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If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process

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IF YOU BUILD IT, THEY WILL COME: THE PROMISES AND PITFALLS OF A COPYRIGHT SMALL CLAIMS PROCESS

Ben Depoorter[†]

ABSTRACT

Copyright law provides fertile ground for small claims adjudication: an abundance of straightforward infringement claims remains unpursued because the costs of litigation in federal courts outweigh the monetary value at stake in many individual disputes.

This Article explains how a small claims process can infuse accountability and deterrence into copyright law by bringing to life meritorious infringement claims that otherwise remain negative value lawsuits, while discouraging dubious, opportunistic infringement allegations.

Applying incentive analysis, this Article then examines Congress's most recent proposal to institute a small claims board. It finds that the CASE Act's statutory damage provisions are mismatched with the voluntary nature of the small claims process. The CASE Act is likely to induce opportunistic claims as well as bluff opt-outs by defendants, rendering the small claims board ineffective. Ironically, the ambitious nature of the CASE Act system inadvertently pushes out adjudication of the very small claims that it seeks to salvage.

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I. INTRODUCTION

Copyright has a small claims problem. Litigation in federal court is prohibitively expensive for many copyright stakeholders. The time, effort, and legal costs involved with litigation outweigh the resources available to many copyright holders; especially in light of the modest amounts at stake in most disputes. By the same token, many accused infringers may prefer to settle even questionable claims rather than risk the burden and expense associated with litigation. In too many instances, especially when involving online infringements, litigation costs either impede the pursuit of valid infringement claims or defending against doubtful infringement claims.

Small claims adjudication offers a straightforward and promising path to tackle copyright’s problem of negative value suits. A small claims court can provide a smoother, more cost-effective venue to decide minor, straightforward infringements. Ideally, such a process enables sympathetic plaintiffs, such as individual photographers and independent fashion designers, to pursue relief against infringers, while also enabling accused infringers to mount an efficient defense against dubious accusations by opportunistic plaintiffs.

Although calls to establish a small claims copyright court have surfaced periodically over the past few decades, prior efforts to establish a small claims tribunal have failed. The Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2017 is the latest attempt to create a court dedicated to resolving small copyright claims. The proposed copyright board would be authorized to handle copyright infringement claims as well as abuses of notice-and-takedown claims under 17 U.S.C. § 512(f) on an accelerated basis, with streamlined procedures and only minimal discovery.

Unfortunately, however, the small claims process, as envisioned by the CASE Act, is flawed. In this Article, I argue that the CASE Act suffers from deep shortcomings that will render the proposed small claims process ineffective.

One major defect concerns the CASE Act's remedial framework. In order to relieve plaintiffs from the difficulties and costs of proving actual damages, the CASE Act provides claimants with the option to elect statutory damages. For registered works, copyright owners can request statutory damages up to \$15,000 per infringed work (with a \$30,000 overall cap), or \$7,500 per work that has not been timely registered (up to a \$15,000 cap).¹ In light of the often rather modest harm associated with "small" claims, this number is steep. Most problematic, these numbers are likely to induce opportunistic claims by plaintiffs and strategic opt-outs by defendants.

If the patterns observed in federal district courts are any indication,² the potential for steep statutory awards at the small claims level makes it likely that virtually every claimant will demand statutory damages in the maximum amount there. In minor infringement cases however, when a creator might have charged \$500 to license the infringed work, a potential award of \$15,000 per work as statutory damages is quite intimidating. To be sure, such awards are well below the statutory range applicable in federal courts. But the tribunal's smooth, low cost procedure reduces the barrier to bring such claims.

Additionally, the imposing nature of the CASE Act's statutory damage range is problematic also in light of the voluntary nature of the proposed

1. See U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 110–12, 138 (2013) [hereinafter SMALL CLAIMS REPORT]; H.R. 5757, 114th Cong. § 2 (2016) (§ 1403(e)); H.R. 6496, 114th Cong. § 2 (2016) (§ 1403(e)).

2. On the statutory damage regime's inadvertent effect of generating opportunistic infringement claims by plaintiffs, see Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 67 UCLA L. REV. (forthcoming 2019) (providing empirical evidence that enhanced statutory damages claims are commonplace in virtually all areas of copyright law); see generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

copyright small claims system. The CASE Act operates on an opt-out basis. An alleged infringer's consent is assumed but a respondent can opt-out within a short time period. The risk of statutory damage awards reduces the incentive of defendants to participate in the small claims system. Faced with potentially excessive damage awards, many plaintiffs will likely opt out. Although a defendant faces a potentially steeper award at the federal level, opting out of the small claims process is appealing if the accused infringer suspects that the plaintiff might not have the determination or financial means to pursue the claim in federal court. Whenever the defendant calls the bluff of the plaintiff by opting out of small claims adjudication, we are back to the status quo: infringement claims that are costlier to pursue than warranted by the amount at stake.

How will all of this play out? The likely outcome is that the CASE Act will induce a large number of claims by plaintiffs, a sizeable number of opt-outs by defendants, and a substantial amount of default judgements. These default judgements can be enforced in federal court and overturned only if there is evidence of fraud, corruption, misrepresentation, or other misconduct. Overall then, instead of administering straightforward infringement claims for modest amounts, the CASE tribunal will induce opportunistic claims by plaintiffs and bluff-calling opt-out decisions by defendants.

This Article proceeds as follows. Part II describes how litigation costs create negative value suits and analyzes their negative effects on the copyright system. Part III reviews prevailing institutional measures and doctrines that reduce the costs of litigation and explains why these are inadequate to resolve copyright's small claims problem. Parts IV and V describe the key aspects of an effective small claims system and highlight the flaws of the CASE Act. An incentive analysis reveals that the proposed small claims process is bound to generate default judgements and "bluff" opt-outs. Part VI provides recommendations for a more narrowly tailored but more effective system of small claims adjudication.

II. COPYRIGHT LAW'S SMALL CLAIMS PROBLEM

Many copyright infringements have limited stakes. Especially in the digital arena, each individual, everyday infringement inflicts very modest harm on copyright holders. An unlicensed use of a photograph online, for instance, might be worth \$500 in lost licensing profits.

The economics do not favor pursuing these minor infringements. Given the costs of moving a case through a federal court, the vast majority of copyright infringements are, what the economists term "negative value suits."

