

The Case for the CCB: A Defense of the Constitutionality of the Copyright Claims Board

Adam Vischio*

INTRODUCTION

Copyright litigation is expensive. Since copyright is federal law, disputes must be heard in federal court. Federal litigation can be prohibitively costly for creators bringing small claims, essentially leaving them with a right without a remedy against infringement of their work. Congress sought to alleviate this financial burden in 2020 when it passed the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act, thus creating the Copyright Claims Board (“CCB”) to adjudicate small copyright disputes.

Opponents raised constitutional concerns about the CCB throughout the legislative process. The concerns included the fact that the CCB officers would wield unreviewable power and that Congress cannot set up non-Article III courts to hear cases involving public rights. Critics renewed their concerns in the aftermath of the Supreme Court’s June 2021 decision in *United States v. Arthrex*, in which the Court found that the Patent Trial and Appeal Board administrative patent judges (“APJs”) wielded unreviewable authority that violated the appointments clause. Furthermore, a possible challenge to the constitutionality of the CCB could be forthcoming since the CCB is now operational.

This Note analyzes the evolution of Appointments Clause and Article III jurisprudence and finds that the CCB is constitutionally constructed. While copyright is likely a private right, the CCB is still constitutionally permitted to hear these claims because the parties voluntarily consent to use the CCB. The voluntary nature of CCB proceedings plus the fact that these small cases are typically not heard by federal courts ease Article III and reviewability concerns.

* J.D. Candidate, Columbia Law School, Class of 2023; B.A., Wake Forest University, Class of 2015. At first, I was rather intimidated by the thought of writing a note. But, thanks to Professor June Besek, my Note advisor, this process became manageable and enjoyable. I am incredibly grateful for Professor Besek’s feedback and gracious guidance. I also would like to thank Professor Shyamkrishna Balganesh and Professor Jeremy Kessler for meeting with me and providing helpful research advice. Lastly, I would like to thank Cameron Turkzadeh, Gersham Johnson, and the rest of the board members and editorial staff of the *Columbia Journal of Law & the Arts* for their helpful comments and support.

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Part I provides background information to the passage of the CASE Act and explores arguments for the necessity of the CCB. Part II outlines the structure of the CCB. Parts III and IV respectively detail relevant Appointments Clause and Article III jurisprudence then apply it to the CCB. Parts V and VI discuss the possible arguments critics may lodge against the CCB in a constitutional challenge and how these invariably fall short. Finally, Part VII takes a practical look at how the Supreme Court as currently constructed might analyze the CCB's constitutionality.

I. BACKGROUND

A. IDENTIFYING THE PROBLEM—THE PROHIBITIVE COST OF COPYRIGHT LITIGATION FOR THOSE BRINGING SMALL CLAIMS

Photographers, authors, and other freelance artists are often helpless as they repeatedly see their work infringed online. Take, for example, an anecdote about photographer Jeff Sedlik, briefly described in an NPR article.¹ One day, Sedlik opened up Amazon.com only to find several of his photographs impermissibly stamped on “T-shirts, hats, bibs, mugs, calendars, cellphone cases and so forth.”² While these Amazon sellers could have legally licensed Sedlik's works for a fee, it is generally far cheaper to download his photos from the internet and then place them on products. Unfortunately for copyright holders, these sellers face little threat of legal consequences—even if their products are taken down following receipt of a DMCA notice, they can simply reupload them.³ As Sedlik told NPR, “if I want to go to federal court, I need to engage a lawyer. And if I want to engage a lawyer, it's very expensive.”⁴

Unfortunately, Sedlik's story is not unique. Douglas Preston, a journalist, author, and president of the Authors Guild shared a similar sentiment in a 2019 op-ed.⁵ Preston detailed the multiple daily Google alerts he receives that direct him to websites that upload illegal copies of his books. Preston noted the “devastating” effect infringement has had on authors' careers and incomes and the prohibitive cost of bringing a copyright infringement lawsuit in federal court.⁶

1. Neda Ulaby, *Will Posting Memes or Pro Wedding Pics Land You in Copyright Small Claims Court?*, NPR (Mar. 12, 2021, 9:00 AM), <https://www.npr.org/2021/03/12/957054009/will-posting-memes-or-pro-wedding-pics-land-you-in-copyright-small-claims-court> [https://perma.cc/5V8J-9XSD] [https://web.archive.org/web/20220924163257/https://www.npr.org/2021/03/12/957054009/will-posting-memes-or-pro-wedding-pics-land-you-in-copyright-small-claims-court].

2. *Id.*

3. *Id.* See generally 17 U.S.C. § 512 (establishing the contours of DMCA). DMCA reform is an ongoing debate. For the sake of staying on topic, I will not dive into the nuances of that debate.

4. Ulaby, *supra* note 1.

5. Douglas Preston, *Congress Can Protect Creative Artists from Piracy. Why Won't the Senate Pass the Bill?*, HARTFORD COURANT (Nov. 10, 2019, 6:00 AM), <https://www.courant.com/opinion/op-ed/hc-op-preston-google-counterfeit-bill-1110-20191110-ltnx4qlxpcvpjutebqdhvox4-story.html> [https://perma.cc/6EBU-CMWW] [https://web.archive.org/web/20220923135351/https://www.courant.com/opinion/op-ed/hc-op-preston-google-counterfeit-bill-1110-20191110-ltnx4qlxpcvpjutebqdhvox4-story.html].

6. *Id.*

The United States Copyright Office (“USCO”) acknowledged in 2013 that the current federal system poses formidable challenges for small copyright claimants seeking to enforce their exclusive rights.⁷ Federal litigation remains prohibitively expensive for people with small infringement claims. The estimated median cost for a party to litigate a copyright infringement claim with less than \$1 million at stake through appeal is \$350,000.⁸

Stories like Sedlik’s and Preston’s illustrate the notion that many copyright holders possess a right without a remedy against infringement of their work. Since copyright holders with small claims generally are unable to take action, users infringe with impunity.

B. LEGISLATIVE HISTORY AND PASSAGE OF THE CASE ACT

Creators like songwriters and authors have long bemoaned the prohibitive costs of copyright litigation and have urged Congress to address the erosion of rights protection.⁹ The USCO took an initial look at the problem and outlined the structure for a copyright small claims board in a 2013 Report.¹⁰ The CASE Act, the legislation creating the CCB, was first introduced by Rep. Hakeem Jeffries (D-NY) in 2017 after years of Congressional deliberation, Copyright Office research and expertise, stakeholder input, and advocacy from individual creators.¹¹ The CASE Act was eventually included in an omnibus COVID relief package signed into law on December 27, 2020.¹²

While this part of the COVID relief package passed with minimal fanfare, the legislative history of the CASE Act involved some fireworks.¹³ The CASE Act passed the House with overwhelming bipartisan support, a rarity in modern D.C., with a 410–

7. U.S. COPYRIGHT OFF., *COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 3* (2013).

8. AIPLA, 2021 REPORT OF THE ECONOMIC SURVEY I–210 (2021).

9. *See Songwriters and Other Creators May Recoup Lost Money with Senate’s Passage of CASE Act*, SONGWRITERS GUILD OF AM., <https://songwritersguild.com/site/case-act-passes-senate> [<https://perma.cc/WF4M-HNA9>] [<https://web.archive.org/web/20220923141635/https://songwritersguild.com/site/case-act-passes-senate>] (last visited Feb. 18, 2022); *The Authors Guild Supports a Copyright Small Claims Court*, THE AUTHORS GUILD (May 2, 2019), <https://www.authorsguild.org/industry-advocacy/the-authors-guild-supports-a-copyright-small-claims-court> [<https://perma.cc/6LZE-MWVJ>] [<https://web.archive.org/web/20220923141845/https://www.authorsguild.org/industry-advocacy/the-authors-guild-supports-a-copyright-small-claims-court>].

10. U.S. COPYRIGHT OFF., *supra* note 7, at 4, 155–61.

11. Press Release, Rep. Hakeem Jeffries, Reps. Jeffries, Marino, Lead Bipartisan Effort to Help Musicians and Artists Protect Their Creative Work (Oct. 4, 2017), <https://jeffries.house.gov/2017/10/04/jeffries-marino-lead-bipartisan-effort-to-help-musicians-and> [<https://perma.cc/SW36-GKP5>] [<https://web.archive.org/web/20220923142123/https://jeffries.house.gov/2017/10/04/jeffries-marino-lead-bipartisan-effort-to-help-musicians-and>].

