The "Agencies" of Copyright Law: Constitutional and Administrative Law on the CASE Act of 2020

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Table of Contents

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I. Introduction

Amid a multitude of recommended copyright reforms, one major issue recently addressed by Congress is the problem of copyright small claims non-adjudication. Litigating a copyright case through appeal costs an average of roughly $350,000, is often time-consuming, and may be complicated by the difficulty of finding an attorney willing to litigate small claims cases.[1] In contrast, a typical copyright infringement claim may often be valued at less than $3,000.[2] In cases where damages awards are likely to be small, many copyright owners have no incentive to sue infringers, even for clearly meritorious claims. Where copyright owners have no incentive to sue to enforce their rights, users may be more likely to infringe. Rampant infringement disincentivizes creation. Copyright law, a regime based on Article I, section 8, clause 8 of the U.S. Constitution, aims to increase incentives to create.[3] Thus, routine, cost-based non-adjudication of small claims undermines the very purpose of copyright law.

Congress's chosen solution to the small claims non-adjudication problem is the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020.[4] The CASE Act creates a "Copyright Claims Board," a seemingly quasi-judicial body, within the U.S. Copyright Office.[5] The CASE Board is expected to operate as, effectively, a small claims court within the Office, providing a streamlined, reduced cost, and purportedly voluntary resolution procedure for copyright claims, subject to an award cap of $30,000 per proceeding.[6] Under the CASE Act, eligible copyright claimants may initiate CASE proceedings against alleged infringers who, in turn, may opt out of the process.[7] If the defendant opts out, the plaintiff may bring the infringement suit in federal court, in which case both parties almost assuredly incur significant additional expense.[8] If the defendant does not opt out, the Board will evaluate the

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1 U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS (SMALL CLAIMS REPORT) 1, 8–9 (2013), https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf; Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns about a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 705 (2018).

2 COALITION OF VISUAL ARTISTS, CREATING A USCO CAPABLE OF SUCCEEDING IN A CHANGING WORLD 8 (Jan. 31, 2017), https://www.asmp.org/wp-content/uploads/House-Judiciary-Comments-1.31.17.pdf.

3 U.S. CONST. art. I, § 8, cl. 8.

4 Consolidated Appropriations Act of 2021, Pub. L. No. 116-260 (2020). The CASE Act was passed by Congress as part of an omnibus spending and COVID-19 relief bill. It was signed into law by President Donald Trump on December 27, 2020. At the time this paper was produced, the official text of the new public law was still pending. Citations in this paper reference the enrolled bill, Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020), and the CASE Act as it appears in Division Q, Title II, Section 212 therein. The CASE Act has been subjected to notice-and-comment. It requires the Board to commence operations by December 27, 2021, absent an extension.

5 CASE Act § 1502. The CASE Act's "Copyright Claims Board," often called the "CCB," is discussed herein as the "CASE Board" or "the Board."

6 John Cannon, *Big Problems with the Copyright Small Claims Court*, JUSTIA (Oct. 24, 2019), https://verdict.justia.com/2019/10/24/big-problems-with-the-copyright-small-claims-court.

7 *Id.*

8 *See* Kerry Maeve Sheehan, *Copyright Law Has a Small Claims Problem, The Case Act Won't Solve It*, AUTHORS ALLIANCE (Jun. 4, 2019), https://www.authorsalliance.org/2019/06/04/copyright-law-

claim on the basis of written submissions, calls, and other remote communication, often without the need for appearances or even an attorney.[9] Decisions of the Board are final and can be appealed only on limited grounds.[10] If a defendant fails to respond, the opt-out nature of the CASE system permits a default judgment to be entered.[11]

Although this latest iteration of the CASE Act has achieved the coveted status of law, the Act itself is not without controversy. Specifically, questions have been raised about the permissibility of Board resolution of infringement claims, a seemingly judicial function that might violate important legal precepts like separation of powers and prohibitions against branch aggrandizement/diminution.[12] Although executive agencies are sometimes permitted to carry out quasi-judicial functions under constitutional and administrative law, that capacity is limited. Furthermore, the Board created by the CASE Act is not part of any obviously executive body.[13] As proposed by the CASE Act, the Board would sit within the U.S. Copyright Office.[14] The Copyright Office is a service unit of the Library of Congress, and the Library is generally thought to be part of the legislative branch.[15] A seemingly open question exists as to whether legislative agencies, too, can perform limited quasi-judicial functions.

This paper evaluates whether the copyright small claims board created by the CASE Act violates constitutional and/or administrative law. It does not consider all possible legal arguments against the CASE Act, but instead focuses on organizational considerations implicating the separation of powers and closely related concerns. Section II examines the uncertainty surrounding the administrative identities of the Library of Congress, the Copyright Office, and the CASE Board as either legislative or executive bodies. Section III describes constitutional and administrative law-based concerns attributable to the CASE Board's possible administrative identities. Finally, Section IV assesses whether any permissible construction of the CASE Board exists or could be achieved through plausible amendments to the Act. This paper concludes

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has-a-small-claims-problem-the-case-act-wont-solve-it%EF%BB%BF/; Keith Kupferschmid & Terrica Carrington, *The CASE Act: You Have Questions, We Have Answers*, COPYRIGHT ALLIANCE (May 13, 2019), https://copyrightalliance.org/ca_post/the-case-act-you-have-questions-we-have-the-answers/.

9 CASE Act § 1506(c).

10 Sheehan, *supra* note 8.

11 *Id.*

12 *See, e.g.*, Susan Neuberger Weller, *Congress Considers Creation of a "Copyright Claims Board" as an Alternative to Handle Small Copyright Claims*, NAT'L L. REV. (Jan. 8, 2020), https://www.natlawreview.com/article/congress-considers-creation-copyright-claims-board-alternative-to-handle-small.

13 *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–68 (1982); Crowell v. Benson, 285 U.S. 22, 50 (1932).

14 CASE Act § 1502(b)(9).

15 *See, e.g.*, *Copyright Office Operations, Accomplishments, and Challenges*, 106th Cong. (2000) (Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary).

that the best resolution of CASE Act separation of powers concerns, and best safeguard against constitutional or administrative law challenge, would be to position the desired small claims board within an executive branch agency. Ultimately, this resolution would require greater reorganization of copyright administrative law than mere revision of the CASE Act itself would likely permit.

II. What's in an Agency: the Executive-Legislative Distinction

The CASE Act, as currently written, places its small claims board within the U.S. Copyright Office. In many ways central to a determination of the Copyright Office's proper scope of adjudicative power, and thus its ability to house a small claims board, is an evaluation of the Office's identity as an entity within the administrative state. In an effort to provide such a categorization, this section addresses two major questions. First, what kind of agency or other federal entity is the Library of Congress, which houses the Copyright Office, and what bearing does the Library's administrative identity have on that of the Office? Second, what kind of agency or federal entity is the Copyright Office, and would a copyright small claims board, seated therein, also be an agency at all or an agency of the same kind? The answers to these questions form the basis for a subsequent discussion of the ramifications of agency types on the constitutionality of the CASE Act's small claims board; the administrative identity of the CASE Board has critical bearing on the activities such a board can constitutionally perform. This section begins with an overview of the types of agencies and requirements for agency status. It then addresses the questions above.

A. Types of Agencies: Executive, Independent, and Legislative Agencies

Likely the best understood, most common agency type is the executive branch agency. Executive branch agencies can be divided into two categories: (1) executive agencies, and (2) independent agencies—though some scholars argue the dividing line between these categories is thin.[16] Congressional delegations of authority to such agencies are limited by general prohibitions on political branch aggrandizement and diminution under separation of powers principles embodied, perhaps increasingly, in the non-delegation doctrine.[17] Notably, Congress may not delegate its legislative power to another branch of government absent an "intelligible principle" guiding and

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[16] Jared P. Cole & Daniel T. Shedd, *Administrative Law Primer: Statutory Definitions of "Agency" and Characteristics of Agency Independence*, CONG. RSCH. SERV. 1 (May 22, 2014), https://fas.org/sgp/crs/misc/R43562.pdf. *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (arguing against a binary view of executive branch agencies as executive or independent).

[17] Todd Garvey & Daniel F. Sheffner, *Congress's Authority to Influence and Control Executive Branch Agencies*, CONG. RSCH. SERV. 9 (Dec. 19, 2018), https://fas.org/sgp/crs/misc/R45442.pdf (citing Mistretta v. United States, 488 U.S. 361, 371 (1989); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935)). The non-delegation doctrine says Congress may not delegate its legislative powers to other entities; the doctrine is subject to qualification. Cornell Law School, *Nondelegation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine (last visited Aug. 3, 2021).

limiting the delegation.[18] Delegations of *non-legislative* power, e.g., quasi-judicial power, to the executive branch are subject to additional constraints. Finally, executive and independent agencies are subject to the Administrative Procedure Act (APA),[19] which provides perhaps the most concrete and tangible restrictions on these agencies' administrative power.[20] The APA is the primary statute of federal administrative law and governs the manner in which federal administrative agencies regulate.[21]

To the extent executive and independent agencies can be subjected to a binary distinction, that distinction is as follows. Executive agencies include federal executive departments headed by a Cabinet secretary, like the Department of Justice, as well as agencies within the Executive Office of the President, like the National Security Council.[22] They are primarily distinguished by their subjection to "direct presidential control"; the heads of such agencies are removable by the President at will.[23] The executive branch also houses a number of significant independent agencies, like the Federal Trade Commission.[24] In modern jurisprudence, independent agencies are distinguished by characteristics like for-cause removal protection, multi-member board or commission structure, and independent litigating authority.[25] As demonstrated by these typical features, independent agencies are "designed by statute to be comparatively free from presidential control."[26]

Despite its often-central focus in administrative law, the executive branch is without a monopoly on agencies. Legislative branch agencies are "distinct from executive branch agencies" and include organizations like the Congressional Research Service.[27] These agencies "aid Congress in its legislative capacity, and do not [or at least should not] 'execute the laws.'"[28] Unlike heads of executive branch agencies, legislative agency heads can be appointed through various means, not only by the

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[18] Garvey, *supra* note 17, at 9–10 (citing United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[19] Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* (2011).

[20] Cole, *supra* note 16, at 9 (citing 5 U.S.C. § 551(1)).

[21] *See* 5 U.S.C. § 500 *et seq.*

[22] *Independent Agencies of the United States Government*, WIKIPEDIA, https://en.wikipedia.org/wiki/Independent_agencies_of_the_United_States_government (last visited Aug. 3, 2021). Subunits of executive agencies often also constitute executive agencies. For example, the Patent and Trademark Office is an executive agency within the Department of Commerce.

[23] Cole, *supra* note 16, at 1.

[24] *Independent Agencies of the United States Government*, *supra* note 22.

[25] Cole, *supra* note 16, at 1–2. Independent agencies are typically characterized by: (1) for-cause removal protection, (2) a multi-member board or commission structure, (3) exemption from Office of Management and Budget legislative clearance requirements, (4) exemption from presidential review of agency rulemaking procedures, (5) direct or concurrent budget submissions to Congress, and (6) independent litigating authority. *Id.*

[26] *Id.* at 1.

[27] *Id.* at 7.

[28] *Id.* at 7 (citing Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("To permit the execution of the laws to be vested in an officer answerable only to Congress would . . . reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.")).