Whenever a copyright plaintiff considers legal action against infringers,³ he or she will weigh the cost of enforcement against the likely benefit.⁴ While an infringement claim might have merit (i.e., a chance of success above 50%), the litigation costs often outweigh the expected award.⁵ For instance, even if the probability of the plaintiff prevailing in court is 80% and the damage claim will be \$10,000, the plaintiff has no financial incentive to pursue the claim if litigation costs are likely to exceed \$8,000.

The negative value of these modest infringement suits renders the plaintiff's threat to litigate non-credible. Because negative value claims are not a credible basis for litigation, the defendant is unlikely to settle the case at terms that reflect the expected outcome at trial—since trial is not a cost-effective proposition for the plaintiff.

Likewise, the costs of litigation can also affect defendants in copyright infringement disputes. In many instances, contesting an infringement claim is an unappealing proposition.⁶ If the litigation costs are likely to exceed the expected value obtained from defending the case in trial, the defendant is better off settling the case out of court—even if a defense would likely be successful.⁷

Negative value suits harm the integrity of the copyright system in several ways. First, whenever enforcement costs create negative value suits, they create a gap between the private and social incentives to enforce.⁸ Although the social

3. Public prosecutions of violations of copyright law are relatively uncommon, however, expect for some high-profile cases. On the gap between criminal copyright law in the books and in action, see Eldar Haber, *The Criminal Copyright Gap*, 18 STAN. TECH. L. REV. 42 (2015).

4. See William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (providing a seminal formal model of the behavior of the decisions by rational litigants).

5. The value of a claim is determined by the probability of success in trial multiplied by the expected award, minus the costs of litigation. See generally John Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

6. Note that legal actions taken by the plaintiff might have positive value even if the opposite is true for the defendant. For instance, the plaintiff might have lower litigation costs than the defendant. On efforts by plaintiffs to reduce enforcement costs, see Ben Depoorter & Robert Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 326–27 (2013) (describing use of bots and other technical measures that automate detection of infringements and enforcement); Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Enforcement: Lessons from Copyright Enforcement by Online Intermediaries*, 19 STAN. TECH. L. REV. 473 (2016) (questioning lack of transparency with regard to algorithmic law enforcement). Additionally, a lawsuit may have potential precedent value or a potential mobilizing value to the plaintiff. See Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817 (2013).

7. Lucian Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

8. Plaintiffs do not usually take into account the positive effect of his lawsuit on the deterrent function of the tort system. This problem will be especially acute if the social benefits

benefits of enforcement might be substantial, an individual right-holder lacks the incentives to shoulder the expense of enforcement.⁹

Given that private enforcement bolsters the deterrent effect of the legal system, a collective action problem is at work here. As a group, copyright holders benefit from enforcement since it increases the expected costs of copyright infringement and, consequently, reduces the total number of infringements. Individually, however, each right holder prefers that others incur the effort and expenses associated with the enforcement of negative value suits. Overall, this enforcement collective action problem leads to under-enforcement, undermining the deterrent effect of the copyright system.

Second, enforcement costs enable opportunistic litigation on behalf of plaintiffs.¹⁰ Aggressive litigants can capitalize on the costs and effort involved with defending the accusation in federal court. Although some defendants might have a reasonable prospect of prevailing at trial, the litigation costs might be prohibitive for many defendants. For that reason, some defendants might settle even some dubious, low merit infringement claims. These dynamics figure prominently in the enforcement practices by copyright trolls.¹¹

Third, litigation costs have rendered ex-post injunctions as the de facto remedy for modest copyright infringements. The vast majority of modest infringements are dealt with through the Digital Millennium Copyright Act's notice-and-takedown system.¹² Injunctions, however, leave copyright holders without compensation for the unauthorized use, distribution, or performance of a copyrighted work prior to the takedown. Although injunctions protect against further infringements, right holders are not adequately compensated for the value obtained by the infringer prior to the injunction.

It can be argued that low stake copyright infringements do not merit enforcement because the social costs of doing might exceed the benefits. This criticism is valid only, however, if one regards the costs of enforcement as fixed. If, however, the costs of enforcement can be reduced, additional

of a lawsuit outweigh the private gains of the plaintiff. See Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

9. *Id.*; see also Peter S. Menell, *A Note on Private versus Social Incentive to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41 (1983).

10. See, e.g., David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

11. See Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 (2015) (providing empirical evidence and discussion of copyright trolling); Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571 (2018).

12. See Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499 (2017) (examining the displacement of substantive copyright law by the Digital Millennium Copyright Act's intermediary safe harbors system).

enforcement may increase accountability.¹³ This is the potential value of small claims adjudication and other means to increase access to justice.

III. HOW TO DEAL WITH NEGATIVE VALUE CLAIMS

Negative value claims are of course not unique to copyright disputes. Some of the proven instruments that increase access to justice include public aid, legal insurance, statutory damages, contingency fees, and fee-shifting. This Part briefly reviews the impact and limitations of each of these instruments in the copyright arena.

A. LEGAL AID

By providing assistance to individuals that are otherwise unable to afford legal representation, legal aid directly addresses the issue of access to the legal system. Subsidized litigation, pro bono, and other legal aid measures decrease the financial burden of legal action and, subsequently, the ability and willingness of individuals to initiate or defend a lawsuit. By taking the litigation costs out of the equation for plaintiffs and defendants, legal actions become feasible.

Along the same lines, the growth of clinical legal education in the area of intellectual property law provides an additional avenue for cash-strapped plaintiffs and defendants to pursue litigation. Although copyright law may seem removed from many of the issues most familiar to clinical settings,¹⁴ the past two decades have seen an exponential rise of clinics that handle copyright disputes.¹⁵ Pro bono work, legal aid, and IP clinics help overcome the chilling

13. It is important to note here that this statement rest on the theoretical assumption that copyright protection is set at the socially optimal level. In utilitarian terms this implies that copyright's monopoly effect does not extend beyond what is needed to set the optimal incentives to create, produce, and distribute copyrighted works. See Talha Syed & Oren Bracha, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1848 (2014). A growing literature shows, however, that creative processes are often unrelated to copyright protection. See generally KATE DARLING & AARON PERZANOWSKI A., *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY* (2017). But see Jonathan Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389 (2013) (arguing that copyright law is essential to intermediaries that incur the capital-intensive risks related to the creation and distribution of content).

