



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

**Copyright Claims Board: Active
Proceedings and Evidence**

Docket No. 2021-8

**COMMENTS OF THE COPYRIGHT ALLIANCE, APA, ASCRL, ASMP, THE
AUTHORS GUILD, CREATIVFUTURE, DMLA, GRAPHIC ARTISTS GUILD, IBPA,
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 December 8, 2021 by the U.S. Copyright Office, regarding procedures governing active proceedings before the Copyright Claims Board and post-determination procedures.

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

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 Our comments submitted on February 7, 2022 were mistakenly referred to as “reply comments.” See Copyright Alliance, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence at 1 (Feb. 7, 2022), <https://copyrightalliance.org/wp-content/uploads/2022/02/CA-Active-Proceedings-Comments-FINAL.pdf>.

organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

American Photographic Artists (APA) is a leading 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 4,100 members, IBPA is the largest publishing association in the U.S. Its vision is a world where every independent publisher has the access, knowledge, and tools needed to professionally engage in all aspects of an inclusive publishing industry. For more information, visit ibpa-online.org.

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

its membership in The International Council of Music Creators (CIAM), in advocating for the strongest possible protections of music creator rights everywhere in the world.

The 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.

1. Complexity of the Regulations and Procedures

As we expressed in our comments, we are extremely concerned that the proposed rules are far too complex, and that the complexity and lack of consistency throughout the regulations will make the Copyright Claims Board inaccessible to *pro se* litigants, who are expected to comprise a significant portion of the system's users, and whom the statute was designed to accommodate. This view is shared by a broad consensus of the commenters, including the Copyright Alliance, et al.,³ Engine,⁴ MPA and RIAA,⁵ the Authors Guild,⁶ as well as individual creators.⁷ This view is supported by the legislative history of the CASE Act, which states that

³ These comments were submitted jointly by 20 organizations (including both members and non-members of the Copyright Alliance) to comply with the Office's request encouraging "parties to file joint comments on issues of common agreement." Copyright Alternative in Small-Claims Enforcement Act Regulations, 86 Fed. Reg. at 16158. Those organizations include: Copyright Alliance, APA, ASCRL, ASMP, Authors Guild, CreativeFuture, DMLA, Graphic Artists Guild, IBPA, MAC, MCNA, NSAI, NPPA, NANPA, PPA, Recording Academy, SAG-AFTRA, SCL, SGA, and SONA.

⁴ "We are concerned, however, that these specific procedures—and in particular, the language used in the proposed Rule—remain too complex for parties who lack legal expertise." Engine, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence at 5 (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0011>.

⁵ "However, after reviewing this NPRM, Commenters have significant concerns that the proposed rules and procedures are much too complex to fulfill the original goal of the system: to provide a forum for relatively quick and inexpensive resolution of small-dollar copyright claims, and which would be navigable even by *pro se* litigants." Motion Picture Association, Inc. & Recording Industry Association of America, Inc., Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence at 2 (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0006>.

⁶ "We fear that proposed rule's complexity and the use of legalese undermines the very purpose of the CCB and will deter *pro se* parties from using the CCB." The Authors Guild, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence at 1 (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0005>.

⁷ "As a content creator, how am I supposed to navigate a system that appears to be just as confusing as court. I was excited about the potential of the CASE Act to provide recourse for creators like myself. Please consider making the rules simpler for creators like myself." H. Smith, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0003>; "I thought that the copyright claims board was going to make things easier for me and other users, but the language and

“[w]hile principles of federal procedure are relevant to the CASE Act, the Act is not intended to simply mimic federal practice. The Act derives from the recognition that the cost and complexity of litigating in federal court has made it functionally impossible for many creators to meaningfully enforce their rights.”⁸

While we applaud the Office for its stated intention to create a handbook that will make the procedures and requirements of the CCB more accessible and understandable,⁹ parties will not be able to rely exclusively on the handbook and will ultimately be bound by the language as codified in the regulations.¹⁰ Importantly, the primary problem is not that the *language* used in the regulations is complex, but rather that the procedures set forth in the regulations are extremely complex. That is why the complexity problems cannot be solved simply by creating a handbook. For example, proposed rule 222.19 (a) says, “[p]arties may cite to the FRE as persuasive authority when making an argument about the credibility, weight, or admissibility of a piece of evidence” even though most parties will not have the legal wherewithal to even know what the Federal Rules of Evidence are, much less how to navigate, apply, or cite to them. Paragraph (b) states, “[a]t a hearing, parties may conduct direct examination (substantively limited to the testimony of the witness in the written statements and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination or submitted through witness statements); and redirect examination (limited to matters raised on cross-examination).” These are undue procedural complexities that cannot be resolved through the creation of a handbook. So, while the handbook will be an invaluable tool for *pro se* parties, it

rules drive me to believe that this system is not designed for the average person to navigate.” Anonymous II, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0013>; “Congress passed the CASE Act to create a small claims court that ‘is intended to be accessible especially for pro se parties and those with little prior formal exposure to copyright law who cannot otherwise addled to have their claims and defenses heard in federal court.’ With these rules the copyright claims board does not serve its intended purpose.” Anonymous I, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0009>.

