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Copyright Claims and Constitutional Games: The Constitutionality of the Copyright Claims Board Following the Supreme Court Ruling in *Arthrex*

By: Laura Callihan

I. Introduction

It is no secret that litigation is a costly and time-consuming process, and thousands of hours and dollars can easily be spent before a case reaches a conclusion, whether through settlement, dismissal, or trial.¹ For small-business owners and individuals, these costs are often too steep to make it economically feasible to pursue legal action.² Moreover, even if a positive judgment is received, the plaintiff will still likely be responsible for court costs and legal fees, which can easily surpass the monetary damages awarded.³ In civil suits, there are some initiatives aiming to increase accessibility to the courtroom in some areas of civil litigation. Perhaps the most notable are small claims courts, in which parties can bring claims before the court, sometimes before a magistrate judge, that are limited in some manner, such as the amount of money in controversy and whether the plaintiff is seeking only monetary damages. Of course, parties who bring claims in these sorts of courts may also have an attorney present, and sometimes it is advisable for the party to do so (such as if the other party has an attorney, if the other party is a large organization, or if the other party is a government agency). Nevertheless, these courts are intended to provide a broader scope of access to the civil court system for those in the general public who are low-income or indigent, minorities, small businesses, or other parties who would otherwise be unable to bring their claims to be heard by the court.

In contrast to claims which can be brought before a small claims court, issues surrounding intellectual property, particularly copyright claims, are nearly always governed by federal law due to the Constitutional provision providing for copyright provision, thus requiring the case to first be heard by a

¹ Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?*, 25 *Comm'n L. & Policy* 1, 2-3 (2020).

² *Id.*

³ Michael Zhang, *Why Photographers Need a Copyright Small Claims System*, *PETAPIXEL* (June 11, 2016), <https://petapixel.com/2016/06/11/photographers-need-copyright-small-claims-system/> (last visited Oct. 9, 2021).

federal district court.⁴ The United States Constitution provides that Congress possesses the enumerated power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ However, there is no federal equivalent to small claims courts, or other specialized civil courts focused upon broadening accessibility to the law. Instead, many individual copyright holders and small businesses choose not to bring infringement claims, not because of the unviability, but because of the costs.⁶ In fact, recent studies have indicated that 70% of photographers are aware of infringements of their copyrighted works.⁷ A majority of copyright infringement claims have an estimated value of less than \$3,000, which makes these suits financially unwise and leaves many photographers’ rights unenforced.⁸ Due to these cost and time commitments which have become extraordinary limitations, particularly for small businesses and individual creators, many scholars have recognized and advocated for a solution that would provide broader access to filing and litigating copyright infringement claims.⁹

Perhaps the most notable solution, and certainly the most relevant for this article, which has been recently brought before Congress is the Copyright Alternative in Small-Claims Enforcement Act of 2020 (the “CASE Act”).¹⁰ This legislation was passed by Congress in 2020, and a more in-depth description of the legislative history, purpose, and effects is detailed below.¹¹ The essential part of the CASE Act is undoubtedly the establishment of the Copyright Claims Board (the “CCB”), which is a small claims court in which copyright claims can be brought before a three-member tribunal in order to resolve eligible claims.¹² There are certain requirements in order for a case to be heard by the tribunal, including a monetary

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ *Id.*

⁶ Olson, *supra* Note 1, at 4.

⁷ Zhang, *supra* Note 3.

⁸ Olson, *supra* Note 1, at 2-3.

⁹ Olson, *supra* at 2-3.

¹⁰ 17 U.S.C. § 1504(e)(1)(D).

¹¹ 17 U.S.C. § 1503.

¹² 17 U.S.C. § 1503.

damages cap of \$30,000 and the consent of both parties.¹³ Although the CCB will not begin accepting cases until late 2021 or early 2022, the passing of the legislation itself has already generated debate on the potential efficacy and sustainability of the CCB.¹⁴ While aimed at increasing accessibility, there could also be unintentional consequences, such as an overwhelming influx of copyright infringement claims which are disproportionately aimed towards individual consumers, a refusal of large corporations to participate since the CCB will be voluntarily and not mandatory, or a potential harm of the general purpose of the Copyright Clause to the promote the useful arts and sciences if the creator fears that her content will be subject to potential copyright infringement claims, whether viable or not, because of the ease of bringing such claims.¹⁵

Additionally, the Supreme Court's recent decision in *United States v. Arthrex, Inc.*,¹⁶ concerning the unconstitutionality of the appointments of current administrative patent judges has caused some scholars to question whether the CCB, if challenged, would be upheld as constitutional under the Appointments Clause which requires that principal officers are appointed by the President of the United States, with the advice and consent of the Senate.¹⁷ The issue is the reviewability of CCB's decisions, which are reviewed by the Register of Copyrights, an officer that is not a presidential appointee nor a federal court, and the appointment of the three officers of the CCB whom will be appointed by the Librarian of Congress who, unlike the Register of Copyrights, is a presidential appointee.¹⁸

While the constitutionality of the CCB has been briefly discussed in scholarship already¹⁹, this article will focus on the CCB's constitutionality under the Appointments Clause in light of the Supreme

¹³ *Frequently Asked Questions*, COPYRIGHT CLAIMS BOARD, <https://www.copyright.gov/about/small-claims/faq.html> [<https://perma.cc/4YBA-XYR3>].

¹⁴ Samantha Handler, *Supreme Court's Patent Judge Ruling May Bedevil Copyright Board*, BLOOMBERG LAW (Sept. 7, 2021), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X9T5J308000000?bna_news_filter=ip-law#jcite (last visited Oct. 24, 2021).

¹⁵ *Id.*

¹⁶ 141 S. Ct. 1970 (2021).

¹⁷ Handler, *supra* Note 14.

¹⁸ See U.S. CONST. art. II, § 2, cl. 2.

¹⁹ See Russell W. Jacobs, *The Copyright Claims Board and the Appointments Clause*, 2021 U. ILL. L. REV. ONLINE 85 (2021); see also COMMENT: PRIVATE OR PUBLIC RIGHT? Who Should Adjudicate Patentability Disputes and

Court's *Arthrex* decision, and the Court's approach to remedying those constitutional issues. In fact, the *Arthrex* decision highlights these two constitutional issues of appointment and reviewability with the CCB which this article will explore, along with its potential effects upon the Copyright Claims Board. More specifically, *Arthrex* indicates that both the appointment and reviewability of the CCB would likely be held unconstitutional if challenged because of the convoluted nature of the appointments by the Librarian of Congress and the potential for the Supreme Court to find that the reviewal of CCB decisions by an inferior officer and not a presidential appointee or a federal court would indicate that these three officers are acting as principal officers and thus unconstitutionally appointed. Finally, this paper will briefly discuss some potential ways that the Supreme Court, if it grants certiorari on a constitutional challenge to the CASE Act, might propose changes to the CCB to remedy the CASE Act to the Appointments Clause.

