



**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, CREATIVEFUTURE, DMLA, GRAPHIC ARTISTS GUILD, IBPA,
MAC, MCNA, NSAI, NPPA, NANPA, PPA, RECORDING ACADEMY, SAG-AFTRA,
SCL, SGA, AND SONA¹**

The organizations listed below appreciate the opportunity to submit reply comments² 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.

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.

² Due to the limited amount of time available for drafting reply comments, our comments will only address written/narrative comments, and do not address redlines that were submitted by some commenters (to the extent those suggested changes are not reflected in their written/narrative comments).

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 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.

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 5,000 members and 100 chapters in the United States and abroad. The Nashville Songwriters Association International is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession.

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

These reply comments should be read in conjunction with our initial comments. To the extent we addressed a particular issue in our initial comments but have not responded to opposing views in our reply comments, the Office should read our initial comments on those issues as responsive to opposing views.

In its comments, Public Knowledge complains about the limited amount of time provided for submitting comments—a timeline that is almost entirely outside of the control of the Copyright Office due to the law’s own timeline for beginning operations of the Copyright Claims Board (CCB)—but uses all of the time available to respond to issues that are not the subject of this NPRM.³ To make matters worse, Public Knowledge then says it plans to address numerous issues raised in the NPRM during the reply comment phase. Given that the reply comment phase provides only an additional 15 days, it is unclear how Public Knowledge will be able to respond to the issues raised in the NPRM at that point yet could not address *any* of those issues during the initial comment phase. This seems like a purposeful attempt to prevent other stakeholders from responding to the points raised in their comments, and the Office should be mindful of this when reviewing and evaluating those comments. While other commenters have also raised issues not appropriately the subject of this NPRM, Public Knowledge seems to be the only commenter that found the timeline insufficient to address *any* of the subjects of the NPRM, while commenting extensively on an entirely separate matter.

In addition, in its comments, Engine says that the brevity of the timeline for submitting comments means that the Office will be unable to hear from small businesses and members of the public. However, the Office received 179 comments in response to this NPRM, and the *overwhelming majority* of those comments were filed by small businesses and members of the public.

To be clear, we recognize that the timeline for responding to the NPRM would ideally be longer, but we understand the constraints placed on the Office and we make it a priority to devote our immediate attention to considering the proposed rules so we can respond in a timely and helpful fashion. We believe that if other stakeholders have an interest in replying to the

³ Public Knowledge, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 (Nov. 30, 2021), <https://publicknowledge.org/policy/comments-to-copyright-office-on-copyright-claims-board/>.

NPRM, they should do the same, and we do not believe that the timeline has been so short as to prevent interested stakeholders or members of the public from providing input. We renew our request that the Office decline to grant extensions to the CASE Act comment periods going forward to ensure that everyone has adequate time to respond to the remaining proposals, and that the Office has sufficient time to consider all of the comments and begin operations by June 25, 2022.

2. Fees

a. Fee for Filing A Claim

We reiterate our position, as stated in our initial comments, *strongly* urging the Office to reconsider its proposal to set a single fee of \$100 for commencing a proceeding before the CCB and we *strongly* encourage the Office, instead, to follow the guidance of the Senate Report in instituting a tiered/split fee structure for initiating a proceeding for the reasons explained in our initial comments.⁴ Of the 179 initial comments filed in response to this NPRM, the vast majority were comments submitted by individual creators expressing concern that the proposed \$100 fee would be cost-prohibitive. Therefore, if 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.

The chart in section 201.3(g) of the proposed regulations mistakenly describes the fee for initiating a proceeding as a fee for “filing a claim before the Copyright Claims Board.” This is incorrect. The fee contemplated by section 1506(e) of the Copyright Act is the fee for *initiating a proceeding*, and is not a fee that would be charged per claim. The Office should correct this error by replacing the words “filing a claim” with “commencing a proceeding,” and should make clear in the regulations that more than one claim can be brought in a single proceeding pursuant to the stipulations set forth in 1504(c)(6) of the Copyright Act.