14. See Christine Haight Farley, Peter Jaszi, Victoria Phillips, Joshua Sarnoff & Ann Shalleck, *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735, 737 (2008) (“[S]tudents have typically worked with laws and in practice areas having a direct impact on the lives of poor or otherwise disadvantaged people.”).

15. See Cynthia Dahl, *Solving Ethical Puzzles to Unlock University Technology Transfer Client Work for an Intellectual Property Legal Clinic*, 23 B.U. J. SCI. & TECH. L. 1, 1. (2017) (“Intellectual property (IP) and technology legal clinics are experiencing an unprecedented surge in popularity. Before 2000, there were only five such clinics, but by 2016, there were seventy-four, with fifty added since 2010 alone.”).

effect of litigation costs on the pursuit of justice in the field of intellectual property law.

Unfortunately, legal aid is hardly a panacea for copyright law's small claims problem. Due to resource limitations, clinics and public aid are not available to all plaintiffs or defendants in need of financial assistance. Due to resource constraints, eligibility for these support measures is selective. Clinics, for instance, may need to focus on cases that could have precedent impact.

As a result, legal aid measures fall short of the social goal of promoting copyright accountability and deterrence in a comprehensive manner, especially as it concerns small claims regarding straightforward infringements.

B. LEGAL EXPENSE INSURANCE

Legal expense insurance reduces the burden of litigation for policy holders. Such policies may provide coverage of the costs of defending against a lawsuit (*passive* insurance policies) and/or the expenses of plaintiffs to bring forth and litigate a claim in court (*active* insurance policies).

In theory, legal expense insurance policies can significantly boost accountability. By improving access to the legal system, legal expense insurance bolsters the deterrent effect of copyright law.¹⁶ For instance, if active legal insurance policies would be widespread in the area of copyright, legal expenses will not stand in the way of the pursuit of valid infringement claims in court or to defend against doubtful or opportunistic infringement claims.¹⁷ Consequently, by increasing the likely pushback by potential plaintiffs and defendants, legal expense insurance may infuse culpability and deterrence in copyright law.¹⁸ If legal expense insurance coverage for copyright liability is widespread, potential infringers or opportunistic claimants realize ex-ante that cash constraints are unlikely to deter legal action by their counterparties. A potential copyright infringer or copyright troll, for instance, will prefer to avoid a dispute with a legal insurance policy holder.

16. See MICHAEL TREBILCOCK, ONTARIO MINISTRY OF THE ATTORNEY GENERAL, *Section VII: Innovations in Service Delivery*, in REPORT OF THE LEGAL AID REVIEW 2008, (“[L]egal insurance may be one means to significantly improve access to justice”); see also Alastair Gray & Neil Rickman, *The Role of Legal Expenses Insurance in Securing Access to the Legal Services Market*, in REFORM OF CIVIL PROCEDURE: ARTICLES ON ‘ACCESS TO JUSTICE’ 305, 310 (A.A.S. Zuckerman & Ross Cranston eds., 1995).

17. See Gray & Rickman, *supra* note 16.

18. By increasing the overall risk of facing legal action, legal insurance policies significantly enhance deterrence and the bite of the legal system in general. See generally Jef De Mot, Ben Depoorter & Michael G. Faure, *The Multiplication Effect of Legal Insurance*, 13 N.Y.U. J.L. & BUS. 1 (2016) (describing multiplication effect of legal expense insurance if coverage is not observable ex ante).

Despite these potential benefits, active legal insurance policies are relatively uncommon. Individuals rarely take out active insurance policies that cover the cost of bringing litigation lawsuits. This applies to many areas of law including intellectual property law. Intellectual property liability insurance is limited to a few selected industries and mostly held by companies.¹⁹

C. STATUTORY DAMAGES

In U.S. copyright law, a copyright holder can elect that the jury sets a statutory damage award.²⁰ In addition to boosting deterrence,²¹ statutory damages remove the burden and costs associated with proving harm. In this regard, statutory damages enable the pursuit of meritorious infringement claims that otherwise would be out of reach for cash-strapped plaintiffs.²² Independent photographers and designers, for instance, rely on the litigation cost reducing-effect of statutory damages in order to obtain recourse against online infringements of their works.

Like the other instruments described in this Section, statutory damages fail to adequately address copyright law's small claim problem, however. First, litigating small claims remains cost prohibitive to many plaintiffs, even when statutory damages relieves them from the burden of proving actual damages. Second, statutory damages give rise to a small claims issue for *defendants*.

19. For descriptions of intellectual property insurance, see generally, Meredith M. Mason & Evan C. Pappas, *Insurance and intellectual property litigation*, in INTELLECTUAL PROPERTY DESKBOOK FOR THE BUSINESS LAWYER 305-07, 312-15 (Sandeen, S. K., ed., 2013); DAVID A. GAUNTLETT, IP ATTORNEY'S HANDBOOK FOR INSURANCE COVERAGE IN INTELLECTUAL PROPERTY DISPUTES 97-98 (2nd Ed. Chicago: American Bar Association, 2014).

20. See 17 U.S.C. § 504(c) (2012).

21. See, e.g., *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (noting purpose of statutory damages under Copyright Act was "to penalize the infringer and to deter future violations" (quoting *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1228-29 (7th Cir. 1991)); Ben Sheffner, *Constitutional Limits on Copyright Statutory Damages*, 158 U. PA. L. REV. PENNUMBRA 53, 60 (2009) (emphasizing role of statutory damages for purpose of attaining effective deterrence in the face of massive online copyright infringements).

22. See, e.g., Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 273-74 (2009) (explaining that when Congress enacted the original Federal Copyright Act in Beginning in 1790, "[t]he original purpose of statutory damages was to provide a minimum award to copyright owners because of the difficulty of measuring actual damages" and profits); *Star's Edge, Inc. v. Braun (In re Braun)*, 327 B.R. 447, 451-52 (Bankr. N.D. Cal. 2005) ("Statutory damages for copyright infringement are similar to unproven damages for violation of privacy in that actual damages resulting from such a wrong are difficult to prove, and legislatures have created a statutory remedy for this reason.").

