



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

**Copyright Claims Board: Initiation of
Proceedings and Related Procedures**

Docket No. 2021-6

**COMMENTS OF THE COPYRIGHT ALLIANCE, ACT, APA, ASCRL, ASMP, THE
AUTHORS GUILD, CREATIVFUTURE, DMLA, GRAPHIC ARTISTS GUILD, IBPA, MAC,
MCNA, NPPA, NANPA, PPA, RECORDING ACADEMY, SAG-AFTRA,
SCL, SGA, AND SONA¹**

The organizations listed below appreciate the opportunity to submit comments in response to the notice of proposed rulemaking ([NPRM](#)) published in the Federal Register on September 29, 2021 by the U.S. Copyright Office, regarding procedures governing the initial stages of a proceeding before the Copyright Claims Board.

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.

ACT | The App Association represents more than 5,000 app makers and connected device companies in the mobile economy, a \$1.7 trillion ecosystem. Organization members leverage the connectivity of smart devices to create innovative solutions to make lives better. The App Association

¹ The organizations identified here are both members and non-members of the Copyright Alliance. It is not our normal practice to identify members separately, but we are doing it in response to the Notices of Inquiry (NOI) and Notices of Proposed Rulemakings (NPRM) related to implementation of the CASE Act solely because the Office “encourage[d] parties to file joint comments on issues of common agreement” in the March 26th NOI. Copyright Alternative in Small-Claims Enforcement Act Regulations, 86 Fed. Reg. 16156, 16158 (proposed Mar. 26, 2021). As we did with the NOI initial and reply comments, to comply with the Office’s request, we are filing jointly with members that otherwise would have filed their own separate (but virtually identical in substance) comments.

is the leading industry resource on market strategy, regulated industries, privacy, intellectual property and security.

American Photographic Artists (APA) is a leading national not-for-profit 501(c)(6) association 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.

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 Artists Coalition (MAC) was formed because the music business is at a critical point in its history. Decisions are being made today in the United States and abroad which will impact music creators for decades. MAC believes music creators should be driving the strategy and conversation about the issues that shape their lives and that artists should have the opportunity to decide how to best protect the fate of their music and their other rights. Founding board members include Anderson .Paak, Dave Matthews, Don Henley, Maren Morris, Meghan Trainor, Shane McAnally, and Verdine White, among others. MAC has been engaging on key issues since its founding in August 2019 and played a key role in advocating for independent artists and their rights around California's AB5.

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.

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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1. General Comments

We appreciate the incredible endeavor that the Copyright Office has undertaken in hiring and training Copyright Claims Board (CCB) staff, working to get the new eCCB system and other relevant systems up and running, and drafting implementing regulations for the CCB—all while also conducting numerous other studies and reports, and balancing the day-to-day functions of the Office. We know that this is no easy task, and we applaud the Office for the work it has done so far. We understand that the Office is working tirelessly to get the CCB up and fully operational as soon as possible, and we very much appreciate it. However, we think it is much more important that the Office take the time it needs to fully consider and draft accurate, detailed and carefully considered implementing regulations rather than moving too hastily solely to meet the December 27 deadline. While we are eager to get the small claims system up and running, we understand how critically important the implementing regulations are to the process and that getting them right may mean that the CCB is not operational until 2022.² We therefore urge the Office to invoke its right to extend the December 27 deadline to ensure that Office staff is allotted the time it needs to make sure these implementing regulations are drafted carefully and correctly.³

The Office may also want to consider adopting the CASE Act implementing regulations on an interim basis, as it did with some of the regulations for the Music Modernization Act (MMA). In promulgating those rules as interim regulations, the Office reasoned that doing so would help “retain[] some flexibility for responding to unforeseen complications” once the system was up-and-running and “allow necessary modifications to be made in response to new evidence or unforeseen issues, or where something is otherwise not functioning as intended.”⁴ For the same reasons, the Office should consider adopting the CASE Act implementing regulations on an interim basis at this stage, and to holding off on issuing final rules until we get a sense for how the proposed regulations will work in practice. Alternatively, if it is not possible to adopt interim regulations, after the CCB is up and running for a

² To be clear, we are not asking for any extensions to the comment or reply comment periods, and we do not think any extensions should be granted in light of the Office’s tight deadline. When we receive notice of a new CASE Act implementation NPRM we devote our immediate attention to considering the proposed rules so we can respond in a timely and helpful fashion. We believe if other stakeholders have interest in reply to the NPRM, they should do the same.

³ In reviewing this NPRM, we noticed a number of typos and mistakes in the proposed regulations, and numerous instances where language is used inconsistently between provisions that should mirror the same requirements (and it is likely that there are some instances such instances and typos that we did not catch).

⁴ The Public Musical Works Database and Transparency of the Mechanical Licensing Collective, 85 Fed. Reg. 86803, 86805 (Dec. 31, 2020).

period of time, the Office should consider publishing another notice of inquiry (NOI) soliciting public comment on the efficacy of the existing rules.

