a claimant per year, the CCB does not have the power to stop a defendant from choosing to infringe repeatedly.¹⁴¹

¹³⁵ H.R. Rep. No. 116-252, at 17 (2019); COPYRIGHT SMALL CLAIMS, *supra* note 5, at 3.

¹³⁶ 17 U.S.C. § 1506(c)(2), (d). However, pro bono attorneys or qualified law students can represent a party. *Id.*

¹³⁷ § 1504(a).

¹³⁸ See NIMMER & NIMMER, *supra* note 126, § 16.10(C)(4) (discussing that, due to the opt-out option for infringing actors, Congress is simply hoping the CASE Act will work but has no basis for so predicting); Daniel Grant, *US Copyright law comes under scrutiny as new legislation makes its way before Congress*, THE ART NEWSPAPER (Mar. 27, 2020), <https://www.theartnewspaper.com/2020/03/27/us-copyright-law-comes-under-scrutiny-as-new-legislation-makes-its-way-before-congress> [<https://perma.cc/ZR7H-6VBD>]. A respondent may affirmatively opt out within 60 days. 17 U.S.C. § 1506(g)(1).

¹³⁹ See COPYRIGHT SMALL CLAIMS, *supra* note 5, at 110–12; Carrington & Kupferschmid, *supra* note 123.

¹⁴⁰ 17 U.S.C. § 1504(e).

¹⁴¹ See § 1504(e), (g).

In its 2013 report to Congress, the Copyright Office noted that, for some small claimants, the primary purpose for bringing an infringement claim is to stop the unauthorized use of their work, not recover monetary damages.¹⁴² It further recognized that determining whether to issue an injunction is straightforward in cases simply involving displaying, copying, or reproducing copyrighted work.¹⁴³ However, the Copyright Office then decided that the expedited procedures of the CCB would make it too difficult for adjudicators to determine whether to issue an injunction in complex cases, like those involving derivative works or where the costs to the defendant outweigh the plaintiff's damages.¹⁴⁴ For example, when the cost to a film company to remove infringing music or images from a film outweighs the damages to the individual creator.¹⁴⁵ However, the CCB may reduce the amount of monetary damages should a defendant voluntarily agree to mitigate or cease their infringing activity.¹⁴⁶ Thus, the CCB cannot enjoin a defendant to discontinue the offending activity without the defendant's consent.¹⁴⁷ As a result, the CASE Act only provides individual authors, artists, and small businesses who cannot afford to bring their claims in federal court a legal remedy for infringement of their copyright but no equitable remedy against a recalcitrant defendant.¹⁴⁸

III. THE FAILINGS OF THE CASE ACT

The goal of copyright law in the United States is to stimulate creative activity for public enrichment by rewarding an author with the creation of a limited monopoly in their work.¹⁴⁹ However, as stated in Part II, the preexisting copyright system in the United States failed to protect individual creators' and

¹⁴² COPYRIGHT SMALL CLAIMS, *supra* note 5, at 113.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 114.

¹⁴⁵ *Id.*

¹⁴⁶ § 1504(e)(1)(A).

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*; NIMMER & NIMMER, *supra* note 126, § 16.06(A), (C).

¹⁴⁹ *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“[Copyright law is] intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements: ‘to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.’”) (internal citations omitted).

small businesses' constitutional and exclusive rights to their copyrighted work, resulting in a copyright system serving only affluent copyright holders.¹⁵⁰ Congress attempted to remedy this inequity through the passage of the CASE Act.¹⁵¹ However, the limited equitable remedies available under the CASE Act cause the law to fall short of its goal.¹⁵² Section A of this Part argues that the remedies of the CASE Act offer insufficient protection for small businesses and individual copyright holders' copyright and thus inadequately incentivize creative activity, causing the CASE Act to fall short of its goal and the overall purpose of copyright law.¹⁵³ Section B argues that the limited remedies available under the CASE Act are inconsistent with the tradition of equity practice in copyright law and reduce the equitable discretion and flexibility of the CCB.¹⁵⁴ This will prevent the CCB from adapting to future changes in copyright law and result in an unequal application of copyright law for those individuals who cannot afford to bring a copyright claim in Federal District Court.¹⁵⁵ Finally, Section C suggests a possible solution.¹⁵⁶