Copyright owners almost universally demand *enhanced* statutory damages.²³ Due to the low amount at stake, defending these claims does not make sense to many defendants.²⁴ Against this backdrop, some opportunistic plaintiffs abuse the statutory damages framework to intimidate risk-averse defendants into making settlement concessions; even on the basis of dubious infringement claims. The alternative for these defendants—incurring the steep litigation costs to bring a successful defense—is dire.²⁵

D. FEE SHIFTING

Fee shifting is one of the most straightforward approaches to litigation costs. By shifting the litigation costs onto a losing party, fee shifting reduces the prospective costs of pursuing a claim with high merit in court. In this manner, fee shifting tempers the problem of small claims in copyright law and the issue of negative value suits.

Additionally, by shifting the expenses of litigation to the losing party, Article 544 of the Copyright Act forces a plaintiff to think hard about filing a doubtful or opportunistic infringement claim. If a defendant is convinced of a positive outcome in trial, he or she will push back without concern about legal expenses.²⁶

Nevertheless, fee shifting is hardly a panacea for copyright's small claims problem. The outcome of copyright litigation is often hard to predict. Copyright infringement disputes that involve non-literal similarity are influenced by many subjective elements. Many of copyright law's legal standards, such as fair use, generate high levels of uncertainty.²⁷ Without being able to rely on a positive verdict, fee shifting is a daunting proposition to risk-averse litigants. In the event of a defeat at trial, the litigant potentially bears not only his or her own legal expenses but also those of the opposing party. Ironically, individuals that are most fearful about this potential downside of

23. See Depoorter, *supra* note 2 (providing empirical evidence that statutory damages claims are commonplace in virtually all areas of copyright law).

24. See Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1114–15 (2015) (providing empirical evidence of copyright trolling practices).

25. When, for instance, the recording industry offered college students the opportunity to settle their cases for amounts ranging between \$3,000 and \$11,000, most of the reportedly 30,000 defendants did so without hesitation. See Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES (Oct. 5, 2007) <https://www.nytimes.com/2007/10/05/business/media/05music.html> [<https://perma.cc/GPF4-CY2G>].

26. See generally Ben Depoorter & Peter S. Menell, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 71–81 (2014) (proposing new fee shifting mechanism to induce fair dealing and reasonable licensing offers by copyright holders).

27. For a discussion of the role of legal standards on uncertainty in copyright law, see Ben Depoorter, *Technology & Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1862–65 (2009).

fee-shifting—cash-strapped individual plaintiffs—are also the ones who are most burdened by litigation costs. Overall, in a world of high uncertainty and fee shifting, the small claims problem remains in effect.

IV. THE PROMISE OF A SMALL CLAIMS COURT

Can copyright law's small claims problem be addressed by creating a small claims court? This Part describes the promise of small claims adjudication.

First, litigation costs are most problematic when they stand in the way of the pursuit of claims with high merit. Ideally, a small claims process enables plaintiffs with meritorious claims (i.e., with a probability of success at trial well above 50%) to obtain redress for infringements that otherwise would be hindered by litigation costs. By providing a fair outcome to these “sympathetic plaintiffs,” the small claims process improves the ecology of copyright law.

Second, by enabling cost-effective enforcement, small claims adjudication might reduce the occurrence of opportunistic infringements. Many minor infringements, for instance in online settings, are facilitated by the knowledge and comfort of infringers that most copyright holders will not take on the expenses of the federal court system to pursue a modest infringement claim. The presence of a small claims system fills that void, eroding the prevailing comfort among “opportunistic infringers” that enforcement will be unlikely.

Third, a small claims process should enable defendants to effectively fight off dubious accusations. Currently, litigation costs are used by some plaintiffs as leverage to obtain settlements even for infringement claims that are dubious (i.e., with a probability of success of trial that is well below 50%). Such “opportunistic plaintiffs” anticipate that cash-strapped or risk-averse defendants will prefer the certainty of a small loss in settlement over an uncertain outcome in federal court. In the presence of a small claims process, however, accused infringers can mount a defense against opportunistic claims without incurring steep litigation costs.

Fourth, in the process of empowering defendants, a small claims process can help deter opportunistic action by plaintiffs. If defendants can cheaply and effectively ward off such claims in the setting of small claims court, this has the ex-ante effect of discouraging opportunistic claimants, including copyright trolls.

The following table illustrates the promise of a small claims process, as described in the previous paragraphs.

Table 1: Desirable Effects of a Small Claims Process

| <u>Copyright Stakeholder</u> | <u>Effect of a Small Claims Process</u> |
|------------------------------|---|
| Sympathetic plaintiffs | Enables legal pursuit |
| Opportunistic infringers | Enhances deterrence |
| Sympathetic defendants | Enables legal defense |
| Opportunistic plaintiffs | Reduces incentives |

V. THE CASE ACT: POTENTIAL PITFALLS

Calls to establish a “small claims” copyright court have surfaced periodically over the past few decades. A legislative initiative to create a small claims tribunal within the U.S. Copyright Office is gaining momentum on Capitol Hill. The Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2017 proposes to implement a report by the U.S. Copyright Office to set-up a “Copyright Claims Board.” This board, consisting of three copyright officers, will be authorized to handle copyright infringement claims as well as abuses of notice-and-takedown claims under 17 U.S.C. § 512(f) on an accelerated basis, with streamlined procedures and only minimal discovery.

Unfortunately, however, the copyright small claims tribunal, as written into H.R. 5757, fails to fully live up to the promise of a small claims process as described in Part IV.

Academic commentators have expressed various concerns about the CASE Act. These objections include the limits that will be imposed on appeals, the lack of transparency of documents pertaining to proceedings, due process issues relating to filing and serving claims, and constitutional issues relating to the proposed opt-out system as well as the Seventh Amendment right to jury trial.²⁸

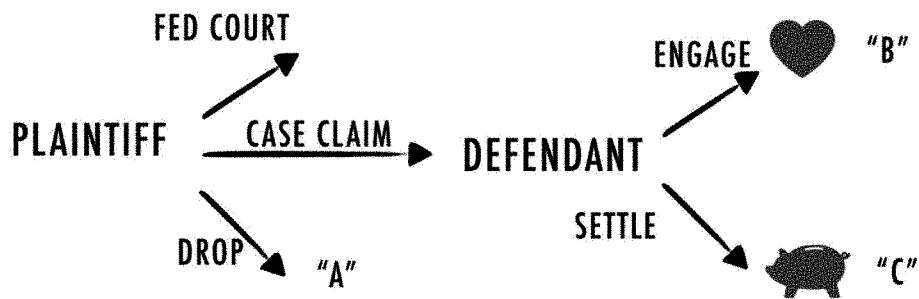
This Part exposes a number of structural flaws of the CASE Act that render the proposed small claims process ineffective. The various figures included below set out the various potential decisions by litigants under the CASE Act.