2. § 201.3. Fees

a. Fee for Filing a Claim

We strongly urge the Office to reconsider its proposal to set a single fee of \$100 for commencing an action before the CCB and instead follow the guidance of the Senate Report in instituting a tiered/split fee structure for initiating a proceeding. In our previous comments,⁵ in response to an inquiry about whether “fees to commence a proceeding should be staggered to require an initial fee and an additional fee once the proceeding is active,” we explained the importance of minimizing the financial loss to the claimant in the event that the respondent ultimately opts out. This is of critical importance given the voluntary nature of the small claims process, and Congress’ goal of ensuring that the process is accessible for those “who cannot otherwise afford to have their claims and defenses heard in federal court.”⁶ This importance is recognized in both the drafting of the Copyright Alternative in Small-Claims Enforcement Act (CASE Act) and its legislative history.

The text of the CASE Act and its legislative history (including both the Senate Report and prior drafts of the legislation) make it clear that section 1510(c) of the Copyright Act is intended to give the Office flexibility to set a split/tiered fee structure for initiating a proceeding, as explained in the Senate Report.

1. While the Office interprets the phrase “any filing fees” in 1510(c) to be inclusive of a single fee to commence a proceeding and another fee to have the Register review a decision by the Board,⁷ this reading is not supported by the text or legislative history. If Congress intended the reference to “any filing fee” in 1510(c) to include the filing fee referenced in 1506(x), it would have specifically referenced section 1506(x) just as it specifically referenced the fee to commence a proceeding in 1506(e). In fact, just two paragraphs earlier in the same section, in

⁵ Comments of the Copyright Alliance, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf> (last visited Oct. 22, 2021).

⁶ H.R. REP. NO. 116-252, at 17 (2021).

⁷ “The Office understands the “sum total of” filing fees to consist of the two filing fees indicated in the statute: The filing fee for the initial claim and the filing fee to request review of a final determination by the Register.” Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. 53897, 53904 (proposed Sep. 29, 2021).

1510(a), Congress does exactly that when it specifies that the provision includes “the fees prescribed under subsections (e) and (x) of section 1506.”

2. Where Congress did not want the Office to charge an additional fee, the law clearly says so. For example, section 1506(f)(1)(B) permits the claimant to file an amended complaint, if the complaint is found to be non-compliant, “without the requirement of an additional filing fee.” If Congress objected to the Office assessing a fee once the case becomes active, it could have and would have said so. Instead, the opposite position is taken in the Senate Report.
3. While it could have been drafted more clearly, the canon of construction known as *noscitur a sociis*⁸ helps illuminate how the phrase “any filing fees” should be understood. The canon instructs that where a phrase is ambiguous, the meaning can be determined by other words in the immediate context. Section 1510(c) makes specific reference to fees associated with bringing a case, (“the fee to commence a proceeding” and “the cost of filing an action in a district court”). This further demonstrates that the phrase “filing fees” in the context of this paragraph is intended to apply to fees associated with initiating a proceeding. Notably, this provision does not reference the fee for filing for an appeal in federal court, as would be expected if the “filings fees” in this context was intended to be inclusive of the fee for review by the Register.
4. Importantly, the Office interprets the second sentence in 1510(c) to be instructive of how much the Office must *actually receive in fees* each time a claimant commences a claim.⁹ This reading is incorrect. Instead, the second sentence is instructing the Register on how to *set* the fee schedule in the regulations. There is no statutory minimum for what amount must be *collected* each time a claimant seeks to commence a proceeding. In support of this point, please see H.R. 3945, a previous version of the legislation, introduced in 2017. H.R. 3945 *did* include such a statutory minimum. In order to commence a proceeding, it would have required a claimant to submit “a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights, which amount shall be at least \$100, shall not

⁸ *Noscitur A Sociis*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/noscitur%20a%20sociis> (last visited Oct. 21, 2021).

⁹ “if the Office were to establish a system in which it charged less than \$100 for the first tier, and the claimant did not move on to the second tier, the total filing fees would not reach the statutory floor.” Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53904.

exceed the cost of filing an action in a United States district court, and shall be established to further the goals of the Copyright Claims Board.”¹⁰ When the CASE Act was reintroduced in 2019, the corresponding text in section 1506(e)(3) was changed to require only that the claimant pay “a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights” with upper and lower limits eliminated from this provision. Alongside this change, a new section 1510(c) was added. When compared, it is clear that section 1405(e)(3) in H.R. 3945 was drafted to instruct that the *claimant* must *actually pay* at least \$100 to commence a proceeding, while section 1510(c) of the Copyright Act is drafted to advise the *Register* on *how to set the fees* in the regulations.