⁸ H.R. REP. NO. 116-252, at 23 (2019).

⁹ Lawyering and Advising in the CASE Act Era, 2022 Virtual Midwinter Meeting of the Copyright Society of the USA (Feb. 11, 2022).

¹⁰ “The handbook will not override any existing statute or regulation.” § 220.3, Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. 69890, 69904 (proposed Dec. 8, 2021).

does not solve the primary problem. We, therefore, strongly urge the Office to *simplify the procedures* proposed in the NPRM as described in our comments.¹¹

In our comments, we urged the Office to, among other things, further limit and simplify the discovery process to ensure that the process is accessible for *pro se* parties and does not unduly encourage respondents to opt out. We, therefore, oppose the suggestion by Engine that the Office “eliminat[e] the good cause requirement for an initial number of additional discovery requests in § 512(f) claims.”¹² As Engine recognizes in its comments, the proposed rules permit a party to request additional discovery “upon a showing of good cause” and provide that “the Board shall balance the needs and circumstances of the case against the burden of additional discovery on any party, along with the amount in dispute and overall goal of efficient resolution of the proceeding.”¹³ This proposal is in line with the statute, which provides that the Board may permit additional discovery (1) upon the request of a party, and for good cause shown; (2) on a limited basis; and (3) consistent with the interests of justice.¹⁴ Eliminating the good cause requirement would not only be a step backward in simplifying the undue complexity in the proposed regulations and encourage respondents to 512(f) claims to opt out of the process, but it would violate the constraints of the statute as well.

2. Default Judgments

We strongly object to the suggestion by Engine that the CCB should “consider common defenses (such as noninfringement, innocent infringement, fair use, and licensure) *sua sponte* in each case, including before entering a default judgment.” This is not the first time Engine has proposed this suggestion,¹⁵ and our response remains the same: Affirmative defenses must be affirmatively raised and sufficiently pleaded by the respondent.¹⁶ Merely checking a box, or

¹¹ See Copyright Alliance, *supra* note 2 at 8-9; *see id.* at 14-15.

¹² Engine, *supra* note 4 at 7.

¹³ § 225.1(d)(2), Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69909.

¹⁴ 17 U.S.C. § 1506(n)(1) (2022).

¹⁵ See Engine, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures at 4 (Nov. 30, 2021), <https://www.regulations.gov/comment/COLC-2021-0004-0174>.

¹⁶ 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...”).

defaulting altogether, does not plead the necessary facts to support a defense. 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 unduly extending the time it takes to litigate them.

On several occasions, we have expressed support for providing useful information to respondents about available defenses¹⁷ and we continue to endorse that suggestion. However, it would be entirely inappropriate for the Board—whose role is to act as an impartial adjudicator—to invoke claims or defenses on behalf of either party, whether that party is an active participant in the proceeding, a defaulting responding, or a claimant subject to a failure to prosecute. While the Copyright Claims Attorneys (CCAs) are empowered to (and should) help the parties identify important facts and properly plead relevant legal arguments, the Office must recognize a clear distinction between permitting CCAs to assist parties in properly articulating their own legal arguments versus allowing the Board or the CCAs to provide legal advice to the parties or invoke arguments and defenses on their behalf, essentially becoming advocates for one party.¹⁸

Specific to default judgments, section 1506(u) of the Copyright Act sets out the process the Board is to undertake when evaluating whether to grant a default, which does *not* include

¹⁷ “Rather than describing the elements of infringement and defenses within the notice/summons, the notice/summons should simply state that all defenses are available and include a link to the Copyright Office webpage with information about copyright infringement, fair use, and other defenses that might be reasonably raised in a typical CCB proceeding.” Copyright Alliance, Comments on Proposed Rule: Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations at 13 (Apr. 26, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/04/CA-CASE-Act-Regulations-Comments-FINAL.pdf>; “The Office should also prepare and provide a list of standard defenses, and should generally compile and make available educational material on copyright and aspects of copyright law that might arise in the typical CCB dispute.” *Id.* at 33; “The Office should include a list of relevant defenses to copyright infringement cases... Likewise, the response forms should provide a list of relevant defenses for declarations of noninfringement and 512(f) misrepresentation claims so as to provide the same degree of assistance to copyright owners, users, and alleged infringers.” Copyright Alliance, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures at 20-21 (Nov. 30, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/11/CA-Comments-Initiation-of-Proceedings-2021-6-FINAL.pdf>; “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.” Copyright Alliance, Comments on Proposed Rule: Copyright Claims Board: Initiation of Proceedings and Related Procedures at 13 (Dec. 15, 2021), <https://copyrightalliance.org/wp-content/uploads/2021/12/CA-Reply-Comments-Initiation-of-Proceedings-2021-6-FINAL.pdf>.