A. The CASE Act Lacks the Teeth to Adequately Protect Individual Creators' and Small Businesses' Exclusive Rights

The purpose of statutory copyright law is to motivate creators to produce work for the general public's benefit.¹⁵⁷ Historically, British and U.S. legislatures have achieved this purpose by rewarding the creative labors of individuals with a statutorily recognized limited monopoly on the exclusive use of their creative property.¹⁵⁸ A limited exclusive monopoly over their created work allows an individual to reap the fruits of their labor, motivating the creation of more works, ultimately contributing to the store of public knowledge and benefiting society.¹⁵⁹

¹⁵⁰ See *supra* Section II.A.

¹⁵¹ See *supra* Section II.B.

¹⁵² *Infra* Sections III.A–B.

¹⁵³ *Infra* Section III.A.

¹⁵⁴ *Infra* Section III.B.

¹⁵⁵ *Infra* Section III.A.

¹⁵⁶ *Infra* Section III.C.

¹⁵⁷ U.S. CONST. art. I, § 8, cl. 8.; see *supra* notes 34–44 and accompanying text.

¹⁵⁸ See *supra* notes 22–44 and accompanying text.

¹⁵⁹ See *supra* notes 22–44 and accompanying text.

The remedies a plaintiff may seek upon infringement of their copyright play an important role in furthering the purpose of copyright law because they protect the incentive to create work.¹⁶⁰ Legal remedies provide individuals with a financial incentive to create and provide a deterrent to some infringers.¹⁶¹ Equitable remedies, injunctions in particular, protect against continued or future infringement of the work, safeguarding the creator's right to exclude and protect the market for the copyright holder's work.¹⁶² While injunctions are no longer automatically issued in copyright cases upon a showing of actual or likely copyright infringement, the remedy is still regularly issued when monetary damages are inadequate to compensate for an injury.¹⁶³ Further, as Justice Roberts noted in his *eBay* concurrence, there is inherent "difficulty [in] protecting the right to exclude through monetary remedies"¹⁶⁴ This difficulty occurs when monetary damages are an insufficient deterrent against infringement.¹⁶⁵

Despite the difficulty of protecting the right to exclude through monetary damages alone and the regular issuance of injunctive relief in copyright cases when monetary damages are inadequate,¹⁶⁶ Congress prohibited the CCB from issuing injunctive relief in copyright suits brought under the CASE Act, absent agreement from both parties.¹⁶⁷ Consequently, the decision as to whether to cease or prevent future infringement of copyright rests entirely on a voluntary agreement between the plaintiff and the infringing defendant.¹⁶⁸ The intent behind this decision is the

¹⁶⁰ See *supra* notes 45–49 and accompanying text.

¹⁶¹ See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980) ("The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works.").

¹⁶² Leval, *supra* note 63, at 1132.

¹⁶³ See *supra* notes 89–94 and accompanying text.

¹⁶⁴ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, concurring); Balganes, *supra* note 29, at 654.

¹⁶⁵ See *id.* at 617 ("With there being no *a priori* duty on others to stay away, the law of self-help would become the default rule of law—a rule that favors the strong and powerful to the detriment of everyone else. As a potentially anarchical situation, this remains untenable as the basis for an ordered system of property.").

¹⁶⁶ See *supra* notes 89–105 and accompanying text.

¹⁶⁷ See *supra* notes 139–45 and accompanying text.