Currently, in the absence of a copyright small claims court, an aggrieved copyright holder/plaintiff must decide to either to pursue the infringement of

28. A group of scholars, specialized in economics, civil procedure, and intellectual property, have expressed various reservations about the CASE Act. For a report and recommendations, see generally Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 33 BERKELEY TECH. L.J. 689 (2018).

his or her work in federal court, offer a settlement, or drop the case altogether. If the claim has negative value (i.e., the litigation costs in federal courts outweigh the expected payoff from trial), a plaintiff has no credible threat to sue. Most small, negative value claims are not pursued—at least not beyond an initial settlement demand letter or DMCA take-down notice. Point “A” in Figure 1 below is where most small claims go to die: the plaintiff drops the case without receiving compensation from the infringer.

Figure 1: Addition of Small Claims Trajectory



A small claims tribunal, such as envisioned by the CASE Act, opens a different avenue to prospective plaintiffs. As an alternative to the federal court system, the plaintiff can elect to have the dispute brought before the small claims tribunal.

When the plaintiff elects the trajectory of the small claims process, the respondent will be notified by the small claims board. The respondent now has several options. If the respondent does not expressly opt out within a certain time frame, the alleged infringer’s consent is assumed, and the small claims board can proceed with adjudication.²⁹ The respondent may welcome the opportunity to respond to the allegations in a timely and cost-effective manner. This avenue is particularly helpful to defendants that have strong counterarguments but who might lack the financial resources to mount a vigorous defense in federal court. Scenario 1 (represented by outcome “B” in Figure 1 above) represents the ideal role of a small claims court. A plaintiff can bring his or her case in an efficient and effective manner and the defendant can present counterarguments or settle the case. The costs savings of the small claims process bring to life what otherwise would be a negative value dispute (to the plaintiff and/or defendant). Either the plaintiff or defendant is wrong in his or assessment of the likely outcome at trial but adjudication in the small

29. See SMALL CLAIMS REPORT, *supra* note 1, at 147 (§ 1405(t) of draft).

claims court will settle the matter. By salvaging negative value claims (outcome “A” in Figure 1 above), a small claims process increases overall accountability for copyright stakeholders. Moreover, if the outcomes of the small claims board are a matter of public record,³⁰ it also adds transparency to the field of copyright law more generally.

In a second potential scenario, the defendant settles the case upon receiving a notification from the small claims board. This potential outcome, represented by “C” in Figure 1 above, is likely especially when the defendant is aware that his or her behavior was infringing and that fighting back is a losing proposition. Note that outcome C of the second scenario is also made possible by the costs-savings aspect of a small claims system. In the absence of a small claims court, a defendant might be less inclined to settle. An opportunistic defendant might wager that the plaintiff (1) does not have the resources to pursue the claim in federal court and/or (2) would need to spend more on federal litigation than the small claim warrants. Given that a small claims procedure drastically reduces the costs of pursuing the infringement claim, the defendant no longer has the luxury of sitting back and calling the bluff of the plaintiff.

If the defendant has meritorious counterarguments, the defendant will likely fight back (outcome “B” above). If the defendant has no real counterarguments, he or she will likely seek to resolve the dispute in settlement (outcome “C” above). Both outcomes highlight the potential added-value of a small claims process in copyright law: more plaintiffs are able to pursue credible claims in a cost-effective manner and defendants are able to challenge doubtful claims. The cost savings of a small claims process revitalize valid claims that are otherwise dead in the water because of litigation costs (outcome “A” in Figure 1) and reduce the likelihood that defendants will settle dubious claims simply to avoid the costs of standing up to opportunistic plaintiffs.

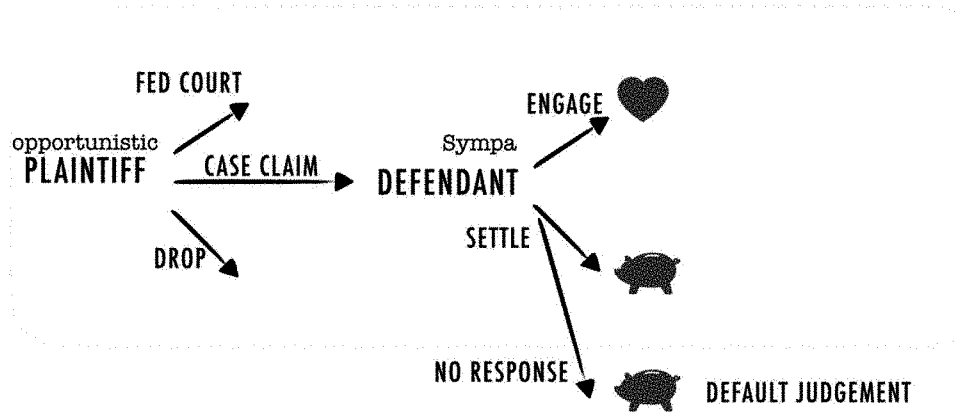
Unfortunately, however, a small claims procedure also brings to life other outcomes that conflict with the goals of the copyright system.

