



**BEFORE THE
U.S. COPYRIGHT OFFICE**

**Copyright Alternative in Small-Claims
Enforcement (“CASE”) Act Regulations**

Docket No. 2021–1

**COMMENTS OF THE COPYRIGHT ALLIANCE, APA, ASCRL, ASMP, THE
AUTHORS GUILD, CREATIVEFUTURE, DMLA, GRAPHIC ARTISTS GUILD, IBPA,
MCNA, NMC, NPPA, NANPA, PPA, THE RECORDING ACADEMY, SAG-AFTRA,
SCL, SGA, AND SONA**

Following up on our initial comments,¹ the organizations listed below appreciate the opportunity to submit reply comments regarding the subjects raised in a [notice of inquiry](#) (“NOI”) published in the Federal Register on March 26, 2021 by the U.S. Copyright Office, regarding implementation of the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

American Photographic Artists (APA) is a leading nonprofit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

¹ Copyright Alliance et. al, *Comment Letter on Copyright Alternative in Small-Claims Enforcement Act Regulations* (Apr. 27, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf>.

The American Society for Collective Rights Licensing, Inc., is the nation's largest 501(c)(6) collective rights administration society serving over 16,000 illustrator and photographer members. ASCRL's goal is to maximize revenue for collectively administered rights and public lending rights and to distribute these funds in an equitable, cost effective, and efficient manner. ASCRL is a strong supporter of CASE Act provisions that enhance and help with the enforcement of the primary rights of illustrators and photographers, as well as strong secondary rights system for markets that illustrators and photographers find difficult or impossible to monetize due to the inefficiencies and costs of the licensing and enforcement systems.

American Society of Media Photographers, Inc. (ASMP) is a 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs and media. In its seventy-five-year-plus history, ASMP has been at the forefront of protecting the rights of visual creators and the craft of photography.

The Authors Guild is a national non-profit association of approximately 10,000 professional, published writers of all genres including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. Among our members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award. We have a long history of contributing to the ongoing interpretation and clarification of U.S. copyright law, and it is our pleasure to continue to serve that role submitting comments concerning implementation of the CASE Act to the Copyright Office.

CreativeFuture is a nonprofit coalition of more than 560 companies and organizations and more than 260,000 individuals – from film, television, music, book publishing, photography, and other creative industries. Its mission is to advocate for strong but appropriate copyright protections and to empower creatives to speak out against piracy and how it affects their ability to create and to make a living. To learn more, visit www.creativefuture.org.

Digital Media Licensing Association (DMLA) (<https://www.digitalmedialicensing.org>) founded in 1951 is a not-for-profit trade association that represents the interests of entities in

North America and internationally that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual to editorial and commercial users. As part of its mission DMLA has been advocating to protect copyright and to ensure fair licensing standards exist.

Graphic Artists Guild, Inc. has advocated on behalf of illustrators, graphic designers, and other graphic artists for fifty years. The Guild educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* raises industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

Founded in 1983 to support independent publishers nationwide, the Independent Book Publishers Association (IBPA) leads and serves the independent publishing community through advocacy, education, and tools for success. With over 3,700 members, IBPA is the largest publishing association in the U.S. Its vision is a world where every independent publisher has the access, knowledge, and tools needed to professionally engage in all aspects of an inclusive publishing industry. For more information, visit ibpa-online.org.

Music Creators North America (MCNA) (<http://www.musiccreatorsna.org/>) is an alliance of independent songwriter and composer organizations who advocate for the rights of, and educate on behalf of, North America's music creator community. In addition, MCNA works with sister alliances across every populated continent to further the interests of music creators throughout the world. Each MCNA member organization (including SGA, SCL, The Alliance for Women Film Composers (AWFC), Music Answers (M.A.), The Screen Composers Guild of Canada (SCGC), and The Songwriters Association of Canada (SAC), is run exclusively by and for songwriters and composers. MCNA stands with over a half-million songwriters, composers and artists in Africa, Asia, Latin and South America and Europe through its membership in The International Council of Music Creators (CIAM), in advocating for the strongest possible protections of music creator rights everywhere in the world.

The National Music Council of the United States (NMC) (<https://www.musiccouncil.org>) is the Congressionally-chartered umbrella organization of US music community advocacy groups, currently celebrating its 81st year as a forum for the study and advancement of American musical culture and education. Founded in 1940, NMC acts as an information clearinghouse for those working to strengthen the importance of music in American life, and through its

prestigious American Eagle Awards program, focuses attention on the great benefits of music education and strong, intellectual property protections. The Council's membership has grown in the 21st Century to include almost 50 national American music organizations, encompassing every important form of professional, educational and commercial musical activity.

Since its founding in 1946, the [National Press Photographers Association](#) (NPPA) has been the Voice of Visual Journalists. NPPA is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously advocates for and protects the constitutional and intellectual property rights of journalists as well as freedom of the press and speech in all its forms, especially as it relates to visual journalism. Its members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism community. NPPA's sister organization, the National Press Photographers Foundation (NPPF) supports NPPA's charitable and educational efforts.