President—although presidential appointment is permitted.[29] Delegations to legislative agencies raise somewhat more limited constitutional concerns; generally, Congress may share its responsibilities with its own agents. However, many scholars fear that delegating certain powers, like rulemaking authority, to legislative agencies constitutes "intra-legislative delegation."[30] Such delegations, they claim, permit Congress to make law without following Article I procedure on bicameralism and presentment, violating separation of powers principles.[31] Instead, they believe certain powers may be properly granted only to executive branch agencies.[32]

Importantly, legislative agencies are generally not subject to the APA.[33] At least in theory, subjection to the APA is what most clearly distinguishes executive agencies from assistive entities within the legislative and judicial branches. The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ."[34] However, the Act creates several exclusions. For purposes of the APA, "agencies" do not include (1) "the Congress," or (2) the courts, to name the most important exceptions.[35] The D.C. Circuit has held that the APA exemption for "the Congress" means the entire legislative branch and all its incumbent assistive entities.[36] Exemption from the APA under one of these exceptions demonstrates that the entity at issue is not an agency of the APA-bound executive branch.

That said, Congress can, and often does, subject entities to the APA through specific legislation and for particular purposes, even if that entity would not otherwise be required to comply with APA provisions because it is covered under one of the exceptions above.[37] For example, the U.S. Sentencing Commission is an entity within the judicial branch that is subject to APA requirements when promulgating sentencing guidelines for federal judges, based on congressional decree.[38] Thus, it is not impossible for a particular legislative—i.e., congressional—agency to be subject to the APA. Of course, this kind of selective subjection of a non-executive agency to the APA by Congress does not make the agency suddenly executive. Presumably, even a

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29 Ida A. Brudnick, *Legislative Branch Agency Appointments: History, Processes, and Recent Actions*, CONG. RSCH. SERV. 1 (Sept. 5, 2019), https://fas.org/sgp/crs/misc/R42072.pdf ("Four agencies are led by a person appointed by the President, with the advice and consent of the Senate; two are appointed by Congress; one is appointed by the Librarian of Congress; and one is appointed by a board of directors.").

30 JeanAne Marie Jiles, *Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act to Prevent Constitutional Challenges*, 52 ADMIN. L. REV. 443, 457–58 (2000) (citing *Bowsher*, 478 U.S. at 726–27; Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274–77 (1991)).

31 *Id.* (citing *Metro. Wash. Airports Auth.*, 501 U.S. at 274–77).

32 *Id.* (citing *Bowsher*, 478 U.S. at 746 (Stevens, J., concurring)); Andy Gass, *Considering Copyright Rulemaking: the Constitutional Question*, 27 BERKELEY TECH. L.J. 1047, 1066–67 (2012).

33 *See, e.g.*, Wash. Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1449 (D.C. Cir. 1994).

34 5 U.S.C. § 551 (2011).

35 *Id.*

36 *Wash. Legal Found.*, 17 F.3d at 1449.

37 Cole, *supra* note 16, at 7.

38 *Id.*

legislative agency required by Congress to abide by certain APA provisions is still bound by separation of powers principles and the corresponding borders of legislative branch authority. Regardless, the practice of Congress to sometimes subject non-executive agencies to the APA is important since it at least partially obscures an otherwise clear dividing line between executive and non-executive bodies.

Finally, some uncertainty exists as to what it means to be an "agency" at all, rather than some other federal body. The term "agency" can mean different things in different contexts; entities may be agencies for purposes of one statute but not another or may be agencies in a lay sense but not a formal, administrative one.[39] Although assistive bodies in the legislative branch are called legislative agencies, "agencies" as defined by and for purposes of the APA include only executive bodies. Even more confusingly, the Smithsonian is described as a "quasi-official agency" but, in many ways, does not appear to be an agency at all.[40] The possibility that Congress can create pseudo or even faux agencies introduces an additional level of complexity to evaluations of administrative identities. Ultimately, whether an entity is described as an "agency," or is subject in whole or in part to the APA, is not determinative of its actual status—its position within the branches of government or true constitutional powers. However, such designations may provide insights into the beliefs or desires of Congress and the courts regarding these entities' roles. This is particularly true for the Copyright Office and related "agencies" of copyright law.

B. The Administrative Identity of the U.S. Library of Congress

Because the Copyright Office is housed in the Library of Congress, an evaluation of the latter's administrative identity may shed light on the related identity of the Copyright Office and the permissibility of housing a small claims board therein. The Library of Congress is one of the oldest institutions of American government; it has its origins in an Act from the year 1800, providing $5,000 for books for use by Congress.[41] Oversight for the library project was to be provided by a joint congressional committee—the first of its kind.[42] Shortly thereafter, in 1802, President Jefferson approved a legislative compromise making the Librarian of Congress a presidential appointment, giving the Library a "unique relationship with the American Presidency."[43] Even so, and although the Library's role has expanded over time, the

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[39] *See id.* at 8–16 (citing Reg'l Mgmt. Corp., Inc. v. Legal Servs. Corp., 186 F.3d 457, 462 (4th Cir. 1999); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148 (2010)).

[40] *Official US Executive Branch Websites*, LIBRARY OF CONG., https://www.loc.gov/rr/news/fedgov.html (last visited Aug. 3, 2021). *See also* Jaclyn Kurin, *Unconstitutional Limbo: Why the Smithsonian Institution May Violate the Separation of Powers Doctrine*, 4 FED. UNIV. PARANA J. CONST. RSCH. 55 (2017), redalyc.org/jatsRepo/5340/534057808003/html/index.html.

[41] *History of the Library of Congress*, LIBRARY OF CONG., https://www.loc.gov/about/history-of-the-library/ (last visited Aug. 3, 2021).

[42] *Id.*

[43] *Id.*

entity's primary original purpose was to serve Congress—to serve the legislature.[44] Today, legal scholars, members of government, and the courts differ substantially in their understandings of the Library's place within the administrative state.[45] A question remains as to whether the Library is part of the legislative branch, the executive branch, or both.

That the Library is part of the legislative branch is almost surely the majority view, and subscribers to this view rest their argument on several compelling considerations. First, and most simply, the name of the institution itself, "Library of Congress," appears to denote the entity's status as part of Congress and thus the legislative branch. Second, the Library was codified under Title 2 of the U.S. Code, a part of the Code that governs the legislative branch.[46] In fact, the U.S. Code includes numerous references to the Library as part of the legislative branch.[47] Third, facially, the Library appears to be part of the legislative branch; the Library was created by an Act of Congress to serve Congress, and it is subject to oversight by the Congressional Joint Committee on the Library.[48] The Committee is composed of ten members of Congress who exercise substantial authority over major decisions by the Library.[49] Finally, the Library itself professes to be a legislative agency.[50]

Proponents of the legislative branch view also cite judicial precedent for support. Courts, they claim, have long characterized the Library as a legislative body.[51] For example, Justices Stevens and Marshall, concurring in *Bowsher v. Synar*,[52] repeatedly described the Librarian as a legislative agent, noting that the existence of certain obligations to the executive branch does not prevent this characterization.[53] In *Washington Legal Foundation v. U.S. Sentencing Commission*,[54] the D.C. Circuit held that the Library is part of the legislative branch, though a separate entity from "Congress" narrowly defined.[55] Thus, the Library "is exempt from the APA because its provisions do not apply to 'the Congress'—that is, the legislative branch."[56] In fact, Congress

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44 *Id.*

45 *Compare* United States v. Brooks, 945 F. Supp. 830, 834 (E.D. Pa. 1996) ("[T]he Copyright Office is part of the legislative branch."), *with* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1341–42 (D.C. Cir. 2012) (discussing why the Library of Congress "is undoubtedly a 'component of the Executive Branch'").

46 2 U.S.C. §§ 131–63 (1925).

47 *See, e.g.*, 2 U.S.C. § 181; 5 U.S.C. § 5531(4).

48 Gass, *supra* note 32, at 1070–71 (citing 2 U.S.C. § 132(b) (2010)); *History of the Library of Congress*, *supra* note 41.

49 Gass, *supra* note 32, at 1070–71 (citing 2 U.S.C. § 132(b) (2010)).

50 *About the Library*, LIBRARY OF CONG., https://www.loc.gov/about/ (last visited Aug. 3, 2021).

51 *See, e.g.*, Barger v. Mumford, 265 F.2d 380, 382 (D.C. Cir. 1959) ("[T]he Library of Congress has long been treated as being in or under the jurisdiction of the legislative branch of the Government.").

52 478 U.S. 714 (1986).

53 *Id.* at 746 n.9, n.11.

54 17 F.3d 1446 (D.C. Cir. 1994).

55 *Id.* at 1449.

56 *Id.* Numerous courts have concluded that the Library is not an agency for purposes of the APA. *See, e.g.*, Green v. U.S. Dept. of Justice, 392 F. Supp. 3d 68, 100 (D.D.C. 2019); Ethnic Emps. of Library of Cong. v. Boorstin, 751 F.2d 1405, at 1416 n.15 (D.C. Cir. 1985) (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 145 (1980)).

has demonstrated that when it intends to make a Library component, like the Copyright Office, subject to APA review it does so through express statements in legislative text.[57] This supports the view that the Library is a legislative body, exempted from the APA under its exception for "the Congress," but occasionally subjected to APA provisions by specific congressional decree and for specific purposes.[58]

Somewhat surprisingly, the alternate view that the Library is part of the executive branch is not without support. Proponents of this view also bolster their position with case law, though that case law tends to support the idea of a dual function for the Library more so than pure executive status. In *Live365, Inc. v. Copyright Royalty Board*,[59] the D.C. Circuit held that the Library is an executive department for purposes of the Appointments Clause; the Librarian is appointed by the President and removable at will.[60] The court concluded that the Librarian is an executive department head, which would seem to render the Library an executive agency.[61] However, as discussed above, the heads of legislative agencies can be appointed in various ways, including by the President, so this mode of appointment does not automatically transform a legislative body into an executive one.[62]

Perhaps more persuasively, the Fourth Circuit in *Eltra Corp. v. Ringer*[63] noted that the Librarian performs some functions that may be viewed as legislative, like the Congressional Research Service, and others that may be viewed as executive, like the Copyright Office.[64] Thus, because of the Library's "hybrid character," it "could have been grouped code-wise [i.e., within the U.S. Code] under either the legislative or executive department."[65] It is unclear whether the *Eltra* court meant to say that the Library is simultaneously both an executive and legislative body, merely codified as legislative out of convenience, or that the Library has both executive and legislative characteristics but is ultimately legislative based on affirmative congressional choice. Either way, the idea of a "hybrid" Library of Congress is appealing for its potential ability to reconcile—if only by accepting—the diverse structural and functional characteristics of the entity.

Despite its obvious appeal, to the extent this "hybrid" nature is interpreted as allowing the Library to sit within both the executive and legislative branches, or to sit within only one branch but have components that are part of another, the idea raises grave constitutional concerns. For example, plaintiffs in *Green v. United States Dept. of Justice*[66] argued that if the Library is "undoubtedly" a "component of the

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57 *See Green*, 392 F. Supp. 3d at 98 (citing Copyright Act, 17 U.S.C. § 701(e) (1998)).
58 *See* Cole, *supra* note 16, at 7.
59 698 F. Supp. 2d 25 (D.D.C. 2010).
60 *Id.* at 42.
61 *See id.* at 43.
62 *See* Brudnick, *supra* note 29, at 1.
63 579 F.2d 294 (4th Cir. 1978).
64 *Id.* at 301.
65 *Id.*
66 392 F. Supp. 3d 68 (D.D.C. 2019).