12. Claudia Rosenbaum, *Congress Passes CASE Act as Part of COVID-19 Relief Bill*, BILLBOARD (Dec. 12, 2020), <https://www.billboard.com/pro/congress-case-copyright-reforms-covid-19-relief-bill> [<https://perma.cc/F58S-YHZD>] [<https://web.archive.org/web/20220923142324/https://www.billboard.com/pro/congress-case-copyright-reforms-covid-19-relief-bill>]; *see* 17 U.S.C. §§ 1501–1511.

13. *See id.*

6 vote.¹⁴ However, in the lead up to the House vote, opposition groups lodged vociferous critiques. The Electronic Frontier Foundation (“EFF”) took aim at the bill, stating that it would lead to “copyright trolls” and “chill protected expression.”¹⁵ Similarly, the American Civil Liberties Union (“ACLU”) wrote a letter to the House urging members to vote against the bill because it would lead to people bringing bad faith claims, leaving unsophisticated internet users subject to large civil penalties.¹⁶ Public Knowledge, a D.C.-based nonprofit, raised constitutional concerns in its opposition, stating that the bill would create an unaccountable court.¹⁷ While these efforts were mostly unsuccessful, these groups and others remained opposed to the Copyright Small Claims Board. These concerns are possibly exacerbated by the unusual inclusion of a large intellectual property bill in an omnibus COVID relief package.¹⁸ This suggests that the next time supporters of the CASE Act and groups like EFF battle over this bill, it will be in a court room. A dispute between the two sides could arise if a default judgment is entered against a respondent, and a respondent brings suit in a federal court challenging constitutionality of the CCB.

II. STRUCTURE OF THE CCB & OVERVIEW OF PROCEEDINGS

The CCB is composed of three Copyright Claims Officers: two with experience in the resolution of copyright infringement and the third with knowledge of copyright

14. Copyright Alternative in Small Claims Enforcement Act of 2019: 116th Congress Final Vote Results for Roll Call 578 on H.R. 2426, CLERK: U.S. HOUSE OF REPRESENTATIVES (Oct. 22, 2019), <https://clerk.house.gov/Votes/2019578> [<https://perma.cc/DTQ9-VSGC>] [<https://web.archive.org/web/20220923143040/https://clerk.house.gov/Votes/2019578>].

15. Copyright “trolls” or “non-practicing entities” are people, companies, or even law firms that enforce “copyrights [they] hold for purposes of making money through litigation, in a manner considered unduly aggressive or opportunistic, and generally, without producing or licensing the works [they] own[] for paid distribution.” *Copyright Trolls*, THE FASHION L., <https://www.thefashionlaw.com/resource-center/copyright-trolls> [<https://perma.cc/SQX4-7K2Z>] [<https://web.archive.org/web/20220923143301/https://www.thefashionlaw.com/resource-center/copyright-trolls>] (last visited Mar. 13, 2021); Katharine Trendacosta, *Yet Another Year of Fighting a Bad Copyright Bill: 2019 Year in Review*, ELECTR. FRONTIER FOUND. (Dec. 22, 2019), <https://www.eff.org/deeplinks/2019/12/yet-another-year-fighting-bad-copyright-bill-2019-year-review> [<https://perma.cc/XGM6-C4NW>] [<https://web.archive.org/web/20220923143707/https://www.eff.org/deeplinks/2019/12/yet-another-year-fighting-bad-copyright-bill-2019-year-review>].

16. Letter from the ACLU to Members of H.R. (Oct. 21, 2019), <https://www.aclu.org/letter/aclu-vote-recommendation-hr-2426-case-act> [<https://perma.cc/7GTM-UMZX>] [<https://web.archive.org/web/20220923144006/https://www.aclu.org/letter/aclu-vote-recommendation-hr-2426-case-act>].

17. Letter from Pub. Knowledge to Members of H.R. (Oct. 21, 2019), <https://publicknowledge.org/policy/public-knowledge-letter-opposing-case-act> [<https://perma.cc/7D7S-DY5X>] [<https://web.archive.org/web/20220923144130/https://publicknowledge.org/policy/public-knowledge-letter-opposing-case-act>]. Public Knowledge is a prominent D.C.-based nonprofit advocacy group that focuses on “intellectual property law, competition, and choice in the digital marketplace and an open standards/end-to-end internet.” *Public Knowledge*, INFLUENCE WATCH, <https://www.influencewatch.org/non-profit/public-knowledge> [<https://perma.cc/ZMC3-RKDX>] [<https://web.archive.org/web/20230317020906/https://www.influencewatch.org/non-profit/public-knowledge>].

18. See Emily Birnbaum, *Lawmakers Are Cramming Controversial Copyright Provisions into a Must-Pass Spending Bill*, PROTOCOL (Dec. 4, 2010), <https://www.protocol.com/Politics/copyright-provisions-in-spending-bill> [<https://perma.cc/QW7C-J55Y>] [<https://web.archive.org/web/20220923144314/https://www.protocol.com/Politics/copyright-provisions-in-spending-bill>].

law and experience in alternative dispute resolution.¹⁹ The Librarian of Congress appoints these officers for initial terms ranging from four to six years.²⁰

Proceedings before the CCB mirror federal district court in some ways but are simplified and streamlined to achieve its goal as a cheaper alternative to federal courts. In order to commence a proceeding before the CCB, a claimant must file a complaint-like document before the CCB that “includes a statement of material facts in support of the claim” and pay a filing fee.²¹ After a claimant files a claim, a copyright claims attorney reviews the claim to ensure that it complies with applicable regulations.²² If the reviewing attorney finds that the claim is not compliant, the claimant is given the opportunity to file an amended claim within thirty days of receiving the deficiency notice.²³

Once a claimant serves a potential respondent with notice and a claim, the respondent has sixty days to opt out of proceeding before the CCB.²⁴ If the respondent decides to opt-out, the case is dismissed *without prejudice*.²⁵ This opt-out component is key to making the tribunal truly voluntary, which supports the case for the CCB passing constitutional muster.²⁶

If a respondent decides not to opt out of proceedings, the respondent must file a response to the claim that can include “legal or equitable defense[s] under this title or otherwise available under law.”²⁷ The respondent has limited ability to file counterclaims.²⁸ The CCB may dismiss a claim or counterclaim after finding it unsuitable on account of: (1) failure to join a necessary party, (2) the lack of “essential witness[es], evidence, or expert testimony,” and (3) “the determination of a relevant issue of law or fact that could exceed either the number of proceedings the [CCB] could reasonably administer or the subject matter competence of the [CCB].”²⁹

Proceedings before the CCB are different from copyright litigation in federal courts. Discovery is “limited and mostly-paper based.”³⁰ Evidence can be admitted “without application of formal rules of evidence.”³¹ Formal motion practice is not part of the

19. *Frequently Asked Questions About the CCB*, CCB.GOV, <https://ccb.gov/faq> [<https://perma.cc/J4PH-FW4F>] [<https://web.archive.org/web/20220923211730/https://ccb.gov/faq>] (last visited Oct. 19, 2022).

20. *Id.*; 17 U.S.C. § 1502(b)(5).

21. 17 U.S.C. § 1506(e)(1).

22. 17 U.S.C. § 1506(f)(1).

23. 17 U.S.C. § 1506(f)(B).

24. 17 U.S.C. § 1506(i).

25. *Id.*

26. See June M. Besek, *Comment re Copyright Office Notice of Inquiry Concerning Remedies for Small Copyright Claims*, COPYRIGHT.GOV, https://www.copyright.gov/docs/smallclaims/comments/29_kernochan_center_for_law.pdf [<https://perma.cc/XY45-KUQW>] [https://web.archive.org/web/20220923153407/https://www.copyright.gov/docs/smallclaims/comments/29_kernochan_center_for_law.pdf] (last visited Nov. 7, 2022) (responding to Notice of Inquiry Concerning Remedies for Small Copyright Claims 76 FED. REG. 66,758 (2011) and noting that making a federal small claims resolution mechanism a voluntary system preserves the seventh amendment right to jury trial).

27. 17 U.S.C. § 1504(c)(5).

28. 17 U.S.C. § 1506(f)(2).

29. 17 U.S.C. § 1506(f)(3)(A)–(C).