Since its founding in 1994, the North American Nature Photography Association (NANPA) has been North America's preeminent national nature photography organization. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world and is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access for nature photographers.

Professional Photographers of America (PPA), the world's largest photographic trade association, represents over 30,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected.

As the only trade association in Washington representing all music creators, the Recording Academy represents the voices of performers, songwriters, producers, engineers, and all music professionals. Dedicated to ensuring the recording arts remain a thriving part of our shared cultural heritage, the Academy honors music's history while investing in its future,

advocates on behalf of music creators, supports music people in times of need, and celebrates artistic excellence through the GRAMMY Awards — music's only peer-recognized accolade and highest achievement.

The Society of Composers & Lyricists (SCL) (<https://thescl.com/>), is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). Established in 1945, SCL's membership has for 76 years been comprised of many of the world's most accomplished composers and lyricists in their respective audio-visual fields, today numbering over 1900.

The Songwriters Guild of America, Inc. (SGA) (<https://www.songwritersguild.com>), is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are formulated solely in the interests of its members. Established in 1931, SGA has for 90 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world on behalf of its approximately 4500 members.

Songwriters of North America (SONA), founded by songwriters Michelle Lewis and Kay Hanley with attorney Dina LaPolt in 2015, is a grassroots organization that advocates on behalf of songwriters' interests before legislative bodies, administrative agencies, and the courts. SONA seeks to ensure that songwriters are paid fairly and reliably for the works they create and played a vital role in securing passage of the Music Modernization Act, which updates the licensing system for musical works. SONA believes it is critical that songwriters and other individual creators who can't afford federal court have a meaningful way to address infringing uses of their copyrighted works.

Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) is the world's largest labor union that represents working media and entertainment artists. In 2012, SAG-AFTRA was formed through the merger of two labor unions: Screen Actors Guild, Inc. (SAG) and the American Federation of Television and Radio Artists (AFTRA). SAG-AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure strong protections for media artists. SAG-AFTRA's membership includes more than 160,000 actors, journalists, DJs, recording artists, and other media professionals, many of whom are creators of their own content.

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Introduction

These reply comments are a follow-up to our initial comments and should be read in conjunction with those comments. Please note that our comments are solely responsive to the specific subjects of inquiry raised in the NOI and do not address issues such as constitutionality, criticisms of the Copyright Office's website and allegations of impartiality, suggestions that clearly run counter to the CASE Act, or other comments that do not relate to the specific questions raised in the NOI.

A. Initiating CCB Proceedings, Notice, and Service of Notice and Claim

1. Content of Initial Notice

Despite differing views regarding the specific contents of the initial notice, there is consensus amongst commenters that the language should be drafted in a way that is easy to understand in style, format, and language, while also adequately informing the Respondent of the nature of the claim(s) against them, their right to opt out and the consequences for not doing so, and other critical information about copyright and the Copyright Claims Board (CCB). Where our opinions differ is with regard to how this information is conveyed. As we stated in our initial comments, there is a fine line between adequately informing the Respondent and overwhelming the Respondent. Likewise, the notice/summons should be used to inform the Respondent of the nature of the proceedings before it, and next steps. It must not be used as a vehicle for persuading Respondents to opt out or not opt out. Rather than describing the elements of infringement and defenses within the notice (which could exponentially increase the complexity and length of the notice very quickly), the contents of the summons/notice should be limited to the essential information about the claim and the process. Additional information considered to be helpful—such as educational information about copyright law and available defenses, available damages, information comparing the CCB process to federal court, etc.—should be provided in links to webpages on the Copyright Office website tailored to address these topics for this audience (see Appendix A of our initial comments). Taking this approach allows a Respondent to easily access this information if they are interested in doing so, without overwhelming those Respondents who are not interested. The Office should also make this information available in hard copy upon request for those Respondents who do not have internet access.

As we stated in our initial comments, the template notice and all other documents and forms related to the CCB should be available *at least* in English and Spanish. In addition, we support the proposal made by Patreon to make broad translational services available to the parties to aid them in comprehending information related to the CCB.²

One comment suggests that the content of the initial claim should “go beyond” the notice pleading requirements in the federal rules, and should, for example, require the Claimant provide “adequate location information (for example a URL).” While we do not support the view that the initial claim “go beyond” the requirements of the federal rules of civil procedure (FRCP), we would not take issue with the initial claim asking the Claimant to provide adequate location information. However, this does not mean that the Claimant should be *required* to list a URL, only that they should have the option to provide a URL as a means for providing the location information. That needs to be made clear since, in other contexts, the providing of a URL has been misinterpreted to be a requirement. (Please see Appendix A for a sample claim form to be filled out by a Claimant in order to commence a claim.)

2. CCB Respondent Notifications (Second Notice)

CCIA and the Internet Association (IA) suggested that the second notice can be sent via email where respondents have registered a designated agent, and otherwise, second notice should be sent via U.S. Postal Service alongside email if an email address is provided in the complaint. We support this proposal, except that entities who have designated a service agent should be able to *elect* to receive the second notice via email rather than USPS, but should not be required to do so.