Executive Branch" when it promulgates rules but is deemed part of "the Congress" under the APA, this creates a separation of powers issue; Congress would appear to be unconstitutionally exercising executive power.[67] The *Eltra* court's statement above should more likely be interpreted to mean that the Library *could* have been organized as either executive or legislative but is ultimately legislative. Under this interpretation, the remaining constitutional problem is whether a legislative Library may simultaneously house both legislative and executive sub-agencies, e.g., a legislative Congressional Research Service and an executive Copyright Office. This issue is taken up in subsequent sections.

In sum, the most compelling view appears to be that the Library is an "agency" of the legislative branch only in the lay sense; it is not a formal, i.e., executive, administrative agency under the APA, but is instead part of "the Congress." An entity's identity for administrative and constitutional purposes is determined as much by structure, how it is organized and where it is located, as by function, what it is perceived to do. The Library of Congress is clearly structured as part of Congress. To whatever extent the Library, acting primarily through the Copyright Office, appears to perform executive functions, this does not transform the Library into an executive agency. Rather, it raises questions as to the permissibility of certain powers currently exercised by its constituent parts. Regardless, and whether or not the administrative identity of the Library is determinative of the Copyright Office's status, this analysis exposes some of the problematic uncertainties of copyright administrative law.

C. The Administrative Identity of the U.S. Copyright Office

Even if it is established that the Library of Congress is, itself, a legislative body, some argue it does not necessarily follow that the Copyright Office is also such a body.[68] In general, "[w]hen it becomes an issue, courts seem inclined to find any organization or part of an organization to be an agency for purposes of settling administrative law questions."[69] Thus, regardless of the administrative identity of the Library, the identity of the Copyright Office may remain an open question. Of course, properly placing the Copyright Office within the administrative law framework is essential to identifying the constitutional scope of the Office's powers, including its ability to host a small claims board under the CASE Act.

Generally, the identity of an entity as part of a particular branch of government is informed by both structural and functional characteristics. Unfortunately, the structural and functional qualities of the Copyright Office are somewhat at odds. The structure of the Office derives from its peculiar history. Long before there was a Copyright Office, there was copyright registration, administered by the states and then by the

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[67] *Id.* at 100. Unfortunately, the court was unable to address this concern since it was not found in the complaint and related to a different statute, the APA, than the one challenged, the DMCA. *Id.*

[68] *See, e.g.*, *Eltra*, 579 F.2d at 294; William J. Clinton, *Statement on Signing the Digital Millennium Copyright Act*, 2 PUB. PAPERS 1902 (Oct. 28, 1998), http:// 1.usa.gov/KL9h4U.

[69] 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMIN. L. & PRAC. § 2:32 (3d ed. 2019).

Library of Congress.[70] It was not until the late 1800s that Librarian Ainsworth Spofford centralized the registration and deposit programs, creating a "Copyright Department" within the Library to oversee them.[71] The modern Copyright Office, headed by the Register of Copyrights, was created by Congress in 1897; it remains within the Library and reports to the Librarian, by whom the Register is appointed.[72] The Copyright Office claims to be part of the legislative branch.[73]

Assuming the Library is indeed a legislative body—as seems relatively certain, despite arguments to the contrary—this historical and organizational structure strongly supports the idea that the Copyright Office is a legislative body as well. As one scholar puts it, there is no "open question" as to the actual branch in which the Copyright Office physically sits.[74] It is difficult to argue, for organizational purposes, that the Library is not part of the legislative branch or that the Office is not part of the Library. Thus, any claim that the Copyright Office is an executive agency must rest "on a legal fiction," acknowledging the Office's actual organizational location but arguing a different identity based on function.[75]

Functionally, the duties of the Copyright Office have expanded and diversified over time. The Copyright Act dictates that the Office perform "all administrative functions and duties" required to implement the Act.[76] This includes: (1) advising Congress, (2) providing information/assistance to federal departments, agencies, and the judiciary, (3) participating in meetings of international organizations, (4) conducting studies and programs, and (5) performing "such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties [above]."[77] These duties appear wholly legislative in nature; however, they have been supplemented by grants of specific rulemaking authority, which have given the Office a larger role in administration of a "complex federal statute."[78] Thus, much like the Library of Congress, the Copyright Office now appears to serve dual functions: the Office's research and policy input seem to suggest a legislative role, while its rulemaking and administrative activities "are more consistent with an executive agency."[79] It appears to be these new rulemaking and administrative functions that

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70 *Overview of the Copyright Office*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/about/ (last visited Aug. 3, 2021).

71 Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 736–37 (2018).

72 *Overview of the Copyright Office*, *supra* note 70. *See* 17 U.S.C. § 701.

73 Perzanowski, *supra* note 71, at 739–40 (citing A Brief Introduction and History, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/circs/circ1a.html (last visited Aug. 3, 2021)).

74 Gass, *supra* note 32, at 1060.

75 *Id.*

76 17 U.S.C. § 701(a).

77 17 U.S.C. § 701(b). Of course, the primary responsibility of the Copyright Office is implementation of the copyright registration and deposit systems, a task the Office itself describes as "ministerial" and in which it appears to have limited discretion. Dan L. Burk, *DNA Copyright in the Administrative State*, 51 U.C. DAVIS L. REV. 1297, 1335–37 (2018); Gass, *supra* note 32.

78 Perzanowski, *supra* note 71, at 738.

79 *Id.*

led President Clinton to declare, in a signing statement accompanying the Digital Millennium Copyright Act (DMCA), that the Office is an executive branch entity for constitutional purposes.[80]

At least one court has echoed that it is an agency's function, rather than its structure, that dictates the branch of government to which it belongs and that it is not necessary to reconcile these two sets of characteristics.[81] The Fourth Circuit in *Eltra* notoriously stated: "it would appear indisputable that the operations of the Office of Copyright are executive."[82] The registration of copyrights, the court said, "cannot be likened to the gathering of information 'relevant to the legislative process' nor does the Register perform a function 'which Congress might delegate to one of its own committees.'"[83] This point is itself arguable, since copyright registration is not required to bring copyrights into existence. The intake and filing of copyright holders' submissions of existing copyrights for registration seem to be merely an extension of the Library of Congress's manifestly legislative recordkeeping function.[84] Regardless, the *Eltra* court concluded the Copyright Office was emphatically executive, claiming Supreme Court agreement with this conclusion since 1909—despite not actually citing any alleged Supreme Court precedent.[85]

Importantly, *Eltra* was decided prior to three important Supreme Court cases on the separation of powers.[86] These cases "embrace a formal rather than functional approach to situating entities like the [Copyright] Office within the legislative or executive branches, and potentially undermine *Eltra*'s analysis."[87] Most notably, in *United States v. Brooks*,[88] the Eastern District of Pennsylvania articulated this syllogistic reasoning: the Library of Congress is clearly a part of Congress; the Library of Congress is therefore part of the legislative branch; the Copyright Office is a division of the Library of Congress; the Copyright Office is therefore part of the legislative branch.[89] Any other conclusion, the court said, would be "untenable."[90]

The *Brooks* court's presiding judge responded specifically to the reasoning in *Eltra*, noting, "The status of the Copyright Office is an open question in the Third

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80 *See* Clinton, *supra* note 68.

81 *See, e.g.*, *Eltra*, 579 F.2d at 294.

82 *Id.* at 301.

83 *Id.*

84 *Copyright in General*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/help/faq/faq-general.html (last visited Aug. 3, 2021).

85 *See Eltra*, 579 F.2d at 301.

86 Perzanowski, *supra* note 71, at 740–41 (citing *Bowsher*, 478 U.S. 714; Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

87 *Id.* (citing *Bowsher*, 478 U.S. 714; *Metro. Wash. Airports Auth.*, 501 U.S. 252).

88 945 F. Supp. 830 (E.D. Pa. 1996).

89 *Id.* at 833 (citing Keeffe v. Library of Cong., 777 F.2d 1573, 1574 (D.C. Cir. 1985) (indicating that the Library is part of Congress and therefore part of the legislative branch); Harry Fox Agency, Inc. v. Mills, Inc., 720 F.2d 733, 736 (2d Cir. 1983), *rev'd on other grounds sub nom.*, Mills Music v. Snyder, 469 U.S. 153 (1985) (indicating that the Copyright Office is part of the legislative branch)). If B (the Library) is part of A (the legislature), and C (the Office) is part of B, then C is part of A.

90 *Id.*

Circuit, and I do not find *Eltra* persuasive."[91] Although the court acknowledged that the Copyright Office is required to perform some administrative functions and duties under the Copyright Act, it disregarded *Eltra*'s functional approach.[92] "Acting similar to an executive agency," the court said, "is not the same as being part of the executive branch."[93] Of course, if the status of the Library of Congress is considered an open question, as it is in at least one circuit, the *Brooks* court's otherwise compelling logic would seem inconclusive.[94]

The rejection of recent structural copyright reform efforts appears to echo the renewed emphasis on formalism present in *Brooks*. For instance, one 2017 Act proposed to transform the Copyright Office into a quasi-executive, independent agency within the legislative branch but separate from the Library of Congress; the entity was to be headed by a director appointed by the President with the advice and consent of the Senate.[95] An additional Act proposed to strip the Librarian of Congress of her power to appoint the next Register of Copyrights, again substituting presidential appointment.[96] These proposals appear to make the Copyright Office more executive-like by placing the Office under the direct control of a presidentially appointed officer. However, the rejection of these proposals seems to indicate Congress's concern at expanding the Office's autonomy, particularly where the Office would remain seemingly part of the legislative branch, and at creating quasi- or hybrid administrative authorities so as to further confuse structure-based agency identification.

Although subjection to the APA is somewhat outside these governing structural and functional considerations and has no decisive bearing on an entity's administrative identity, it may tell us something about the government's beliefs. 17 U.S.C. § 701(e) of the Copyright Act subjects almost all actions taken by the Register of Copyrights under that Title to the APA.[97] Congress can, by statute, subject entities to the APA that would not otherwise be subject to its governance. Thus, this provision may look more like application of the APA to specific functions of a legislative agency than like a subtle indication that the Copyright Office is actually purely executive. A decision by Congress to take special action to subject certain activities of a particular entity to the APA may suggest that Congress believes, without such affirmative steps, the entity would not be subject to the Act because it is not executive.

Ultimately, the administrative identities of the Library of Congress and, particularly, the Copyright Office remain uncertain. Courts and scholars are split, and the complexities of the administrative law framework make a clear answer difficult to distill. As stated above, it seems most likely that the Library is a legislative rather

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91 *Id.*
92 *Id.* at 833–34.
93 *Id.* at 834.
94 *See, e.g.*, Fox Television Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1013 n.4 (9th Cir. 2017).
95 Copyright Office for the Digital Economy Act, H.R. 890, 115th Cong. (2017–2018).
96 Register of Copyrights Selection and Accountability Act, H.R. 1695, 115th Cong. (2017).
97 Burk, *supra* note 77, at 1309–10 (citing 17 U.S.C. § 701(e)).

than executive agency, exempted from the APA as part of "the Congress."[98] It seems similarly likely that the Copyright Office is also a legislative agency, subject to the APA due only to specific legislation dictating the Act's applicability based on Congress's understanding that the Act would otherwise not apply.[99] The alternative idea—that an executive agency could be housed within a legislative agency or the legislative branch—seems to violate separation of powers principles and run afoul of structural considerations in recent Supreme Court precedent. If this logic is correct, it seems the CASE small claims board, if an agency at all, will also be a legislative one. If not, the identity of the CASE Board will, too, be uncertain. The CASE Act fails to expressly indicate whether the Board will be subject to the APA and thereby fails to provide important insight into Congress's understanding of the Board's identity.