5. The legislative history embodied in the Senate Report also supports our reading of the law. The Report says, “In recognition that a respondent may opt-out and therefore not require much involvement by Board staff, the initial filing fee itself should be smaller than the fee charged later when a proceeding becomes active. Filing fees that are set too high would discourage potential claimants from considering using the Board to resolve their disputes since respondents who exercise their right to opt-out would result in the loss of the filing fee by the claimant.” (Note also that the phrase “filing fees” is used here in the manner that is consistent with our reading of the phrase in 1510(c)).¹¹ While the Office is technically correct in saying that the Senate Report proposes the two-tiered fee structure in a footnote, that understates what the Senate Report says. The body of the text goes further than proposing a tiered/split fee system, it *assumes* that the Office will implement such a system.¹²

In drafting the CASE Act, Congress understood the important policy rationale for permitting a tiered/split fee structure in light of the voluntary nature of the proceeding. Requiring claimants to pay the full \$100—a fee that was calculated to cover the entirety of a proceeding before the CCB—for a case that does not proceed due to an opt out is grossly unjust, and cost-prohibitive for creators seeking

¹⁰ Copyright Alternative in Small-Claims Enforcement Act of 2017, H.R. 3945, 115th Cong. § 1405(e)(3) (2017).

¹¹ In addition, the Senate Report discusses the fees set for review by the Register in an entirely different section, and explains that “The fees for such review shall be uniform for all similarly situated parties” with no reference to this being contemplated alongside fees to commence a proceeding, and no reference to an upper or lower limit. *Compare* S. REP. NO. 116-105, at 6 (2019) (discussing the fees for review by the Register of Copyrights), *with* S. REP. NO. 116-105, at 14 (2019) (setting the upper and lower limits of the filing fee to commence a proceeding).

¹² “In recognition that a respondent may opt-out and therefore not require much involvement by Board staff, the initial filing fee itself should be smaller than the fee charged later when a proceeding becomes active.” *Id.* at 4.

access to justice. Congress understood that and entrusted the Office with establishing fees in a manner which takes that into account. If, in the face of all this evidence to the contrary, the Office still believes that it does not have authority under the statute to create a tiered/split fee structure, we strongly urge the Office to make a significant portion of the \$100 filing fee refundable if the respondent opts out.

b. Fee for Designated Service Agents

The Office has proposed a \$6 fee for designation of a service agent for CCB purposes. While we understand that the fee for designating an agent under the Digital Millennium Copyright Act (DMCA) is \$6, designated agents under the DMCA must be updated every three years and that \$6 fee is charged each time the information is updated. In other words, for purposes of the DMCA, the \$6 fee pays for three years. Since entities will not be required to renew their designated service agent for CCB purposes, the fee the Office sets should reflect the fact that the fee assessed will permit the entity to remain on the list indefinitely. In addition, while the law requires an entity to designate an agent under the DMCA in order to qualify for the safe harbor, the CCB’s designated agent registry is not required and is intended to be a courtesy for large entities. Therefore, while we agree that the fee should be set to encourage participation by corporations, partnerships, and unincorporated associations, we do not think the fee assessed for DMCA purposes is a useful benchmark as the two registries are dissimilar other than in name. The fee to designate an agent for CCB purposes should, at minimum, be equivalent to the actual cost of maintaining the database.

c. Fee for Filing a Counterclaim

We agree with the Office’s proposal not to charge a fee for counterclaims. Since such a fee is not charged in federal court, and the CCB is intended to be an affordable alternative to federal court, there should likewise be no fee for bringing counterclaims before the CCB.

3. § 220.1 Definitions

We urge the Office to use the terms “claimant notice” and “CCB notice” in place of “initial notice” and “second notice,” respectively. While reviewing the NPRM, we noted that in a situation where a claimant submits more than one “initial notice” form—for example, if there is a mistake in the first form and the claimant must fill out another “initial notice” form to correct the error—the term “initial notice” could be misinterpreted to mean the first form (with incorrect information). This

reading is not accounted for in the proposed definition, and it could pose problems for provisions like 222.4(a)(2), which says that the second notice should “be addressed to the respondent, using the address that appeared in the initial notice.” To fix this, the Office should use less ambiguous terms like “claimant notice” and “CCB notice.”

The proposed definition for “initial notice”¹³ makes reference to a counterclaim even though neither the law nor the regulations suggest that counterclaimants will fill out or serve an initial notice form. Therefore, in addition to replacing “initial notice” with “claimant notice,” the Office should revise its proposed definition, delete the reference to a “counterclaim,” and clarify that the phrase means the notice that was actually served on the respondent by the claimant. For example: *A ~~claimant notice~~ ~~initial notice~~ means the notice of a proceeding that accompanies a claim ~~or counterclaim~~ in a Copyright Claims Board proceeding as described in 17 U.S.C. 1506(g), if properly served.*

4. § 222.2 Initiating a proceeding; the claim

a. Contents of the Claim

The claim form provided by the Office should include a reminder to claimants to check the libraries and archives opt-out list to ensure they do not attempt to bring a claim against a library or archive that has preemptively opted out. That reminder should also explain that if they believe an entity has been added to the list improperly, they can challenge that designation in the claim (and provide a designated space to do so). Likewise, claimants should be reminded to check the list of designated service agents to ensure that organizations and business entities that have designated such an agent are properly served.