II. Background

The Copyright Clause of the U.S. Constitution posits that the driving force behind copyright law in the United States is to encourage creators to continuously create.²⁰ The exact language provides that “[Congress shall have the power] to promote the progress of science and useful arts, securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.”²¹ These protections are viewed in the United States legal system, not as inherent rights, but as government-provided rights that run on a system of incentivizing creators to continue expressing, creating, and developing their ideas in order to further develop the society around them.²² Through various protections and limitations on infringement, creators are given some assurance that they will receive some form of credit, compensation,

Is the Current Scheme Really Constitutional?, 21 Marq. Intell. Prop. L. Rev. 57 (arguing that a small-claims Copyright Claims Board would not violate Article III of the Constitution nor violate due process rights and the (qualified) right to a jury trial); *ARTICLE: Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 Berkeley Tech. L.J. 689 (concluding that a small-claims Copyright Claims Board would likely be held as unconstitutional under Article III and in violation of due process rights and the (qualified) right to a jury trial).

²⁰ See U.S. CONST. art. 1, § 8, cl. 8.

²¹ *Id.*

²² U.S. COPYRIGHT OFFICE OVERVIEW, <https://www.copyright.gov/about/> [<https://perma.cc/V8UC-46MS>] (last visited Oct. 28, 2021).

or control over their work.²³ Of course, the rights of the creators must also be balanced with the competing interests of the public to consume and utilize works and creations, which allows the public to gain access to these expressions of ideas in order to continue the process of creation and development, and prohibits creators from “monopolizing” expression of an idea which would then prohibit further progress.²⁴

The United States Copyright Office is responsible for registering and recording copyright claims and ownership information, as well as advising both Congress and the public on copyright issues.²⁵ The Copyright Office was formed under the Library of Congress in 1870 with the Librarian of Congress as its head.²⁶ In 1897, the Copyright Office was designated as its own separate department within the Library and headed by the Register of Copyrights.²⁷ Once the Librarian of Congress is appointed by the President with the advice and consent of the Senate according to the Appointments Clause, the Librarian designates the Register of Copyrights.²⁸ The official Copyright Office website explains that the Register “is the principal advisor to Congress on national and international copyright matters.”²⁹ Additionally, the Copyright Office registers copyright claims and processes claim applications.³⁰ If a claim is refused after examination, there is an administrative appeals process through which applicants may request a reconsideration of the decision, although after two rounds of this administrative review, the decision of the Copyright Review Board becomes finalized.³¹ After the final decision is reached, the applicant may appeal the Board’s decision by initiating a judicial action in federal court against the Register of Copyrights.³²

²³ 17 U.S.C. 501.

²⁴ See U.S. U.S. COPYRIGHT OFFICE OVERVIEW, www.copyright.gov (last visited Oct. 28, 2021).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1704.2 (3d ed. 2021). (Once a request for review is properly filed, the Review Board considers the record and the applicant’s written submissions. From these materials, the members of the Review Board will vote on whether to uphold or overturn the refusal to register the copyright, with a majority required for either decision).

³² *Id.* at § 1706.

Copyright law can be complicated by the competing interests of creators and the public, various doctrines, such as the fair use doctrine, continuously evolving software, and ensuring that the original works eligible for copyright protection are truly being protected, even if created by individuals or small businesses.³³ The ever-changing nature of technology has ensured that the court system must constantly evolve in order to ensure the same protections.³⁴ Congress has periodically enacted statutes in an attempt to counteract piracy and infringement as technology advances. For instance, the Digital Millennium Copyright Act (DMCA) was enacted in 1998 “as a response to problems associated with widespread online copyright infringement.”³⁵ A major purpose of the DMCA was to address the growing issues that creators faced due to infringing activity occurring on devices and through the internet, and “the notice and takedown system was intended to balance the competing interests of service providers, copyright owners and Internet users.”³⁶ Despite the DMCA’s enactment in 1998, “the notice and takedown regime has turned out to be inordinately burdensome for service providers, ineffective at combating wide scale online copyright infringement, and easily exploitable as a means to suppress free speech.”³⁷ And while the DMCA is not the focus of this article, this seminal piece of legislation still demonstrates the shortcomings of the Copyright Office and the difficulties inherent in tasking Congress with the role of enacting legislation to protect against infringement in the face of ever-expanding technology.³⁸

³³ See Haochen Sun, *Fair Use as a Collective User Right*, 90 North Carolina Law Review, 127, 129 (2011) (arguing that the current copyright legislation and processes are heavily criticized because of these issues, such as concerns that modern uses of fair use as an affirmative defense in the United States fails to truly protect public interests); see also Michael Shinall, *Software & Copyright Exhaustion: A Proposal to Amend §117 & Restore Balance to the Copyright System*, 24 Albany Law Journal of Science and Technology, 365, 368 (2014). (proposing an amendment to §117 in order to modernize the statute and provide better copyright protection for software through updated language).

³⁴ Morgan E. Pietz, *Copyright Court: A New Approach to Recapturing Revenue Lost to Infringement: How Existing Court Rules, Tactics From the "Trolls," and Innovative Lawyering Can Immediately Create a Copyright Small Claims Procedure That Solves Bittorrent and Photo Piracy*, 64 J. Copyright Soc’y 1, 2-4 (2017).

³⁵ Alan Gocho, *A Modern System for Resolving Online Copyright Infringement Disputes: Administrative Rulemaking And Adjudication, A One-Stop Fix to the Digital Millennium Copyright Act*, 58 IDEA 131, 134; See also 17 U.S.C. § 1201-1205.

³⁶ *Id.* at 137.

³⁷ *Id.* at 137.

³⁸ *Id.* at 138. (suggesting an alternative framework for the Copyright Office if Congress granted “administrative rulemaking and adjudicative authority to the U.S. Copyright Office”).

Additionally, there is a severe inaccessibility issue recognized by both Congress and the Judiciary because of the high financial and time costs that litigants must contribute to bring a claim of copyright infringement.³⁹ These costs are often so high for individual creators and small businesses that it is not financially feasible and rarely advisable to bring copyright infringement claims.⁴⁰ This is particularly true for creators with claims that have a potential damages estimation of a relatively small amount because of the costs of attorney's fees and court fees.⁴¹ In fact, a recent study demonstrated that among photographers, with photographs being one of the most frequently infringed, 70% had seen their work infringed.⁴² This statistic is one of many, which indicates the difficulties that individuals and small business owners face, particularly in an increasingly digitized society which makes catching, let alone litigating, all infringement an impossible task, even for creators who have the necessary financial resources to do so.⁴³ In fact, "[t]he American Intellectual Property Law Association estimated the median cost for a copyright infringement lawsuit with less than \$1 million at stake to be \$350,000, including appeals."⁴⁴

The Copyright Claims Board is Congress's answer to demonstrate the need for reform, and it is intended to promote efficiency within the courts, provide a navigable and more accessible process for copyright infringement claims, provide a process which is more economically viable, and ensure creators are experts within the copyright field.⁴⁵ Essentially, by creating a small claims court with limitations on the claims brought before it, the CCB is meant to act as a streamlined, cost-efficient method that individuals and small businesses can utilize to better protect their works from infringement.⁴⁶ To promote accessibility, there are certain requirements in order for a case to be heard by the tribunal, including a monetary damages

³⁹ Olson, *supra* note 1, at 2-3.

⁴⁰ *Id.*

⁴¹ *Id.* at 4.