The discussion above is not intended to conclusively determine the executive or legislative character of the Library of Congress, the Copyright Office, or even the CASE Board itself. Instead, it seeks to elucidate the shocking, genuine uncertainty that exists with regard to these bodies' administrative identities while identifying the most plausible possibilities. There is a clear imperative, based on the separation of powers doctrine, to determine a federal body's administrative identity before imbuing it with powers of a particular government branch. However, copyright experts appear unable or unwilling to conclusively identify the bodies of copyright law. Some courts and scholars have even fallen prey to a kind of constitutional apathy that would permit the administration of copyright law by bastardized "hybrid" entities—separation of powers be damned. Given the marked uncertainty in this area of law, this paper next considers the constitutionality and administrative permissibility of each of the following: (1) a legislative branch CASE Board, or (2) an executive branch CASE Board. The branch of government in which the Board is ultimately found to reside will have significant impacts on the legitimacy of its new small claims resolution process.

III. Where In the World Should the CASE Board Be?

Can a copyright small claims board, as proposed by the CASE Act, be created without violating constitutional or administrative law? The answer to this question depends, in large part, on the Board's expected placement within the tripartite scheme of American government. Executive and legislative agencies are subject to different limitations on the exercise of their own powers and quasi-powers more commonly associated with another branch of government. This section describes those limitations and details the constitutional and administrative law concerns attributable to the CASE Board's possible identities as either a legislative or executive agency.

A. Locating the CASE Small Claims Board within a Legislative Agency

The CASE Act, as discussed above, places its small claims board within the U.S.

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98 *See* 5 U.S.C. § 551.

99 *See* Cole, *supra* note 16, at 9.

Copyright Office, which, itself, sits within the Library of Congress. If these entities, and the CASE Board with them, are deemed part of the legislative branch, this raises particular constitutional and administrative concerns for the permissibility of the CASE Board and its proceedings. The implications of a legislative CASE Board, situated within a Copyright Office presumed to be a legislative agency, are discussed below.

1. General constitutional concerns of delegations to legislative agencies

Delegations to legislative agencies raise a unique constitutional concern—namely, that such "intra-legislative" or "intra-branch" allocations of power might permit Congress, through its agents, to effectively legislate without abiding by the bicameralism and presentment requirements of Article I.[100] Article I of the U.S. Constitution requires Congress to legislate by passing an identical form of any proposed bill in each house; the bill must then be presented to the President for approval.[101] Any instance of lawmaking by Congress that fails to follow this procedure violates Article I. Intra-legislative delegations might also involve invasions into exclusive powers of other branches, permitting congressional aggrandizement. Though rarely discussed, the permissibility of delegations to Congress's own legislative agencies is considered by a handful of cases and scholars. Those views are discussed below.

Perhaps most persuasively, Professor Aaron Saiger cites Justice Stevens, concurring in *Bowsher v. Synar*, in concluding that the intra-branch delegation of, specifically, legislative power has been systematically rejected.[102] Congress, Justice Stevens said, must abide by bicameralism and presentment when it "seeks to make policy that will bind the Nation."[103] It may not "exercise its fundamental power to formulate national policy by delegating that power . . . to an individual agent of the Congress . . . ."[104] Justice Stevens held, with the Court, that the intra-branch delegation of "fundamental" legislative power is unconstitutional—even though delegation of some such power to executive agencies is permitted.[105] Both Saiger and Stevens leave somewhat open when a delegation is one of "legislative" power rather than judicial or executive power, which, arguably, may not be delegated by Congress at all, since Congress may not exercise such powers itself.

Practitioner and lecturer Andy Gass has further examined whether the Copyright Office is necessarily an "individual agent of the Congress" for separation of powers purposes, so as to prohibit the Office and its progeny from receiving delegations of

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100 Jiles, *supra* note 30, at 457 (citing U.S. CONST. art. I, § 7).
101 U.S. CONST. art. I, § 7.
102 Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2607–08 (2011).
103 *Id.* at 2607 (citing *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring)).
104 *Id.* (quoting *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring)).
105 *Id.* at 2608 (citing *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring)).

legislative power.[106] Where, as in this section, the Copyright Office is presumed to be a legislative agency, the answer to this question seems quite obvious. An agency belonging to and empowered solely by Congress appears to be its agent in every conceivable sense. Moreover, Mr. Gass concludes, Justice Stevens' *Bowsher* concurrence "suggests that a regulatory actor may serve two discrete supervisors—both Congress and the executive—and still count as a congressional 'agent' in the relevant sense."[107] Thus, even seemingly executive or quasi-executive functions carried out by a legislative Copyright Office do not remedy the intra-branch delegation problem—the primary constitutional concern related to creation of a legislative CASE Board. Even a "hybrid" Copyright Office is still likely an agent of Congress, ineligible to receive intra-branch delegations of legislative power, particularly as involve rule- or policymaking.

2. Can legislative bodies perform mini-adjudications?

In general, agency adjudication implicates Article III, section 1 of the Constitution, which vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[108] The Court in *Commodity Futures Trading Commission v. Schor*[109] described two functions for this provision: "to protect the role of an independent judiciary and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government."[110] However, the Court also concluded that a litigant's Article III right is not absolute.[111] Instead, it may be waived where the litigant voluntarily chooses to submit to agency jurisdiction.[112] Of course, *Schor* permits agency adjudication on limited grounds and only in the context of executive agencies—it does not speak to the possibility of legislative agency adjudication. In fact, the legal community has engaged in little if any discussion of legislative agency adjudication. Particularly given intra-branch delegation concerns not present in executive agency adjudication, there is reason to conclude legislative agency adjudication is impermissible.

As summarized by Justice Stevens, the intra-legislative delegation problem targets binding policy creation without bicameralism and presentment; this issue is particularly problematic in the context of adjudicative functions exercised by legislative agencies since adjudication often makes policy.[113] In many instances, the process of

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[106] *See, e.g.*, Gass, *supra* note 32, at 1061.

[107] *Id.* at 1062 (citing *Bowsher*, 478 U.S. at 746 (Stevens, J., concurring)).

[108] U.S. CONST. art. III, § 1.

[109] 478 U.S. 833 (1986).

[110] Cornell Law School, *Agency Adjudication*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-1/agency-adjudication (last visited Aug. 3, 2021) (citing *Schor*, 478 U.S. at 833).

[111] *Id.* (citing *Schor*, 478 U.S. at 848).

[112] *Id.* (citing *Schor*, 478 U.S. at 848–49).

[113] *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring); *Adjudication (Administrative State)*, BALLOTPEDIA, https://ballotpedia.org/Adjudication_(administrative_state) (last visited Aug. 3, 2021). The idea here is that Congress, which is empowered to make laws, cannot also create binding national policy on how those laws are to be enforced without enacting the policy itself as law. It is

agency adjudication involves much more than "plugging a pre-existing [statutory] meaning into a given set of facts."[114] Instead, it involves significant policy considerations as well as action that looks suspiciously similar to judicial law-interpreting.[115] In *SEC v. Chenery Corporation*,[116] the Court acknowledged this reality, but held that executive agencies are permitted to impose policy-based rules "through the vehicle of an adjudicatory proceeding."[117] Legislative agencies have been given no such authorization. Adjudication by a legislative CASE Board is thus immediately suspect under the constitutional concerns raised above.

Given the complexities of the copyright issues the CASE Board appears authorized to adjudicate—including the fair use defense—it seems unlikely plug-and-chug adjudication would be the norm; more likely, Board adjudications would be, in at least some sense, policy-oriented.[118] The fair use defense is a multi-factor balancing test with a complex and volatile judicial history.[119] The test is used by courts to determine whether otherwise illegal appropriation of copyrighted material should be permitted, primarily based on incentives balancing and policy-focused considerations, like whether the use was for educational purposes.[120] Fair use ultimately determines what is more important in a particular case, the rights of the creator or public access to the creative work. Because the fair use test invokes the discretionary judgment of the decision-maker, and because case law implementing the defense provides limited guidance, consideration of fair use by the CASE Board will almost surely involve at least the application, if not the creation, of agency policy. Per Justice Stevens, Congress may not delegate national policy formulation to an agent of Congress.[121]

Notably, the CASE Act does not purport to create precedent through Board proceedings—even precedent that would bind the Board itself; this might call into question whether the Board is, in fact, formulating "national" policy.[122] Even so, CASE adjudications might frequently involve "impos[ition] of agency policy on individual parties."[123] The Copyright Office is heavily engaged in research and recommenda-

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only the executive branch that is empowered to create non-statutory discretionary enforcement policy, as part of its role in administering the law, something the legislature is not empowered to do.

114 William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 352–53 (2000).

115 *Adjudication (Administrative State)*, *supra* note 113; Araiza, *supra* note 114, at 352–53.

116 332 U.S. 194 (1947).

117 Araiza, *supra* note 114, at 354 (citing *Chenery*, 332 U.S. at 203).

118 *See, e.g.*, Kupferschmid, *supra* note 8; Kate Ruane, *The CASE Act's Flaws Threaten Free Speech and Congress Must Fix Them*, THE HILL (Oct. 7, 2019).

119 *See* 17 U.S.C. § 107.

120 *See More Information on Fair Use*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/fair-use/more-info.html (last visited Aug. 3, 2021); 17 U.S.C. § 107 (describing the fair use defense).

121 Saiger, *supra* note 102, at 2607–08 (quoting *Bowsher*, 478 U.S. at 737 (Stevens, J., concurring)).

122 CASE Act § 1507(a)(3). *See Bowsher*, 478 U.S. at 737 (Stevens, J., concurring).

123 Araiza, *supra* note 114, at 352.

tions of copyright policy, which, normally, must be enacted by Congress through bicameralism and presentment.[124] The CASE Act's declaration that the Board may not rely on its own arguably policy-driven determinations in future decisions as formal precedent is an insufficient check against bicameralism and presentment concerns. The Board might still rely informally on its past determinations and, in cases dealing with ambiguous concepts like fair use, would still impose agency policy on individuals who collectively make up "the nation." Thus, although almost never discussed, it seems unlikely legislative agencies can constitutionally perform mini adjudications as proposed by the CASE Act.