⁴ Copyright Alliance, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 at 8-11 (Nov. 30, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/11/CA-Comments-Initiation-of-Proceedings-2021-6-FINAL.pdf>.

b. Fee for Filing a Counterclaim

We reiterate our position, as stated in our initial comments, that the Office should not institute 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. In its comments, the American Intellectual Property Law Association (AIPLA) argues that the Office should require such a fee (1) to cover administrative costs, (2) to discourage frivolous counterclaims, and (3) to align the CCB with the Trademark Trial and Appeal Board (TTAB), which charges a fee to file counterclaims.⁵ While the position of the AIPLA is well-intentioned, we disagree with those rationales for the following reasons:

1. The fee structure of the CCB, as outlined in the law, is designed such that the filing fee to initiate a claim will cover any administrative costs incurred by the filing of a counterclaim. While there are certainly administrative costs associated with counterclaims, the filing fee contemplated by section 1506(e) of the Copyright Act is a fee to commence a *proceeding*, not a fee charged *per claim*. Therefore, despite the fact that there will be greater levels of review for proceedings where the claimant brings more than a single claim, the fee will remain the same because it covers the entirety of that proceeding.⁶ Likewise, despite the fact that a proceeding in which counterclaims are raised will require additional review of those counterclaims, no additional fee should be charged for the review of those counterclaims. In addition, the notice requirements for counterclaims are less stringent than the requirements for a claim; for example, the law does not require a notice to be sent by, or on behalf of, the Office in the instance of a counterclaim.
2. There are a number of safeguards in the law to deter a party from bringing frivolous counterclaims. Most notably, section 1506(y)(2) permits the CCB to award attorney's fees of up to \$5,000 (or more in extraordinary circumstances) to a party who has been

⁵ American Intellectual Property Law Association, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 at 3 (Nov. 10, 2021), https://www.aipla.org/docs/default-source/news/aipla-letter-to-copyright-office-re-case-regulations-111021-final.pdf?sfvrsn=31ff1634_0.

⁶ See 17 U.S.C. § 1504(c)(6); see also *id.* § 1506(e)(3).

adversely affected by another party who “pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact.”⁷ Section 1506(y)(3) would allow the CCB to ban the offending party for a period of 12 months if they are found to have pursued a frivolous claim, counterclaim, or defense on more than one occasion.⁸ Any filing fee that might possibly be instituted by the Office for the purpose of deterring frivolous counterclaims would pale in comparison to the penalties already provided for in the law.

3. The purpose of the CCB, and the need it was designed to meet, is fundamentally different from that of the TTAB. The CCB was specifically designed as a cost-effective alternative to federal court for a subset of copyright claims. Therefore, in determining whether a fee for counterclaims is appropriate, the Office should compare its proposals to the workings of the federal court system and ensure that the fee is more cost-effective by comparison. Since there is no fee in federal court for filing counterclaims, there should likewise be no fee for bringing counterclaims before the CCB.

3. Initiating a proceeding; the claim

In their comments, Amazon⁹ and the Computer & Communications Industry Association¹⁰ (CCIA) argue that claims of secondary liability should be categorically excluded from the jurisdiction of the CCB, or in the alternative that “the Office [should] make clear in the forthcoming CCB Practice Guide that secondary liability cases are generally too complicated for CCB resolution, absent a specific showing of appropriateness by the claimant.”¹¹ Since the law specifically permits claims of infringement, it would be inappropriate for the Copyright Office to

⁷ 17 U.S.C. § 1506(y)(2).

⁸ *Id.* § 1506(y)(3).

⁹ Amazon.com, Inc., Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 (Nov. 30, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0177>.

¹⁰ Computer & Communications Industry Association, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 (Nov. 30, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0183>.

¹¹ Amazon.com, Inc., *supra* note 9.

categorically exclude claims of secondary liability which as much constitute claims of infringement as do claims of direct liability.

Given the nature of the organizations petitioning for this exclusion (i.e., online service providers (OSPs)), it is likely that they are more specifically concerned with secondary liability claims for which section 512 of the Copyright Act provides safe harbors. As it relates to those claims, section 1506(f)(1)(C) of the Copyright Act already excludes such claims, except where the OSP fails to remove or disable access to the material expeditiously in response to a takedown notice.¹² Therefore, it is clear that Congress intentionally provided for these claims to be heard and decided by the CCB where the OSP fails to respond appropriately to a takedown notice, and it would be inappropriate and contrary to the law for the Office to exclude such claims. Likewise, it would be inappropriate for the Office to require a specific showing of “appropriateness” beyond what is stated in the law. Given the requisite experience and understanding of copyright law of the CCB Officers, in most cases they will be more than equipped to decide cases of secondary liability. However, if a particular claim is unsuitable for some reason, including due to the complexity of the facts at issue, section 1506(f)(3) permits the CCB to dismiss that claim without prejudice.