⁴² Zhang, *supra* note 3.

⁴³ Olson, *supra* note 1 at 3.

⁴⁴ *Id.* at 6, (quoting American Intellectual Property Law Association, Report of the Economic Survey 2011, at 35 (2011)).

⁴⁵ Olson, *supra* note 1 at 4.

⁴⁶ *About*, THE U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/about/small-claims/> [https://perma.cc/8LNM-BA73] (last visited Oct. 28, 2021).

cap of \$30,000, the consent of both parties, and limited types and amount of evidence that can be brought before the CCB.⁴⁷

The CASE Act was passed by the House of Representatives in October of 2019 and by the Senate in December of 2020.⁴⁸ The CASE Act was a part of a larger piece of legislation for COVID-19 relief.⁴⁹ However, the CASE Act was not rushed through Congress. Rather, lobbyists, guilds, senators and house representatives, artists and inventors, and many others had been advocating for a piece of legislation like the CASE Act for years.⁵⁰ In fact, after the last major modification to U.S. copyright law (the Copyright Act of 1976), creators almost immediately began advocating for modifications, in part because of increasingly quick and drastic advancements in technology.⁵¹ These developments have provided more avenues and methods for copyright infringement.⁵² This, in turn, has led to a dramatic increase in the amount of copyright infringement which small businesses and individual copyright holders face because as the technology advances, so too are they left more vulnerable to infringing activity.⁵³ However, as discussed above, small business and individual copyright holders often do not have the financial resources to litigate these claims. Because of the advances in technology and the large area of vulnerability that these copyright holders are increasingly exposed to, the CASE Act is meant to act as the next major modification to U.S. copyright law and provide a more viable avenue for small claim infringement actions.⁵⁴

III. Case Law and Statutes

⁴⁷ *Id.*

⁴⁸ 116 P.L. 260, 2020 Enacted H.R. 133, 116 Enacted H.R. 133, 134 Stat. 1182.

⁴⁹ *Id.*

⁵⁰ Kyle Jahner, *House Passes Bill to Create Copyright Small Claims Court (1)*, (2019) BLOOMBERGLAW.COM, https://www.bloomberglaw.com/bloomberglawnews/ip-law/X8KU056O000000?bna_news_filter=ip-law#jcite (last visited Oct. 28, 2021).

⁵¹ *ACLU Vote Recommendation for H.R. 2426, The CASE Act*, ACLU (Oct. 19, 2019), <https://www.aclu.org/letter/aclu-vote-recommendation-hr-2426-case-act>.

⁵² Gocha, *supra* Note 35, at 34.

⁵³ Olson, *supra* Note 1, at 22.

⁵⁴ *Id.* at 8.

a. Relevant Legislative History

There is a significant amount of important legislative and judicial history surrounding the Appointments Clause itself and the power of the President to “appoint” and “remove” principal officers. This power initially comes from the U.S. Constitution in a clause known as the “Appointments Clause” which states that:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.⁵⁵

This provides the President with the power to appoint what the courts have deemed “superior” officers who would have significant authority in making final decisions which would not be eligible for further review under the executive branch.⁵⁶ Moreover, the Supreme Court has held that this clause not only grants “appointment” powers to the President, but that the Constitution also necessarily requires that the President possess removal authority.⁵⁷ This is in order to ensure that the President has the power to properly “take Care that the Laws be faithfully executed” as the U.S. Constitution requires in the “Take Care” clause.⁵⁸

There are several policy reasons surrounding an interpretation of the Appointments Clause which can be viewed as somewhat restricting upon administrative agencies. First, it is important for a “principal” or “superior” officer who has significant authority in making final decisions to be appointed by the President with the advice and consent of Congress in order to ensure that administrative agencies cannot usurp their designated authority and become a quasi-legislative branch. Second, it is important for these officers to be visible to the public as a result of being nominated and appointed by the President in order to ensure

⁵⁵ U.S. CONST. art. 2, § 2, cl. 2.

⁵⁶ *Buckley v. Valeo*, 424 U.S. 1 at 83 (1976).

⁵⁷ *Meyers v. U.S.*, 272 U.S. 52 at 161 (“The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.”).

⁵⁸ U.S. CONST. art. 2, § 3.

visibility and accountability of our government. And third, the Appointments Clause is intended to provide the President, and his direct superiors, with the removal power granted to the President by the Constitution and through judicial interpretation.⁵⁹ These policy arguments are essential to understanding the potential issues that might arise in connection with the Copyright Claims Board, as will later be discussed in this article.

b. Relevant Case Law

1. At first glance, there is very little case law on the CASE Act because it was only recently passed by Congress in December of 2020 and will not be accepting claims until December of 2021 at the earliest, although there is a possibility that the CCB will be granted a six-month extension to June 2022 for cause like the pandemic or other good cause.⁶⁰ In fact, in any recent case from the previous year that does have discussion about the CCB does so only in *dicta*, and the issues in those cases focus on other doctrines.⁶¹

However, when considering whether the CCB will be held as unconstitutional under the Appointments Clause of the U.S. Constitution, there is a potentially impactful case from the US. Supreme Court in 2021 where the Court held that the Patent Trial and Appeal Board judges had been appointed unconstitutionally under the Appointments Clause.⁶² The Patent Trial and Appeal Board (the “PTAB”) is an administrative agency under the USPTO, and PTAB “decides appeals from the decisions of patent examiners, and adjudicates the patentability of issued patents challenged by third parties in post-grant proceedings.”⁶³ PTAB decisions were appealable to the Federal Circuit, but in *Arthrex*, the Federal Circuit found that the administrative patent judges (APJs) “have significant authority to adjudicate patent rights

⁵⁹ U.S. CONST. art. 2, § 2, cl. 2.

⁶⁰ *Coming Soon: Copyright Claims Board to Hear Small Copyright Claims*, U.S. Copyright Office, (Feb. 2021), <https://copyright.gov/about/small-claims/quick-facts.pdf>.

⁶¹ See *Bell v. Wilmott Storage Servs.*, 2021 U.S. App. LEXIS 27127, *33 (copyright infringement claim centered around the *de minimis* doctrine, but the opinion mentions the CCB, explains some of the reasoning for creating the CCB, and uses the justifications for the CCB to support its own decision).

⁶² *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); see also <https://news.bloomberglaw.com/ip-law/supreme-courts-patent-judge-ruling-may-bedevil-copyright-board>.