While several additional counterarguments can be made to mitigate constitutional concerns related to the risk of legislative agency policymaking, these rebuttals are inadequate. First, it is true that the CASE Act permits inappropriate cases to be spun off to the courts if they contain subject matter not properly evaluated by the Board.[125] This might include cases involving unsettled judicial doctrines, where the risk of impermissible agency policymaking is particularly great. However, this decision on the propriety of Board adjudication would be made by the Board itself—an improper method for checking the exercise of potentially unconstitutional power by the legislative branch.[126] Second, the Board will be bound by judicial precedent, which might be viewed as eliminating any opportunity for policymaking, or even policy-implementing, by the Board itself.[127] However, the fact that the Board will be bound by judicial precedent is no check against potential policymaking where judicial precedent is divided or otherwise unclear, as in the case of fair use.[128]

A further general counterargument to the position that legislative agencies may not adjudicate is that the Copyright Office already exercises adjudicatory power, evincing the permissibility of CASE Board adjudication. The Copyright Office hears appeals from denials of registrations and, until recently, Copyright Arbitration Royalty Panels (CARPs) had power to resolve disputes between claimants to proceeds of compulsory licenses.[129] Unlike patents, copyrights are created automatically when a creative work is fixed in a tangible medium of expression; they are not "issued" and do not require registration to exist.[130] Registration is a voluntary component of Office and Library recordkeeping and provides certain rights of recovery not otherwise available.[131] Realistically, hearing appeals from denials of registration looks less like adjudication of a right and more like an ancillary activity closely related to the Copyright Office's role of facilitating copyright registration. Furthermore, CARPs have been replaced by the Copyright Royalty Board, a separate entity within the Library of Congress, not encompassed by the Copyright Office; having been expelled from

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124 *See* 17 U.S.C. § 701(b).
125 CASE Act § 1506(f)(3).
126 *See id.*
127 CASE Act § 1503(b)(1).
128 *See id.*
129 Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 154 (2004).
130 *Copyright in General*, *supra* note 84.
131 *See id.*

the Copyright Office, CARPs cannot credibly evince the permissibility of Copyright Office or CASE Board adjudication.[132] Finally, even if the Copyright Office does currently wield some adjudicative power, that is not evidence it does so constitutionally.

Even disregarding the risk of legislative agency policymaking, delegations of adjudicative power to legislative agencies also pose important due process concerns. Due process concerns are present in the context of quasi-judicial actions by executive agencies as well as legislative ones, but these concerns are perhaps more acute in the legislative arena. Executive agencies are bound by formal procedures for agency adjudication, articulated in the APA.[133] Presumably, these procedures serve to create due process safeguards and to constrain agency adjudicative power within constitutional bounds. Legislative agencies, in contrast, are generally not subject to the APA, so adjudicative power granted to a legislative CASE Board would appear to lack important substantive and procedural safeguards.[134] The Copyright Office has been explicitly made subject to the APA, perhaps reducing this concern in context.[135] However, the freedom of legislative agencies from the APA or comparable limiting legislation may suggest Congress did not intend legislative agencies *in general* to exercise adjudicative powers. Also, the extent to which CASE Board officials will be subject to APA requirements, and thus constraints on their adjudicative power, remains unclear.

Beyond descriptive statements above on the constitutional impermissibility of adjudication by a legislative CASE Board, normative arguments also exist for positioning any such board elsewhere in the administrative framework. Much as the creation of national policy by legislative agencies likely violates bicameralism and presentment, rulemaking by legislative agencies is similarly problematic. The Copyright Office itself seems to have acknowledged this reality. Rulemaking procedures related to the triennial digital rights management exception of the 1998 DMCA represented the Office's first foray into substantive rulemaking.[136] It appears the Office also intends to issue substantive rules implementing the CASE Act, as evinced by its March 26, 2021 initiation of notice-and-comment. Most likely, the Office has not, until recently, considered itself entitled to such authority. Although adjudication is not, itself, a form of rulemaking, rules often come out of adjudications.[137] Thus, it would perhaps be more efficient to house the desired small claims board in a federal entity with a broader range of certain constitutional powers, e.g., an executive agency, rather than

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[132] Kali Murray, Sapna Kumar, Jason Mazzone, & Hannibal Travis, *An Uncomfortable Fit?: Intellectual Property Policy and the Administrative State*, 14 MARQ. INTELL. PROP. L. REV. 441, 447 (2010); Perzanowski, *supra* note 71, at 751–52.

[133] Cole, *supra* note 16, at 9 (citing 5 U.S.C. § 551(1)).

[134] *See* 5 U.S.C. § 551; *Wash. Legal Found.*, 17 F.3d at 1449.

[135] 17 U.S.C. § 701(e).

[136] Terry Hart, *Can the Copyright Office Regulate?*, COPYHYPE (Nov. 4, 2010), http://www.copyhype.com/2010/11/can-the-copyright-office-regulate/.

[137] *See, e.g.*, *Adjudication (Administrative State)*, *supra* note 113.

one whose adjudicative powers, even if accepted, might be cut off at the knees.

In sum, descriptive arguments—primarily related to the impermissibility of legislative agency policymaking absent bicameralism and presentment—suggest that a legislative CASE Board cannot constitutionally perform adjudications. Similarly, normative arguments suggest that a legislative CASE Board should not perform adjudications since such proceedings would be more effectively carried out by executive bodies with a wider range of unquestioned administrative powers. In the end, the permissibility and advisability of a legislative CASE Board may come down to a determination of whether the Board is actually engaged in adjudication or in some other form of dispute resolution that does not constitute policymaking and does not involve the exercise of powers not properly held by the agency. That possibility is addressed below.

3. Are CASE proceedings adjudications or non-judicial arbitrations?

Even if it is true that legislative agency adjudication is constitutionally impermissible, some question may remain as to whether CASE Board proceedings are "adjudications" in a formal sense. If CASE proceedings are not "adjudications" but are instead a form of non-judicial arbitration, do the same prohibitions and separation of powers concerns discussed above still apply? If not, construing CASE proceedings as arbitrations or some other non-judicial proceeding might permit the Board's placement in a legislative Copyright Office.

The CASE Board procedure is a heavily streamlined version of district court copyright litigation. Upon submission of a claim by a copyright owner and acquiescence, on an opt-out basis, by the alleged infringer, the CASE Board will receive limited discovery, review written documents, and conduct abbreviated hearings.[138] Qualifying claims deal primarily with alleged infringement valued below a $30,000 monetary cap.[139] At the conclusion of proceedings, the CASE Board will make independent factual determinations based on a preponderance of the evidence standard and render a final determination.[140] The CASE Board will be bound by judicial precedent.[141] However, its determinations will not have precedential effect, even on its own future proceedings.[142] Parties can request review of these decisions by the Register of Copyrights or can appeal to the federal court system under very limited circumstances.[143] Presumably, Board determinations will be enforceable in federal court.

The CASE Act describes the Board's activities as constituting an "alternative

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[138] CASE Act § 1506.
[139] CASE Act § 1504.
[140] CASE Act §§ 1503, 1506.
[141] CASE Act § 1503.
[142] CASE Act § 1507(a)(3).
[143] CASE Act § 1508.

dispute resolution process."[144] That the CASE Board purports to engage in alternative dispute resolution (ADR) does not necessarily save its activities from characterization as adjudicative. Judicial engagement in early ADR was institutionalized in amendments to Federal Rule of Civil Procedure 16 in 1983.[145] Though initially described as "extrajudicial," ADR was, through subsequent amendments recognizing its judicial nature, "moved inside the courts."[146] ADR "has become a part of the judicial process and no longer stands apart from it."[147] In this sense, ADR appears to be merely a form of adjudication; thus, such a characterization might not save CASE Board activities from the objections above.

It is true that, under the Administrative Dispute Resolution Act (ADRA),[148] executive agencies are encouraged to employ ADR.[149] Executive agencies have long been permitted to exercise some judicial-looking power ancillary to administration of particular statutes. Some courts and scholars even theorize that because arbitration is a voluntary proceeding it can be conducted using purely executive rather than judicial or quasi-judicial power.[150] However, since legislative agencies do not, as a normative matter, engage in the executive function of administering the law, there is no reason to permit them to exercise powers "ancillary" to that function.[151] It is uncertain whether legislative agencies may engage in arbitration at all.

It seems highly unlikely that Congress would extend authorization to conduct ADR proceedings to legislative agencies for the first time through legislation as obscure as the CASE Act. Congress, it is often said, does not "hide elephants in mouseholes."[152] Although executive agencies began employing ADR before it was officially authorized, Congress met this trend with the ADRA—expansive legislation limiting use of ADR by these bodies.[153] The ADRA employs the same definition of "agencies" as the APA, meaning it excludes "the Congress" and legislative branch agencies.[154] Congress has proposed no similar legislation limiting use of ADR in legislative agencies, and it is difficult to imagine that Congress intended legislative agencies to use this tool but did not see a need to constrain that use.

The Copyright Office might constitute an agency under the ADRA, since the Office has been made subject, through legislation, to the APA; the ADRA defines

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144 *See e.g.*, CASE Act § 1509(b).
145 Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 230 (1995).
146 *Id.*
147 *Id.* at 235.
148 Administrative Dispute Resolution Act (ADRA) of 1996, 5 U.S.C. §§ 571–584 (1996).
149 *Id.*
150 John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV 143, 186–87 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361981 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 844–50 (1986)).
151 Cole, *supra* note 16, at 7 (citing *Bowsher*, 478 U.S. at 726).
152 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).
153 Resnik, *supra* note 145, at 236–37.
154 5 U.S.C. § 571(1); 5 U.S.C. § 551.

"agency" with reference to the APA.[155] Notably, this would not necessarily mean that the CASE Board is also such an agency under the ADRA. The CASE Act says nothing about the Board's subjection to the APA, and the Board could be viewed as a separate body for APA purposes in the same way the Copyright Office is arguably separate from the Library. The unanswered question is whether an entity excluded from the APA as part of "the Congress," but made subject to the APA for practical purposes through specific legislation, is or is not an agency for purposes of the ADRA. Regardless, even if the CASE Board is deemed to be an agency under the ADRA, it appears that CASE proceedings might not satisfy ADRA constraints. For instance, the ADRA permits arbitration only where voluntary and where all parties consent.[156] A major criticism of the CASE Act is that the new regime is not sufficiently voluntary and improperly equates silence with consent.[157]

The first problem is the CASE Act's "opt-out" structure. After a copyright claimant elects to use the CASE system and serves notice, the alleged infringer has sixty days to decline resolution by the CASE Board.[158] The claimant may then sue in federal court. Defendants must actively decline CASE jurisdiction, navigating the Act's convoluted opt-out procedures.[159] If a defendant fails to opt out, a default judgment of as much as $30,000 may be entered.[160] This structure seems to run afoul of the ADRA's voluntariness/consent requirement, permitting adverse judgments to be entered without the involvement, let alone affirmative consent, of defendants.

In evaluating whether silence or inaction, i.e., failure to opt out, can ever constitute affirmative, voluntary consent sufficient to enforce an agreement to arbitrate under CASE, a useful contract law comparison can be made. This comparison is particularly persuasive since, under the Federal Arbitration Act, agreements to arbitrate are typically enforced as contracts.[161] Under contract law, acceptance, as required to formulate a contract, typically requires either written or verbal consent.[162] Only in limited circumstances will silence or inaction suffice.[163] These include circumstances where (1) prior dealings between parties indicate they have a custom of treating silence as consent, (2) parties have explicitly agreed that silence may constitute consent, or (3) the silent party acts on the agreement, signaling consent to its terms.[164]

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155 17 U.S.C. § 701(e); 5 U.S.C. § 571(1).

156 5 U.S.C. § 575(a)(1).

157 *See, e.g.*, Samuelson, *supra* note 1, at 694–97.

158 CASE Act § 1506.

159 *See* CASE Act § 1506(i).