As a third outcome, a defendant may fail to respond to the letter from the small claims board. In such an event, the plaintiff can turn to federal court or continue the small claims process. The proposed CASE Act provides that the

30. *See id.* at 140 (§ 1405(b) of draft (containing requirement to maintain records that document the proceedings)); H.R. 5757, 114th Cong. § 2 (2d Sess. 2016) (same); H.R. 6496, 114th Cong. § 2 (2d Sess. 2016) (same). The Copyright Office proposal would require the board decisions, awards or any settlements to be in writing, and provides for publication of final determination on a website. *See* SMALL CLAIMS REPORT, *supra* note 1, at 146–47 (§ 1405(s) of draft); H.R. 6496, at § 2 (§ 1405(u)). H.R. 5757 provided for the publication of other records, subject to redaction. *See* H.R. 5757, at § 2 (§ 1405(s)).

small claims court can issue default judgements if the accused party is non-responsive. A successful claimant can then request an order from a federal court to enforce the small claim ruling against the defaulting party. Such a default judgement can be challenged upon a showing of excusable neglect.³¹

Figure 2: Default Judgement “Mill” Trajectory



Although default judgements provide recourse to sympathetic plaintiffs (claims with a probability of success above 50%) against infringers, this trajectory has a dark side as well. In the hands of an opportunistic plaintiff (i.e., asserting claims with a probability of success well below 50%), however, the small claims process could potentially be used as a remedial scheme to reach quick default judgements against sympathetic defendants that fail to respond in a timely manner. Those defaults can be taken to district courts for enforcement. Figure 2 above illustrates this potential scenario. In the most perverse variation of this scheme, an opportunistic plaintiff could file dubious infringement claims and withdraw claims whenever a respondent reacts. The resulting default judgements might present a new income stream to copyright trolls and other malign enforcement intermediaries.³²

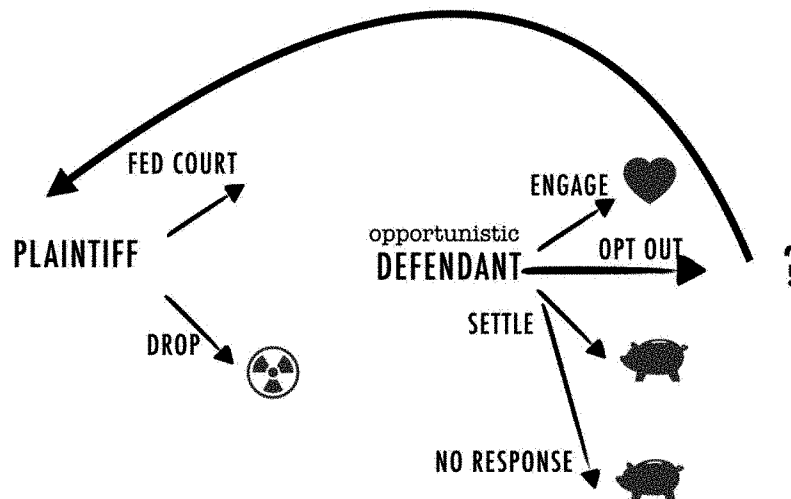
A fourth outcome is enabled by the CASE Act’s opt-out provision. A defendant is always free to withdraw from the CASE procedure. This voluntary nature of the small claims process is motivated in part by constitutional limitations on the type of courts and jurisdiction that can be

31. See SMALL CLAIMS REPORT, *supra* note 1, at 151–52 (§ 1407 of draft). See *id.* at 152 (§ 1407(c)); H.R. 5757, at § 2 (same); H.R. 6496, at § 2 (§ 1407(b)).

32. An updated version of H.R. 3945 seeks to temper this issue by adding an adjustable limit of 10 cases per year per claimant. AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3945, *supra* note 1 (§ 1403(g) of draft).

created in the copyright context.³³ The opt-out mechanism opens the door to opportunistic actions by defendants, however. A self-aware, guilty defendant may seek to exploit the opt-out provision in order to reset the dispute to the federal status quo. Figure 3 below illustrates this scenario. If the defendant declines the small claims tribunal's jurisdiction, the plaintiff is back at square one. The sympathetic plaintiff with a valid claim must either pursue the case in federal court or drop the claim. The defendant faces steeper statutory awards at the federal level but, by opting out, the defendant can call the plaintiff's bluff and challenge him or her to incur the full costs of litigation in federal court. As a result, the opt-out provision enables opportunistic infringers to bring back to life the very negative value suit issue that plagues so many copyright small claims.

Figure 3: Opportunistic Opt-Outs: "Bluff" Trajectory



Revisiting the goals outlined in Table 1 above, the small claims process of the CASE Act accomplishes some of the stated goals of copyright small claims adjudication, fails at others, while creating some inadvertent and undesirable side effect.

At its best, the small claims system, as contemplated by the CASE Act, enables action by presumptively sympathetic plaintiffs against presumptively sympathetic defendants. The litigation cost savings enable both parties to present their arguments in adjudication. At the same time, however, opportunistic infringers do not fear the CASE Act's small claims process.

33. See Samuelson & Hashimoto, *supra* note 28, at 697–98.

Unless defendants are sufficiently risk-averse, the opt-out provision enables them to bring back to life the negative value problem faced by the sympathetic plaintiff—the very same issue that a small claims process seeks to address in the first place. In this regard, the CASE Act is a step forward in some instances but leaves unaltered the plight of cash strapped plaintiffs that face opportunistic defendants. Infringers, currently shielded by the federal costs of litigation, will not be deterred by the small claims system. Most problematic, however, is the inadvertent addition of a new avenue of opportunistic monetization of copyright claims. The potential of a quick default judgment mill is a step backward and should be fixed or its costs be weighed against the potentially countervailing positive effects of the CASE Act. The type of scenario that will play out will depend on the fact patterns at hand in each dispute and the motives of the individual litigants.

In the next Part, I provide and discuss a number of policy options that would improve the design of the CASE Act's small claims process.

VI. THE CASE ACT: POTENTIAL IMPROVEMENTS

This Part provides a number of concrete policy suggestions that address potential shortcomings of a small claims system, including the design flaws of the CASE Act that were highlighted in Part V. An effective small claims court should handle simple disputes, offer modest compensation, set out reasonable statutory damage awards, apply adjusted filing fees, and offer defendant opt-in.

A. MODEST AWARDS

A small claims court should be reserved exclusively for disputes with modest stakes. If the amount in dispute is substantial, a full trial with legal representation and discovery is more appropriate.

The CASE Act provides that the Copyright Claims Board may provide “actual damages and profits . . . which determination shall include in appropriate cases consideration of whether the infringing party has agreed to cease or mitigate the infringing activity”³⁴ The CASE Act caps the adjudication of copyright infringement damages claims at \$30,000 or less.³⁵ Additionally, the CASE Act provides claimants the option to elect statutory damages. For registered works, copyright owners can request up to \$15,000

34. SMALL CLAIMS REPORT, *supra* note 1, at 138 (§ 1403(d)(1)(A) of draft); H.R. 5757, at § 2 (§ 1403(e)(1)(A)); H.R. 6496, at § 2 (§ 1403(e)(1)(A)).