30. CCB.GOV, *supra* note 19.

31. 17 U.S.C. § 1506(o).

proceedings “unless requested by the parties or the CCB.”³² Hearings can proceed virtually, and parties can appear without counsel.³³ Law students providing pro bono representation can also represent a party with appropriate supervision.³⁴

A majority of officers is required to issue a determination and a dissenting officer can append a statement to the determination.³⁵ CCB determinations must (1) be in writing along with an explanation “of the factual and legal basis of the determination,” (2) “set forth any terms by which a respondent or counterclaim respondent has agreed to cease infringing activity,” and (3) “include a clear statement of all damages and other relief awarded.”³⁶ CCB determinations do not have precedential effect, even in future cases before the CCB itself.³⁷ A CCB determination does not preclude the parties from relitigating in federal court or before the CCB again.³⁸

Remedies are limited to actual damages, profits, and statutory damages.³⁹ For registered works, statutory damages are capped at \$15,000 for each work infringed whereas the recovery for unregistered works is capped at \$7,500, “or a total of \$15,000 in any 1 proceeding.”⁴⁰ Regardless of the amount of claims a party brings, the total monetary recovery in a single proceeding may not exceed \$30,000.⁴¹ This figure excludes attorneys’ fees, which can be awarded upon a finding of bad faith and is capped at \$5,000.⁴² The CCB can also include “a requirement to cease conduct.”⁴³

Opportunities for appeal from CCB decisions are specifically limited to maintain the CCB’s purpose as a streamlined alternative to federal litigation. Parties can require reconsideration of a Board decision before the same Board “based on (a) a clear error of law or fact material to the outcome, or (b) a technical mistake.”⁴⁴ If such a request is denied, parties can request the review of the final determination by the Register of Copyrights within thirty days of the denial.⁴⁵ Appeals to a federal district court are extremely narrow, allowed only where the Board “(a) issued a determination resulting from fraud, corruption, misrepresentation, or other misconduct, (b) exceeded its authority or failed to render a final judgment, or (c) issued a determination based on default or failure to prosecute due to excusable neglect.”⁴⁶

32. CCB.GOV, *supra* note 19.

33. 17 U.S.C. § 1506(d), (p).

34. 17 U.S.C. § 1506(d)(2).

35. 17 U.S.C. § 1506(t)(1)(A).

36. 17 U.S.C. § 1506(t)(1)(A)–(E).

37. 17 U.S.C. § 1507(a)(3).

38. 17 U.S.C. § 1507(a)(1).

39. 17 U.S.C. § 1504(e)(1)(A).

40. 17 U.S.C. § 1504(e)(1)(A)(ii)(II).

41. 17 U.S.C. § 1504(e)(1)(D). Note, actual damages are also capped at \$30,000 for a single work although the amount depends on the evidence provided at the proceeding. *See* CCB.GOV, *supra* note 19.

42. 17 U.S.C. § 1506(y)(2).

43. 17 U.S.C. § 1504(e)(2).

44. 17 U.S.C. § 1506(w).

45. 17 U.S.C. § 1506(x).

46. 17 U.S.C. § 1508(c)(1)(A)–(C).

III. APPOINTMENTS CLAUSE FOUNDATIONS

A. A ROADMAP FROM THE CONSTITUTION TO PRESENT JURISPRUDENCE

The Appointments Clause of the Constitution empowers the President to appoint “Officers of the United States.”⁴⁷ Deciding who is an Officer of the United States is often the subject of litigation. Foundational Appointments Clause cases like *Buckley v. Valeo* and *Freytag v. Comm’r of Internal Revenue* provide guidelines in distinguishing an “employee” from an “officer.”⁴⁸ Slightly more complex is the principal/inferior officer line-drawing exercise, as the seminal case *Morrison v. Olson* illustrates.⁴⁹

Appointments Clause challenges remain a common avenue to overturn decisions. The D.C. Circuit case *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.* provides a notable look at an Appointments clause challenge in the copyright context.⁵⁰ And recently in *Lucia v. SEC* and *United States v. Arthrex*, the Court has demonstrated its willingness to examine potential Appointments Clause issues.⁵¹

The Court takes a fact intensive look in Appointments Clause cases and examines the responsibilities and authority of the Agency employee or officer at question. Often, the Court, as in *Lucia*, looks to see if a particular employee or officer wields federal judge-like power.⁵² Other times, as the Court did in *Arthrex*, it places great emphasis on the finality and reviewability of the decisions issued by an officer.⁵³ Thus, the Appointments Clause doctrine can be unruly and changeable, but in any Appointments Clause challenge, the Court looks to previous decisions and makes comparisons. The remainder of this section examines foundational cases and takes an in-depth look at the key features of the doctrine. Finally, the section concludes that CCB officers are likely inferior officers given where the caselaw currently stands.

B. EMPLOYEE V. OFFICER

The first task often performed in an Appointments Clause analysis is to distinguish between “officers” and “employees.” Two foundational cases, *Buckley* and *Freytag*, guide the analysis, providing the courts with the “significant authority” standard.⁵⁴

First, the challenge in *Buckley* centered around the Federal Elections Commission (“FEC”) as established by the Federal Election Campaign Act of 1971 and amended in

47. U.S. CONST. art. II, § 2, cl. 2. “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

48. *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976); *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

49. 487 U.S. 654 (1988).

50. 684 F.3d 1332 (D.C. Cir. 2012).

51. *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

52. *See Lucia*, 138 S. Ct. at 2049.

53. *Arthrex*, 141 S. Ct. at 1985.

54. *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976); *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

1974.⁵⁵ The Act provided the FEC's eight-member body with "extensive rule-making, enforcement, and adjudicatory powers."⁵⁶ The Supreme Court specifically noted that FEC's enforcement power was "both direct and wide ranging" including the possibility of "institut[ing] a civil action for (i) injunctive or other relief."⁵⁷

The Court found that the FEC commissioners were "at the very least . . . inferior officers" and held their appointments unconstitutional.⁵⁸ In perhaps the most notable line from the case, the Court wrote that "any appointee exercising *significant authority* pursuant to the laws of the United States is an 'Officer of the United States.'"⁵⁹

Freytag endorsed the "significant authority" test when the Supreme Court analyzed whether the Chief Judge of the U.S. Tax Court had the constitutional authority to appoint "special trial judges" to the court.⁶⁰ These special trial judges ("STJs") were "authorized to hear (1) certain prescribed proceedings, in which the STJs were allowed to resolve disputes, and (2) any other proceeding which the chief judge may designate, in which the STJs could prepare only proposed findings and a proposed opinion (referred to as a subsection (b)(4) proceeding)."⁶¹ The Court reiterated the "significant authority" language from *Buckley* and held that the STJs wielded "significant discretion" and thus were inferior officers.⁶²

C. PRINCIPAL VS. INFERIOR OFFICERS: AN EXERCISE IN LINE-DRAWING

The next common step in an Appointments Clause challenge—distinguishing between principal and inferior officers—is more challenging and unruly than is delineating between an officer and employee. Usually, the principal/inferior officer analysis begins with *Morrison v. Olson*.⁶³

The Court in *Morrison* analyzed the status of an independent counsel appointed by the Attorney General to "investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."⁶⁴ If the Attorney General ("AG") found reasonable grounds to continue an investigation of a government official, the AG was required to apply to the "Special Division" to appoint an independent counsel.⁶⁵ The Special Division was a newly created court that "appointed the counsel and defined the counsel's prosecutorial jurisdiction."⁶⁶ Once appointed, the

55. *Buckley*, 424 U.S. at 5–6.

56. OLIVER DUNFORD & DAMIEN SCHIFF, DISTINGUISHING BETWEEN INFERIOR AND NON-INFERIOR OFFICERS UNDER THE APPOINTMENTS CLAUSE—A QUESTION OF "SIGNIFICANCE" 29 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917655 [<https://perma.cc/KHQ7-EE4X>] [https://web.archive.org/web/20221012142412/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917655].

57. *Buckley*, 424 U.S. at 111.

58. *Id.* at 126, 143.

59. *Id.* at 126 (emphasis added).

60. DUNFORD & SCHIFF, *supra* note 56, at 32; *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

61. DUNFORD & SCHIFF, *supra* note 56, at 32 (internal quotation marks omitted).

62. *See Freytag*, 501 U.S. at 881 (quoting *Buckley*, 424 U.S. at 126).

63. *Morrison v. Olson*, 487 U.S. 654 (1988).

64. *Morrison*, 487 U.S. at 660.

65. *Id.* at 661.