¹⁶⁸ 17 U.S.C. § 1504(e)(2)(A)(i), (2)(B).

hope that an infringing defendant will voluntarily agree to cease their infringing conduct in exchange for a reduced damages award, which would be recorded in the CCB final determination and then could be enforced in federal court.¹⁶⁹

The issue with the voluntary agreement alternative to injunctive relief is that it relies entirely on the whims of the defendant, inadequately protecting the copyright holder's exclusive property right to control the use of their work.¹⁷⁰ While the option to choose reduced damages may incentivize some defendants to cease their conduct, it opens the door to affluent defendants with an "infringe now, pay later" attitude, creating a license to a creator's copyright without the creator's consent or a fair use determination.¹⁷¹ As a result, the remedies available to individual artists and small businesses will not deter the infringing conduct of defendants with the financial means to pay the maximum amount of damages available to the plaintiff under the CASE Act.¹⁷² Thus, the ability of the CASE Act to protect individual creators' and small businesses' right to exclude is limited to only those defendants who find the damages of the CASE Act prohibitive.¹⁷³ The individual creators' or small businesses' protection of their copyright under the CASE Act ceases to exist, despite the potential monetary penalties, should the defendant find such monetary damages easily within their financial means, like a large corporate defendant.¹⁷⁴

An argument could be made that these monetary damages should be sufficient to incentivize the creative activity of individual creators and small businesses regardless of repeated infringement by wealthy or corporate defendants. But this argument neglects that many individual copyright holders are not solely motivated by money but by reputation and recognition for their

¹⁶⁹ *Id.*; COPYRIGHT SMALL CLAIMS, *supra* note 5, at 114–15.

¹⁷⁰ See 17 U.S.C. § 1504(e)(2).

¹⁷¹ Spillane, *supra* note 51, at 260; see Douglas Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 352 (1981) ("Monetary compensation tolerates the wrong and allows the perpetrator to buy injustice.").

¹⁷² Spillane, *supra* note 51, at 260.

¹⁷³ See 17 U.S.C. § 1504(e)(1)(A)(i), (2)(A)–(B); see *supra* notes 134–42 and accompanying text.

¹⁷⁴ See *supra* notes 133–45 and accompanying text.

work.¹⁷⁵ Additionally, a goal of the CASE Act was to address the economic disparity in U.S. copyright law regarding the protection of a creator's exclusive right to control their work.¹⁷⁶ A system that does not provide a method of protecting the exclusive copyright of "middle-class creatives" against wealthy infringers who are not deterred by monetary damages but does protect the exclusive rights of wealthy copyright holders against those same infringers with equitable remedies falls short of this goal.

B. Impact of Reduced Equitable Discretion and Flexibility in Copyright Claims Board's Decision-Making

The foundation of copyright law is based on property law and the protection of the limited exclusive monopoly of authors and creators in their created works to benefit the public by producing knowledge.¹⁷⁷ For more than 200 years, this exclusive monopoly's protection has been built on a balance of statutory law and common law.¹⁷⁸ Statutory law provides the core purpose of copyright law, which is to benefit the public by incentivizing the creation of knowledge, arts, and sciences by guaranteeing the limited exclusive rights of copyright owners.¹⁷⁹ Common law's equitable and legal remedies provide an equitable gloss and flexibility, ensuring that copyright's foundational goals align with the needs of the individual litigants and "keep pace with innovation."¹⁸⁰ Unfortunately, because the CASE Act only allows the CCB to grant legal remedies, absent a voluntary agreement from an infringer,¹⁸¹ the system will likely be unable to keep pace with the copyright case law and technological developments.¹⁸² The inability to keep abreast of a rapidly changing area of law will likely render Congress's attempt to remedy the socioeconomic divide in protecting the exclusive right to copyright guaranteed by the Constitution ineffectual in the long term.

¹⁷⁵ See Miller & Cuntz, *supra* note 95 and accompanying text.

¹⁷⁶ See *supra* notes 125–26 and accompanying text.

¹⁷⁷ See *supra* Sections I.A–C and accompanying notes.

¹⁷⁸ See *supra* Sections I.A–C and accompanying notes.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* Section I.D.2 and accompanying notes.

¹⁸¹ 17 U.S.C. § 1504(e)(1)–(2).

¹⁸² See *supra* Section I.D.2 and accompanying notes.