160 CASE Act § 1506(u); Kristin Lamb, *No Copyright Case Too Small: Content Creators Rejoice or Casual Infringers Beware?*, NAT'L L. REV. (Nov. 1, 2019), https://www.natlawreview.com/article/no-copyright-case-too-small-content-creators-rejoice-or-casual-infringers-beware.

161 Federal Arbitration Act (FAA), 9 U.S.C. § 2 (stating that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

162 *See, e.g.*, *When Can Silence Be Considered Acceptance?*, WARREN GAMMILL & ASSOCS. (Jun. 17, 2016), https://www.gammilllaw.com/blog/2016/06/when-can-silence-be-considered-acceptance.shtml (last visited Aug. 3, 2021).

163 *Id.*

164 *Id.*

Neither these circumstances nor comparable ones appear to apply in the CASE Act setting. Particularly given the CASE Act's novelty, there is nothing to indicate any custom, expectation, or agreement that silence or inaction constitutes consent. While the CASE Act apparently attempts to establish a new default rule for giving consent, the rule is highly suspect, particularly where litigants are not reasonably aware that such a rule exists.

That the CASE Act clearly indicates the effect of failure to opt out is no defense; copyright defendants are unlikely to know the CASE Act exists or applies to them, let alone that its provisions are drastically different from those of long-standing federal law. Those most likely to be sufficiently aware of the opt-out requirement to be considered to have given voluntary consent are sophisticated parties who regularly deal with copyright law. Casual, individual, and inadvertent infringers are the least likely to be aware of the opt-out provision or to be able to navigate the steps required to successfully opt out. Unfortunately, these parties are also the worst positioned to pay potentially exorbitant default judgments. The CASE system was created to solve the problem of unlitigated copyright small claims through a streamlined litigation process, not to ensure that unlitigated small claims regularly become unlitigated default judgments. Even if an opt-out system might be sufficiently voluntary with respect to sophisticated litigants, this is not the primary demographic the CASE system was designed to benefit.[165]

The ADRA, and general tenets of ADR, also suggest proceedings must be fair and unbiased.[166] CASE Act critics suggest that Board proceedings may be unduly influenced by the intrinsically claimant-friendly Copyright Office, resulting in decisions unfairly skewed in favor of copyright claimants.[167] The CASE Act itself purports to create a Board relatively free of Copyright Office influence, despite being housed within the Office. For example, the Act prohibits CASE officials from consulting with the Register of Copyrights on the facts of any particular matter before the Board or the application of law to those facts.[168] However, Board decisions must comply with applicable regulations issued by the Register, and the Board may consult with the Register on general issues of law.[169] CASE Board officers will also be appointed by the Librarian at the recommendation of the Register, while non-officer

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[165] Apart from problems raised in the context of the ADRA, the opt-out nature of the CASE Act may also create other constitutional issues since, by failing to opt out, the respondent waives their right to a jury trial in federal court. Due process concerns might also apply. *See, e.g.*, Meredith Filak Rose, *What a Reasonable Copyright Small Claims Court Would Look Like*, PUB. KNOWLEDGE (Aug. 3, 2021), https://www.publicknowledge.org/blog/what-a-reasonable-copyright-small-claims-court-would-look-like/.

[166] 5 U.S.C. 573 (describing arbiters as "neutrals").

[167] *See, e.g.*, Samuelson, *supra* note 1, at 708 (considering potential implicit bias of CASE Board officers).

[168] CASE Act § 1503(b).

[169] *Id.*

CASE Board attorneys will be hired by the Register.[170] The independence and objectivity of the Board is therefore still in significant doubt. Thus, even if ADR is not merely a form of adjudication, and even if the CASE Board would be an agency under the ADRA, it seems unlikely that arbitration proceedings can be carried out by the CASE Board, simply based on ADRA requirements, including voluntary consent and fair and unbiased proceedings. In sum, the fate of a legislative branch CASE Board is decidedly grim.

B. Locating the CASE Small Claims Board within an Executive Agency

Having reviewed the implications of a CASE Board deemed to be part of the legislative branch, this section next addresses the constitutional and administrative law implications of an executive branch CASE Board. The CASE Board might be deemed an executive body, even without reorganization of existing copyright administrative law. If the functional approach to agency identification prevails, it may be that the Copyright Office and CASE Board simply *are* executive, regardless of their location within the Library of Congress. Alternatively, it may be that the Copyright Office, and the CASE Board with it, is a sort of "honorary" executive agency, exercising powers unavailable to other legislative bodies due to its subjection to the APA.

An executive CASE Board could also be created through organizational reform. Proposals to reorganize the Copyright Office as a separate executive or semi-executive agency outside the Library may eventually find their footing, giving the CASE Board a more obviously executive home. Alternatively, a CASE-type board could be situated within an existing executive agency, like the Patent and Trademark Office (PTO). Because this section attempts to address the constitutionality of the CASE Board as the law currently stands, it operates under the first set of possibilities above, largely disregarding opportunities for organizational reform. The implications of an executive CASE Board, situated within a Copyright Office presumed to be an executive agency, are discussed below.

1. General constitutional concerns of delegations to executive agencies

Congressional delegations of power to executive agencies invoke a variety of concerns related to the separation of powers. Delegations of specifically legislative power evoke fears regarding forfeiture of congressional power and abdication of congressional duties. The Supreme Court has stated loudly that "the legislative power of Congress cannot be delegated."[171] Yet, these concerns have not deterred frequent, broad delegations of power to executive agencies. This is thanks to an important caveat emerging from recent precedent: Congress may not delegate its legislative power to another branch *absent an "intelligible principle" guiding and limiting the delegation*.[172] Examples of intelligible principles include requirements to act in the "public

[170] CASE Act § 1502(b).
[171] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).
[172] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

interest, convenience, or necessity" or in a "just and reasonable" manner.[173] Though ambiguously defined, the term is articulated in recent Supreme Court precedent as focusing on the requirement of specific policy objectives.[174]

Delegations of *non-legislative,* quasi-judicial power to executive agencies raise additional constitutional concerns. The first concern relates to aggrandizement of the executive branch. Allowing executive agencies to act as judges appears, facially, to violate Article III, section 1 of the U.S. Constitution, which states: "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."[175] Such delegations appear to grant to executive agencies powers properly held by the judiciary. However, the Supreme Court has held that executive agencies may permissibly perform certain quasi-judicial tasks, including fact-finding and adjudication of public rights, so long as those tasks are subject to adequate judicial review.[176] The distinction between public and private rights, an essential concept in the context of intellectual property rights adjudication by agencies, is discussed at length below.

Though not central to this paper, a second constitutional concern related to delegations of quasi-judicial power to executive agencies, as employed in executive agency adjudication, is preservation of litigants' due process rights. Due process concerns are also present in the context of legislative agency adjudication. Unlike most legislative agencies, however, executive agencies are subject to the APA, which includes specific procedural provisions reigning in agency adjudication.[177] This fact, in theory, safeguards due process in executive agency proceedings. Even so, these safeguards are almost surely incomplete; thus, due process concerns are omnipresent in any discussion of agency adjudication.

2. The administrative law doctrine of public and private rights

As just noted, allowing executive agencies to perform adjudicative functions appears, facially, to violate Article III, section 1 of the Constitution.[178] Despite this apparent restriction, in the early part of the twentieth century, executive agencies "began to adopt roles typically reserved for the judiciary, arguably with the blessing of judges and to the benefit of certain adjudications."[179] For instance, "the Court developed through common-law adjudication an 'appellate review' model of administrative

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[173] *Intelligible Principle Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/i/intellligible-principle/ (last visited Aug. 3, 2021).

[174] Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 267 (2017); Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

[175] U.S. CONST. art. III, § 1.

[176] *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 88–94 (1932).

[177] 5 U.S.C. §§ 551–59.

[178] U.S. CONST. art. III, § 1.

[179] Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 326–27 (2017).

agency oversight as a means to avoid being called upon to decide 'matters that were not properly judicial but were rather administrative in nature.'"[180] In theory, certain subject matter is more properly adjudicated by agencies with expertise in administering the statutory regimes at issue. Over the years, the Supreme Court has attempted to clarify which matters are properly within the purview of executive agencies and which matters may not be removed from Article III court jurisdiction.

In *Crowell v. Benson*,[181] the Court articulated an important test for determining the appropriateness of executive agency adjudication: the public versus private rights distinction.[182] Public rights, the Court said, appear to be rights the agency has full reign to decide; such adjudications raise no constitutional problems.[183] Although the Court's description of public rights is far from clear, it is generally agreed that public rights run, in at least some sense, between private persons and the government.[184] They generally include rights created by the State, which it could have declined to create at all.[185] Public franchises are an obvious example. In contrast, private rights, like those stemming from common law claims, run between private persons. Private rights questions are more complex and can be delegated under more limited circumstances, like where the agency engages in only limited fact-finding, rather than determination of true legal questions, subject to adequate judicial review.[186]

Subsequent case law on the public/private rights distinction is checkered. In *Northern Pipeline Construction Company v. Marathon Pipeline Company*,[187] the Court issued a more formalistic opinion.[188] The Court concluded that Congress may delegate adjudicative power to non-Article III courts in only three instances: (1) territorial courts, (2) courts martial, and (3) legislative courts and executive agencies in cases of public rights.[189] The plurality opinion appeared to entirely disavow, rather than merely restrict, agencies' authority to adjudicate private rights.[190] A few years later, in *Commodity Futures Trading Commission v. Schor*, the Court effectively repudiated *Northern Pipeline* and reaffirmed *Crowell*.[191] The Court held that Article III "does not confer on litigants an absolute right to plenary consideration of every nature of claim by an Article III court"—even in the case of private rights.[192] Private rights

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[180] Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 68 (2015).

[181] 285 U.S. at 50.

[182] *Id.* at 50–51.

[183] *See id.* (discussing Congress's power to delegate adjudication of public rights to administrative bodies).

[184] *See, e.g.*, *id.*

[185] STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY, 195 (8th ed. 2017).

[186] *See Crowell*, 285 U.S. at 88–94 (discussing the scope of authority of administrative bodies).

[187] 458 U.S. 50 (1982).

[188] *See generally id.*

[189] *See id.* at 64–70 (recognizing three instances where grants of adjudicative power to non-Article III courts are "consistent with, rather than threatening to" the separation of powers).

[190] *See id.* (recognizing constitutional delegations to legislative courts and executive agencies in cases of public rights, notably without mention of comparable permissions for private rights).

[191] *See generally Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 833 (1986).

[192] *Id.* at 848.

are judicable by executive agencies, but only where such adjudication presents no significant threat to the separation of powers.[193] The *Schor* Court also indicated that agency-judicable private rights are often those wrapped up in a federal regulatory scheme or, more loosely, created by federal law.[194]

Behind these cases lurk two core justifications for the unique treatment of public rights and the adjudication of such rights by executive agencies. First, States enjoy sovereign immunity and cannot be sued without their consent.[195] If it is permissible for the State not to consent to suit at all, it must be permissible for the State to allow such litigation but to assign it to a non-Article III tribunal, like an executive agency.[196] Second, a public right is a right created by the State rather than, for example, a common law right.[197] The State could have declined to create the right at all.[198] Thus, individuals are better off with the right as enforced by a non-Article III adjudicator than with no right at all.[199] Agency adjudication of private rights must rest, instead, on alternative justifications like connection to a federal regulatory scheme or the existence of special circumstances that limit separation of powers concerns.