66. DUNFORD & SCHIFF, *supra* note 56, at 34–35.

independent counsel had a wide range of latitude, including “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.”⁶⁷ Notably, the Act vested the AG with removal powers, albeit on a limited basis for “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties”⁶⁸

The Court ultimately concluded that the independent counsel was an inferior officer based on several factors.⁶⁹ Perhaps most importantly, the Court stressed that the independent counsel was removable by a higher executive branch official, the AG.⁷⁰ The Court also noted that the independent counsel was empowered with “only certain, limited duties.”⁷¹ The Court described the independent counsel as possessing “limited jurisdiction and tenure.”⁷² Concluding, the Court wrote “these factors relating to the ‘ideas of tenure, duration . . . and duties of the independent counsel . . . [are] sufficient to establish that [the independent counsel] is an ‘inferior’ officer in the constitutional sense.”⁷³

The *Morrison* Court acknowledged that the line between inferior and principal officer is “far from clear.”⁷⁴ Not surprisingly, the Court again engaged in another difficult line drawing exercise in *Edmond v. United States*.⁷⁵ In *Edmond*, the Court considered “whether the Secretary of Transportation can lawfully appoint civilian members of the Coast Guard Court of Criminal Appeals.”⁷⁶ The ability of the Secretary of Transportation to appoint these civilian adjudicators hinged on whether these members of the court were principal or inferior officers.⁷⁷

The Court held that members of the Coast Guard Court of Criminal Appeals were inferior officers and attempted to provide a guideline for principal/inferior officer analysis.⁷⁸ This guidepost in *Edmond* was supervision.⁷⁹ The Court described inferior officers as those administrative officials who wield significant authority and “whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”⁸⁰

The civilian court members checked enough boxes for the *Edmond* Court to be comfortable characterizing them as inferior officers. The Court noted that the Judge Advocate General has administrative oversight over the Court of Criminal Appeals and

67. *Morrison*, 487 U.S. at 662.

68. *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)).

69. *Id.* at 670–71.

70. *Id.* at 671

71. *Id.*

72. *Id.* at 691.

73. *Id.* at 672.

74. *Id.* at 671.

75. 520 U.S. 651 (1997).

76. DUNFORD & SCHIFF, *supra* note 56 at 39; *Edmond*, 520 U.S. at 653.

77. *Id.*

78. *Id.* at 666.

79. *Id.*

80. *Id.* at 663.

could both appoint and remove these officers.⁸¹ Notably, the Judge Advocate General could remove these officers “without cause,” providing the Judge with a “powerful tool for control.”⁸² The Court also stressed that the Court of Appeals for the Armed Forces had the power to review and reverse the Coast Guard court’s decisions.⁸³

D. CASELAW POST *MORRISON* AND *EDMOND*

1. Intercollegiate Broadcasting System

Copyright scholars are often familiar with Appointments Clause challenges because of the 2012 D.C. Circuit opinion in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.* Although this case can be overlooked because of the recent *Arthrex* opinion, an in-depth analysis of this case may provide some insight into how the Court might analyze a possible Appointments Clause challenge to the CCB.

In *Intercollegiate*, the D.C. Circuit considered a challenge to the constitutionality of the Copyright Royalty Judges (“CRJ”) of the Copyright Royalty Board.⁸⁴ The Copyright Royalty and Distribution Reform Act of 2004 established the Copyright Royalty Judges program in the Library of Congress.⁸⁵ The Librarian of Congress appoints three CRJs to serve staggered six-year terms.⁸⁶ The CRJs “oversee the copyright law’s statutory licenses, which permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner.”⁸⁷ The CRJs also “determine and adjust royalty rates and terms applicable to the statutory copyright licenses” and “oversee distribution of royalties deposited with the Copyright Office.”⁸⁸

The CRJs possessed the authority to issue final rate determinations and possessed strong removal protections.⁸⁹ The CRJs were protected with good-cause-like removal protections.⁹⁰ The Librarian of Congress could remove CRJs only for (1) violations of standards of conduct like financial conflicts of interest, (2) misconduct, or (3) neglect of duty.⁹¹ Furthermore, the Librarian of Congress could only indirectly supervise CRJs by approving various procedural regulations and “overseeing various logistical aspects of their duties.”⁹² Lastly, the Librarian possessed arms-length control over the CRJ by way of the Register of Copyrights, who possessed the ability to “to interpret the copyright

81. *Id.* at 664; DUNFORD & SCHIFF, *supra* note 56 at 40.

82. *Edmond*, 520 U.S. at 664.

83. *Id.* at 664–665.

84. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334–35 (D.C. Cir. 2012).

85. *About Us*, U.S. COPYRIGHT ROYALTY BD., <https://www.crb.gov> [<https://perma.cc/W2L3-VDHW>] [<https://web.archive.org/web/20221012143419/https://www.crb.gov>] (last visited Feb. 20, 2022).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Intercollegiate Broad. Sys.*, 684 F.3d at 1340–41.

90. *See* 17 U.S.C. § 802(i).

91. 17 U.S.C. § 802(h)–(i).

92. *Intercollegiate Broad. Sys.*, 684 F.3d at 1338.

laws and provide written opinions to the CRJs on ‘novel material question[s]’ of law; the CRJs must abide by these opinions in their determinations.”⁹³

The D.C. Circuit found the CRJs were principal officers and held that the structure of the CRB violated the Appointments Clause.⁹⁴ The D.C. Circuit emphasized the broad impact of CRB determinations and strong removal protections afforded to CRJs. The court noted that CRJ ratemaking decisions “have considerable consequences” and that “billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board’s decisions.”⁹⁵ The Register of Copyrights’ control over rate-determinations was “quite faint.”⁹⁶ Moreover, the removability protections of the CRJs, limited to misconduct or neglect of duty, were unlike the protections afforded to the civilian court members of Coast Guard Court of Criminal Appeals in *Edmond*.

The D.C. Circuit’s remedy solely focused on CRJ’s removability protections. The court noted that “[o]nce the limitations on the Librarian’s removal authority are nullified, they would become validly appointed inferior officers.”⁹⁷ The court also quickly addressed the constitutional status of the Librarian of Congress, holding that the “Librarian is a Head of Department who may permissibly appoint the Copyright Royalty Judges.”⁹⁸

2. The Roberts Court’s look at the Appointments Clause: *Lucia* and *Arthrex*

The Roberts Court, armed with some new tools on how to tackle Appointments Clause cases, made two notable recent decisions in *Lucia v. SEC* and *United States v. Arthrex*.⁹⁹

In *Lucia*, the Court considered the constitutionality of the Administrative Law Judge (“ALJ”) system for the United States Securities and Exchange Commission (“SEC”).¹⁰⁰ SEC staff members, not the Commissioners, select five ALJs.¹⁰¹ The ALJs presiding over SEC enforcement actions have “extensive powers” comparable to “that of a federal district judge conducting a bench trial.”¹⁰² The Commission can review ALJ decisions “either upon request or sua sponte.”¹⁰³ However, if the Commission elects not to review an ALJ decision, it issues an order deeming the ALJ decision “the action of the Commission.”¹⁰⁴

93. *Id.* at 1338.

94. *Id.* at 1341.

95. *Id.* at 1337–38 (quoting *SoundExchange v. Librarian of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

96. *Id.* at 1339.

97. *Id.* at 1341.

98. *Id.*

99. *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

100. *Lucia*, 138 S. Ct. at 2049.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (quoting 15 U.S.C. § 78d–1(c)).