⁶³ Janet Gongola, *The Patent Trial and Appeal Board: Who are they and what do they do?*, U.S. Patent and Trademark Office, (2019), <https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/patent-trial-and-appeal-board-who-are-they-and-what>.

and neither the Secretary of Commerce nor the Director of the USPTO had unfettered authority to review the APJs' decisions or remove them from office."⁶⁴ The APJs are appointed by the Secretary of Commerce; however, due to the high degree of adjudicatory power which the APJs wield without the proper level of review, the Supreme Court determined that the APJs were not inferior officers but superior officers who should have been appointed by the President according to the Appointments Clause.⁶⁵

In *Arthrex*, the Supreme Court determined that the APJs were superior, rather than inferior, officers and that they were thereby unconstitutionally appointed.⁶⁶ Instead, Chief Justice Roberts resolved the constitutional issue by severing the section of the statute concerning the appealability of its decisions and instead mandated the Director of the USPTO possess the final authority regarding the final result of inter partes review proceeding.⁶⁷ There are some specific limitations that the opinion places upon the Director of the USPTO, including that the Director's ability to oversee the APJs only extends to inter partes review proceedings.⁶⁸

In order to best understand the Court's decision in *Arthrex*, one must also have a proper understanding of the Appointments Clause and previous interpretations handed down by the Court.⁶⁹ Perhaps most significant is the Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) concerning the proper interpretations of a superior and inferior officer.⁷⁰ In *Buckley*, the central issue was whether Congress had unconstitutionally formed and appointed officers to the Federal Election Commission as a part of the Federal Election Campaign Act of 1971 because the officers had considerable adjudicatory power but were

⁶⁴ Susan Krumpltsch and Ellen Scordino, *United States v. Arthrex: Where does the Supreme Court's decision leave the PTAB?*, DLA Piper.com, (June 2016), <https://www.dlapiper.com/en/us/insights/publications/2021/06/united-states-v-arthrex/>.

⁶⁵ See U.S. CONST. art. 1, § 8, cl. 8. ("and with the Advice and Consent of the Senate, shall appoint...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").

⁶⁶ *Arthrex*, 141 S. Ct. 1970 at 1985.

⁶⁷ *Id.* at 1987.

⁶⁸ *Id.*

⁶⁹ *Buckley*, *supra* Note 54, at 125-126.

⁷⁰ *Id.* at 118-119.

neither appointed by the President, nor did the President have the power to remove them.⁷¹ Among other responsibilities, the Federal Election Commission was delegated with enforcing a civil action for the violation of the Federal Election Campaign Act of 1971.⁷² Ultimately, the Court determined that the administrative functions of the commission should be conducted only by superior officers of the United States.⁷³ They recognized that this was an important principle under the separation of powers doctrine because “that would be to usurp the power of appointment by indirection.”⁷⁴ Because of this principle, the Court chose to interpret and apply the Appointments Clause in a manner that would protect the interests of the public as well as the efficacy, reliability, and strength of the federal government.⁷⁵ The Court wrote that:

[T]hese provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.⁷⁶

Therefore, the Appointments Clause is essential for ensuring that the separation of powers is maintained, and it requires that officers who possess the power to adjudicate must adhere to certain appointment and removal requirements in order to ensure Constitutionality.⁷⁷

Additionally, the Supreme Court has more recently addressed the issue of defining the difference between principal and inferior officers in the seminal case of *Morrison v. Olson*.⁷⁸ In *Morrison*, the Court analyzed whether the Special Counsel appointed by the Attorney General in order to “investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal criminal laws.”⁷⁹ While the Court was unwilling to create a bright-line test for courts to distinguish inferior and superior officers, they do lay out several factors in consideration of this issue. The first factor is whether the party

⁷¹ *Id.* at 126.

⁷² *Id.* at 126.

⁷³ *Id.* at 83.

⁷⁴ *Id.* at 82.

⁷⁵ *Id.* at 140-41.

⁷⁶ *Id.* at 140.

⁷⁷ *Id.* at 142.

⁷⁸ *Morrison v. Olson*, 487 U.S. 654, 670 (1988).

⁷⁹ *Id.* at 660.

at issue is “subject to removal by a higher Executive Branch official.”⁸⁰ In *Morrison*, the Court determined that while the independent counsel did not directly report to the Attorney General (or the President), the removal power of the Attorney General indicated that, at some level, the special counsel was an inferior officer.⁸¹ The second factor is whether the party is “empowered by the Act to perform only certain, limited duties” which indicates that it is an inferior officer.⁸² The independent counsel in *Morrison* was limited to only investigating with the potential ability to prosecute federal crimes, leading the Court to conclude that this second factor indicated that she was an inferior officer. Finally, the third factor is whether the office is “limited in jurisdiction” which also indicates an inferior officer, and which the Court determined to be true of the independent counsel which was another indication that the independent counsel was an inferior office.

After establishing that the Special Division was an inferior office, the *Morrison* Court also analyzed whether, as inferior officers, their Congressionally-granted duties were in violation of the Appointments Clause. The Court determined that the Special Division, as a special court underneath the judiciary branch, was not acting in violation of the Appointments Clause and thereby not acting in a manner which would be considered as inhibiting the powers of the Executive branch.⁸³ The Court’s analysis included evaluating the duties designated to the Special Division by Congress and determining that the duties were those of an inferior officer.⁸⁴

In *Arthrex*, the Court also borrows heavily from their previous decision in *Edmond v. United States*, 520 U.S. 651, 117 S. Ct. 1573 (1997) where several petitioners appealed their court-martial convictions on the grounds that the Secretary of Transportation, and not the Judge Advocate General, had appointed two of the civilian judges sitting on the Coast Guard Court of Criminal Appeals.⁸⁵ The Court clarified the

⁸⁰ *Id.* at 671.

⁸¹ *Id.* at 671.

⁸² *Id.* at 671.

⁸³ *Id.* at 682.

⁸⁴ *Id.*

⁸⁵ *Edmond v. United States*, 520 U. S. 651, 662 (1997).

meanings of “inferior” and “superior” officers for the purposes of the Establishment Clause as “[w]hether one is an ‘inferior’ officer depends on whether he has a superior’ other than the President.”⁸⁶ In other words, the *Edmond* Court expanded upon their decision in *Buckley* and further defined an inferior officer as those who are, at some level, supervised by a superior officer who was installed in accordance with the Appointments Clause.⁸⁷ Instead of further defining inferior and superior officers as they did in *Buckley* and in *Edmond*, the *Arthrex* Court declined to set out factors by which lower courts can determine whether an officer is principal or inferior officers for purposes of the Appointments Clause.⁸⁸ Nonetheless, the Court does still hold that the binding decisions made by the APJs with unreviewable authority are not in accordance with the Court’s previous interpretations of the Appointments Clause.⁸⁹

Urging the Court to uphold the constitutionality of the APJs authority, the Government presented several ultimately unsuccessful arguments which center around their contention that the APJs are constitutionally wielding their authority.⁹⁰ But because of the potential relevance to this article’s examination of the constitutionality of the Copyright Claims Board, this article will focus upon one particular argument concerning the influence of the Director of the USPTO. The Director is nominated by the President and appointed with the advice and consent of the Senate which qualifies the Director as a principal officer under the Appointments Clause.⁹¹ The APJs are appointed by the Secretary of Commerce in consultation with the Director of the USPTO.⁹² The Government argued that because of the role that the Director plays in picking the APJs, the Director is able to influence the inter partes review process, even if such influence is indirect, which would then ensure that decisions made by the APJs are constitutionally

⁸⁶ *Arthrex*, 141 S. Ct. 1970 at 1987 (quoting *Edmond*, 520 U. S. 651, 662).

⁸⁷ *Edmond*, 520 U.S. 651, 663.

⁸⁸ *Arthrex*, 141 S. Ct. 1970, 1985 (“When it comes to the patent system in particular, adjudication has followed the traditional rule that a principal officer, if not the President himself, makes the final decision on how to exercise executive power”).