As noted in Part I and above, the role of the decision maker (the courts) in copyright cases has not been to solely apply the statutory language of the copyright law to cases but also to determine on a case-by-case basis an adequate remedy for copyright infringement.¹⁸³ While courts initially presumed an equitable remedy like injunctive relief to be the only form of adequate remedy for copyright infringement,¹⁸⁴ as copyright law developed, courts also introduced monetary.¹⁸⁵ Together, these equitable and legal remedies enabled the courts to provide either reasonable preventative protection against future infringement or a restorative remedy, depending on which remedy would better protect the plaintiff's exclusive right to their creative work.¹⁸⁶ As modern copyright law became more complex, the need for courts to exercise judicial discretion in determining which remedy not only protected the exclusive rights of copyright holders but also benefited the cache of knowledge available to the public became more pronounced.¹⁸⁷

Through *eBay* and its progeny, the Supreme Court removed the precedent of presuming an equitable remedy automatically applied to a copyright case.¹⁸⁸ While the result was that legal remedies became more common in copyright infringement cases,¹⁸⁹ the *eBay* Court's criticism of the district court's broad denial of injunctive relief and emphasis on the exercise of judicial discretion with traditional principles of equity suggests that courts should exercise equitable discretion by considering whether legal or equitable remedies best furthers the purpose of copyright law, without presuming the adequacy of either.¹⁹⁰ Further, Justice Kennedy's concurrence, later cited in the notable Second Circuit case *Salinger v. Colting*,¹⁹¹ provided additional clarity that such

¹⁸³ See *supra* notes 61–83 and accompanying text.

¹⁸⁴ See *supra* notes 32–33, 55–60 and accompanying text.

¹⁸⁵ See *supra* notes 32–33 and accompanying text.

¹⁸⁶ See *supra* Section II.B and accompanying notes.

¹⁸⁷ See Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1103–04 (2020).

¹⁸⁸ See *supra* Section I.D.2 and accompanying notes.

¹⁸⁹ See *supra* Section I.D.3 and accompanying notes.

¹⁹⁰ See *supra* Section I.D.2 and accompanying notes.

¹⁹¹ 607 F.3d 68, 82 (2d Cir. 2010).

equitable discretion and flexibility allows the courts to “keep pace with innovation in this rapidly changing technological area.”¹⁹²

In its current form, the CASE Act does not allow the CCB to grant equitable relief in copyright infringement cases, only legal remedies in the form of actual or statutory damages.¹⁹³ This restriction to only monetary remedies is inconsistent with *eBay* because it creates a presumption that only monetary damages are adequate to remedy copyright claims brought by individuals and small businesses who cannot afford to bring their suits before a federal court.¹⁹⁴ However, irreparable harm is not exclusive to only those who can afford to pursue a federal copyright infringement suit.¹⁹⁵ It stands to reason that middle-class individual creators and small businesses who have suffered irreparable harm through copyright infringement will be left in the cold with no way of enforcing their copyright because of the CASE Act’s presumptive remedy of exclusive monetary relief.¹⁹⁶

Further, per the Copyright Act, the federal courts may “grant temporary and final injunctions on such terms as [they] may deem reasonable to prevent or restrain infringement of a copyright[.]”¹⁹⁷ and, in the wake of *eBay*, courts have developed a precedent, following the four equitable factors, in determining whether to grant injunctions in copyright infringement cases.¹⁹⁸ The CASE Act requires the CCB to apply current case law precedents in its decisions.¹⁹⁹ Should the facts of a case, however, resemble that which would warrant the issuance of an injunction in the precedential federal court, like in a simple piracy case, the CCB will have to issue a remedy to the plaintiff inconsistent with such precedent.²⁰⁰

¹⁹² *Id.*

¹⁹³ 17 U.S.C. § 1504(e).

¹⁹⁴ *See supra* Section I.D.2 and accompanying notes.