In the NPRM, the Office proposes asking claimants and counterclaimants to infringement and declaratory judgment actions to include the work of authorship’s category.¹⁴ While the proposal does add, “or, if the claimant is unable to determine the applicable category, a brief description of the nature of the work,” we believe that asking for the technical category of the work could be confusing for pro se parties and may elicit well-intentioned but incorrect responses. Moreover, since the Office can easily ascertain this information directly from the registration certificate or pending application there is no need for the Office to request this information. Because any information requested by the CCB at

¹³ In the NPRM, the Office proposes this definition: “An initial notice means the notice of a proceeding that accompanies a claim or counterclaim in a Copyright Claims Board proceeding as described in 17 U.S.C. 1506(g).” Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53905.

¹⁴ 222.2(c)(5)(ii)(E), 222.2(c)(6)(ii)(E), 222.8(c)(3)(ii)(E), and 222.8(c)(4)(ii)(D). *Id.* at 53905-06, 53910-11.

this stage should be limited to only what is absolutely necessary, we urge the Office not to include this question on the claim form.

For declarations of non-infringement, the Office proposes that the claim should include “a brief statement describing the reasons why the claimant believes that no infringement occurred, including any relevant history or agreements between the parties,”¹⁵ but does not require the claimant to specifically plead facts describing an actual dispute/controversy between the parties as is required by law.¹⁶ In order to bring a claim for declaration of non-infringement, a claimant should be required to plead specific facts that show an actual dispute/controversy exists between the parties (for example, a threat of a lawsuit or receipt of a cease and desist letter from the copyright owner or its agent).¹⁷ In addition, 222.2(d) should allow a claimant to include supporting documentation of such dispute/controversy.

Sections 222.2(c)(8) and 222.8(c)(6) instruct claimants and counterclaimants to include an estimation¹⁸ of the “harm suffered” as a result of the alleged activity.¹⁹ While “harm suffered” may be an appropriate metric for other claims, this instruction is too limiting for claimants and counterclaimants bringing infringement claims because it asks about, and instructs the claimant or counterclaimant on how to estimate, *actual* damages. Parties bringing infringement claims have the option to pursue either statutory or actual damages (or to decline to pursue damages at all).²⁰ These parties should be instructed, instead, to include “to the extent known, a statement describing and estimating the ~~monetary harm suffered~~ damages sought, if any...” and the second sentence instructing that “this statement may address the copyright owner’s actual damages and the profits received by respondent(s) that are attributable to the alleged infringement” should be deleted.²¹ In addition, in

¹⁵ 222.8(c)(4)(iv) and 222.2(c)(6)(iv). *Id.* at 53906, 53911.

¹⁶ 17 U.S.C. § 1504(c)(2); 28 U.S.C. § 2201.

¹⁷ “[W]e summarized as follows: ‘Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing to *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)).

¹⁸ 222.2(c)(6) should include the words “and estimating” for consistency. Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53906.

¹⁹ The regulations then go on to add “For claims of infringement, this statement may include a description of the profits attributable to the alleged infringement received by the counterclaimant(s) against whom the counterclaim is asserted.” *Id.* at 53911.

²⁰ 17 U.S.C. § 1504(e)(1)(B).

²¹ “Actual damages can be difficult to prove and measure in copyright cases. First, information about the extent of infringement and resulting profits is unlikely to be known, or fully known, to a plaintiff and may be difficult to obtain from a defendant who did not keep records of infringing activities or is reluctant to produce them in discovery. Second, it may be difficult to assess the full value of the harm caused by an infringer’s unauthorized use of a work.” Maria A. Pallante,

asking this question, the Office should also ensure that the claimants and counterclaimants are aware that they have until a final determination is rendered to elect to pursue actual damages and profits or statutory damages (or no damages at all).²²

For claims and counterclaims of misrepresentation brought under section 512(f), the Office proposes that the claim/counterclaim form include the *sender* and *recipient* of DMCA takedown notices and counternotices.²³ While this language may be appropriate for the regulations, we urge the Office to clarify on the forms it provides to the parties that while the relevant online service provider (OSP) may be the one delivering (or receiving) these notices, they should not be listed as the “sender” or “recipient.”