⁸⁹ *Id.* at 1984 (citing *Edmond*, 520 U.S. 651, 663).

⁹⁰ *Id.* at 1984-85. (Arguing that there are modern examples of appointed officers who “exercise final decision-making authority” and that the early forms of Patent Trial and Appeal Board did not allow for review by the Commissioner either).

⁹¹ 35 U.S.C. § 3(a)(1); U.S. CONST. art. 2, § 2, cl. 2.

⁹² 35 U.S.C. § 6(a)

reviewed under the Appointments Clause.⁹³ The Government contends that because of the selection and removal authority which the Director holds, the APJs' authority is subject to review by the Director as a principal officer which would thereby make the APJs' authority in final decision-making to be constitutional under the Appointments Clause.⁹⁴ However, the majority opinion swiftly rejected the Government's argument because, while removal authority is significant, it is not sufficient to constitute proper review by a principal officer over the final decisions of an inferior officer.⁹⁵

Additionally, the majority opinion in *Arthrex* focused its holding upon the legislative history of the Appointments Clause within different administrative agencies, ultimately concluding that the history and tradition of the U.S. Patent system does not support the "unreviewable authority wielded by APJs during inter partes review."⁹⁶ The Court notes that in an 1856 decision, "our explanation, almost "too manifest to require comment," was that the authority to review flowed from the "necessity of 'supervision and control,' vested in the commissioner, acting under the direction of the President."⁹⁷ This principle is echoed within the more recent legislation, The Administration Procedure Act, which allows for the heads of administrations to review decisions.⁹⁸ The Court determined that due to legislation that promotes "the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of §557(b)," so too should their opinion reflect this legislative history of affirming the importance of the separation of authority and the role of review between superior and inferior officers.

IV. Analysis/Discussion: Constitutionality of the Copyright Claims Board

⁹³ *Arthrex*, 141 S. Ct. 1970, 1981 (2021).

⁹⁴ *Id.* at 1981.

⁹⁵ *Id.* at 1982 (citing *Seila Law*, 591 U. S., at ___, 140 S. Ct. 2183, 207 L. Ed. 2d 494, 503).

⁹⁶ *Id.* at 1985.

⁹⁷ *Id.* at 1983 (quoting *Barnard v. Ashley*, 59 U.S. 43, 45 (1856)).

⁹⁸ *Id.* at 1984 (citing 5 U. S. C. §557(b)). (This legislation was passed in 1976, demonstrating Congress' understanding of the Appointments Clause).

The Copyright Claims Board has many potential drawbacks with perhaps the most notable flaw being the ability for large corporations to continue to use attorneys to fully defend themselves even as small business and individual copyright holders bring actions in the small claims court. Although the CCB is designed in order to level the playing field, the resources behind corporations might make this task difficult, as discussed above. It will be interesting to see the issues that arise as the CCB begins to take claims and how the CCB, the legislature, and the courts will address those issues. But beyond any policy concerns, the issue of constitutionality under the Appointments Clause still remains.

a. Interpreting the legislative history of the Copyright Claims Board

Support for the Copyright Claims Board has been varied. On the one hand, *Bloomberg Law* has reported that “[t]he Copyright Office, the American Bar Association, the American Intellectual Property Law Association, and the U.S. Chamber of Commerce support the measure.”⁹⁹ On the other hand, some prominent organizations, like the American Civil Liberties Union, opposed the legislation because of many of the potential negative impacts as discussed below.

1. Potential Benefits of the Copyright Claims Board

There are certainly many potential benefits to the CCB, with perhaps one of the most important being its prospective of reducing litigation costs. Much of this remains to be determined, as the Copyright Office is still in the process of setting up the CCB and determining different processes, including setting fees.¹⁰⁰ Nevertheless, there are other manners in which the CCB could potentially require less financial backing, including the possibility of eliminating or reducing attorney’s fees. According to the CCB, parties will be allowed to represent themselves, thereby reducing or eliminating any attorney’s fees.¹⁰¹ Although not detailed extensively yet as it is still being formed by the Copyright Office, the process is also designed

⁹⁹Jahner, *supra* Note 52.

¹⁰⁰*Id.*

¹⁰¹*Frequently Asked Questions, COPYRIGHT CLAIMS BOARD, supra* Note 13.

to be streamlined so that the parties can save both time and money.¹⁰² For instance, instead of spending long periods of time and attorney's fees on the discovery process, the CCB has limited discovery "to the production of relevant information and documents, written interrogatories, and written requests for admission."¹⁰³ Additionally, the CCB will generally not require formal motions, and CCB's decisions will be posted online.¹⁰⁴ Finally, the CCB could also alleviate a defendant's fear of facing extraordinarily large statutory damage awards, since the CCB caps the amount of damages to \$30,000.¹⁰⁵ Overall, the CCB seems potentially well-designed to offer a streamlined process by which claims can (theoretically) be heard in a more efficient manner to save time and money for claimants as well as for overloaded courts.

Another significant potential benefit of the CCB is the existence of safeguards against repeat, bad-faith parties. For instance, the Copyright Office warns that bringing a bad faith claim may result in the party having to pay the attorney's fees of the other party, up to \$5,000.¹⁰⁶ Additionally, the CCB will have the authority to suspend bad-faith parties from bringing any claims for a one-year period, to limit the number of claims that a party may file within a one-year period, and to dismiss any or all of the bad faith party's claims.¹⁰⁷

2. *Potential Detriments and Drawbacks of the Copyright Claims Board*

On the other hand, there are several potential detriments that the CCB could bring upon individuals and smaller businesses, which could defeat the purpose of forming a small claims court. For instance, the CCB may still have bad-faith parties who intentionally use this system to exploit it, repeatedly bringing bad faith claims or attempting to overwhelm competitors.¹⁰⁸ While the Copyright Office has said that they will establish safeguards against this type of behavior, parties who are colloquially known as "copyright trolls"

¹⁰² Olson, *supra* Note 1 at 3.

¹⁰³ *Frequently Asked Questions*, COPYRIGHT CLAIMS BOARD, *supra* Note 13.

¹⁰⁴ 17 U.S.C. § 1506(a).

¹⁰⁵ Morgan Pietz, *Copyright Court: A New Approach To Recapturing Revenue Lost To Infringement: How Existing Court Rules, Tactics From The "Trolls," And Innovative Lawyering Can Immediately Create A Copyright Small Claims Procedure That Solves Bittorrent And Photo Piracy*, 64 J. Copyright Soc'y 1 at 6.

¹⁰⁶ *Frequently Asked Questions*, COPYRIGHT CLAIMS BOARD, *supra* Note 13.