¹⁹⁵ *See* COPYRIGHT SMALL CLAIMS, *supra* note 5, at 113 n.805 (“But I think from the standpoint of indigent artists, the injunctive relief is absolutely critical. And what we see more often than not is folks that come in to our offices who really just want their stuff back, or taken down, or the infringement to stop.”) (quoting Tr. at 284:19–24 (Nov. 16, 2012) (David Leichtman, VLA)).

¹⁹⁶ *See id.*

¹⁹⁷ 17 U.S.C. § 502.

¹⁹⁸ Spillane, *supra* note 51, at 279–82.

¹⁹⁹ 17 U.S.C. § 1506(a).

²⁰⁰ *See, e.g.,* *Beastie Boys v. Monster Energy Co.*, 87 F. Supp. 3d 672, 678–79 (S.D.N.Y. 2015) (permanently enjoining defendant from infringing’ because

This will likely result in a continued unequal application of copyright law to individual artists and small businesses who cannot afford to bring copyright claims to federal court.²⁰¹

Finally, the ability of a court to grant either legal or equitable remedies on a case by case basis enables courts to keep pace with changes in copyright law and technological innovation.²⁰² By limiting the CCB to granting only legal remedies, absent an agreement by a defendant to cease infringing conduct voluntarily,²⁰³ Congress has handicapped the CASE Act's ability to adapt to changes to copyright law over the long term.²⁰⁴ As a result, the CASE Act will likely be ineffectual as technology, copyright law, and views on permissible remedies continue developing.²⁰⁵

C. A Possible Solution

The above two sections argued that the inability of the CCB to issue injunctive relief under the CASE Act would cause the CASE Act to fall short of its purpose because the Act reduces the ability of the CCB to adapt to future changes in copyright law and does not sufficiently protect the intended beneficiaries of the Act against future infringement.²⁰⁶ This section suggests a possible solution. Congress should amend the CASE Act to allow the CCB to grant permanent injunctions in limited cases, at minimum, in instances where direct copying resembling simple piracy has occurred, repeated infringement is likely, and the defendant cannot raise a colorable fair use defense.²⁰⁷

the plaintiffs were unwilling to license their music for product advertising); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1024, 1030, 1047 (9th Cir. 2013) (a permanent injunction issued to prevent BitTorrent infringement); *Elsevier Inc. v. Siew Yee Chew*, No. 17CIV6225JGKGWG, 2019 WL 74606, at *11–12 (S.D.N.Y. Jan. 2, 2019), *report and recommendation adopted*, No. 17-CV-6225 (JGK), 2019 WL 10947099 (S.D.N.Y. Jan. 23, 2019) (granting an injunction to stop the distribution of counterfeit textbooks).

²⁰¹ See 17 U.S.C. § 1503(b)(1).

²⁰² *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010).

²⁰³ 17 U.S.C. § 1504(e).

²⁰⁴ *Salinger*, 607 F.3d at 82.

²⁰⁵ See *supra* notes 49, 82–105 and accompanying text.

²⁰⁶ See *supra* Sections III.A–B and accompanying notes.

²⁰⁷ See, e.g., *Remedies for Small Copyright Claims: Hearing Before the Sub-Comm. on Cts., the Internet, and Intell. Prop. of the Comm. on the Judiciary H. of*

One argument raised against permitting the CCB to issue injunctions under the CASE Act is that the four-factor test in *eBay* is too complex for the streamlined proceeding with limited discovery.²⁰⁸ However, this argument considered only preliminary injunctions that occur at the beginning of a copyright case and often require a separate hearing.²⁰⁹ Permanent injunctions, on the other hand, occur at the end of the case, following the establishment of actual copyright infringement; thus, no additional proceeding need occur.²¹⁰

Further, because this solution requires direct copying by the infringer, akin to simple piracy, the CCB would not consider granting an injunction in a case involving the more complex issue of derivative work.²¹¹ Nor would the permanent injunction raise First Amendment issues if a requirement is that the defendant has no colorable fair use defense.²¹² As a result, while the plaintiff must still satisfy the four-factor test under *eBay*, the evidence required will involve straightforward copying, selling, and distribution rather than more complex copyright issues, better suiting the streamlined copyright resolution process of the CASE Act.²¹³