In the section on “additional matter” that may accompany the claim (section 222.2(d)), paragraph (2)²⁴ should be revised. As written, the second sentence is confusing because it is unclear how it differs from paragraph (3), which invites the claimant to include additional information that shows allegedly infringing activity. If the claimant would like to include documentation of unauthorized posting, etc., that would already be permitted by paragraph (3). The text in paragraph (2) should be struck in its entirety and replaced with “A copy of the work at issue.” In addition, the word “hyperlink” should be struck from paragraph (3) and replaced with the word “screenshot.” Although “hyperlink” is only provided as an example of what may be submitted, it could unintentionally suggest to pro se parties that a hyperlink is good documentary evidence, when in reality the webpages that are hyperlinked can be easily revised (and in many cases, they are regularly changed/updated). If the Office is going to provide an example, “screenshot” would be a much better example. These edits should be mirrored in sections 222.7(c)(2), 222.8(d)(2), and 222.9(c)(2).

b. Technical Corrections

In section 222.2(c)(2), the term “claims” should be “claim(s).” Sections 222.2(c)(5), (6), and (7), and 222.8(c)(3), (4), and (5) erroneously cross-reference their respective paragraph (b) where they should cross-reference their respective paragraph (c)—e.g., section 222.2(c)(5) cross-references

Copyright Small Claims, United States Copyright Office (Sep. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

²² § 1504(e)(1)(B).

²³ 222.2(c)(7)(i), 222.2(c)(7)(ii), 222.2(c)(7)(iv)(A), 222.2(c)(7)(iv)(B), 222.8(c)(5)(i), 222.8(c)(5)(ii), 222.8(c)(5)(iv)(A), and 222.8(c)(5)(iv)(B). Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53906, 53911.

²⁴ “(2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink, that shows where the allegedly infringed work has been posted;” *Id.* at 53906

“paragraph (b)(2)(i)” where it should say “paragraph (c)(2)(i).” For consistency with section 222.2(c)(5)(iii)(C), sections 222.2(c)(6)(i) and 222.2(c)(6)(iii)(D) should reference “person(s) or organization(s).” As a general matter, for consistency and accuracy, the regulations should refer to “person(s) or organization(s),” rather than just “person(s),” and the regulations should only use “party” when referring to an actual party to the proceeding. Along those lines, sections 222.8(c)(3)(iii)(C) and 222.8(c)(4)(iii)(D) refer to “person(s) or organization(s)” and “person(s),” respectively, where they should refer to “party” like section 222.8(c)(4)(i)—since counterclaims can only be brought against existing parties to the proceeding.

5. § 222.3 Content of Initial Notice to Respondent

In the NPRM, the Office asks whether the claimant should be required to provide a telephone number or email address in the initial notice. We agree with the privacy concerns raised by the Office in the NPRM (which could deter potential claimants from using the system), and therefore suggest that the claimant be given the *option* of providing that additional contact information.

Section 222.3(a)(2) states that the initial notice must “be addressed to the respondent,” however, it is unclear if this means the notice must bear the name and physical mailing address of the respondent, or that the notice must bear the respondent’s name in the heading. This should be revised for clarity.

Sections 222.3(a)(10) and 222.4(a)(9) state that the initial notice and second notice will include information on how to become a registered user of the Board’s electronic filing system. While it is important that the respondent receive this information, unlike the other information listed in paragraph (a), we do not think that this information should be included at this stage for the following reasons:

1. The respondent should use the 60-day opt-out period to fully understand the CCB and the claims being brought against them, and to decide whether or not to opt out. It is important that the respondent not be overwhelmed by information and documents that are not yet relevant/important during the 60-day opt-out period. Thus, any information that is not directly related to that decision-making process should be conveyed to the respondent at a later stage in the process (if the respondent does not opt out). The respondent does not need to become a registered user of the system unless and until the

case becomes active.²⁵ While prior drafts of the legislation included a 30-day opt out window, the CASE Act, as passed, includes a 60-day opt out window to better ensure that respondents have enough time to understand the claims against them, the workings of the CCB, and the consequences of consenting to have the case decided by the CCB. These 60 days should be *exclusively* for understanding the process and considering the claims against them, and it is important that the respondent not be asked to do *anything* other than decide whether to participate in the small claims proceeding during that time.

2. While asking users to register for the electronic system may seem innocuous on the surface, requiring respondents to register as users of the system at this stage could tip the scale in favor of them taking the simpler approach of opting out without ever considering the merits of the claim(s) or the process as a whole. For example, a respondent with concerns about privacy may not be comfortable with sharing their personal information—especially at this stage, when they are still unfamiliar with the CCB—and may decide to just opt out instead.
3. Asking users to register for the electronic system at this stage could also confuse respondents into thinking they have to become registered users of the system in order to opt out. This could lead users who otherwise may want to opt out, not to do so. As we, and many others, have stated in previous comments, the opt-out process should be as simple as possible and should only include the information absolutely necessary to the opt-out process. Respondents should not have to become registered users of the system in order to opt out, and the information that they receive during the opt-out period should be limited to what is absolutely necessary at this stage so as not to overwhelm, confuse, or mislead them as they consider whether to participate in the proceeding.
4. Users should not have to become registered users of the system to confirm that the notice relates to a genuine legal proceeding. Like opting out, verifying the validity of the proceeding should be a simple and straightforward process. Respondents should be able to verify the validity of the proceeding by entering the docket number (or a secret keycode) in the electronic system without becoming a user. The Office should also

²⁵ And even when the case becomes active, the user does not necessarily need to use the system (they can use a paper-based system if they meet the requirements set out in 222.5(d)(3)(ii)(B)). *Id.* at 53909.

provide an email address and phone number that respondents can contact to verify that the notice relates to a genuine legal proceeding.