¹⁰⁷ *Id.*

¹⁰⁸ 17 U.S.C. § 1506(y).

and “copyright troll attorneys” are infamous amongst legal circles for continuously sending out letters to possible copyright infringers and demanding monetary compensation while threatening to otherwise bring a copyright infringement claim against them.¹⁰⁹ If the parties are involved in litigation, the copyright troll routinely seeks exorbitant damages, which often surpass standard licensing fees.¹¹⁰ In fact, copyright trolls sometimes offer little proof of copyright ownership, fail to mention to the threatened party that they might not be liable for infringement at all according to a fair use defense, and demand that the settlement be agreed upon within a short time frame.¹¹¹ In fact, Michael Goodyear discusses the rise of “attorney copyright trolls” who, working with their client, bring and pursue numerous claims with the hope of incurring legal fees and potentially winning a large case with a high award of damages.¹¹² Goodyear notes that “[t]he copyright troll brings unnecessary litigation that disrupts the previous balance of allowing borderline fair use and minor infringements while pursuing claims against egregious infringers,” which goes against the exact principles of efficiency and accessibility that the CCB claims to aim to promote through its commission.¹¹³ Copyright trolls are particularly dangerous to small claims boards where parties are more likely to have fewer financial resources and less time to dedicate to pending suits, forcing settlements which otherwise might be afforded due process through the CCB or the federal court system, if the claim is brought by the “copyright troll” at all.¹¹⁴

Additionally, the CCB might harm the general purpose of the Copyright Clause of the Constitution, to promote creators to create and information to be disseminated, by making the process for bringing copyright infringement claims less complicated, even if there is potential infringing activity. National Public Radio writer Neda Ulaby astutely notes that copyright infringement is more prevalent than ever

¹⁰⁹ Michael Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 Texas Rev. Ent. & Sports L. 77, 79 (2020).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 80.

¹¹³ *Id.*

¹¹⁴ *Id.* at 79.

because of the internet and particularly because of social media.¹¹⁵ For instance, sharing wedding photos on Facebook is extremely commonplace within our culture, but the distribution of those photos might be protected under an agreement between the photographer and the individual who hired her.¹¹⁶ Due to CCB's streamlined process and potentially lower costs, photographers could now bring a copyright infringement claim more easily, which, as discussed above, is a positive benefit of the CASE Act.¹¹⁷ However, from the public policy standpoint of protecting the public interest, opening up the availability for hundreds of thousands of suits, particularly when copyright infringement on a relatively smaller scale is so prevalent, might be disastrous.¹¹⁸ The effects could cause creators to lose faith in the strength of copyright protections and could inhibit the Constitutional aim of "promot[ing] the progress of science and useful arts."¹¹⁹ This could also be a very dangerous avenue to allow corporations to more easily sue individuals and relatively smaller parties who are allegedly infringing copyrighted works, leading consumers and small-scale creators to fear more about their consumption and use of materials, as stated above.¹²⁰ In fact, Olson estimates that these potentially harsher enforcement practices would likely have the effect of "endangering the free flow of information and use of works to spur creativity and innovation online. Over time, increased enforcement may also have deleterious effects on the practice of fair use by creating a chilling effect for infringers and fair users alike."¹²¹

Additionally, many of the same challenges which individual plaintiffs undergo when faced with a case involving a large corporation might not be eliminated by the CCB. For instance, the CCB permits parties to hire an attorney, which would potentially defeat the whole purpose of the system if large

¹¹⁵ Neda Ulaby, *Will Posting Memes Or Pro Wedding Pics Land You In Copyright Small Claims Court?*, NPR.org, (March 12, 2021), <https://www.npr.org/2021/03/12/957054009/will-posting-memes-or-pro-wedding-pics-land-you-in-copyright-small-claims-court>.

¹¹⁶ *Id.*

¹¹⁷ See Olson, *supra* Note 1 at 3.

¹¹⁸ See Olson, *supra* Note 1 at 3. ("At the same time, casual and often inadvertent copyright infringement is so commonplace it has become the norm, especially on social media and in other digital spaces").

¹¹⁹ U.S. CONST. art. 1, § 8, cl. 8.

¹²⁰ Olson, *supra*, note 1, at 5.

¹²¹ Olson, *supra*, note 1, at 22.

corporations are suing or being sued by an individual or small business for copyright infringement.¹²² If the large corporation is represented by counsel, an individual would be well-advised to hire their own attorney instead of trying to go *pro se*. But of course, if they do choose to hire an attorney, one of the CCB's purposes, providing a lower-cost and more easily accessible court for small claims, would be defeated.¹²³ Additionally, many individuals or smaller businesses may more easily miss any notices of copyright infringement claims against them from the CCB, and by not responding, have a default judgment entered against them.¹²⁴ Although the purpose of the CCB is, in part, to "even the playing-field" between individuals and corporations, the CCB might not truly be able to solve these discrepancies without further reforms.¹²⁵

Finally, there is one aspect of the CCB which could be viewed as both a positive and negative attribute of the system: the appealability of decisions. This is particularly relevant because the argument in this article is centered upon the constitutionality of the appointment of the three officers, since decisions are not directly appealable to the federal court system nor to a presidentially-appointed principal officer. While decisions of the CCB are reviewable after the CCB has handed down a final determination, it is only if "the party identifies a clear error of law or fact material to the outcome, or a technical mistake" and submits a written request asking for an amendment or reconsideration within 30 days.¹²⁶ If the CCB chooses, they may amend or reconsider the final determination, but this decision essentially then becomes unreviewable under the Copyright Office.¹²⁷ The only other method for challenging the final determination of the CCB is to submit a written request to a district court of the United States within 90 days, seeking an order to vacate, modify, or correct the final determination of the CCB.¹²⁸ However, this reviewability is only available in the following cases:

(A) If the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct;

¹²² 17 U.S.C. § 1506(d)(1).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Olson, *supra* Note 1 at 23.

¹²⁶ 17 U.S.C. § 1506(w) (2021).

¹²⁷ 17 U.S.C. § 1508.

¹²⁸ 17 U.S.C. § 1508(c)(1) (2021).

- (B) if the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue; or
- (C) in the case of a default determination or determination based on a failure to prosecute, if it is established that the default or failure was due to excusable neglect.¹²⁹

These parameters limit the capabilities of parties to appeal their claims. In fact, the Copyright Office notes these limitations on its website.¹³⁰ The benefit for the parties is that the process is much less arduous and resource-consuming by giving up some of their ability to appeal. Of course, there is also a possible harsh penalty for a party who does not agree with the final determination of the CCB, and this complicated issue of appealability seems to potentially have unconstitutional effects upon the entire CCB.

b. The Appointments Clause, The Copyright Claims Board, and Constitutionality

1. Constitutional Challenges under the Appointments Clause

The Appointments Clause protects the separation of powers and ensures that the President maintains control of the Executive power granted in the Constitution. Under the Appointments Clauses, there are three major issues that could constitute a constitutional violation. Although there is not a set list of factors by which courts have established a method to determine if the officers are acting constitutionally according to their authority and in congruence with the Appointments Clause, there are three major issues which the Supreme Court has previously addressed, as discussed above. The court should evaluate the role and authority held by the officer(s), whether the decisions made by the officers, if determined to be inferior, are properly reviewable by a principal officer, and the nature of their appointment and removal.

The first step in determining whether there is a constitutional issue under the Appointments Clause is to categorize the officers involved in the statute at issue.¹³¹ The officers may either be principal officers or inferior officers. While there is not a clear test that the courts have set out in order to determine whether the officers at issue are either principal or inferior, there are several guideposts that can be utilized. In order to easily determine whether Congress intended for the officers to be principal or inferior, a simple test is to

¹²⁹ *Id.*

¹³⁰ *Frequently Asked Questions*, COPYRIGHT CLAIMS BOARD, *supra* Note 13.