In its comments, the Organization for Transformative Works (OTW) suggests that “[t]he Copyright Office should establish penalties that apply to any communications between parties that includes baseless or improper claims.”¹³ While the Office has some oversight over communications between parties within the context of the CCB, and has proposed the use of various forms to ensure that accurate and appropriate information is shared between the parties, it is unclear under what authority the Office or CCB would be able to control communications between the parties that occurs outside of those specific contexts as those communications would be beyond the purview of the CCB. OTW also proposes sanctions for such communications, including a default judgment in favor of the respondent or a bar from participation before the CCB—both of which would be *incredibly* inappropriate.

OTW as well as Fordham University School of Law’s Samuelson-Glushko Intellectual Property and Information Law Clinic (Fordham Clinic) suggest that claimants should be required

¹² 17 U.S.C. § 1506(f)(1)(C).

¹³ Organization for Transformative Works, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 at 5 (Nov. 30, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0182>.

to include documentation in support of their claims to ensure that the respondent has sufficient information for understanding the claims against them and deciding whether to participate in the proceeding.¹⁴ While we agree with the Office’s position that including additional documentation should be optional because “requiring such information at the initial claim stage would discourage claimants from initiating a proceeding and would be more burdensome than the requirements for litigation in the federal courts,”¹⁵ we believe there is a reasonable middle ground. Whether to include additional documentation should remain optional, as proposed by the Office, but to address the concerns raised by OTW and the Fordham Clinic, upon review of the claim by a Copyright Claims Attorney (CCA), if the CCA believes that the respondent would need additional documentation to understand the claim and make an informed decision, the CCA should require such additional documentation before approving the claim and permitting service on the respondent. These determinations should be made on a case-by-case basis.

4. Content of Initial Notice to Respondent

In its comments, the Fordham Clinic suggests that the initial notice should include information clarifying the differences between the CCB and federal court. OTW suggests that the initial notice should include information about the registration status of the work at issue and the implications of that status as it relates to federal court proceedings. We strongly disagree with OTW and Fordham Clinic here. As we have stated in previous comments, the contents of the 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. In addition, if the Office were to follow OTW’s suggestion, it would also be necessary to inform respondents about a slew of other issues, like the absence of a monetary limit in federal court where the plaintiff seeks actual damages, and the

¹⁴ *Id.* at 8; Fordham University School of Law’s Samuelson-Glushko Intellectual Property and Information Law Clinic, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 at 1-2 (Nov. 12, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0131>.

¹⁵ Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. 53897, 53898 (proposed Sep. 29, 2021).

lack of *any* overall damages cap per case, whether the plaintiff seeks actual or statutory damages; or informing the respondent that if a suit is brought in federal court the proceeding is not optional, along with statistics citing the average cost of litigation in federal court; or the fact that it is generally not advised to litigate *pro se* in a federal copyright proceeding, along with statistics on the cost for hiring an attorney for federal litigation; or informing the respondent that criminal penalties for infringement exist under certain circumstances. Of course, we are not suggesting that the Office include those points. As we have said in previous comments, the notices must not be used as vehicles for persuading respondents to opt out or not opt out. The purpose of these notices is to convey essential information about the claim and the process.

The Science Fiction and Fantasy Writers of America (SFWA) also state that the notice should make no mention of federal court or any consequences of opting out. However, the respondent should understand that just because they opt out of the CCB proceeding, and just because the claim “qualified” for the CCB’s small claims process, does not mean that the same claim could not potentially be brought in federal court.

In its comments, Verizon makes the point that “the idea of encouraging settlements outside the CCB process would turn the tribunal into a back-door settlement enforcement mill.” A widely cited statistic says that over 95% of civil cases settle before trial. Settlement is a healthy and important part of our judicial system, and helps ensure judicial efficiency.¹⁶ Simply using inflammatory terms such as “back-door” and “mill” to describe the settlement process does not change that fact. And because the CCB is a voluntary forum, where the respondent can easily opt out of the process, there is no leverage at all for coercing parties into a settlement, as Verizon seems to imply would be the case.

5. Service; designated service agents

As stated in our initial comments, 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

¹⁶ Ahern v. Cent. Pac. Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988) (“The Ninth Circuit is firmly “committed to the rule that the law favors and encourages compromise settlements.” (quoting United States v. McInnes, 556 F.2d 436, 441 (9th Cir.1977))) (“[T]here is an overriding public interest in settling and quieting litigation.” (quoting *Id.*) (citations omitted)) (“It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation.” (quoting Speed Shore Corp. v. Denda, 605 F.2d 469, 473 (9th Cir.1979))).

that designated agent. However, if that is not the case, we urge the Office to incorporate such a requirement into the regulations.