We strongly urge the Office to provide instructions on how to become registered users of the electronic system by certified mail *after* the 60-day opt-out window ends, in conjunction with the provision of the schedule to the respondent. While the Office proposes sending the schedule through the electronic system rather than by certified mail,²⁶ we believe that sending the schedule by certified mail along with instructions on how to become a registered user of the system will better ensure that respondents:

1. are not overwhelmed during the opt-out window (as explained above);
2. actually receive and review the schedule. We do not think that the respondent's first interaction with the electronic filing system should be when the CCB sends them something. The first communication from the CCB could be inadvertently ignored or missed (for example, an email could go into the respondents' junk email folder and they would never see the schedule and would have no reason to look for it). They may not know to check the system for the schedule at this juncture, and again, explaining all of this during the opt-out period is too much unnecessary information. We think that the respondent's first interaction with the system should be when the respondent uses the system pro-actively so they can take their time to get familiar with the system on their own terms and at their own pace; and
3. receive information about how to register as a user of the electronic system at the appropriate juncture, which is when the proceeding has become "active" and they indeed have reason to become users of the system.

Section 222.3(b), says that "... the *respondent* shall cause the initial notice, the claim, the paper opt-out notification form, and any other documents required by the direction of the Board to be served with the initial notice and the claim, upon each respondent..." (emphasis added). It should instead say "... the *claimant* shall cause..." In addition, in the last sentence of section 222.3(b), it's unclear whether the term "claim" in the last sentence should indeed say "claim" or if it is intended to reference the "notice" form. If the Office intended to say "claim," we believe the regulations should specify that

²⁶ 222.5(d)(3). *Id.* at 53908-09.

the claim served should be the version approved by the Copyright Claims Attorneys. We suggest changing that last sentence to say, “The copy of the claim that is served shall be the copy that ~~is~~ **found to be compliant by the Copyright Claims Attorneys, and is**, at the time of service, available on the Board’s electronic filing system.”

6. § 222.4 Second Notice by or on behalf of the Board

As we stated in our previous comments,²⁷ since the notice requirements under section 1506(g) of the Copyright Act mirror the requirements for serving notice of process under the Federal Rules of Civil Procedure and therefore are sufficient on their own, the regulations should make clear that the second notice sent by the CCB is a courtesy notice and that there is no consequence if a respondent fails to receive the second notice sent by the CCB or if the CCB fails to send the second notice. As written, the regulations do not make this point clear.

In the narrative portion of the NPRM, on page 53902, the Office indicates that, “the CCB is required to issue a second notice to the respondent if the respondent has not already opted out *or filed a response*” (emphasis added). While not reflected in the regulations in this NPRM, we felt it important to comment on this so that later proposed regulations do not allow a respondent to submit a response before the opt out period ends. The respondent should be required to wait until the opt out period ends and the case becomes “active.” After the Board issues the schedule with relevant deadlines, the respondent should be permitted to file its response. While prior drafts of the legislation included a 30-day opt out window, the CASE Act as passed includes a 60-day opt out window to better ensure that respondents have enough time to understand the claims against them, the workings of the CCB, and the consequences of consenting to have the case decided by the CCB. Since this concern was compelling enough for Congress to double the length of the opt-out window, the Office should ensure that respondents have the *full sixty days* to make their decision and/or consult with counsel before submitting a response. In addition, the law permits a claimant to voluntarily dismiss a proceeding, claim, or respondent at any point until the respondent submits their response. It is in the best interest of both parties as well as the CCB to give the claimant the full sixty days to voluntarily dismiss a proceeding, claim, or respondent pursuant to section 1506(q) of the Copyright Act.

²⁷ COPYRIGHT ALLIANCE, *supra* note 4.

7. § 222.5 Service; designated service agents

We believe that section 1506(g)(5)(A) of the Copyright Act requires that where a corporation, partnership, or unincorporated association has designated a service agent pursuant to section 1506(g)(5)(B), the respondent is required to serve notice on that designated agent. However, if that is not the case, we urge the Office to incorporate such a requirement into the regulations.

Section 222.5(d)(3)(ii) says that when documents are served via electronic means, “service is complete upon filing or sending, respectively, but is not effective if the filer or sender learns that it did not reach the person to be served.” We have several concerns about this provision.