The Court concluded that the SEC ALJs were officers, not employees, and thus were not validly appointed.¹⁰⁵ The Court likened the SEC ALJs to the STJs at issue in *Freytag* and claimed that “*Freytag* says everything necessary to decide this case.”¹⁰⁶ Like the STJs, the SEC ALJs wield “significant discretion” when carrying out “important functions” and have the ability to shape “fair and orderly adversarial hearings.”¹⁰⁷ In addition to the federal judge-like powers the SEC ALJs wield, the Court noted that these ALJs receive a career appointment “to a position created by statute, down to its ‘duties, salary, and means of appointment.’”¹⁰⁸

Justice Sotomayor dissented from the majority in *Lucia*, writing separately that the SEC ALJs were not officers primarily “because they lack[ed] final decision-making authority.”¹⁰⁹ Sotomayor stressed the Commission’s role throughout ALJ proceedings, specifically that the Commission “can review any initial decision” and can decide to “accept[] evidence itself or refer a matter to an ALJ.”¹¹⁰ Notably, both Justice Sotomayor’s dissent and Justice Breyer’s concurrence left some ambiguity about the court’s decision on the constitutionality of the SEC ALJs’ “for cause” removal protections.¹¹¹

The Court’s most recent foray into the Appointments Clause came in *United States v. Arthrex*. In 2015, Arthrex Inc. sued Smith & Nephew Inc. for patent infringement.¹¹² Smith & Nephew then filed an *inter partes* review (“IPR”) challenging the validity of Arthrex’s patent.¹¹³ The Patent Trial and Appeal Board (“PTAB”) invalidated Arthrex’s patent, and Arthrex appealed to the Federal Circuit, arguing that the PTAB judges were unconstitutionally appointed because the Secretary of Commerce lacked sufficient supervisory powers.¹¹⁴ The Federal Circuit agreed, finding that the PTAB judges were principal officers and “must be appointed by the President and confirmed by the Senate” and remanded the case for a new hearing before the PTAB.¹¹⁵ To cure this defect, the Federal Circuit suggested a remedy of a “partial invalidation of the statutory limitations on the removal of APJs.”¹¹⁶ The Federal Circuit found that the APJ’s removal protections— “only for such cause as will promote the efficiency of the service”—improperly limited the United States Patent and Trademark Office (“USPTO”) Director’s removal authority over the APJs.¹¹⁷

The Supreme Court took a different approach when it weighed in on the constitutionality of the APJs. The Court agreed with the Federal Circuit that the APJs

105. *Id.* at 2051.

106. *Id.* at 2053.

107. *Id.*

108. *Id.*

109. *Id.* at 2065 (Sotomayor, J., dissenting).

110. *Id.*

111. *Id.* at 2057–58 (Breyer, J., concurring).

112. Jasper L. Tran, *Life After Arthrex*, 103 J. PAT. TRADEMARK OFFICE SOC’Y 1, 5 (2021).

113. *Id.* at 6.

114. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1325 (Fed. Cir. 2019). *See generally* Russell W. Jacobs, *The Copyright Claims Board and The Appointments Clause*, 2021 U. ILL. L. REV. ONLINE 85 (2021).

115. *Arthrex*, 941 F.3d at 1335.

116. *Id.* at 1338.

117. *Id.* (quoting 5 U.S.C. § 7513(a)).

were officers and unconstitutionally appointed, but disagreed with the appropriate remedy, bluntly stating that this remedy “satisfied no one.”¹¹⁸ In crafting a new remedy, the Court focused on the reviewability of APJ decisions.¹¹⁹ Chief Justice Roberts, writing for the majority, held that the APJs wielded “unreviewable authority” during IPR review that “is incompatible with their appointment by the Secretary to an inferior office.”¹²⁰ The Court emphasized that there lacked a clear “chain of command” and that the APJs possessed unchecked authority without “review by their nominal superior or any other principal officer in the Executive Branch.”¹²¹

The Court provided a new remedy, effectively turning the APJs into clear inferior officers.¹²² The Court gave the USPTO Director the discretionary power to review PTAB decisions and “upon review, may issue decisions himself on behalf of the Board.”¹²³ Notably, the majority did not delve into the Government’s argument contending that “at-will removal by the Secretary [of Commerce] would cure the constitutional problem.”¹²⁴ The majority simply noted that review by the USPTO Director “better reflects the structure of supervision within the PTO and the nature of APJs’ duties.”¹²⁵

E. COPYRIGHT CLAIMS OFFICERS ARE INFERIOR OFFICERS

The Copyright Claims Officers are likely officers, not employees, because they wield significant authority and exercise significant discretion. Like the STJs in *Freytag*, these officers can manage cases before them and set parameters for hearings.¹²⁶ Copyright Claims Officers “manage proceedings, make evidentiary determinations, oversee discovery, and conduct hearings.”¹²⁷ Like the Copyright Royalty Board’s rate making authority, the Copyright Claims Officers’ ability to issue a final determination on whether a respondent infringed a claimant’s right could impose significant financial penalties.¹²⁸

Copyright Claims Officers wield the ability to make final determinations like the SEC ALJs in *Lucia*.¹²⁹ These officers can also “make determinations on copyright infringement claims and award monetary damages . . . independently without consulting the Register of Copyrights on the facts of any case.”¹³⁰ While Copyright

118. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1978 (2021).

119. *Id.* at 1985.

120. *Id.*

121. *Id.* at 1981–83.

122. *See* Tran, *supra* note 112, at 8.

123. *Arthrex*, 141 S. Ct. at 1987.

124. *Id.*

125. *Id.*

126. *Freytag v. Comm’r*, 501 U.S. 868 at 881–82 (1991).

127. Jacobs, *supra* note 113, at 90. *See also* 17 U.S.C. § 1502(a)(1) (describing the functions of copyright claims officers).

128. Jacobs, *supra* note 113, at 90; *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337–38 (D.C. Cir. 2012).

129. Jacobs, *supra* note 113, at 90.

130. *Id.*

Claims Officers decisions do not have precedential effect, there are limited opportunities to appeal CCB decisions. This increases the likelihood that determinations by the copyright claims officers will be final.

Next, looking at whether the Copyright Claims Officers are principal or inferior officers is a closer call, but they are likely categorized as inferior officers.¹³¹ First, the Librarian of Congress appears to have the ability to remove a copyright claims officer *at will*.¹³² The CASE Act language mirrors “the rewrite of the removal language in 17 U.S.C. section 802(i) ordered by the D.C. Circuit in [*Intercollegiate*] to remedy the Appointments Clause problem.”¹³³ Second, the Librarian of Congress can influence the Officers via the Register of Copyrights.¹³⁴ The Officers are “under the general direction of the Register of Copyrights.”¹³⁵ The Register recommends copyright claims officers that the Librarian approves.¹³⁶ While the Officers may not consult with the Register on specific facts of a case, the officers can consult with the Register “on general issues of law.”¹³⁷ The Officers are also subject to performance appraisals.¹³⁸ These provisions provide significant avenues for the Librarian to directly influence the Copyright Claims Officers, making them inferior officers.

IV. ARTICLE III

A. A ROADMAP OF THE IMPORTANCE OF ARTICLE III IN THE PUBLIC RIGHTS DOCTRINE AND CONSENT TO NON-ARTICLE III COURTS

Article III of the Constitution establishes the judicial branch of the federal government and enables the Supreme Court and lower courts to hear cases and controversies.¹³⁹ As Professor Aistars notes, “despite this constitutional directive for

131. Professor Russell W. Jacobs similarly concludes that copyright claims officers would likely be found to be inferior officers. *See id.*

132. 17 U.S.C. § 1502(b)(7).

133. Jacobs, *supra* note 113, at 93. *Compare id.* (“Subject to section 1503(b) [independence determinations], the Librarian of Congress may sanction or remove a Copyright Claims Officer.”) with 17 U.S.C. § 802(i) (“The Librarian of Congress may sanction or remove a Copyright Royalty Judge for violation of the standards of conduct adopted under subsection (h) [financial conflicts of interest, restrictions against *ex parte* communications], misconduct, neglect of duty, or any disqualifying physical or mental disability.”).

134. *See generally* 17 U.S.C. § 1502 (indicating several provisions, like hiring and vacancies, where the Register can significantly influence the copyright claims officers).

135. 17 U.S.C. § 1503(c).

136. 17 U.S.C. § 1502(b)(1).

137. 17 U.S.C. § 1503(b)(2)(A).

138. 17 U.S.C. § 1503(b)(3).

139. U.S. CONST. art. III, §§ 1–2:

“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in

separation of powers and a judiciary independent of political influence, over the last century and a half, innumerable institutions and agencies have been created by Congress to adjudicate a variety of disputes in special tribunals and agencies outside the federal court system.”¹⁴⁰

This section examines the evolution of the public rights doctrine and distills from the caselaw a guide to determining whether a right is a private or public. The Court initially took a rigid approach when outlining the public rights doctrine, illustrated in *Murray’s Lessee v. Hoboken Land Improvement Co.*¹⁴¹ However, since *Thomas v. Union Carbide Agric. Prods. Co.*, the Court has increasingly taken a pragmatic approach when deciding whether a right is public or private.¹⁴² Regardless of how a right is defined, the Court has consistently authorized cases to proceed in non-Article III courts when the parties voluntarily waive their rights to be heard by an Article III court.¹⁴³ Finally, although the Court has never explicitly examined whether copyright is a private or public right, the section concludes that copyright is likely a private right because of its pre-statutory origins.