While the proposed solution is still a limited form of equitable relief and therefore does not resolve all the issues discussed in Sections A and B,²¹⁴ this solution does introduce some flexibility and equitable discretion into remedies available under the CASE Act. This allows the CCB to follow court precedents and

Reps, 109th Cong. 2 (2006) (statement of Paul Aiken, Executive Director, Authors Guild) (“If a plaintiff demonstrates that a defendant has repeatedly infringed the plaintiff’s copyright with no colorable defense of fair use, then the court should be empowered to enjoin the defendant against further infringement of the plaintiff’s registered work.”).

²⁰⁸ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 113.

²⁰⁹ *See id.*

²¹⁰ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06, § 14.06(B)(1)(a) (Matthew Bender, rev. ed. 2022).

²¹¹ *See* COPYRIGHT SMALL CLAIMS, *supra* note 5, at 113–14.

²¹² *See Salinger v. Colting*, 607 F.3d 68, 82–83 (2d Cir. 2010) (“Some uses, however, will so patently infringe another’s copyright, without giving rise to an even colorable fair use defense, that the likely First Amendment value in the use is virtually nonexistent.”).

²¹³ *See* COPYRIGHT SMALL CLAIMS, *supra* note 5, at 113.

²¹⁴ *See supra* Sections III.A–B and accompanying notes.

become more adaptive to future developments in copyright law. Further, the solution provides individual creators and small businesses with some form of protection over their right to exclude others from using their copyright.

CONCLUSION

The purpose of copyright law is to “promote the progress of the sciences and useful arts.”²¹⁵ Theoretically, copyright law achieves this purpose by giving creators property rights over their creations, thus incentivizing and rewarding creators who create new works and make the works available for public enjoyment. Essential to copyright law is the right of the creator to protect their work against theft or copyright infringement. This right allows them to reap the rewards for their labor used to produce art for the public benefit by obtaining monetary and equitable remedies when their rights are infringed.

For many creators, however, like self-employed artists and small businesses with limited income, the cost of litigating copyright infringement in federal court is prohibitively high, preventing these creators from enforcing their property rights when a person or a business infringes, particularly when the injury is of small monetary value or difficult to measure. This, combined with the increasing use of the internet and the “unprecedented desire for content,”²¹⁶ has led to an increase in copyright infringement, including small claim infringement, which “taken in the aggregate, . . . [has] an effect on the livelihoods of individual creators akin to the infamous torture ‘death by a thousand cuts.’”²¹⁷

Congress created the CASE Act of 2020 to provide a forum specifically for middle-class creatives who cannot afford to litigate copyright claims in federal court. However, in so doing, Congress sacrificed the equitable remedies—significantly, injunctive relief—traditionally available to plaintiffs in a standard copyright infringement suit.

Though in recent years the granting of injunctive relief in a copyright suit is no longer automatic, the option of injunctive

²¹⁵ U.S. CONST. art. I, § 8, cl. 8.

²¹⁶ COPYRIGHT SMALL CLAIMS, *supra* note 5, at 1.

²¹⁷ *Id.* at 2.

relief is essential to the overall purpose of copyright law. The flexibility to grant the equitable remedy of an injunction in lieu of monetary damages allows a court to further the purpose of copyright law on a case-by-case basis. This equitable discretion also allows the courts to keep pace with technological developments that impact copyright law. Finally, injunctive relief protects the copyright holder's exclusive rights when monetary damages are an inadequate remedy or an insufficient deterrent for infringement.

By limiting the CCB to granting legal remedies and excluding injunctive relief, Congress introduced rigidity into the CASE Act. This makes the CCB's ability to apply court precedent difficult and limits its adaptability to innovations in copyright law. Ultimately, this rigidity pulls the teeth out of the CASE Act, limiting its ability to protect the exclusive rights of middle-class creatives without the financial means to bring suit in federal court. Therefore, Congress should include in the CASE Act that, in limited circumstances, the CCB may award injunctive relief to plaintiffs in copyright infringement cases.