3. Service of Process and Designated Agents

Some of the comments suggest that a corporate parent should be permitted to designate a single agent to receive notice for all its subsidiaries. If the Office permits this, the corporate parent should be required to affirm that it has the legal authority to act on behalf of the subsidiary. Likewise, the Claimant must be able to rely on the information presented in the directory, so Respondents should ultimately be held responsible for ensuring that the information

² Patreon, *Comment Letter on Copyright Alternative in Small-Claims Enforcement Act Regulations* at 4 (Apr. 27, 2021), file:///C:/Users/sjlev/AppData/Local/Temp/COLC-2021-0001-0037_attachment_1-1.pdf.

is accurate and up-to-date. Even when a single agent is registered for multiple subsidiaries, each entity and its designated agent should be listed in the directory no differently than it would be if each had registered an agent separately (i.e., a Claimant should be able to easily search the directory and identify the proper designated agent without confusion). In addition, this courtesy should not be offered at a discount. A corporate parent that wishes to designate an agent for its subsidiaries should still be required to pay the fee (as determined by the Office) for each entity. Please see our initial comments for more on the fee for designating a service agent.

Some comments also suggest that the fee for designating a service agent should be similar to designating a DMCA agent. As we explained in our initial comments, the ability to designate an agent to receive notice under the CASE Act is for the benefit of *large entities with multiple locations* (small businesses with a single location or only a few locations would have no need for this registry). Unlike designated agents under the DMCA, which is a requirement to qualify for the safe harbor, this designated agent registry is not required and is intended to be a courtesy for these large entities. For example, no such registry exists for serving notice pursuant to a federal court proceeding. Instead, a simple web search is all one needs to find the appropriate address for serving legal documents.³ We believe the Office should charge more for this accommodation than they charge for the DMCA registry and the proceeds could be used to help offset some of the operational costs of the CCB.

At least one comment suggests that online service providers be permitted to designate an exclusive channel or modality (for example, email) for receiving service of process. In order for service by email to be appropriate, the Respondent would have to waive personal service. This proposal seems to suggest that service by email can be elected without a waiver of personal service. For that reason, we oppose this suggestion.

³ For example, Amazon lists the appropriate address for serving subpoenas and other legal processes online. Amazon.com, *Conditions of Use* (last updated May 3, 2021), <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXX>.

B. Opt-Out Provisions

1. Respondent's Opt-Out

Provide input on any issues that should be considered relating to the respondent's written opt-out notice, including the methods that a respondent may use to execute that notice

As discussed in our initial comments, the opt-out process should be as simple as possible, entailing nothing more than a Respondent who wants to opt out going to a webpage the Copyright Office has created, entering the docket number and an email address to receive electronic confirmation, and clicking the opt-out box (or if the docket number is information that will be publicly available, they should be given a secret keycode to enter). An opt-out form, along with a self-addressed envelope, should also be included with the service materials so the Respondent can simply fill out and return the form if they do not have internet access and wish to opt out.

Some commenters suggest alternative options for opting out, including by phone. While we support making the process simple, opting out by phone should not be permitted.⁴ There should be a clear written record of a Respondent's opt out, including a statement attesting, under penalty of perjury, to the fact that the person opting out is the named Respondent, or an agent authorized by the Respondent to opt out.

At least one comment suggests that Respondents should be permitted to opt out of multiple proceedings via a single submission. The opt out process should be so simple that it should be easy to opt out of each proceeding, individually. We, therefore, oppose this suggestion, which could unnecessarily complicate and cause confusion in a process that is intended to be easy and straightforward.

Regarding fair use, at least one comment suggests that the Office issue regulations describing in detail how the Board will determine jurisdictional issues, as they believe this will impact a person's decision about whether to opt out of a proceeding. While the Office may wish to incorporate such information on a webpage or in FAQs, we disagree that it is a factor which is likely to impact Respondents' decisions on whether to opt out since copyright law is largely consistent across jurisdictions in the United States. Nonetheless, jurisdictional issues should be at the discretion of the Board, and should not be subject to arguments between the parties.

⁴ The Office should consider setting up a phone number where respondents can call and get instructions on how to opt out if they wish.

Whether the CCB should incorporate into its system a way to recognize entities or individuals that wish to consistently opt out of CCB proceedings

Some of the commenters argue that the Office has the authority to, and should, allow entities other than qualifying libraries and archives (L/As) to blanket opt-out of proceedings before the CCB. The CASE Act does not permit the Copyright Office to establish a blanket opt-out for individuals and entities other than qualifying L/As. The law requires that a Respondent who does not qualify for the L/A blanket opt-out and wishes not to participate in a particular proceeding opt out within 60 days *beginning* on the date of service. Allowing an individual or entity other than a qualifying L/A to opt out *before* the date of service would run counter to this requirement. 17 USC 1506(aa)(4) expressly limits the blanket opt-out not only to L/As, but more narrowly to those L/As that qualify under section 108. It is clear that Congress intended application of the blanket opt-out to be extremely narrow. In fact, during the legislative process, a general “blanket opt-out” was considered by Congress (and included in a discussion draft which was circulated in 2018) and ultimately rejected, except in the case of L/As.⁵ Other changes incorporated in the discussion draft—such as extending the opt-out period from 30 days to 60 days, and including a second notification to be sent by the Copyright Office—were retained and made law.