B. THE EVOLUTION OF THE PUBLIC RIGHTS DOCTRINE

The Court’s first venture into the constitutionality of a non-Article III court came in *Murray’s Lessee v. Hoboken Land Improvement Co.*¹⁴⁴ At issue in *Murray’s Lessee* was a “summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its own customs collectors.”¹⁴⁵ Importantly, the *Murray’s Lessee* decision is credited with creating the “public rights doctrine,” first described as matters “involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are

office. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”

140. Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 26 GEO. MASON. L. REV. 65, 71 (2018).

141. 59 U.S. 272 (1855).

142. 473 U.S. 568 (1985).

143. See generally *Wellness Int’l Network v. Sharif*, 575 U.S. 665 (2015); *Peretz v. United States*, 501 U.S. 923 (1991); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *Roell v. Withrow*, 538 U.S. 580 (2003).

144. *Murray’s Lessee*, 59 U.S. 272.

145. LIBRARY OF CONGRESS, *Congressional Power To Establish Non-Article III Courts: Current Doctrine*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/artIII-S1-1-3-1-1/ALDE_00001191 [<https://perma.cc/FM5X-UVHB>] [https://web.archive.org/web/20220416030126/https://constitution.congress.gov/browse/essay/artIII-S1-1-3-1-1/ALDE_00001191] (last visited Apr. 16, 2022).

susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States.”¹⁴⁶ The doctrine evolved in *Crowell v. Benson*, where the Court upheld the ability of Congress to establish “legislative” courts.¹⁴⁷ The *Crowell* Court defined public rights as matters “between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”¹⁴⁸

The public rights doctrine has evolved in a confusing manner throughout modern jurisprudence and the Court often has a difficult time drawing the line between a public and a private right. After *Crowell*, the Court appeared to take a more pragmatic approach rather than undertake formal classification exercises, as illustrated in *Thomas v. Union Carbide Agric. Prods. Co.*¹⁴⁹ In *Union Carbide*, the Court upheld the constitutionality of a binding arbitration process that the EPA used to resolve disputes among participants in the Federal Insecticide, Fungicide, and Rodenticide Act’s registration scheme.¹⁵⁰ Here, Justice O’Connor described the public rights doctrine as reflecting “a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.”¹⁵¹

Two relatively recent cases illustrate a slightly different approach than the approach the Court took in *Union Carbide*, indicating a possible return to a *Crowell*-like formal approach. First, in 2011, the Court in *Stern v. Marshall* analyzed whether a Bankruptcy Court judge could enter final judgment on a tortious interference counterclaim.¹⁵² Chief Justice Roberts, writing for the majority, wrote that “it is still the case that what makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action.”¹⁵³ Following this guidance, the majority held that the tortious interference counterclaim did not fall under the public rights exception and thus the Bankruptcy Court lacked the constitutional authority to enter a final judgment.¹⁵⁴ However, possibly offering an additional factor in the analysis, Chief Justice Roberts noted that this case did not present “a situation in which Congress devised an ‘expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.’”¹⁵⁵

146. *Murray’s Lessee*, 59 U.S. at 284.

147. *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (distinguishing “legislative” courts from “constitutional” courts).

148. *Id.*

149. *Aistars*, *supra* note 140, at 72; *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

150. *Id.* at 571.

151. *Id.* at 589 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982)).

152. *Stern v. Marshall*, 564 U.S. 462, 470–71 (2011).

153. *Id.* at 490–91.

154. *Id.* at 493, 503.

155. Compare *id.* at 494 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)), with *In re Reed*, 888 F.3d 930, 935–36 (8th Cir. 2018) (holding that a bankruptcy court could hear a counterclaim that stems from bankruptcy itself and does not implicate a common law claim).

Jumping ahead to 2018, in *Oil States Energy Servs. v. Greene's Energy Grp.*, the Court addressed the public rights doctrine in an intellectual property context.¹⁵⁶ Specifically, the Court analyzed whether the USPTO's *inter partes* review before the PTAB violates Article III.¹⁵⁷ The Court noted that in determining "whether a proceeding involves an exercise of Article III judicial power" the Court distinguishes between public and private rights.¹⁵⁸ Justice Thomas, writing for the majority, stated that the Court "has not 'definitively explained' the distinction between public and private rights."¹⁵⁹ But, rather than adding to the "various formulations" of the doctrine, Justice Thomas reiterated the Crowell test emphasizing matters "arising between the government and others."¹⁶⁰ Under this rubric, the Court held that "[i]nter partes review falls squarely within the public-rights doctrine."¹⁶¹ Justice Thomas and the majority explicitly stated that "the decision to grant a patent is a matter of public rights" and that *inter partes* review "involves the same basic matter as the grant of the patent."¹⁶² Furthermore, the majority disagreed with Justice Gorsuch's dissent which found that Article III courts' traditional jurisdiction over patent validity foreclosed the possibility of other courts engaging in the same adjudication.¹⁶³

C. CONSENTING TO NON-ARTICLE III COURTS

The classification of a right as public or private does not end the constitutional analysis of whether a matter can proceed before a non-Article III court. In contexts like proceedings before magistrate judges or non-bankruptcy courts, courts often consider whether the parties voluntarily consented to a non-Article III tribunal.¹⁶⁴

The Supreme Court has demonstrated a willingness to allow cases to proceed before non-Article III courts, even when they would normally be heard by an Article III court, when the parties voluntarily waive their right to be heard before an Article III court.¹⁶⁵ In 2015, the Court in *Wellness Int'l Network, Ltd. v. Sharif*, held that "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge."¹⁶⁶ Justice Sotomayor, writing for the majority, relied heavily on

156. *Oil States Energy Servs. v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018).

157. *Id.* at 1370–72.

158. *Id.* at 1373.

159. *Id.* at 1373 (quoting *N. Pipeline Constr. v. Marathon Pipe Line*, 458 U.S. 50, 69 (1982)).

160. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

161. *Id.* But see Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591 (2019) (disagreeing with the Court's delineation of public and private rights in *Oil States* and noting that it is a mistake to classify patents as solely statutory based).

162. *Oil States Energy Services*, 138 S. Ct. at 1373–74.

163. *Id.* at 1378.

164. See, e.g., *Roell v. Withrow*, 538 U.S. 580, 590 (2003) (holding that implied consent is sufficient to proceed before a magistrate judge); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) (holding that the respondent waived any right to a full trial of a counterclaim before an Article III court because he consented to proceedings before the CFTC).

165. See generally *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015); *Peretz v. United States*, 501 U.S. 923 (1991); *Schor*, 478 U.S. 833; *Roell*, 538 U.S. 580.

166. *Sharif*, 575 U.S. at 669.

Commodity Futures Trading Comm'n v. Schor to support the conclusion that “the entitlement to an Article III adjudicator is ‘a personal right’ and thus ordinarily ‘subject to waiver.’”¹⁶⁷ Notably in *Sharif*, the Court applied a pragmatic, *Union-Carbide* approach to address the Article III concerns.¹⁶⁸ Justice Sotomayor focused her analysis on the “practical effect” that allowing proceedings before this bankruptcy court “[would] have on the constitutionally assigned role of the federal judiciary” rather than reaching a decision based on “formalistic and unbending rules.”¹⁶⁹ Justice Sotomayor clarified the jurisprudence regarding Article III, writing that “the cases in which this Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an objecting defendant forced to litigate *involuntarily* before a non-Article III court.”¹⁷⁰

The majority in *Sharif* emphasized the structural purpose of Article III.¹⁷¹ Justice Sotomayor summarized decades of Article III jurisprudence stemming from *Schor* and *Peretz*, writing that Article III “bar[s] congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts and thereby prevent[ing] the encroachment or aggrandizement of one branch at the expense of the other.”¹⁷² Furthermore, the majority wrote that “allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.”¹⁷³

Consent may also be implied, at least in the context of proceedings before a magistrate judge.¹⁷⁴ The 2003 case *Roell v. Withrow* involved a proceeding before a magistrate judge in which the respondent argued that he did not provide consent.¹⁷⁵ The majority here found that the Federal Magistrate Act of 1979 intended to permit implied consent from the parties.¹⁷⁶ In accepting implied consent, the court noted that this promoted “judicial efficiency” and “substantially honored” the Article III right.¹⁷⁷

D. COPYRIGHT AS A PRIVATE RIGHT

The evolution of the public rights doctrine necessitates a look at whether copyright is a public or private right. While the Court has never explicitly addressed this issue, Justice Thomas’ opinion in *Feltner v. Columbia Pictures Television* provides some insight into how the Court might likely view copyright as a private right.¹⁷⁸ In *Feltner*, the Court held that the “Seventh Amendment grants a right to a jury trial when a copyright

167. *Id.* at 678 (quoting *Schor*, 478 U.S. at 848).