35. *See* SMALL CLAIMS REPORT, *supra* note 1, at 139 (§ 1403(d)(1)(D) of draft); H.R. 5757, at § 2 (§ 1403(e)(1)(D)); H.R. 6496, at § 2 (§ 1403(e)(1)(D)).

per infringed work in statutory damages (up to a \$30,000 overall cap), or \$7,500 per work for works that have not been timely registered (up to a \$15,000 cap).³⁶

Given the nature of most “small” claims, especially in relation to the most frequently occurring online infringements, a \$30,000 cap is rather high. To be sure, awards in the order of \$30,000 might be in the lower or mid-range of verdicts in copyright infringement cases in federal court. Yet, focusing on the lower range of awards at the federal level is misleading. As described in Part V above, veritable small claims never make it to federal court. Small claims do not justify the expense of going to federal court. Federal litigation is the tip of the iceberg of disputes. The primary goal of a small claims system is to breathe life into minor claims that are entirely absent from federal dockets today, such as the unauthorized copying and distribution of photos and other copyrighted content online.

Of course, the small claims board can set awards as low as it deems appropriate in each individual case. The problem, however, is that the range and its high upper-limit intimidates potential defendants. In light of the risk of a steep damage award, many defendants might opt out of the small claims trajectory. In light of its voluntary nature, a lower cap might be better suited to the goals of a small claims process. If the worst-case outcome in the small claims court is too daunting, there is little reason to expect that a defendant will embrace the prospect of an expedient and cost-effective system that reaches such (potentially crippling) outcome.

Lowering the maximum awards in the small claims court, would increase the chances that a defendant will engage with the plaintiff in an expedient manner in the small claims forum. Doing so would likely be an important step towards avoidance of the opt-out outcome depicted in Figure 3 above and induce the benevolent outcomes “B” and “C”, as illustrated in Figure 1.

B. REASONABLE STATUTORY AWARDS

The CASE Act provides claimants the option to elect statutory damages. Copyright owners can request up to \$15,000 per infringed work in statutory damages (up to a \$30,000 cap) for registered works, or \$7,500 per work for works that have not been timely registered (up to a \$15,000 cap).³⁷

In principle, statutory damages are a good fit for a small claims. Small harm disputes are especially vulnerable to the burdens imposed by legal expenses,

36. See SMALL CLAIMS REPORT, *supra* note 1, at 112, 138 (§ 1403(d)(1)(A)) of draft; H.R. 5757, at § 2 (§ 1403(e)(1)(A)); H.R. 6496, at § 2 (§ 1403(e)(1)(A)).

37. See SMALL CLAIMS REPORT, *supra* note 1, at 110–12, 138 (§ 1403(d) of draft); H.R. 5757, 114th Cong. § 2 (2016) (§ 1403(e)); H.R. 6496, 114th Cong. § 2 (2016) (§ 1403(e)).

including that of proving harm. As a result, the requirement to gather evidence of harm may turn claims with modest stakes into negative value suits.

If the patterns observed in federal district courts are any indication,³⁸ however, virtually every claimant at the small claims board might demand statutory damages in the maximum amount.³⁹ Although the CASE Act's proposed cap on statutory awards is well below the statutory range that applies in federal courts, the streamlined nature of the small claim procedure makes it more likely that plaintiffs will see the case through to obtain the statutory award. In this regard, a demand of \$15,000 in statutory damages might be quite intimidating to a defendant in a dispute over a minor infringement.

In light of the voluntary nature of the CASE Act, statutory damages are likely to generate one of two potential responses from defendants. On the one hand, if a defendant fears a statutory award verdict in excess of \$30,000 at the federal level, he or she will welcome the plaintiff's decision to initiate the small claims procedure. On the other hand, a defendant is likely to opt out of the small claims procedure when there is some indication that a plaintiff does not have the determination or financial means to pursue the claim in federal court. The decision to opt out is sensible to a plaintiff in those circumstances, especially if statutory damage awards on the small claims are potentially steep.

In order to avoid opt-outs, Congress could lower the cap on awards in the small claims court. A lower statutory damage cap at the small claims level will reduce the incentive of a defendant to opt out and move the case back to the federal level. Alternatively, the CASE Act could restrict the availability of statutory damages to instances where the plaintiff is able explain why it might be hard or too costly to prove actual harm. A third measure would be to penalize excessive claims for statutory awards; for instance, through fee-shifting.⁴⁰

38. Although explicitly designed to relieve the burden of litigation to plaintiff, the statutory damage regime has the inadvertent effect of generating opportunistic infringement claims. See Depoorter, *supra* note 2 (providing empirical evidence that enhanced statutory damages claims are commonplace in virtually all areas of copyright law).

39. See Christian Helmers, Yassine Lefouili, Brian Love & Luke McDonagh, *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s IP Enterprise Court*, 8–9, BERKELEY TECH. L.J. COMMENTS (Jan. 10, 2018) <http://btlj.org/2018/01/who-needs-a-copyright-small-claims-court-evidence-from-the-u-k-s-i-p-enterprise-court/> [<https://perma.cc/WNV4-VXNT>] (“[T]he proposed use of statutory damages in the U.S. may invite gamesmanship by plaintiffs enforcing rights to works with little or no actual market value simply to leverage the possibility of five-figure statutory damages awards.”).

40. See Depoorter, *supra* note 2 (suggesting the availability of fee shifting in favor of a losing party that faced excessive damage awards by the plaintiff in the case).