Not only does the Office lack the legal authority to create such a blanket opt-out, as a practical matter, allowing for a blanket opt-out for individuals and entities other than a qualifying L/A would mean creating unnecessary and cumbersome work for the Office. Certain organizations would campaign to encourage all individuals to opt out even though most would have no prospect of ever being involved in a CCB proceeding. The Office would be barraged by thousands of emails, letters and postcards from people blanket opting out, creating unnecessary work for the Office and leaving the Office the responsibility of managing and maintaining this information for no reason. It is much more cost efficient and practical for potential Respondents to opt out if and when there’s an actual case filed against them that they do not wish to participate in.

⁵ See H.R.3945: Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing before the House Committee on Judiciary, (testimony of Jonathan Berroya, 115th Cong (2018), https://internetassociation.org/wp-content/uploads/2020/12/Jonathan_Berroya_Witness_Testimony_9_27_18_Copyright-0854d8d02b3bd872f82979eab754ef29.pdf); H.R.3945: Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing before the House Committee on Judiciary, (testimony of Keith Kupferschmid) at 5, 115th Cong (2018), <https://copyrightalliance.org/wp-content/uploads/2020/04/CA-HR-3945-CASE-Act-Testimony-FINAL.pdf>.

Whether to create a publicly accessible list of entities or individuals who have opted out of using the CCB in prior proceedings

Some comments encourage the Office to create and publish a list of persons and entities that *intend* to consistently opt out of proceedings. Again, this would mean creating unnecessary and cumbersome work for the Office, as it manages thousands of emails, letters and postcards from people stating their intentions to consistently opt out. It would also almost certainly confuse potential Respondents who may think that by declaring their intent to opt out that they are actually opting out. Moreover, if any of the commenters who suggested this continue to think this is a good idea, there is nothing preventing them from compiling their own list of persons and entities that *intend* to consistently opt out and publishing it.

Instead of this approach, as we explain in our initial comments, the Office should maintain a list of everyone that has opted out and how frequently they have opted out, and this list should either be made publicly accessible or, at the very least, accessible upon request by any potential Claimant. This will allow creators to make an informed decision before filing a claim against someone who has previously opted out or has opted out more than once. In addition, while a blanket opt-out for individuals and entities is not (and should not be) permissible under the CASE Act, by putting Claimants on notice that a Respondent has previously opted out and so may be likely to opt out again, a list of this kind will serve a similar purpose without undermining the very reason the process was designed as an opt-out system. For more information on Respondent’s opt-out, please see our initial comments.⁶

2. Library and Archives Opt-Outs

Whether a library or archive should be required to prove or certify its qualification for the limitations on exclusive rights under 17 U.S.C. 108, and thus for the blanket opt-out provision

Some commenters suggest that L/As should be permitted to “self-certify” that they qualify for section 108 and the blanket opt-out. We *strongly* oppose this view. L/As should be required to prove their qualification for section 108 and the blanket opt-out, under penalty of perjury. In granting L/As the ability to blanket opt out of proceedings before the CCB, Congress

⁶ Copyright Alliance et. al, *Comment Letter on Copyright Alternative in Small-Claims Enforcement Act Regulations* at 17 (Apr. 27, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf>.

created a unique and narrow exception. In 17 USC 1506(aa)(4), Congress expressly limited the ability to blanket opt out to L/As that qualify for the limitations on exclusive rights under section 108. In its direct reference to section 108 in defining L/As that qualify for the blanket opt out, it is clear that Congress did not intend for the blanket opt out to extend to any person or entity other than L/As that qualify under section 108.⁷ To allow entities to “self-certify” would be to open the blanket opt out to any entity claiming to be a “library” or “archive” regardless of whether the entity rightfully qualifies under the law. Please see our initial comments for more on the blanket opt-out for L/As.⁸

A few commenters also suggest that L/As should be permitted to rescind their blanket opt-out and begin opting out on a case-by-case basis. We *strongly* disagree. The CASE Act does not change existing law, but instead creates an alternative and streamlined forum for resolving copyright disputes. A qualifying L/A that does not wish to take advantage of this alternative forum has the unique ability to preemptively opt out of all proceedings. However, once that L/A makes the decision to remove themselves from proceedings across the board by blanket opting out, it should not be permitted to rescind the blanket opt out. If this is a big concern for L/As then alternatively, the Office could create a two-tiered system. One tier would allow L/As to blanket opt out permanently. The other tier would require qualifying L/As to *recertify* their blanket opt out on an annual basis, that way if a L/A ever changes its mind and wishes to leave open the possibility of resolving disputes before the CCB, it can simply decline to recertify. This would have the additional benefit of acting as a routine “audit” to ensure that L/As taking advantage of the blanket opt-out continue to meet the qualifications for section 108. A tiered approach would be necessary in this context because the CASE Act does not allow the Office to require L/As to renew their blanket opt out, but in this scenario, the “recertification” tier would be optional.