In his comments, Eric Goldman raises the possibility of a claimant misidentifying the defendant or the defendant's address, and says that "the CCB needs to validate that the right defendant was identified and that service was made to that person." However, this is a possibility that also exists in federal court, and it is unreasonable to expect that the CCB could somehow ensure that the claimant does not misidentify the respondent or the respondent's address. If the correct respondent is not properly served within the 90-day window provided by the law, the proceeding (or the respondent, whichever applies) would be dismissed without prejudice.¹⁷ The Office could include instructions in the initial and second notice forms to contact the Office if you are incorrectly served as the result of a misidentification.

6. Response

In its comments, Engine suggests that the Office should provide "a checklist form of defenses that respondents can use when answering a complaint/asserting defenses during a proceeding. And the CCB should, as a matter of course, evaluate each of the defenses on the checklist sua sponte in each case, including when respondents proceed pro se and when the CCB awards damages in the context of a default judgment." Affirmative defenses must be affirmatively raised and sufficiently pleaded.¹⁸ Merely checking a box, or defaulting altogether, does not plead the necessary facts to support a defense, and it is not the role of the CCB Officers to make arguments on behalf of parties that did not raise those arguments, or did not respond at all to the proceeding. In addition, allowing respondents to check boxes to raise any and every possible defense will simply encourage respondents to raise frivolous defenses without basis in law or fact, making these cases more complicated for claimants to prosecute and drawing out the time it takes to litigate these cases.

¹⁷ 17 U.S.C. § 1506(v)(1).

¹⁸ *Cf.* Fed. R. Civ. P. 8(b)(1)(A) ("In responding to a pleading, a party must...state in short and plain terms its defenses to each claim asserted against it."); *id.* R. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including...").

7. Response to Counterclaim

In its comments, SFWA raised concerns about prohibiting claimants from opting out of a counterclaim, adding that, “[t]he one-sided nature of this ban means that respondents enjoy more rights than claimants.” In expounding on its view, the SFWA says, “[t]he claimant unfairly bears the burden of paying the filing fee, initiating the process, and assuming the risk of being subjected to a counterclaim. In cases where each party believes it was wronged by the other, the respondent is placed at a distinct advantage by being able to force the case through the CCB process.” While we are sympathetic to this view, we disagree with the SFWA for a few reasons:

1. As an initial matter, the Office is technically inquiring about whether to allow the claimant to opt out of the *proceeding* in response to a counterclaim, therefore terminating the entire proceeding. Several commenters’ views address whether the claimant should be able to opt out of the *counterclaim*, but that is not exactly what has been proposed by the Office. To be clear, we would be concerned with allowing either approach.¹⁹
2. 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.²⁰ For example, a respondent cannot opt out of an infringement claim but choose to participate in a 512(f) claim brought against them in the same proceeding because the decision to participate goes to the entire *proceeding*, and not individual claims. For this reason, we disagree that preventing a claimant from opting out of a proceeding amounts to a one-sided system. This is also why we would have concerns with permitting a claimant to opt out of a *counterclaim*—such an allowance would, in fact,

¹⁹ As we stated in our initial comments, if the Office believes that 17 U.S.C. § 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 the counterclaim respondent/claimant to opt out of the proceeding (thereby also dismissing the claims brought by that counterclaim respondent/claimant), the opt out should only be permitted with the consent of all parties.

²⁰ 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 § 1504(c)(4). 17 U.S.C. § 1504(c)(4).

create a one-sided scenario where the claimant can choose to stay in the proceeding and opt out of claims against them while the respondent cannot.

3. Perhaps even more importantly, and as we explain in greater detail in our initial comments, allowing the claimant to opt out of the proceeding in response to a counterclaim may be at odds with the law.
4. To SFWA’s point about the burdens placed on the claimants as compared to the respondents, we believe that given the fact that the process is voluntary and initiated by the claimant, it is not unreasonable that the claimant bears the burdens articulated in the SFWA comments. Permitting the claimant to opt out of counterclaims, for example, could actually deter respondents from participating in the system.