1. It is unclear what “learns” means. Presumably, the Office does not intend to permit a party to hold up a case simply by making an unsubstantiated claim to have never received a document. Rather than placing the onus on the sender to “learn” that the document did not reach the intended recipient, the regulations should require the intended recipient to timely notify the sender that the materials were not received. We propose that the last sentence in section 222.5(d)(3)(ii) be revised to say: For these service methods, service is complete upon filing or sending, respectively, but is not effective if the **intended recipient timely notifies the** filer or sender ~~learns that it~~ **the document to be served was never received. did not reach the person to be served.** Along with this revision, a new paragraph 222.5(e)(3)(iii) should be added, saying, “For any document that is served by an electronic means other than the Board’s electronic filing system, as permitted pursuant to section 222.5(d)(3)(ii), a certificate of service must be filed with the Board’s electronic filing system.” This will ensure that the intended recipient is on notice that the document has been served via the agreed upon alternative electronic system so that they can timely notify the sender if the document was not received.
2. In the NPRM, the Office does not set a time limit in which the sender must “learn” that the document did not reach the other party for this provision to take effect. As written, a party could notify the serving party well into the proceedings or even after a case is decided and claim to have not received documents that should have been served.
3. It is unclear what the consequences are if service of a document is deemed not to be effective under this provision. Presumably, the sender would be required to send the document again and complete service, but beyond that, we are concerned about how service

being deemed ineffective under this provision might impact a case—especially a case that is in its later stages or already decided.

4. The Office should clarify whether the phrase “filed with the Board” as used in section 222.5(e)(1) means something different than “filing it with the Board’s electronic filing system” as used in 222.5(d)(3)(ii). Presumably these phrases have different meanings, otherwise sections 222.5(e)(1) and 222.5(d)(3)(ii) appear to be in conflict with one another.

In the NPRM, the Office says that “Documentary evidence will be a focus of the standard requests for production that the Office will propose in a future rulemaking addressing discovery.”²⁸ As a reminder, we anticipate that this future rulemaking will (1) treat the record, including documents, interrogatories, testimony, etc., with a presumption of confidentiality and (2) automatically impose a standard, default protective order to ensure that any confidential documents produced in discovery that are required to be exchanged or filed by the parties in the proceeding would be redacted pursuant to the operative protective order.

8. § 222.6 Waiver of service

Section 222.6(a)(10)(ii), as written, states that a waiver *does* affect a respondent’s ability to opt out. This provision should be corrected to require “[a]n affirmation that waiving service does **not** affect respondent’s ability to opt out of the proceeding.” Section 222.6(c) should also be corrected to state that “[w]aiving service does **not** affect respondent’s ability to opt out of proceedings.”

Section 222.6(a)(10)(iii) says that the waiver of personal service will include “An affirmation that respondent understands the requirement to opt out within 60 days of receiving the request.” There is no *requirement* to opt out of the small claims process. It is critical that the Office revise this language to indicate that the respondent has the *option* to opt out, but is not required to do so.

9. § 222.7 Response

In the NPRM, the Office requests comment on “whether providing a list of defenses (or a link to lists of defenses) that are commonly pleaded in copyright infringement suits would be productive.” The Office should include a list of relevant defenses to copyright infringement cases, but should not go into much more detail than simply listing those defenses. Alternatively, if the Office decides to provide more than just a list, it should be careful to avoid crossing the line into providing legal advice.

²⁸ Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53898.

Likewise, the response forms should provide a list of relevant defenses for declarations of non-infringement and 512(f) misrepresentation claims so as to provide the same degree of assistance to copyright owners, users, and alleged infringers. It is important that claimants and respondents be treated the same and that neither be given greater assistance and leeway before the CCB than the other. In addition, the response form should also remind respondents that they can consult pro bono assistance from legal clinics and link to information about eligible legal clinics and how to contact them.²⁹

There is a typo in section 222.7(b)(4) that should be corrected as follows: “For claims brought under 17 U.S.C. 1504(c)(1), a statement describing in detail the dispute regarding the alleged infringement, including any defenses as well as any reason why the Respondent believes there was no copyright infringement, including whether any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 ~~that~~ are implicated;”

10. §222.8 Counterclaim

There is a typo in section 222.8(c)(3)(ii) that should be fixed as follows: “The following information for each work at issue in the ~~e~~claim counterclaim.” In addition, section 222.8(c)(3)(iii)(D) should be revised, as follows, to conform with the text in section 222.2(c)(iii)(D) regarding the initial claim: “The ~~nature of the alleged infringement~~ facts leading the counterclaimant to believe the work has been infringed.”

11. § 222.9 Response to counterclaim

In the NPRM, the Office invites comment on whether to provide “a mechanism for the respondent to the counterclaim to opt out of the proceeding.” We do not believe that the respondent to a counterclaim (aka, the claimant) should be permitted to opt out. As proposed by the Office in the NPRM, a counterclaim would have to be asserted at the same time as (and in some cases, for good cause, after) the response is filed. We agree with this approach, as a respondent should be allotted the same amount of time to prepare their counterclaim as they do to prepare the response to the claim. Pursuant to section 1506(q) of the Copyright Act, a claimant is permitted to voluntarily dismiss a proceeding up until “a respondent files a response to the claim in a proceeding.” Permitting the counterclaim respondent/claimant to “opt out” of the proceeding in response to a counterclaim would

²⁹ This information should also be provided to claimants.

be akin to permitting the claimant to voluntarily dismiss the proceeding after the response has been filed, which may be at odds with the law.