In its comments, Verizon suggests that the Office should penalize claimants who attempt to bring claims against an entity on the opt-out list. Copyright Claims Attorneys should ultimately be responsible for ensuring that they do not approve service upon an entity that has blanket opted out. Claimants who do this will lose money every time, so it’s doubtful that this

⁷ We also oppose comments suggesting that the CCB adopt a definition of “libraries and archives” other than the definition articulated in the statute.

⁸ Copyright Alliance et. al, *Comment Letter on Copyright Alternative in Small-Claims Enforcement Act Regulations* at 20-21 (Apr. 27, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf>.

would be an issue. However, in the event this does occur, the lost filing fee is enough of a deterrence. Claimants should not be punished for such an oversight.

Whether the Office should include a regulatory provision that specifies that this opt-out extends to employees operating in the course of their employment

Some commenters suggest that the blanket opt-out for L/As should extend to its employees. Some comments even go so far as to suggest that *not* extending the blanket opt-out to these individuals is akin to holding these individuals liable for infringement or making their participation in a proceeding before the CCB mandatory. Neither of these is correct. These employees will still have the ability to opt out of proceedings on a case-by-case basis, just like every other individual. Likewise, declining to extend the blanket opt-out to employees of the L/A does not equate to a legal determination about the scope of an employee's actions or that person's liability. Instead, declining to extend the blanket opt out merely recognizes and respects that whether an employee is operating within the scope of their employment is a question of fact that would need to be determined by the CCB. If a claim is brought against an employee (and that employee fails to opt out), and the CCB determines that the employee was acting within the scope of their employment and the claim should have been brought against a L/A that has elected to blanket opt out, the claim should be dismissed.⁹

How to address circumstances where a library or archives ceases qualifying

At least one comment suggests that a claimant interested in pursuing a claim against a L/A that it believes no longer qualifies should be able to file its claim against the library, indicating that that the library is no longer eligible for the preemptive opt-out. As we discussed in our initial comments, the process for challenging a L/A's blanket opt out status should be much broader. As an initial matter, a L/A found to qualify for the blanket opt-out should be required to inform the Copyright Office of any changes that may call that status into question. In addition, since L/As are not required to renew the blanket opt-out, and because a L/A could attempt to use a decision by the Copyright Office that a L/A qualifies for the section 108 exceptions could influence a court's assessment of section 108 (despite the fact that CCB decisions are non-precedential), there should be a process to allow anyone, including members of

⁹ For this same reason, we strongly oppose the view expressed in at least one comment that the blanket out-out for L/As should extend to the institutions housing the L/A.

the public who may not be seeking to bring a claim before the CCB, to challenge whether a L/A still qualifies. The Office should charge a fee for this kind of challenge, to be paid by the challenger if the L/A is found to still qualify, and by the L/A if it is found to be out of compliance.

Additionally, if, after a L/A is placed on the blanket opt-out list, a federal court determines that the entity does not qualify for the section 108 exception, the Copyright Office should receive that information (from both the court and the entity) and reconsider the blanket opt-out after giving the L/A an opportunity to defend its status.

C. Additional CCB Practice and Procedures

1. Discovery; Other Rules of Practice and Procedure; Evidentiary Rules

In its 2013 Small Claims Report (Report), the Office states that “litigants should be able to pursue some amount of discovery in small claims actions, including production of documents, interrogatory responses, and written admissions” and that although discovery should be limited, “the ability to learn about the other side’s case may be critical to support a defense or damages claim, or help to facilitate a settlement.”¹⁰ We agree, and therefore strongly oppose any comments suggesting that that parties should be able to opt out of discovery, that evidence should be limited to information that is publicly available, or that discovery should be excluded from proceedings (except with regard to smaller claims, as we discuss in our initial comments). Instead, the CCB should ensure that discovery is limited by requiring that all discovery requests, including requests for production of documents, be: (i) narrowly targeted; (ii) highly likely to result in the production of evidence that is directly relevant to the claims and defenses; and (iii) serve the goal of efficient resolution of the case in light of the nature of the claims and defenses and the amount in dispute. Some comments suggest that parties to 512(f) disputes will likely need discovery of emails and text messages, as well as depositions, to show subjective bad faith. Broad discovery of emails and text message is inappropriate, and any such discovery should be tailored as discussed above. Additionally, as the Office explains in its Report, depositions,

¹⁰ U.S. Copyright Office, *Copyright Small Claims, A Report of the Register of Copyrights* at 125 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

“which are typically conducted in person, can be intimidating for litigants, and require costly transcription services”¹¹ should be excluded.

Some commenters also suggest that parties should be required to produce any material inconsistent with their arguments and positions. Not only would such a requirement amount to a broad, “catch-all” discovery request, the suggestion appears to conflate civil procedure with criminal procedure (where defendants have the right to obtain exculpatory evidence in the government's possession) and would be inappropriate for parties to a CCB proceeding.

2. Protective Orders

The CCB’s handling of confidential information (including the redacting of such information) and the issuance of protective orders

Some comments suggest that CCB-related data, records, and proceedings be made publicly available. As we discuss in more detail in our initial comments, information provided in the course of discovery, such as documents, interrogatories, testimony, etc. should be presumed to be confidential and not be made available publicly. In addition, there should be a standard simple protective order, similar to the USPTO’s Trademark Trial and Appeals Board (TTAB) (at 37 CFR 2.116 (g)), which automatically imposes a protective order in every case.