¹³¹ *Morrison*, *supra* Note 76, at 671.

determine the authority that appoints the officers themselves.¹³² Put simply, the Court looks to the legislative language and determines who appointed the officers. If it is not the President who is charged with appointing the officer with the advice and consent of the Senate, then it is then likely that Congress intended for the officer to be an inferior officer. However, the more authoritative is the test performed by the Court in order to determine if Congress presented the officers as either inferior or principal within the legislation according to the responsibility of the officer and the supervision over that officer's decisions.¹³³ For this, the Court in *Buckley* held that an officer who holds "significant authority in adjudicating the public rights of private parties" should be considered to be a principal officer.¹³⁴

Additionally, as previously discussed, the Court in *Morrison* determined that while there is not a bright line test to determine whether an officer is inferior or principal, there are several factors which the court can look at for guidance, including (1) the authority which can remove that officer, (2) whether the party is "empowered by the Act to perform only certain, limited duties" which indicates that it is an inferior officer, and (3) whether the office is "limited in jurisdiction," which also indicates an inferior officer.¹³⁵ Of course, this is the standard by which officers who hold significant authority are evaluated. When looking at whether the decisions of the Copyright Claims Officers would constitute as significant under this standard, one need only to look to the recent decision of the Court in *Arthrex* in order to see that the decisions of the PTAB concerning whether to cancel a patent as decisions which the Court determined were sufficient to classify the APJs as wielding significant authority.¹³⁶ However, the Supreme Court can also evaluate the Copyright Claims Board according to the factors laid out in *Morrison* in order to make a determination.

The first factor in *Morrison*, namely, analyzing who possesses the authority to remove the officer from their position, indicates that the Copyright Claims Board officers would be considered inferior

¹³² *Arthrex*, *supra* Note 16, at 1979-80.

¹³³ *See Buckley*, *supra* Note 54, at 141.

¹³⁴ *Arthrex*, *supra* Note 16 at 1981 (*quoting Buckley*, *supra* Note 54, at 126).

¹³⁵ *Morrison*, 487 U.S. 654 at 671.

¹³⁶ *Arthrex*, *supra* Note 16 at 1980.

officers. This is because according to the statute, the Librarian of Congress possesses the ability to remove Copyright Claims Officers.¹³⁷ The Court notes in *Morrison* that:

Although appellant may not be "subordinate" to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree "inferior" in rank and authority.

This is an indication from the Court that while reviewability is not necessarily an indication of an inferior officer, since the Special Counsel in *Morrison* was not directly reporting to the Attorney General, a better indication of whether an officer is inferior is to look at the officer who holds the removal authority.

The second and third factors in *Morrison*, namely whether the officers are limited in duties and limited in jurisdiction, are also particularly good indications that the Copyright Claims Officers are inferior officers. For instance, the duties themselves of the officers are limited to adjudicating specific types of claims with monetary damages caps and in adherence to specific rules which limit the discovery process.¹³⁸ This is also present in *Arthrex* in which the Court found that the "unreviewable executive power exercised by APJs is incompatible with their status as inferior officers."¹³⁹ Additionally, the jurisdiction of the Copyright Claims Officers is quite limited to specific types of copyright infringement claims, indicating that the officers' limited scope of jurisdiction is that of an inferior officer.¹⁴⁰

Second, the administrative body might be unconstitutional due to an improper process by which the final decisions are reviewed. More specifically, the final decisions of an administrative agency must be reviewed by a superior officer and cannot be the final decision of the executive branch if the decision cannot be appealed past an inferior officer.¹⁴¹ Concerning the Copyright Claims Officers, who would likely be considered as superior officers by the Supreme Court, there is currently no executive review of the board's

¹³⁷ 17 U.S.C. § 1502(b)(7) ("Subject to section 1503(b) [17 USCS § 1503(b)], the Librarian of Congress may sanction or remove a Copyright Claims Officer").

¹³⁸ 17 U.S.C. § 1506(a).

¹³⁹ *Arthrex*, *supra* Note 16, at 1983.

¹⁴⁰ 17 U.S.C. § 1503.

¹⁴¹ *Arthrex*, *supra* Note 16, at 1983.

decisions by a superior officer.¹⁴² This is the most serious constitutional issue surrounding the Copyright Claims Board because the decisions are appealable only to the Register of Copyrights or the Federal District Court. The statute itself provides that:

“Not later than 90 days after the date on which the Copyright Claims Board issues a final or amended final determination in a proceeding, or not later than 90 days after the date on which the Register of Copyrights completes any process of reconsideration or review of the determination, whichever occurs later, a party may seek an order from a district court of the United States vacating, modifying, or correcting the determination of the Copyright Claims Board.¹⁴³

The statute continues by listing the cases where a party may challenge the determination of the Copyright Claims Board.¹⁴⁴ This creates serious issues concerning the reviewability of the final determination of the Copyright Claims Officers because, if the Court determines that the officers are inferior, those decisions must be reviewable by a principal officer. In this statute, the determinations reviewed by the Register of Copyrights are not sufficient. The Register of Copyrights is also an inferior officer because, like the Copyright Claims Officers, they are appointed by the Librarian of Congress. Although the Librarian of Congress is a principal officer with the Congressional authority to appoint these inferior officers, that is not sufficient under the Appointments Clause.

Finally, the third issue raised by the courts concerning the Appointments Clause is the ability of the President to exercise his removal authority against officers who possess this significant authority.¹⁴⁵ Once again, this is a significant and important function of the President because of the “take care” clause which provides that “he shall take Care that the Laws be faithfully executed.”¹⁴⁶ As previously discussed, this is a very important power which has been judicially interpreted and recognized as an executive function of the President.¹⁴⁷ The Supreme Court in *Myers* determined that:

Article II grants to the President [*164] the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of

¹⁴² See 17 U.S.C. § 1508.

¹⁴³ 17 U.S.C. § 1508(c)(1)

¹⁴⁴ 17 U.S.C. § 1508(c)(1)(A)-(C)

¹⁴⁵ *Myers v. United States*, 272 U.S. 52, 161 (1926).

¹⁴⁶ U.S. CONST. art. 3, § 1.

¹⁴⁷ *Myers*, *supra* Note 71.

appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed;¹⁴⁸

This removal power of the President cannot, of course, be executed upon inferior officers. Nevertheless, it is likely that the Supreme Court would find that the President should have the authority to remove the Copyright Claims Officers because of their conduct in acting as superior officers as previously discussed.

2. *Policy Interpretations and Concerns Surrounding the Appointments Clause*

The legislative history and case law surrounding the Appointments Clause demonstrates a strong history of interpreting the clause as requiring a careful analysis of administrative agencies and their officers who wield significant authority to make final decisions, as previously discussed. These interpretations of the Appointments Clause are important because of the policy reasons behind the clause itself. First, it is important for a “principal” or “superior” officer who has significant authority in making final decisions to be appointed by the President with the advice and consent of Congress in order to ensure that administrative agencies cannot usurp their designated authority and become a quasi-legislative branch. Second, it is important for these officers to be visible to the public as a result of being nominated and appointed by the President in order to ensure visibility and accountability of our government.