8. Opt-out Provisions

a. Blanket Opt-out and Proposals for Opt-in

In each of their comments, Verizon and Amazon advocate for a blanket opt-out for entities other than libraries and archives. We have addressed this issue in previous comments, and although we are confident that the Office understands that it is prevented by law from creating a blanket opt-out regime for entities outside of libraries and archives,²¹ we urge the Office to revisit our previous responses on this issue,²² as well as the comments filed by Senators Durbin and Kennedy and Representative Jeffries,²³ if there is any lingering doubt. Although Amazon, in its comments, argues that the legislative history does not clearly indicate that Congress considered and rejected a blanket opt-out regime for entities other than libraries and archives, this assertion is incorrect and is specifically addressed in our previous comments as

²¹ “Congress did not establish a blanket opt-out for any entities other than libraries and archives, and in that case, it did so expressly by statute. This suggests that the Office lacks authority to adopt other blanket opt-outs by regulation.” Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, 86 Fed. Reg. 16156, 16161 (proposed Mar. 26, 2021).

²² Copyright Alliance, Comments on Proposed Rule: Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations at 11 (May 10, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/05/CA-CASE-Implementation-REPLY-Comments-FINAL.pdf>; Copyright Alliance, Comments on Proposed Rule: Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations at 19 (Apr. 26, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf>.

²³ Senators Durbin and Kennedy and Representative Jeffries, Comments on Proposed Rule: Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations (May 10, 2021), <https://www.regulations.gov/comment/COLC-2021-0001-0047>.

well as comments submitted by Senators Durbin and Kennedy and Representative Jeffries. We look forward to an affirmative statement from the Office that closes the door on these arguments.

Relatedly, CCIA suggests that the Office provide for an “opt-in approach.” In its 2013 Copyright Small Claims report, prepared for and submitted to Congress, the Office discusses both an opt-in and opt-out approach for the small claims process and “recommends that Congress consider the relative merits of both an opt-out process and opt-in process to initiate a proceeding.”²⁴ In addition, both CCIA and the Internet Association raised this same issue in their respective testimonies before the House Judiciary Committee on the CASE Act in 2018.²⁵ The idea of an opt-in approach has been considered by Congress and rejected, and the Office has no authority to change the opt-out framework clearly established in the law into an opt-in regime.

b. Verification Code

In its comments, CCIA questions the necessity for a verification code for the opt-out process and suggests, instead, that parties be able to opt out solely using the docket number. While we have stated numerous times before that we support an opt-out process that is easy and simplified, we also support the Office’s proposal to require a verification code and we do not believe these two ideas are mutually exclusive. Requiring respondents to include a verification code when opting out will not make the process for opting out any more difficult, but adds a second layer of protection for ensuring the security and integrity of the opt-out process (particularly if the docket number might be publicly accessible). This proposal is not much different than the 2-factor authentication procedures employed by many of CCIA’s own member organizations for security measures on their platforms.

c. Opt-out window

In its comments, OTW suggests that because organizations providing pro bono legal assistance may be slower to respond than private counsel, “[t]he final rule should permit respondents to delay the opt-out decision for up to 270 days to allow for consultation with

²⁴ Maria A. Pallante, *Copyright Small Claims*, UNITED STATES COPYRIGHT OFFICE 121 (Sep. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

²⁵ Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Comm. on the Judiciary, 115th Cong. 3 (2018) (statement of Matt Schruers, Vice President for Law and Policy, Computer & Communications Industry Association); Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Comm. on the Judiciary, 115th Cong. 2 (2018) (written testimony of Jonathan Berroya, Senior Vice President and General Counsel, Internet Association).

counsel.”²⁶ While the CCB does have the capacity to extend the 60-day opt-out window “in exceptional circumstances [and] ... in the interests of justice,”²⁷ extending the window to 270 days would amount to a 350% increase in the amount of time the respondent has to opt out, thus significantly delaying the proceeding. This cannot be what Congress envisioned when it created the CCB to be “streamlined and efficient,”²⁸ or when it permitted the CCB to extend the opt-out window in the interests of justice. Further, in most cases, we do not believe that it will take longer than 60 days for those parties who wish to consult counsel to do so, nor do we believe that (in general) failure to consult with counsel in a timely manner should amount to an “exceptional circumstance,” particularly in a forum that is optional. The decision on whether to extend an opt-out window should be made on a case-by-case basis, and the CCB should be prudent in ensuring that:

1. Those extensions are only granted in *truly* exceptional circumstances, which by definition would amount to a rarity; and
2. The length of any extension granted serves the “interests of justice” and accounts for the fact that this process is intended to be “streamlined and efficient.”

d. Rescinding an Opt-out

Some commenters suggest that respondents should be permitted to rescind their decision to opt out of a proceeding if certain circumstances are met. While we might otherwise be amenable to some of the limitations expressed in those comments, we reiterate that the law does not permit a respondent that has opted out to rescind that decision. 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

²⁶ Organization for Transformative Works, *supra* note 13, at 11.