Some comments suggest that the CCB implement a process by which certain materials are designated as “Highly Confidential – For Attorneys’ Eyes Only.” While this may work in the context of federal litigation, this will not work for CCB proceedings because the CCB is designed for, and we expect most parties to be, pro se individuals who are not attorneys.

3. Respondent’s Default and Claimant’s Failure to Prosecute

At least one comment suggests that the Office issue regulations allowing for Respondents to “move for dismissal, or default judgement” for a Claimant’s failure to prosecute. As we stated in our initial comments, there should be no formal motions practice before the CCB, pursuant to 17 USC 1506(m). 17 USC 1506(u) and (v) define a Respondent’s default and a Claimant’s failure to prosecute, respectively, and neither require action by the other party. Instead, these

¹¹ *Id.*

determinations are to be made by the Board, and parties should neither be required nor permitted to make formal motions to that effect.

4. Smaller Claims

Some comments suggest that smaller claims proceedings must be subject to the same procedural requirements as other proceedings before the CCB. While that is true with regard to certain requirements like notice, 17 USC 5106(z) gives the Office broad authority to “establish regulations to provide for the consideration and determination” of smaller claims. To do so directly implies that smaller claims may be subject to different procedural requirements than other proceedings. Therefore, as we explain in greater detail in our initial comments, determinations in smaller claims proceedings should be made “on the basis of the filing of the written direct statement by each party (or party group filing a joint petition), the response by any opposing party, and one optional reply by a party who has filed a written direct statement.” (See CRB regulations at 37 CFR 351.3) The default rule in smaller claims proceedings should exclude discovery, and an exception should only be made upon a showing of good cause or where the CCB officers need to ask questions to complete the record and make a determination.

F. Fees

As we explain in our initial comments, the sum of any filing fees for commencing a claim should be significantly less than the fee for federal court (as close to \$100 as possible). The fees should be staggered to minimize the financial loss to the Claimant in the event that the Respondent ultimately opts out. The initial fee, which would be due upon filing, should be no more than \$25. The secondary fee would be due after the opt-out period elapses, and the total of these fees should be as close to \$100 as possible. In order to encourage use of the tribunal, it is critical that the Office minimize the financial loss that results from a Respondent’s opt out. Some commenters suggest that the fee be set higher, for example, for claimants who file more frequently or claimants who are pursuing higher damages. We oppose these suggestions. That some creators may bring claims more frequently speaks to the fact that a real need exists that has gone unmet for too long. No one should be penalized for seeking the kind of justice the CASE Act was designed to procure. Likewise, no one should be penalized for seeking or being awarded

damages to rectify a harm. The CCB was designed to be low cost to meet the needs of individual creators and small businesses. Factors such as the number of claims a person has commenced, or the amount of damages they seek or have been awarded, are arbitrary and should have no bearing on the filing fee.

At least one commenter suggests that the filing fee should be higher for corporate actors. We do not oppose this suggestion on its face. However, we urge the Office to keep in mind that all corporate actors do not have access to the same resources—many are small businesses—and therefore an entity’s corporate status, alone, should not be the basis for determining fees. Therefore, if a higher fee is charged to corporate actors, it is important that in doing so that the Copyright Office distinguish between small businesses who should not be subject to the higher fee and larger businesses that are more capable of paying a larger fee.

G. Permissible Number of Cases

Some commenters suggested low limits, like five or ten cases per year. As we discuss in our initial comments, we suggest that the Office permit up to 20 *active claims* per Claimant for the first year, with discretion to allow for more than 20 cases (on a case-by-case basis) for good cause and in the interests of justice. While there should not be an annual limit on the number of cases *filed*—since doing so could mean that people will reach that limit without ever having a single case *heard* by the CCB, which would not be in the interests of justice—the Office should permit no more than 20 *filings at one time*. In other words, if someone has 20 filings, they cannot file another case until at least one of those 20 filings results in an opt out. This would continue on until the party has reached 20 *active claims* in the first year. This limitation should sunset after the first year, when the Office can review whether any claim limitations are appropriate based on empirical data and experience, and if so, what such limits should be. A limit of less than 20 *active claims* per year would have the likely effect of continuing to underserve those groups most in need of an alternative copyright forum.

While we understand the need for the Office to maintain control over case management, we strongly oppose suggestions that the Office set a limit that is based on the amount of monetary damages a party can be awarded in a year, or that the limit on the number of cases be set especially low to deter bad actors. The amount of damages a person is rightfully awarded before the CCB in no way impacts operation of the Office or the CCB. Unlike the number of

cases—where there is some distinct threshold number of cases the CCB will be able to maintain at one time—the damages awarded by the CCB is an arbitrary metric that is neither demonstrative of the Board’s capacity to manage cases before it or the number of cases a particular individual has brought. Likewise, any suggestions that the market price of the infringed work be used as a metric for limiting cases is equally arbitrary and irrelevant, and should be rejected. In addition, several commenters imply, in this context and in other places throughout their comments, that the more cases a copyright owner brings and the more damages they are awarded (or alternatively, the more cases a person’s attorney has brought and the more damages that attorney has helped their clients win), the more likely they are to be a bad actor. This line of thinking assumes that all copyright owners are so called “copyright trolls” for simply enforcing their rights. The fact that a bona fide copyright owner brings many cases and accumulates lots of damage awards means one thing—that they are infringed a lot. If someone is a bad actor there are other indicators of such, but the number of cases and damage awards is NOT one of them.