C. SIMPLE CASES

The proposed breath of jurisdiction of the CASE Act small claims board is inopportunistically ambitious. The proposed jurisdiction includes nonliteral infringements and secondary liability claims. Such claims are often too complex to be resolved readily through a streamlined process that is limited to summary adjudications by an administrative tribunal on documentary evidence. It is questionable that an accelerated process with limited discovery and pleadings can resolve in satisfactory matter the various complex questions that plague many copyright disputes. Instead, it is more appropriate for a small claims court to exclusively adjudicate straightforward infringement claims that involve claims of exact or near-exact copying, distribution or public performances.⁴¹ Moreover, if respondents raise defenses or counterclaims that require discovery and more elaborate fact-finding, a dispute is likely unsuitable for resolution in a small claims forum.⁴²

A more limited jurisdiction would have a positive interaction effect with the issues outlined above. The relatively steep damage caps reflect the ambition to extend the reach of the small claims court from small to medium size claims. In and of itself, this fits the goal to relieve federal courts and provide a more cost-effective alternative to as many stake holders as possible. The intention of the drafters of the CASE Act to include medium stake claims explains the relatively high damage cap. In doing so, however, the CASE Act inadvertently pushes out many claims in the smaller range. The availability of (statutory) damage awards up to \$30,000, is likely to lead many minor infringers to opt out. By reducing the scope of jurisdiction to simple claims that fit a streamlined, administrative process, there is less need for as high a cap as presently provided.

D. ADJUSTED FILING FEES

The CASE Act proposes a modest filing fee that applies uniformly to all claims.⁴³ A \$100 fee per filing ensures a low barrier to entry to all claimants. At the same time, however, such simple fee structure is a missed opportunity to

41. See Mark A. Lemley & R. Antony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004) (proposing an administrative dispute resolution system that would handle simple, “clear” cases of file-sharing infringements); Mark A. Lemley & R. Antony Reese, *A Quick and Inexpensive System to Resolve Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L. REV. 1 (2005) (same).

42. See Samuelson & Hashimoto, *supra* note 28, at 698.

43. The Office Report and the CASE Act of 2017 suggests filing fees at a minimum rate of \$100 per filing. See SMALL CLAIMS REPORT, *supra* note 1, at 140 (§ 1405(e) of draft); H.R. 5757, 114th Cong. § 2 (2d Sess. 2016) (same); H.R. 6496, 114th Cong. § 2 (2d Sess. 2016) (same).

address the negative outcomes depicted in Figure 3 above. A low fee further reduces the costs for opportunistic actors that might file low merit claims to verify if the defendant is responsive (default judgements mills) or to intimidate defendants into generous settlement concessions (copyright trolls). Abandoning the CASE Act's single, flat filing fee in favor of a differentiated filing fee, would safeguard against some of the opportunistic abuses of any small claims system.

Variable fee structures, as employed by small claims courts elsewhere, tie fee to the claimed level of damages.⁴⁴ Fees could, for instance, be set on a sliding scale: \$50 for a claim to up to \$500; \$100 for claims to up to \$2000; etc. Additionally, fees could be adjusted so that they higher for plaintiffs who have brought a certain number of claims within a set time period.⁴⁵ Such adjustments to the filing fee structure of a small claims court would make it costlier for plaintiffs to file baseless or inflated damage claims, especially as it relates to statutory damages.

E. DEFENDANT OPT-IN

One notable aspect of the CASE Act is that the decision to bring a dispute to the small claims track rests exclusively with the plaintiffs. Given the voluntary nature of the system, a plaintiff also retains the option to pursue a small claim in a federal court instead of at the small claims board. A plaintiff might have good reasons to prefer having the dispute move through the federal court system (e.g., procedural differences, etc.). But some plaintiffs might elect to pursue a small claim in a federal court for strategic reasons, such as to burden alleged infringers with litigation costs or to instill fear about the higher potential awards at the federal level. In other words, the CASE Act leaves unabated the strategy of opportunistic plaintiffs to leverage federal litigation costs to obtain generous settlement concessions from risk-averse or cash-strapped defendants.⁴⁶

44. The UK's IP Enterprise Court, for instance, employs a multi-part schedule of fees that requires claimants to pay a fee that is based on: the amount of damages claimed (£35 to £455), whether or not injunctive relief is sought (£480, if so), and whether or not a hearing is required to dispose of the case (£25 to £335, depending, again, on the damages sought). *See* ANGELA FOX, *THE INTELLECTUAL PROPERTY ENTERPRISE COURT: PRACTICE AND PROCEDURE* ch. 10, 10-016, 10-044 (2d ed. 2016); HM COURTS & TRIBUNALS SERV., *GUIDE TO THE INTELLECTUAL PROPERTY ENTERPRISE COURT SMALL CLAIMS TRACK 11* (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426129/patents-court-small-claims.pdf [<https://perma.cc/5EA7-LXC4>].

45. *See* Samuelson & Hashimoto, *supra* note 28, at 700.

46. As mentioned previously, a defendant can of course call the bluff of the plaintiff. But doing so is not without risk to the alleged infringer. The higher litigation costs in court may simply be too daunting.

A creative countermeasure to such opportunistic filings at the federal level, would be to allow a defendant to petition that the federal court move the dispute to the small claims venue. A court might assess this request on the circumstances of the dispute, including the amount at stake, the simplicity of the legal questions, etc. Keeping with the voluntary nature of the small claims process, however, the plaintiff might likewise have the right to opt-out. Subsequently, the federal court should have some discretion to consider the reasonableness of the plaintiff's refusal to use the smalls claims process; for instance, when deciding on fee-shifting in its final verdict.

VII. CONCLUSION

A copyright small claims tribunal holds great promise. A small claims process can provide a smoother and more cost-effective forum to decide minor, straightforward infringements. Ideally, it enables sympathetic plaintiffs, such as individual photographers and independent fashion designers, to obtain relief against infringers, while at the same time enabling accused infringers to mount an efficient defense effort against dubious accusations.

In order to accomplish these goals, however, a small claims system must be designed carefully, with an eye to the likely actions of the various stakeholders, including potential loopholes that might be exploited in an opportunistic manner.

Applying incentive analysis, this Article examined Congress's most recent attempt at the small claims proposal and concludes that the CASE Act is likely to induce a large number of claims by plaintiffs, a large number of opt-outs by defendants, and a large number of default judgements. In conclusion, the CASE Act falls short of addressing the issue of opportunistic claiming and may in fact exacerbate the problem of copyright trolls altogether.

A small claims court should effectively administer straightforward infringement claims for modest amounts. Everything else belongs in federal courts. Congress would be well advised to go back to the drawing board and set-up a more narrowly tailored but more effective system of small claims adjudication. This Article provides several constructive suggestions towards that goal.