168. *Id.*

169. *Id.* (quoting *Schor*, 478 U.S. at 851).

170. *Id.* at 682–83 (emphasis added).

171. *Id.* at 678.

172. *Id.* (internal quotation marks omitted).

173. *Id.*

174. *See generally* *Roell v. Withrow*, 538 U.S. 580 (2003).

175. *Id.*

176. *Id.* at 588.

177. *Id.* at 590–591.

178. 523 U.S. 340 (1998).

owner elects to recover statutory damages.”¹⁷⁹ In reaching this holding, Justice Thomas discussed the pre-statutory origins of copyright. Justice Thomas wrote that “the common law and statutes in England and this country granted copyright owners causes of action for infringement.”¹⁸⁰ Furthermore, Justice Thomas noted that “statutory copyright protections were enacted even before adoption of the Constitution.”¹⁸¹ The eventual passage of the Copyright Act of 1970 did not “change[] the practice of trying copyright actions for damages in courts of law before juries.”¹⁸² The historical recognition of copyright remedies supports the proposition that copyright is a private right.

Copyright does not necessarily implicate the government. Yes, the USCO plays a role in registration, and a work must either be registered or denied registration in order to bring an infringement claim.¹⁸³ However, copyright protection begins automatically as soon as an original work of authorship is fixed within a tangible medium of expression, and registration does not create entitlement.¹⁸⁴ Unlike the USPTO’s granting of a patent, the USCO does not grant a copyright to a creator. The USCO’s minimal involvement and pre-Constitution origins of copyright strongly indicate that copyright is a private right.

V. OPPOSITION GROUPS AND CHALLENGES

Groups that have opposed the CCB, like EFF, Public Knowledge, and the ACLU raise several constitutional concerns, perhaps most notably that: (1) Congress cannot assign some copyright disputes to an administrative tribunal, (2) CCB officers wield “nearly unreviewable authority” (like the concern raised about PTAB judges in *Arthrex*), (3) the CCB fails the public rights doctrine test, and (4) the CCB dilutes the fair use defense.¹⁸⁵

179. *Id.* at 342.

180. *Id.* at 348.

181. *Id.* at 350.

182. *Id.* at 351.

183. UNITED STATES COPYRIGHT OFFICE, CIRCULAR 1 COPYRIGHT BASICS (2021); *see also* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 886–88 (2019).

184. UNITED STATES COPYRIGHT OFFICE, *supra* note 183.

185. *See, e.g.*, Katharine Trendacosta, *Congress Continues to Ignore the Dangerous Flaws of the CASE Act*, ELECTRONIC FRONTIER FOUND. (Sept. 11, 2019), <https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act> [<https://perma.cc/2YKV-DD4M>] [<https://web/20221006200318/https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act>]; Meredith Whipple, *Public Knowledge Condemns Passage of CASE Act in Funding Bill*, PUB. KNOWLEDGE (Dec. 21, 2020), <https://publicknowledge.org/public-knowledge-condemns-passage-of-case-act-in-funding-bill> [<https://perma.cc/B37L-ZWfY>] [<https://web.archive.org/web/20221006200601/https://publicknowledge.org/public-knowledge-condemns-passage-of-case-act-in-funding-bill>]; ACLU Letter to Members of the House of Representatives, *supra* note 16; Public Knowledge et al., Comments Before the Copyright Office: In the Matter of Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations (Apr. 26, 2021), <https://publicknowledge.org/policy/comments-to-the-copyright-office-on-the-case-act> [<https://perma.cc/P2AU-9FW8>] [<https://web.archive.org/web/20221012191305/https://publicknowledge.org/policy/comments-to-the-copyright-office-on-the-case-act>].

Critics point to *Stern* for the proposition that “Congress does not have power under Article I of the Constitution to establish tribunals to adjudicate certain types of claims because such claims can only be adjudicated by Article III courts.”¹⁸⁶ Regardless of whether copyright is classified as a public or private right, these critics argue that CCB is unconstitutional because it would adjudicate “copyright infringement claims over which Article III courts have long had exclusive jurisdiction.”¹⁸⁷

CCB detractors also allege that the CCB wields “nearly unreviewable authority.”¹⁸⁸ This problem is exacerbated because of concerns that the USCO is captured and is biased towards copyright holders.¹⁸⁹ Regardless of the speculation of USCO bias towards copyright holders, critics are correct that there are limited opportunities to review CCB decisions.¹⁹⁰ The Court’s emphasis on the lack of reviewability of APJ decisions in *Arthrex* signals that the Court may side with critics on this issue.

As discussed above, copyright is likely a private right.¹⁹¹ Thus, critics allege that since Article I tribunals can only adjudicate public rights, the CCB “fails the public rights doctrine test.”¹⁹² Furthermore, even if the copyright is a public right, the lack of ability to appeal a CCB decision to an Article III court leads to the CCB failing the public rights doctrine requirements.¹⁹³

Lastly, and perhaps most importantly, is the concern that the CCB will dilute the fair use defense.¹⁹⁴ Fair use in copyright law is a complicated, mixed question of law and fact and is often the crux of a copyright litigation.¹⁹⁵ Public Knowledge and other critics rightly note that “fair use is not static; courts are constantly adapting the four factors to accommodate new uses, formats, technologies, and concerns.”¹⁹⁶ Reviewing the four fair use factors often involves a complex deep dive into the underlying facts and extensive discovery in a case.¹⁹⁷ Critics argue that the CCB is not equipped to deal with

Opposition groups raise other concerns that are unaddressed in this Note. These arguments include that the CCB violates the due process rights of litigants, possesses overly broad jurisdiction, has inadequate opt-out procedures that will lead to a “default judgment mill,” and will create a new breed of “copyright trolls.” See Aistars, *supra* note 140, for a response to most of these concerns.

186. Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. LAW. J., 689, 692 (2018).

187. *Id.* at 693.

188. ACLU Letter to Members of the House of Representatives, *supra* note 16, at 2.

189. See Meredith Whipple, *The Consequences of Regulatory Capture at The Copyright Office*, PUB. KNOWLEDGE (Sept. 8, 2016), <https://publicknowledge.org/the-consequences-of-regulatory-capture-at-the-copyright-office> [https://perma.cc/4ZWU-7V5S] [https://web.archive.org/web/20221006200934/https://publicknowledge.org/the-consequences-of-regulatory-capture-at-the-copyright-office]. As Whipple notes, “[r]egulatory capture occurs when a government agency is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry.”

190. See *infra* Part II.

191. See *infra* Part IV.D.

192. Pub. Knowledge et al., Comments Before the Copyright Office, *supra* note 185, at 4.

193. *Id.* at 6.

194. See, e.g., *id.*, *supra* note 185.

195. One of the most prominent recent copyright cases, *Google v. Oracle* demonstrates the importance of fair use analysis in a copyright litigation. 141 S. Ct. 1183 (2021) (finding Google’s copying of Java API’s protected fair use largely because of the public benefit the copying provided).

196. Pub. Knowledge et al., Comments Before the Copyright Office, *supra* note 185, at 18.

197. *Id.*

complicated fair use cases and that “the CCB should dismiss cases that raise a fair use defense for lack of subject matter jurisdiction.”¹⁹⁸ The possibility that CCB tribunal judges would create novel fair use interpretations poses strong constitutional concerns. A truncated fair use analysis also raises the concern that the CCB officers are diluting the fair use defense for parties before the tribunal.

VI. DEFENSE OF THE CONSTITUTIONALITY OF THE CCB

The opposition groups have valid concerns and given the strong opposition to the passage of the CASE Act, a legal challenge from these groups is likely. However, ultimately, the CCB as currently constructed is constitutionally valid and likely to withstand potential renewed attacks.

First and foremost, as proponents often note, the voluntary nature of the CCB alleviates Article III concerns.¹⁹⁹ Like the bankruptcy proceedings in *Sharif*, parties provide their consent to proceedings before the CCB because a claimant voluntarily selects the CCB and the respondent can opt-out and proceed in federal court. Should the Court follow a pragmatic approach like it did in *Sharif*, a party waiving the right to proceed in federal court and opting for the CCB does not pose any Article III issue. As the USCO noted in its 2013 report, the “Court has had the greatest difficulty with the broad mandate of the bankruptcy courts, including those courts’ ability to decide state law claims that, even if related to a bankruptcy proceeding, are not essential to the process.”²⁰⁰ This concern was apparent in *Sharif*. But unlike bankruptcy courts, the CCB has a small mandate, adjudicating over small copyright claims that would not generally be pursued in federal courts. Thus, the voluntary nature of proceedings before the CCB should outweigh any Article III concerns.