Some commenters expressed concern about shell companies being used as a workaround for limits on cases. While this concern may have some validity in the patent context, it has no merit in the copyright context, where “the assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue.”¹² Anyone with standing to sue must be the owner of an exclusive right and a real party in interest—not a mere shell company operating as a “troll” as some commenters suggest—so this concern is without merit.

H. Conduct of Parties and Attorneys

Some comments suggest that factors including the identity of the claimant (e.g., individual vs. corporate actor), the amount of damages sought/awarded, and the number of claims brought by a given party should be relevant in determining whether someone is a bad faith actor. However, none of these factors—taken alone or in the aggregate—suggest that a person is acting in bad faith. As we discuss elsewhere in these reply comments, several commenters seem to imply in their responses that the more cases one brings and the more

¹² *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013), <https://casetext.com/case/righthaven-llc-v-hoehn-2>.

damages they are awarded, the more likely they are to be a bad actor. This line of thinking is incorrect. In reality, that some creators may have a high volume of unresolved copyright disputes, or that a creator may win and be awarded damages in multiple cases, speaks to the fact that a real need exists that has gone unmet for too long.

In their comments, CCIA and IA suggest that the CCB publish a list of parties who are barred from using the CCB due to bad faith conduct. We agree. The CCB should put the public on notice by making this list publicly available. This is especially important with regard to attorneys who have been barred.

Some comments suggest that for infringement claims, the CCB should send a written communication to the address on the copyright registration to ensure that the copyright owner is aware of the action. We disagree and oppose this suggestion. Anyone with standing to sue—i.e., any owner of an exclusive right—may bring a claim of infringement before the CCB. That individual or entity may be different than the copyright owner listed on the copyright registration certificate. An exclusive licensee of one of the rights has no legal obligation to notify the licensor (unless it is specified in the license). Likewise, copyright transfers are not required to be recorded with the Office, so the address of record may belong to someone with no current rights or interest in the case.

I. Other Subjects

Fair Use

Several commenters suggest that claims involving fair use should be excluded from the CCB. This suggestion is completely unworkable and should be given no consideration by the Office. Suggesting that excluding any case that involves a fair use defense is simply these commenters way of trying to undermine the CASE Act since many CCB cases may include fair use claims, regardless of the soundness of the claims.

Fair use is an affirmative defense that can be raised in any case involving infringement or declarations of non-infringement, as well as some section 512(f) claims—all of the claims the CCB is permitted to hear. In its Report, the Office states that, “because [fair use] is so frequently invoked as a defense to infringement, to eliminate it from possible consideration likely would rule out the adjudication of many meritorious claims.”¹³ We agree, and therefore *strongly* oppose

¹³ U.S. Copyright Office, *Copyright Small Claims, A Report of the Register of Copyrights* at 106 (2013),

any comments arguing that claims involving fair use are too complex for adjudication before the CCB—a contention that ignores the level of copyright experience required of all CCB Officers. We also strongly oppose assertions that Copyright Claims *Attorneys* should review claims to determine whether the alleged use qualifies as fair use “on its face”—a move that would undermine the fact that fair use is an affirmative defense to a strict liability tort, and require the Copyright Claims Attorneys to take on an adjudicatory function in conflict with their duties.

Cases involving software, new technologies, secondary liability

Some comments also suggest that the claims involving new technologies, software issues, or secondary liability should be excluded. We oppose this suggestion. As with any other copyrightable subject matter, cases involving new technologies or software can vary in complexity. This is not unique to new technology or software. Likewise, cases involving secondary liability can vary in complexity. For this reason, the law allows the CCB to dismiss cases on a case-by-case basis that it determines are “unsuitable for determination” by the Board, including cases involving issues that “exceed... the subject matter competence of the Copyright Claims Board.”¹⁴ There is no reason cases involving technology, software, or secondary liability should be excluded on their face from the permissible claims.

Statutory vs. Actual Damages

Some commenters argue that in determining damages, the CCB should aim to award actual damages even when statutory damages are permitted and requested. Some even suggest that whether the work is commercial or non-commercial should play a role in determining whether to award actual or statutory damages. The Office should reject any such suggestions. Under the law, it is up to the Claimant or Counterclaimant to *elect* whether to pursue damages, and if so, whether statutory or actual. It is not up to the Board to make this determination for a party, or to override a party’s statutory right to elect statutory damages. Likewise, the commercial or non-commercial nature of the work is irrelevant, and it would be both inappropriate and counter to the law for the CCB to override a party’s timely election of statutory damages for any reason. This is especially critical given that actual damages are notoriously

<https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

¹⁴ 17 U.S.C. § 1506(f)(3) (2020).