The counterclaim respondent/claimant consents to be a part of the proceeding when they voluntarily bring a claim under the jurisdiction of the CCB. Like respondents, they elect to either proceed before the CCB or not to; they do not get to pick and choose which eligible claims they would like to be subject to before the CCB. To make this clear, the Office should include a prominent statement on the claim form informing claimants that by bringing a claim before the CCB, they voluntarily consent to the process, including any counterclaims permitted by 17 USC 1504(c)(4).³⁰

If the Office believes that 1506(q) does not preclude a respondent to a counterclaim/claimant from opting out of a proceeding in response to a counterclaim and wishes to permit such an opt out, the claim brought by the counterclaim respondent/claimant should be dismissed without prejudice, and the opt out should only be permitted with the consent of all parties. This will help ensure that resources already expended and invested by the other parties (for example, to hire an attorney) do not go to waste simply because the claimant no longer wants to proceed.

12. § 223.1 Respondent's opt-out

In the NPRM, the Office requests comment on whether the regulations “should include a provision permitting a respondent to give the CCB notice of an intention to participate after an initial opt-out.”³¹ Such a maneuver is not permitted by the law. Section 1506(i) of the Copyright Act explains that once a respondent opts out, “the proceeding shall be dismissed without prejudice.” While the provision goes on to include a special exception allowing the CCB to extend the 60-day opt-out window “in exceptional circumstances” there is no exception related to permitting a respondent to rescind their opt-out. As a result, upon the respondent's opt out, the proceeding is dismissed. The law provides only one way to bring a case before the CCB—commencing a proceeding pursuant to section 1506(e) of the Copyright Act. The law does not permit a respondent to re-commence a proceeding that has been dismissed, except by starting the process anew. Additionally, the law gives respondents 60 days to decide whether to participate or opt out of a proceeding. Respondents can, and should, take as much of that time as they need to make an informed decision, rather than rushing to opt out prematurely.

³⁰ It may also be beneficial for the claimant to receive all of the same warnings about the rights they are waiving by choosing to have the case heard by the CCB.

³¹ Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. at 53903.

While the Office declines to create a publicly accessible list of entities or individuals who have opted out of particular proceedings at this time “given the limited time before the anticipated commencement of CCB operations and the need to focus on establishing the core proceedings of the CCB,” we strongly urge the Office to revisit this issue within the first year of the CCB’s operation. As we stated in our previous comments,³² this is essential so that creators can 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.

The Office should revise section 223.1(f) to include a timeframe within which the CCB will notify the parties following an opt-out.

Section 223.1(g) uses the phrase “initial opt-out notification” for the first and only time in the regulations. To avoid confusion and maintain consistency, “initial” should be deleted from that phrase. In addition, Sections 223.1(g) and (h) should be amended as follows to conform with section 222.8(a) and rule 13 of the Federal Rules of Civil Procedure:

(g) Effect of opt-out on refiled claims. If the claimant attempts to refile a claim against the same respondent(s), ~~covering arising out of the same acts and the same theories of recovery transaction or occurrence that is the subject matter of the original claim~~ after the respondent’s ~~initial~~ opt-out notification, the Board will apply the prior opt-out election and dismiss the claim.

(h) Effect of opt-out on unrelated claims. The respondent’s opt-out for a particular claim will not be construed as an opt-out for claims ~~involving arising out of different acts or different theories of recovery~~ transactions or occurrences that are the subject matter of the original claim.

³² COPYRIGHT ALLIANCE, *supra* note 4.

13. § 224.1 Compliance review

During compliance review, the Copyright Claims Attorneys should check the libraries and archives opt-out list to ensure that they do not permit service upon an entity that has preemptively opted out, except where the claimant asserts a reasonable challenge to the validity of that entity's status.

We thank the Office for its attention to these comments and its dedication to implementing the CASE Act and ensuring that the Copyright Claims Board is the inexpensive, streamlined, and accessible forum that Congress intended.

Respectfully submitted,

Copyright Alliance	Music Artists Coalition (MAC)
ACT The App Association	Music Creators North America (MCNA)
American Photographic Artists (APA)	National Press Photographers Association
American Society for Collective Rights	(NPPA)
Licensing, Inc. (ASCRL)	North American Nature Photography Association
American Society of Media Photographers	(NANPA)
(ASMP)	Professional Photographers of America (PPA)
Authors Guild	Recording Academy
CreativeFuture	SAG-AFTRA
Digital Media Licensing Association	Society of Composers & Lyricists (SCL)
(DMLA)	Songwriters Guild of America, Inc. (SGA)
Graphic Artists Guild	Songwriters of North America (SONA)
Independent Book Publishers Association	
(IBPA)	

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