The Court continues to struggle with determining when non-Article III bodies can adjudicate private rights. In the face of ongoing legal development, this paper views the cases above as standing for the following proposition: (1) public rights are fully judicable by executive agencies, and (2) adjudication of private rights raises significant constitutional concerns and is rarely permissible, except under limited circumstances that mitigate separation of powers concerns, as where private rights are closely tied to a federal regulatory scheme. This paper does not function to provide a complete history or description of the public/private rights distinction. Instead, the distinction, as just summarized, will be made and employed in determining the permissibility of copyright adjudication by an executive branch CASE Board. Notably, the public/private rights distinction has no bearing on the permissibility of executive agency arbitration, another potential characterization of CASE Board proceedings that is discussed herein.

3. Are copyrights public or private rights?

Categorization of copyrights as public or private rights requires substantial consideration of the history of American copyright law. American copyright law is governed, first and foremost, by the Patent and Copyright Clause of the U.S. Constitution.[200] This clause provides Congress with the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the

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193 *Id.* at 853–54.
194 *Id.* at 840 (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593 (1985)).
195 BREYER, *supra* note 185, at 195.
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *See* U.S. CONST. art. I, § 8, cl. 8.

exclusive right to their respective writings and discoveries."[201] The clause creates an incentives-based scheme, utilizing individual rights, which often look like private property rights, to secure collective benefits.

Unlike patents, which have their origins in British law as "royal prerogative[s]," copyrights were first secured by courts at common law, pointing to a historical status as private rights.[202] In 1783, Connecticut became the first state to approve an "Act for the encouragement of literature and genius," stating:

> [I]t is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.[203]

Although this prelude "might seem to strongly favor authors' rights," the Act also specified that "books were to be offered at reasonable prices and in sufficient quantities, or else a compulsory license would issue."[204] This dual private/public focus mirrors the language of the Patent and Copyright Clause and has remained characteristic of American copyright law.

The earliest federal copyright statute was approved on May 31, 1790, "for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies [for limited times]."[205] This statute strengthened the emphasis of American copyright law on private means as a route to public ends. The advent of federal copyright law also established a dual system of common law copyright for unpublished works and statutory copyright for published works.[206] Common law copyright existed in the states until complete federal preemption was imposed by the 1976 Copyright Act for all works created after January 1, 1978; it was at that time that American copyright law transformed completely into a federal statutory system.[207]

Even after the transition of the American copyright system from common to statutory law, the conception of copyrights as private rights remained, with little consideration given by courts or scholars to the relevance of copyright's larger public purpose.[208] Instead, "[t]hrough most of its history American copyright law adopted a

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201 *Id.*

202 Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2609–10 (2019).

203 B. Zorina Khan, *An Economic History of Copyright in Europe and the United States*, ECON. HISTORY ASS'N (Mar. 16, 2008), https://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/.

204 *Id.*

205 *Id.*

206 *Id.*

207 Mossoff, *supra* note 202, at 2609–10, 2610 n.98.

208 *See, e.g.*, Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1114–16 (2020).

relatively straightforward understanding of its functioning, premised on its structure as a private right directed at governing horizontal interaction between creators and copiers through a regime of civil liability."[209] This private law conception "treated copyright as an individual *right*, vested in the author and with correlative obligations (duties) imposed on others."[210] This formulation was maintained by legal formalists, who described copyrights as "negative" private rights, i.e., rights against another person *not* to have something done.[211] Legal realists, though they had less use for the public/private rights distinction, also regarded copyright as a private law institution in which the "primary purpose" was to "benefit the author."[212] Judicial precedent was well aligned with this view.[213]

It was not until the 1940s, immediately following the New Deal era, that participants in the American legal system began to question the private nature of copyrights.[214] Some commentators have attributed this skepticism to a shift in legal philosophies, from formalism and realism to more innovative jurisprudential ideas, like "legal process theory."[215] However, it seems more likely that the drastic expansion of the New Deal administrative state began to enlarge the expected role of copyright law and its agencies, developing for copyright law a more pronounced connection to a growing federal regulatory scheme and a more public focus. Regardless, the entire history of American copyright law appears to suggest the following: copyrights are private rights that run between individuals but are closely connected to broader social goals of creation, likely representing a federal regulatory scheme.

Why, it may be asked, are copyrights not simply public rights, particularly given that patents have recently been declared to be public in nature?[216] Why, instead, complicate the equation by continuing to refer to copyrights as private rights at all, subject to executive agency adjudication only on the basis of their connection to a "regulatory scheme"? In *Oil States Energy Services v. Greene's Energy Group*,[217] the Supreme Court upheld the constitutionality of inter partes review (IPR), an executive agency proceeding of the Patent Trial and Appeal Board (PTAB).[218] IPR is a procedure for

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209 *Id.* at 1123.

210 *Id.* at 1124.

211 *Id.* at 1128.

212 *Id.* at 1140 (quoting Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506 (1945)).

213 *See, e.g.*, Baker v. Seldon, 101 U.S. 99 (1880); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); Bobbs-Merrill v. Straus, 210 U.S. 339 (1908). "*Baker*, *Burrow-Giles*, and *Bobbs-Merrill* together symbolize the judicial crystallization of the private law conception of copyright during the Classical era, even though they each dealt with different doctrinal questions. Noticeable in each opinion is the absence of any effort to locate the purposes of copyright in goals external to the interests of the private litigants, or in public-regarding (or social) policy considerations. They each take copyright's structure as a private 'right' seriously. . . ." Balganesh, *supra* note 208, at 1135.

214 *See* Balganesh, *supra* note 208, at 1145.

215 *Id.* at 1147–50.

216 *See* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1373 (2018).

217 *Id.*

218 *Id.* at 1379. *See, e.g.*, *Inter Partes Review*, U.S. PATENT & TRADEMARK OFFICE,

challenging the validity of an issued patent on grounds that the patent should never have been issued at all.[219] The Court concluded that executive agency adjudication in the form of IPR was permissible on the basis of the public rights doctrine; for IPR purposes, the Court found, patents are public rights, similar to public franchises, which arise between the government and others.[220]

The conclusion in *Oil States* does not render copyrights public rights. Copyrights differ from patents in several ways. First, copyrights have a long common law history, while patents originated as royal favors under British law; common law rights are private rights.[221] Second, copyrights are less like public franchises in that they come into existence automatically upon fixation of a creative work.[222] The Copyright Office makes determinations on registration requests, evaluating claims of existing copyright, but does not actually *issue* copyrights. This distinction is particularly important since IPR is a reevaluation by the agency of the appropriateness of its decision to issue a patent.[223] It was the granting of patents and reconsideration of such grants that the Court in *Oil States* found involved public rights.[224] It is unclear whether the Court, if faced with executive agency adjudication of a patent *infringement* claim, would have come to the same determination on the public nature of patents. The Court stated, "We address the constitutionality of [IPR] only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum."[225] The silence of the Supreme Court on the permissibility of infringement adjudication by the PTAB cannot help but give pause in considering the permissibility of CASE Board infringement proceedings. It appears infringement proceedings are likely to involve private rights.

Interestingly, like IPR, the Copyright Office's adjudication of appeals from denials of registration appears to involve public rights. In fact, in the instance of registration appeals, there is typically no third person to whom a party's private right could possibly run. However, it seems likely that copyrights themselves, regardless of their facilitation of broader social goals, ultimately run between individuals. Although copyright and patent law both purport to serve the same collective goal of incentivizing creation under the Patent and Copyright Clause, Congress has chosen to pursue that goal differently in each of these two legal arenas.

Assuming that copyrights are private rights that run between individuals, at least in the context of infringement claims, and that those rights are connected to a federal regulatory scheme, the remaining question is this: is the connection to a federal regulatory scheme sufficiently strong to justify executive agency adjudication and to

https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review (last visited Aug. 3, 2021).

219 *See Inter Partes Review*, *supra* note 218.

220 *Oil States*, 138 S. Ct. at 1374.

221 *Id.*

222 *Copyright in General*, *supra* note 84.

223 *See, e.g.*, *id.*

224 *Oil States*, 138 S. Ct. at 1374.

225 *Id.* at 1379.

mitigate separation of powers concerns? As Copyright Office power and the focus of copyright law on the collective good continue to mount, the relationship of copyright law to such a scheme grows more pronounced. In addition, *Schor* suggests that connection to a federal regulatory scheme may not be the only circumstance where private rights are judicable by executive agencies; if consent to CASE proceedings constitutes an agreement to arbitrate a private right, Board adjudication appears permissible, regardless of the regulatory scheme question.[226]

Schor permits parties to waive their right to Article III adjudication by conferring on a third party, like an arbiter, the legal authority to resolve their dispute.[227] According to Professor John Harrison, commenting on *Schor*:

> When private people make a contract to arbitrate, they give one another a right to demand compliance with the arbitrator's award. . . . The arrangement in *Schor* thus can be explained as transactions in which the government acquires a new proprietary interest with the consent of private parties. That interest is a power to bind them the way an arbitrator does. It is acquired in return for a government benefit. For Schor, the benefit was access to the CFTC dispute-resolution process, which was designed to be less costly than litigation [much like CASE proceedings]. Once the government acquires a power like a private arbitrator's, the executive may exercise that power the way it exercises any other proprietary right of the government. The exercise of public rights by the executive thus can produce results quite similar to the adjudication by a court of a suit between private parties. Producing those results, however, requires only executive and not judicial power. Private parties cannot add to the constitutional powers of government officials, but they can engage in transactions, like contracts, that give the government new legal powers in its proprietary capacity.[228]

Assuming agreement to CASE proceedings constitutes a valid agreement to arbitrate, executive agency determination of a private rights issue, whether or not connected to a federal regulatory scheme, is almost surely permissible. Indeed, separation of powers concerns are likely entirely assuaged since it appears an executive agency arbitrator in this context exercises only executive, rather than judicial, power.[229]

If, as previously considered, the CASE Act fails the requirements of federal arbitration under the ADRA because of its opt-out structure and potential for unfairness,

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[226] Harrison, *supra* note 150, at 186–87 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849–50 (1986)).

[227] *Id.* at 187 (citing *Schor*, 478 U.S. at 849–50; 9 U.S.C. § 2 (specifying that agreements to arbitrate shall be "valid, irrevocable, and enforceable," except insofar as subject to revocation as is any contract)).

[228] *Id.* (citing *Schor*, 478 U.S. at 844, 849–50).

[229] *Id.*

an executive branch CASE Board may simply rely instead on the nature of copyrights as private rights closely related to a federal regulatory scheme in order to conduct pure adjudicative proceedings. In other words, it should rely on properly delegated quasi-judicial powers of adjudication rather than executive powers of arbitration. In either case, it appears the opportunity for constitutional operation of an executive branch CASE Board is relatively great.

IV. The CASE Act, an Administrative Law Refugee: Alive or Dead?

Up to this point, this paper has considered the administrative identities—executive or legislative—of the Library of Congress, the Copyright Office, and the CASE Board. It has also considered whether CASE proceedings might be a form of ADR, as the CASE Act suggests, rather than pure adjudicative proceedings. Finally, it has evaluated constitutional concerns stemming from implementation of CASE proceedings by the executive and legislative branches. This section assesses whether, based on the considerations explored above, the CASE Act is constitutional as written, could be redeemed through plausible saving amendments, or must be abandoned altogether once appropriately challenged.