Second, as discussed above in Part III Section E, Copyright Claims Officers are likely inferior officers. Since the Librarian of Congress can remove the Officers seemingly at will and can exercise significant authority over the Officers via the Register of Copyrights, this alleviates any possible appointments clause issue.²⁰¹ The Court’s more recent look at the Copyright Office through the lens of an Appointments Clause challenge was *Intercollegiate*. This case is a plausible starting point for a challenge, and the Court will likely be able to distinguish the CRJs from the Copyright Claims Officers and observe that the CASE Act language mirrors the remedied CRJ language.²⁰²

Third, although copyright is likely a private right, the Court has yet to expressly address this issue and it may treat copyright as a public right because of its historic kinship with patent law. Furthermore, the House of Representative suggested in its Report on the CASE Act that “at least for some purposes, the case law suggests that the grant of a copyright should be considered a public right.”²⁰³ The Court often draws

198. *Id.* at 18–19.

199. U. S. COPYRIGHT OFF., *supra* note 7, at 41.

200. *Id.* at 39.

201. *See infra* Part III.D.

202. Jacobs, *supra* note 114, at 93.

203. H.R. REP. NO. 116–252, at 21 (2019).

parallels between patent and copyright law and did so recently in the 2020 case *Allen v. Cooper*, where the Court held that the IP Clause (Article 1, Section 8, Clause 8) “could not provide the basis for an abrogation of sovereign immunity.”²⁰⁴ Justice Kagan, writing for the majority, heavily relied on precedent in a patent infringement case, *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank*. In *Florida Prepaid*, the Court examined the Patent Remedy Act, which, like the Copyright Remedy Clarification Act of 1990 (CRCA) at issue in *Allen*, sought “to put ‘states on the same footing as private parties.’”²⁰⁵

The Court has treated copyright law and patent law as interchangeable in numerous areas. For example, in the seminal copyright case *Sony Corp. of America v. Universal City Studios*, the Court explicitly relied on the historic kinship between the two areas in developing contributory infringement in the copyright context.²⁰⁶ In *Sony*, the Court “engrafted an express provision from the Patent Act of 1952 onto the Copyright Act of 1976.”²⁰⁷ The *Sony* court imported patent law’s staple article of commerce doctrine “into the realm of copyright law.”²⁰⁸ Thus, should the Court directly address this issue, it will likely draw parallels to patent law and may ultimately decide that like patents, copyrights are public rights because of the common origin and similarities between the two areas. Therefore, this particular issue may weigh against a finding of constitutionality.

Finally, regarding the dilution of the fair use defense, CCB determinations lack precedential effect, thus minimizing this concern. In situations where there are circuit splits or conflicting judicial precedent, the CCB “shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court,” or if the action could be brought in multiple jurisdictions, “the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue.”²⁰⁹ This prevents CCB Officers from creating “new law” or altering substantive copyright law in any way. Lastly, in the unusual scenario where a respondent raises a novel fair use defense that the CCB cannot properly evaluate because the tribunal lacks proper evidence, the “the case could be dismissed without prejudice to be litigated in federal court.”²¹⁰

VII. POSSIBLE APPROACHES THE SUPREME COURT MAY TAKE

Since there are similarities between the CCB and PTAB, the Court may invoke an *Arthrex* style remedy like making the Librarian of Congress, a presidentially nominated

204. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

205. *Id.* at 996 (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999)).

206. 464 U.S. 417, 439 (1984).

207. Peter S. Minnel & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 943 (2007).

208. *Id.* at 944.

209. 17 U.S.C. § 1506 (2).

210. U. S. COPYRIGHT OFF., *supra* note 7, at 107.

and Senate confirmed position, “the reviewer of the claims board decisions.”²¹¹ However, as discussed, there are fundamental differences between Copyright Claims Officers and the PTAB APJs that make reviewability less of a concern.²¹² Furthermore, the Copyright Office is housed in the Legislative Branch, rather than the Executive Branch like the USPTO, thus making *Arthrex* less applicable.²¹³

The Court may also impose greater opportunities for appealing CCB decisions to federal courts if it sees an Article III challenge. However, adding greater opportunities for appeal would likely be a fatal blow to the CCB.²¹⁴ The purpose of the CCB is to provide copyright holders with a streamlined, cost-effective version to federal court litigation. Adding the possibility of an appeal to a federal court imposes additional expenses on litigants and adds further uncertainties for those seeking to enforce their copyright protections against alleged infringers.

The Court may also view the CCB as “an opt-in arbitration service” and see no constitutional issue.²¹⁵ Proceedings before the CCB share similarities with arbitration and other alternative dispute resolution forums. Like in arbitration models, participants can consent to participate in CCB and waive their rights to be heard in federal court and potentially by a jury.²¹⁶ The limited opportunities to appeal CCB decisions are similar to those afforded in Section 10 of the Federal Arbitration Act.²¹⁷ The Supreme Court has not stated that the Federal Arbitration Act “threatens the integrity of the judicial branch.”²¹⁸ Furthermore, unlike some private arbitration venues, the CCB is “subject-matter limited to statutory copyright law, rather than the common law.”²¹⁹ Thus, arguably the Court could see no problem with the CCB hearing limited small copyright claims and not even grant certiorari to a possible challenge to the CCB.

VIII. CONCLUSION

The launch of the Copyright Claims Board brings the possibility that opposition groups will renew their critiques of the CCB and at some point challenge the tribunal’s constitutionality in federal court.²²⁰ The growing use of Appointments Clause

211. Samantha Handler, *Supreme Court’s Patent Judge Ruling May Bedevil Copyright Board*, BLOOMBERG L. (Sept. 7, 2021), <https://news.bloomberglaw.com/ip-law/supreme-courts-patent-judge-ruling-may-bedevil-copyright-board> [https://perma.cc/UCV4-J3NC] [https://web.archive.org/web/20221027183319/https://news.bloomberglaw.com/ip-law/supreme-courts-patent-judge-ruling-may-bedevil-copyright-board].

212. See *infra* Parts II and VI.

213. *Id.*

214. See *Don’t Be Bamboozled by Public Knowledge’s Lie About the CASE Act*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/dont-be-bamboozled-by-public-knowledges-lies-about-the-case-act> [https://perma.cc/RRF2-QJFY] [https://web.archive.org/web/20221007221041/https://copyrightalliance.org/dont-be-bamboozled-by-public-knowledges-lies-about-the-case-act] (last visited Mar. 13, 2022).

215. Jacobs, *supra* note 114, at 89.

216. See *infra* Part II.

217. H.R. REP. NO. 116-252, at 22 (2019).

218. *Id.*

219. *Id.*

220. See Handler, *supra* note 211.

challenges by parties as a mechanism to review unfavorable decisions, as demonstrated by *Arthrex* and *Lucia*, show that one of the main critiques of the CCB will likely be that it wields unreviewable authority and its officers are improperly appointed. However, the CCB officers are likely inferior officers and the Librarian of Congress possess adequate removal and supervisory powers over the officers, distinguishing this situation from the challenges in *Arthrex* and *Lucia*.

A constitutional challenge to the CCB could force the Court to finally tackle the question of whether copyright is a public or private right. Justice Thomas' opinion in *Feltner* and the pre-statutory origins of copyright suggest that it is a private right. However, a finding of copyright as a public right would not be dispositive because the voluntary nature of the proceedings mitigates concerns with a non-Article III court adjudicating a public right. A claimant chooses the CCB over federal court and a respondent can decide to opt-out, thus providing clear and uncoerced consent to litigate the dispute before the CCB. Thus, this brings the CCB in line with modern Article III jurisprudence established in *Sharif*.

The CCB is a long-sought-after alternative dispute resolution forum for copyright holders with small claims seeking to enforce their rights against possible infringers. Commentators properly question how many people will actually participate in the CCB and whether it will meet its goal of providing a streamlined, cost-efficient alternative to federal court litigation.²²¹ Time will provide an answer to that, but for now, the passage of the CASE Act and the establishment of the CCB demonstrates a laudable step to finally providing creators with small copyright infringement claims a true remedy for their rights.

221. *Id.*