First, there is a potential issue concerning the power of the Copyright Claims Board because the significant authority of the board officers to make these final decisions could lead the Supreme Court to find that the CCB is unconstitutionally acting as a quasi-legislative body, although this first policy argument is unlikely. Because these decisions are not reviewed by a presidentially-appointed officer, there is a finality to the decision within the Executive branch. This binding decision seems to be analogous to the decisions made by the APJs which were at issue in *Arthrex*.¹⁴⁹ Of course as previously discussed, the Court found that the APJs were acting outside of their authority and unconstitutionally granting final decisions because they were inferior officers and the decisions were not being reviewed.¹⁵⁰ In the CCB, the officers are

¹⁴⁸ *Id.* at 163-64.

¹⁴⁹ *Arthrex*, *supra* Note 16, at 1987.

¹⁵⁰ *Id.*

appointed by the Librarian of Congress after consultation with the Register of Copyrights, indicating that the officers would likely be considered inferior officers under *Buckley*.¹⁵¹ Nevertheless, the legislative nature of these claims does not seem likely because the administrative role of the CCB is not to produce codes that must be followed, but rather, the Officers of the Copyright Claims Board are responsible for providing a small claims alternative to the costly federal district courts. This is supported by the Court's decision in *Arthrex* which, although finding the APJs to be acting unconstitutionally, did not allege that the PTAB was acting with the intent to circumvent the legislative branch but instead focused upon other issues as discussed above.

The second policy justification that the courts have recognized behind the Appointments Clause is the visibility and accountability that is expected when final, executive decisions are made. This is also an issue which, like the first policy justification, might not have a significant amount of weight as far as the visibility of the CCB since the decisions are handed down directly from the Officers. However, the accountability of the Copyright Claims Board is a much bigger issue because, like in *Buckley*, there is a significant gap between the final decision makers, the Officers of the Copyright Claims Board, and the elected Executive Officer who is wielding this significant authority.¹⁵² Of course, the chain of authority moves from the President, elected by the people in theory, and the President's appointment of the Librarian of Congress, who is a superior officer. Then, from the Librarian of Congress, the officers for the Copyright Claims Board are selected.¹⁵³ This chain is problematic because there should be a method by which officers can be held accountable by the people, which once again, is important because of the significant authority which they possess, through an election process.¹⁵⁴ Yet, the officers on this board do not have that direct connection which would allow accountability.

¹⁵¹ 17 U.S.C. § 1052(b)(1); *Buckley*, *supra* Note 54 at 273.

¹⁵² *Buckley*, *supra* Note 54 at 139-40.

¹⁵³ 17 U.S.C. § 1052(b)(1) ("The Register of Copyrights shall recommend 3 full-time Copyright Claims Officers to serve on the Copyright Claims Board in Accordance with paragraph (3)(A). The Officers shall be appointed by the Librarian of Congress to such positions after consultation with the Register of Copyrights.").

¹⁵⁴ *See Buckley*, *supra* Note 54 at 67.

There is also another counterargument which could potentially be raised by the Government if the constitutionality of the Copyright Claims Board was challenged. Like the Government attempted to argue in *Arthrex*, the Appointments Clause could potentially be satisfied because of the scheme under which the Copyright Claims Officers are appointed. The officers are, of course, appointed by the Librarian of Congress with the advice of the Register of Copyrights. Because of this appointment power, there might be an indirect authority of review that the Government could contend makes the determinations of the Copyright Claims Board reviewable by the Librarian of Congress. Nevertheless, like in *Arthrex*, this argument is likely to fail because of the Court's previous decision in *Edmond*.¹⁵⁵

c. What might be potential solutions to unconstitutionality claims/issues?

Another important question to consider is whether the *Arthrex* decision provides a solution to the Copyright Claim Board's potential constitutionality question under the Appointments Clause. In *Arthrex*, as previously discussed, the Supreme Court ended the majority opinion by providing a solution to the constitutionality issue of the authority exercised by the APJs. In *Arthrex*, the Court determined that the APJs could continue to exercise the same authority as long as the decisions were also made reviewable by the Commissioner. If the Copyright Claims Board was to be challenged on the same issue of the Appointments Clause, it is very possible that the Supreme Court would offer the same "fix."¹⁵⁶ However, because of the structure of the CCB, this might become strange. For the Copyright Claims Board, this would have to mean that the decisions of the Board are reviewed by the Librarian of Congress. It would be necessary to designate the Librarian to review the Copyright Claims Board's decisions because of the Appointments Clause. The U.S. Copyright Office itself is a separate department of the Library of Congress, and the Librarian is appointed by the President themselves.¹⁵⁷

Of course, instead of directing the Librarian to review the claims, the alternative which might make more sense would be if the Register of Copyrights, the head of the U.S. Copyright Office, was given the

¹⁵⁵ *Arthrex*, 141 S. Ct. 1970, 1981 (2021).

¹⁵⁶ Handler, *supra* Note 14.

¹⁵⁷ U.S. CONST. art. II, § 2, cl. 2.

power to review the decisions made by the Copyright Claims Board. While the Copyright Office is under the Library of Congress, it has also been recognized as a distinct department of the Library of Congress since 1897.¹⁵⁸ And, as frequently noted by modern scholars, the mission of the Copyright Office has been steadily broadening, and its place under the Library of Congress has subsequently become increasingly strained.¹⁵⁹ In fact, law professor Kali Murray noted that “The actual mission of the Copyright Office is getting much broader, but actual statutes haven’t been amended to reflect those conditions.”¹⁶⁰ In fact, the Librarian of Congress is not required to be an attorney nor possess any time of experience within intellectual property while the Register of Copyrights must have a legal background.¹⁶¹ While the Librarian does appoint the Copyright Claims Board officers with the advice of the Register, the Librarian’s separation from the Copyright Office and the nature of the intellectual property work seem to indicate that it should be the Register of Copyrights to review claims from the CCB, regardless of the Appointments Clause.

Alternatively, the legislature could act preemptively and amend the statute accordingly in order to avoid this issue entirely. Of course, this could also potentially raise other issues because the Librarian of Congress is likely not the most qualified officer to review the decisions of the Copyright Claims Board.

V. Conclusion

Based on the Court’s decision in *Arthrex* and the prior interpretations of the Appointments Clause, it is very likely that the CCB, if challenged, will be held as unconstitutional under the Appointments clause in particular. However, the *Arthrex* court would also likely utilize the same methods that they used to ensure that the APJs were utilizing their authority constitutionally and change the system of the Copyright Claims Board so that the Librarian of Congress would be able to review the determinations made by the Copyright Claims Board in conjunction with, or in place of, the Register of Copyrights.

¹⁵⁸ U.S. Copyright Office Overview, *supra* Note 13.

¹⁵⁹ Handler, *supra* Note 14.

¹⁶⁰ *Id.*

¹⁶¹ Copyright Alternative in Small-Claims Enforcement Act of 2019, H.R. 1502, 116th Cong. (2019).