²⁷ 17 U.S.C. § 1506(i).

²⁸ H.R. REP. NO. 116-252, at 17 (2019).

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.

9. Compliance Review

In its comments, Amazon suggests that the Office should modify the regulations “to require Copyright Claims Attorneys to conduct a reasonably diligent inquiry into the claimant’s history of bad-faith or vexatious-litigant tendencies, and to consider the results of that inquiry before authorizing the claim for service.” To the extent that Amazon is suggesting that the CCAs should review whether or not a particular claimant is actively barred from using the CCB, pursuant to section 1506(y)(3), we agree. We would also agree that where a claimant has previously been sanctioned pursuant to section 1506(y)(2), it might make sense to have the CCAs scrutinize other claims brought by that same claimant a bit more closely. However, if Amazon is suggesting that CCAs should be given the discretion to deny a claim where the claim otherwise complies with the law and applicable regulations, and where there is no evidence that the claim is being brought for a harassing or other improper purpose and the claimant has not been barred pursuant to 1506(y)(3)—for example, where a claimant or its legal representation has been sanctioned before another tribunal but has not engaged in bad faith behavior before the CCB—we disagree. There are already a number of safeguards included in the law (that go well beyond what is available in federal court) to prevent or deter bad faith conduct including:

1. The ability of respondents to opt out of any proceeding, for any reason, without penalty;²⁹
2. The requirement to award reasonable attorneys fees to a party that is adversely affected by a bad faith claim, counterclaim, or defense (up to \$5,000, or more in extraordinary circumstances);³⁰

²⁹ § 1506(i).

³⁰ *Id.* § 1506(y)(2).

3. The requirement to bar a party from participating before the CCB for a period of 12 months if they bring a claim, counterclaim, or defense in bad faith before the CCB on more than occasion;³¹
4. The ability for the CCB to limit the number of claims a particular claimant may bring before the CCB.³²

Amazon also suggests that “the Office can and should adopt more specific screening procedures that will head off harassing or improper conduct at the first pass.”³³ Verizon also expressed a similar position in its comments.³⁴ While we believe there are sufficient procedures and safeguards in place to prevent and deter harassing or improper conduct, we would need to see specific proposals from the Office before opining one way or the other on the appropriateness of those procedures.

10. Miscellaneous

A number of comments raised issues that are not appropriately the subject of this NPRM. Due to the Office’s limited time constraints, there is not enough time to respond effectively to the various points that are not relevant to this NPRM, and the Office should not incorporate those suggestions without putting stakeholders on notice through an appropriate NOI or NPRM and giving stakeholders a legitimate opportunity to provide input. That being said, there are a few miscellaneous issues that we will respond to briefly.

Some commenters suggest that the Office should conduct a rulemaking on the types of claims that are suitable for determination by the CCB, however, the law is clear on which claims are permissible and which claims are not. As a result, it is unclear what authority the Office would have to impose limitations on permissible claims. The law requires the Office to conduct a

³¹ *Id.*

³² *Id.* § 1504(g).

³³ Amazon.com, Inc., *supra* note 9, At 7.

³⁴ “Given the volume of claims that CCB will inevitably receive (including from pro se parties unfamiliar with copyright law), we continue to encourage the Copyright Office to consider further rules to deter invalid or frivolous claims.” Verizon, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures under the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 at 1 (Nov. 12, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0128>.

study within 3 years of the CCB’s first determination, including on “[w]hether adjustments to the authority of the Copyright Claims Board are necessary or advisable.” This would be the appropriate time and avenue for examining this issue.

Some commenters suggest that ex parte communications with the CCAs should be prohibited, however, the law is clear that ex parte communications are only prohibited with regard to the Register of Copyrights and the CCB Officers; such a rule would conflict with the CCAs’ responsibility to communicate with the parties on certain issues.

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)	Nashville Songwriters Association International
American Society for Collective Rights	(NSAI)
Licensing, Inc. (ASCRL)	National Press Photographers Association
American Society of Media Photographers	(NPPA)
(ASMP)	North American Nature Photography Association
Authors Guild	(NANPA)
CreativeFuture	Professional Photographers of America (PPA)
Digital Media Licensing Association	Recording Academy
(DMLA)	SAG-AFTRA
Graphic Artists Guild	Society of Composers & Lyricists (SCL)
Independent Book Publishers Association	Songwriters Guild of America, Inc. (SGA)
(IBPA)	Songwriters of North America (SONA)

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