A. The Constitutional Fate of a Legislative CASE Board

From the analysis performed above, it appears adjudication cannot be performed by a legislative agency. Intra-legislative delegations, like those required for such adjudication, raise significant separation of powers concerns, including bicameralism and presentment and congressional aggrandizement.[230] Although such concerns have been quieted, through cases like *Schor*, in relation to executive agency adjudication, legislative agencies have been given no comparable authorization.[231] Since the complex claims to be reviewed by the CASE Board would likely create, or at least apply, agency policy in a way that would bind litigants, such delegations of power by Congress to its own agents appear constitutionally impermissible. That the Copyright Office appears to exercise some adjudicative power, hearing denials of appeals of registration, does not contradict this finding, since activities related to registration are far more ancillary to the Office's clearly authorized activities than is adjudication of infringement claims. If the Copyright Office and CASE Board are legislative agencies engaged in adjudication, the CASE Act is likely unconstitutional.

For similar reasons, it seems likely that arbitration cannot be performed by a legislative agency. Arbitration requires either (1) an exercise of judicial power, in which case it looks like merely a form of prohibited adjudication, or (2) an exercise of executive power in the context of a voluntary proceeding under the ADRA.[232] Adjudication-type arbitration by a legislative agency is likely impermissible for the reasons discussed above. Meanwhile, executive power-based arbitration by a legislative

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[230] *See, e.g.*, Jiles, *supra* note 30, at 457–58 (citing Bowsher v. Synar, 478 U.S. 714, 726–27 (1986); Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274–77 (1991)).

[231] *See, e.g.*, *Schor*, 478 U.S. at 848–49.

[232] Resnik, *supra* note 145, at 230, 235.

CASE Board would appear to require a delegation by Congress to Congress of executive authority and thus to involve impermissible legislative branch aggrandizement. Legislative agencies do not execute the laws and so are not entitled to powers, like ADR, that are ancillary to that function.[233] Moreover, if Congress had intended to give legislative agencies power to perform ADR, it would likely have done so more explicitly and subject to significant constraints like the ADRA. The ADRA, like the APA, explicitly excludes "the Congress."[234] If the Copyright Office and CASE Board are legislative agencies engaged in arbitration, the CASE Act is likely unconstitutional.

Certain amendments to the CASE Act might permit the Board to engage in arbitration, even while seated in the legislative branch. Potentially, Congress could make the CASE Board subject to the APA, as it has done with the Copyright Office.[235] As previously discussed, congressional subjection to the APA may also make an entity an agency for purposes of the ADRA since the two acts share the same definition of "agency." The CASE Act, at present, does not appear to include any such provision. In addition, the CASE Act could be amended to ensure voluntary proceedings, satisfying the ADRA. To this end, the CASE Act's opt-out provision should likely be eliminated. To the extent additional provisions can be created to increase the independence and objectivity of CASE Board officials as "neutrals" in compliance with the ADRA, these provisions may also be valuable to the goal of avoiding a potentially fatal legal challenge to the Act.

Even incorporating these proposed revisions, a significant problem with legislative agency arbitration remains. The solution above facilitates otherwise unconstitutional action by simply subjecting the CASE Board to statutes intended to apply to the executive branch. In the end, Congress's continuing efforts to subject structurally legislative bodies like the Copyright Office to procedurally oriented administrative constraints do not make them part of the executive branch. If it is clear that what the legal system now demands is a more robust form of administrative copyright law, a true executive agency should be created for that purpose. Congress should not continue to muddy the waters of agency identification by creating legislative agencies in executive clothing—agencies it has expressly excluded from the APA only to confusingly readmit them through special legislation.[236]

B. The Constitutional Fate of an Executive CASE Board

From the analysis performed above, it seems clear that adjudication can be constitutionally performed by an executive agency. Although executive agency adjudication raises initial Article III, section 1 concerns, the Supreme Court has developed numerous doctrines to permit some exercise of quasi-judicial power by such agencies.

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233 *See* Cole, *supra* note 16, at 7.
234 5 U.S.C. § 571(1).
235 *See* 17 U.S.C. § 701(e).
236 *Compare* 5 U.S.C. § 551, *with* 17 U.S.C. § 701(e).

The public/private rights distinction provides that adjudication of private rights is permissible where the right at issue is closely connected to a federal regulatory scheme or where other mitigating factors exist, dispelling separation of powers concerns.[237] For CASE Board purposes, copyrights appear to be private rights, running between individuals. Copyrights themselves have a long common law history and, unlike patents, are not expressly "issued" by an agency—both of which suggest a private nature.[238] Infringement claims also appear to involve private rights, as claims between individuals. Most importantly, the whole of copyright law appears closely connected to the regulatory scheme of incentivizing creation, plausibly permitting executive agency adjudication.[239] If the Copyright Office and CASE Board are executive agencies engaged in adjudication, the CASE Act is likely constitutional. This structure may be particularly valuable in that CASE proceedings structured as adjudication, rather than ADR, would not be subject to the ADRA and might not require elimination of the opt-out clause unless otherwise demanded under due process. The main issue for the opt-out clause is the ADRA's voluntariness requirement.

Arbitration can likely also be constitutionally performed by an executive agency, though certain amendments to the CASE Act might be needed to bring the Act into compliance with the ADRA. The ADRA expressly encourages arbitration by executive agencies.[240] However, it also includes several requirements, like the consent of all parties.[241] As in the case of arbitration by a legislative agency, the CASE Act poses a problem here since its opt-out and default judgment provisions appear to eliminate the need for the participation, let alone consent, of alleged infringers. If CASE proceedings are, as the Act suggests, to be perceived as a form of ADR rather than adjudication, care should be taken to ensure that proceedings are sufficiently voluntary to survive challenges related to the ADRA, due process, and Article I/Article III. The opt-out provision should likely be eliminated, while steps should perhaps be taken to ensure objectivity of CASE officials to meet the "neutral" arbitrator requirements of ADRA. Under these conditions, if the Copyright Office and CASE Board are executive agencies engaged in arbitration, the CASE Act is likely constitutional.

Arbitration by an executive agency is a particularly favorable structure for CASE-style proceedings since executive agencies can perform arbitration using executive, rather than judicial, power.[242] This structure is less subject to constitutional challenge—perhaps even than executive agency adjudication—since it essentially eliminates separation of powers concerns. Regardless of the identity of CASE proceedings as adjudication or arbitration, the survival of the CASE Act is best safeguarded by housing the Board within an executive agency—whether within an existing executive agency or one newly created based on the expanding administrative

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237 *See, e.g.*, *Schor*, 478 U.S. at 840 (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 593–94 (1985)).

238 *See, e.g.*, Mossoff, *supra* note 202, at 2609–10.

239 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8.

240 5 U.S.C. § 571(1).

241 5 U.S.C. § 575(a)(1).

242 Harrison, *supra* note 150, at186–87 (citing *Schor*, 478 U.S. at 849–50).

state and demand for more robust administration of copyright law. The remaining problem for the CASE Act, then, is the location of its Board in a Copyright Office housed in the Library of Congress and therefore at least seemingly, if not definitively, in the legislative branch.

C. Additional Recommendations

As stated above, the least constitutionally suspect construction of the CASE Act places the CASE Board within an executive agency. Up to this point, this paper has focused on evaluating the constitutionality of different possible constructions or readings of the *existing* CASE Act. This opportunity for multiple constructions of the Act is created by uncertainty surrounding the administrative identity of federal copyright bodies like the Copyright Office and the CASE Board—legislative or executive. The opportunity is extended by related uncertainty as to the type of proceeding the CASE Board would actually conduct—adjudication or arbitration. Potential CASE Act amendments discussed or recommended above are primarily limited to minimalistic savings measures, e.g., removing the Act's opt-out clause or increasing Board objectivity. This paper has also, intermittently, alluded to opportunities for more extensive CASE Act or general copyright system reform. Those recommendations are briefly summarized here.

As the administrative state, and copyright law itself, continues to expand, the need for and expectation of proactive copyright administration will almost surely increase. Indeed, efforts by Congress to subject the Copyright Office to the APA and to endow the Office with new, executive-looking powers may be taken as indications of the need or desire for copyright administration by a true executive branch agency, unencumbered by any attachment to the legislature. Administration of other varieties of intellectual property law by just such an executive agency—i.e., the PTO—establishes a clear pattern. As copyright law grows more complex, the justifications for its divergence from this pattern appear to diminish. Rather than continue to endorse the constitutionally suspect creation of "hybrid" agencies, arguably straddling multiple branches of government, Congress should instead consider: (1) establishing the Copyright Office as an executive agency outside the Library of Congress, (2) granting the PTO responsibility for all necessary executive-type functions of copyright law, or (3) creating a new executive agency to handle copyright matters that fall outside the scope of legislative authority.

V. Conclusion

The CASE Act is, to say the least, an innovative solution to a pressing problem of American copyright law—the problem of small claims non-adjudication. While a more conventional approach to this problem might have been to place a copyright-specialized small claims court within the judicial branch, this proposal would be plagued by limited resources and judicial resistance. Instead, the CASE Act proposes to make small claims non-adjudication a government-wide concern, drawing on the powers and resources of other branches to reduce cost-based access-to-justice barriers. However, the separation of powers doctrine clarifies that, although the powers of

different branches sometimes overlap, one branch may not exercise the powers of another at will. Essential to the constitutionality of any new legislation is a clear identification of the administrative identities of the government bodies in play; uncertainty or ambivalence to these identities is simply not an option.

Any legislative effort toward copyright law reform is thus met with a problem of its own; the administrative law of copyright is shockingly ill-defined. Scholars and courts appear unable to agree on the administrative identities, powers, or limitations of copyright law's most basic institutions. Many of these institutions already "exercise authority that seems incompatible or at least difficult to reconcile with the Supreme Court's anti-aggrandizement decisions."[243] These realities bring into question whether Congress "constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons"—as many major reforms like the CASE Act essentially must do.[244] The difficulty of identifying copyright entities as members of a particular branch of government exposes essentially every significant potential copyright reform to the possibility of constitutional or related administrative law challenge.

This paper has demonstrated that the CASE Act may, after all, present a constitutional or potentially constitutional solution to small claims non-adjudication—if the Board is either interpreted to be or relocated in an executive agency. What it demonstrates more clearly, however, is the disorganization of copyright administrative law. Regardless of the extent to which the CASE Act is ultimately implemented, the more necessary reform is administrative reorganization. Given Congress's recurring efforts to expand the executive-style powers of the Copyright Office, it seems clear this reorganization should involve designation of a true executive branch agency assigned to carry out the expanded administrative functions modern copyright law has come to demand. The current status of copyright entities as administrative law "floaters"—sometimes legislative, sometimes executive, sometimes judicial—significantly undermines the separation of powers doctrine as well as opportunities for the success of badly needed copyright reforms, like the CASE Act.

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[243] Gass, *supra* note 32, at 1057 (quoting Walter Dellinger, Memorandum, *The Constitutional Separation of Powers Between the President and Congress*, 63 LAW & CONTEMP. PROBS. 513, 562 (2000)).

[244] *Id.* (quoting Dellinger, *supra* note 243, at 563).