difficult to prove. In its Report, the Office goes into detail about why actual damages are difficult to prove, adding that, “For these reasons, statutory damages have long played an important role in the protection of copyright interests. In addition, many view statutory damages as essential to deterring infringing conduct. If all that can be recovered from an infringer at the end of a lawsuit is what the infringer would have paid for a license in the first place, exploiters of copyrighted works have little reason not to adopt a ‘take now, pay later’ philosophy.”¹⁵

Third-party subpoenas

In its comments, Verizon says that the Office should “create guidance for its Claims Attorneys that any Section 512 (h) subpoenas directed to a Section 512 (a) mere conduit service provider must be issued by a federal judge and not by a clerk of a court.”¹¹ It would not be appropriate for the Office to render legal advice to claimants on the highly contested issue whether a subpoena under Section 512(h) is properly directed at a 512(a) ISP. As the Office’s 2020 Section 512 Report concluded, Section 512(h) is “ambiguous” as to its applicability to Section 512(a) ISPs, and certain language in Section 512(h) indicates that Section 512(a) ISPs *are* proper targets of a 512(h) subpoena. *See* Section 512 Report at 166 (“section 512(h) states that the copyright owner may request the court ‘to issue a subpoena to a service provider,’ which, as defined in section 512(k), includes mere conduits.”) (footnotes omitted). In any event, it is the clerk of a federal district court – not the CCB – who will determine whether to issue a subpoena under Section 512(h). *See* 17 U.S.C. §512(h)(4) (“If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena....”).

¹⁵ U.S. Copyright Office, *Copyright Small Claims, A Report of the Register of Copyrights* at 21 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

Conclusion

We thank you for the opportunity to submit these reply comments, and for the Office's dedication to implementing the CASE Act and ensuring that the Copyright Claims Board is the inexpensive, streamlined, and accessible forum that Congress intended. We look forward to providing additional input as this process proceeds to the NPRM stage.

Respectfully submitted,

Copyright Alliance

American Photographic Artists (APA)

American Society for Collective Rights
Licensing, Inc. (ASCRL)

American Society of Media Photographers
(ASMP)

Authors Guild

CreativeFuture

Digital Media Licensing Association
(DMLA)

Graphic Artists Guild

Independent Book Publishers Association
(IBPA)

Music Creators North America (MCNA)

National Music Council (NMC)

National Press Photographers Association
(NPPA)

North American Nature Photography Association
(NANPA)

Professional Photographers of America (PPA)

Recording Academy

SAG-AFTRA

Society of Composers & Lyricists (SCL)

Songwriters Guild of America, Inc. (SGA)

Songwriters of North America (SONA)

May 10, 2021

Appendix A

SAMPLE CCB CLAIM FORM

(to be filed by Claimant)

I. ABOUT THE CLAIMANT(S)

1. Claimant's name
2. Claimant's address
3. Claimant's phone number
4. Claimant's email
5. Are you the creator of the work?
6. If there is more than one Claimant, include same information for any additional Claimants

II. INFORMATION ABOUT THE COPYRIGHTED WORK

1. Title(s) of the copyrighted work(s) alleged to be infringed
2. Name of the copyright owner
3. Type of work
4. Copyright Office registration number, if any.
5. Date the work was registered, if any.
6. If registration application is pending, insert SP #
7. If there is more than one copyright work alleged to be infringed, include same information for any additional works

III. INFORMATION ABOUT OWNERSHIP

1. Are you the copyright owner of the work? If so, please provide documentation establishing ownership.
2. Have you ever transferred ownership of the copyright or an exclusive right to someone else?
3. If there is more than one copyright work alleged to be infringed, include same information for any additional works

IV. INFORMATION ABOUT THE RESPONDENT(S)

1. Respondent's name
2. Respondent's address
3. Respondent's phone number, if known
4. Respondent's email, if known
5. If there is more than one Respondent, include same information for any additional Respondents

V. INFORMATION ABOUT INFRINGING ACTIVITY

To the best of your knowledge...

1. Explain what the infringing activity is.
2. Why do you think there is an infringement taking place?
3. Do you have direct evidence that the respondent copied the work? Explain and provide copies if you do
4. Is your copyrighted work and the material or activity that you alleged to be infringing substantial similarity to one another? If so, explain.
5. Can you establish that the respondent had access to your works? If so, explain.
6. Where is the infringing activity taking place?
7. How and when did you discover the infringement?
8. When did the infringement begin?
9. Is the infringement ongoing? If not, when did it end?
10. How long has the infringement take place?
11. If the infringement is taking place on the internet and is still taking place, please provide a URL to the infringing activity.
12. If the infringement is not taking place on the internet, please provide any documentation that show the alleged infringement
13. What copyright rights of yours do you allege are being infringing by the Respondent's actions.
14. Explain why you believe the Respondent(s) are responsible for the infringement

VI. RELATIONSHIP BETWEEN THE CLAIMANT AND THE RESPONDENT

1. Has the Respondent ever licensed the work from you? If so, explain.
2. Has the Respondent even licensed any copyrighted works from you? If so, explain.
3. Did you or someone else give permission to the Respondent to use the work(s)