¹⁸ It may be useful for CCAs to undergo formal training for appropriately working with and assisting *pro se* parties.

raising a defense that has not been properly raised by a respondent. The statute is clear that in an instance where a respondent has missed one or more deadlines without justifiable cause, the Board *shall* enter a default judgment if the evidence *submitted by the claimant* is sufficient to support a finding in favor of the claimant under applicable law.¹⁹ Defaulting should be neither encouraged nor rewarded, and permitting the Board to raise common defenses *sua sponte* where a party has neglected to appear would do just that. If a respondent’s default is due to excusable neglect and that respondent has valid defenses, the statute provides an appropriate avenue for challenging and vacating or modifying the default determination, but it remains for the respondent to raise defenses on its own behalf.

In section 227.1(d), the Office proposes that “[i]f the respondent misses a third deadline in the scheduling order without good cause, the Board may, in its discretion, proceed directly to requiring submission of evidence to proceed with a default determination as set forth in § 227.2.” While Public Knowledge argues in its comments that this proposed rule is essentially unfair to the defaulting party, we agree with this proposed rule, especially in light of the point the Office raises in the narrative portion of the NPRM that this rule serves to “prevent[] respondents from repeatedly using the default provisions as a backdoor extension for deadlines.”²⁰ The proposed rules do not *require* the Board to proceed with the default process and skip the two notices, but it gives it the discretion to do so—notably only after *two* other deadlines have already been missed, and notices have been sent in both instances. Such discretion is wholly appropriate. The Board has to draw the line at some point and cannot continue to reward a party that makes a practice of ignoring deadlines with extension after extension. Such a practice would undermine the Congressional goal that the CCB’s small claims process be “streamlined and efficient.”²¹

¹⁹ Specifically, § 1506(u)(1) requires that the claimant submit relevant evidence and that the Board “determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law.” 17 U.S.C. § 1506(u)(1). § 1506(u)(2) then requires that “[i]f the Copyright Claims Board makes an affirmative determination under paragraph (1), the Copyright Claims Board shall prepare a proposed default determination, and shall provide written notice to the respondent at all addresses” (emphasis added). § 1506(u)(2). In other words, if “the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law” (emphasis added), § 1506(u)(1), the Board must enter the default judgment (unless the respondent responds to the notice of pending default within the allotted timeframe).

²⁰ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. 69890, 69892 (proposed Dec. 8, 2021).

²¹ H.R. REP. NO. 116-252, at 17 (2019).

Public Knowledge also wrongly asserts that the regulations would “allow[] a default judgment without any substantive evidence to support the claim.”²² Proposed section 227.2 requires that in instances of default, a claimant must submit “written direct testimony,” which is explained in section 222.14(b) as “consist[ing] of documentary evidence, witness statements, and a party statement.”²³

3. Permissible Number of Cases

We reiterate that if the Office feels the need to impose an annual limit on the number of proceedings, we *strongly* urge the Office to make that annual limit: (i) be reasonable, justifiable, and in the interests of justice; (ii) be based on the number of *active proceedings* before the CCB by the same claimant, and (iii) sunset after one or two years (unless it becomes clear sooner that the Board has excess capacity to take on more cases) so that the Office can re-evaluate the established limit. In addition, in our reading of the law, the Office lacks the authority to establish a limitation on the number of cases filed by attorneys.²⁴

Engine and Verizon each expressed concern in their comments about the use of shell companies or other corporate entities for the purpose of circumventing the limit on the number of cases. While this concern may have some validity in the patent context, it has no merit in the copyright context, where “the assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue.”²⁵ To have standing to sue for infringement, an individual or entity must be the owner of an exclusive right and a real party in interest—not a mere shell company operating as a bad-faith workaround—so this concern is without merit. In addition, the notion

²² Public Knowledge, Comments on Proposed Rule: Copyright Claims Board: Active Proceedings and Evidence at 4-5 (Feb. 7, 2022), <https://www.regulations.gov/comment/COLC-2021-0007-0007>.

²³ As written, use of the words “shall” and “and” in § 222.14(b) seem to suggest that parties would be *required* to submit witness statements (plural) even where there are no witnesses in order to satisfy the any requirements to submit “written direct testimony.” § 222.14(b), Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69906. § 222.14(b) should be revised to read: “Written direct and response testimony shall consist of documentary evidence, ~~witness statements~~, and a party statement. **Witness statements may also be included if applicable.**”

²⁴ See Copyright Alliance, *supra* note 2 at 11.

²⁵ Righthaven LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013).

that parties will invest the funds to create shell companies for the sole purpose of bringing claims before an *optional* tribunal where the respondent can easily opt out is nonsensical and unfounded.²⁶

Large corporate families comprised of distinct legal entities exist for legitimate and non-nefarious purposes, and each distinct legal entity should be treated as such. Additionally, it is common for individual creators to carry out their business operations through a limited liability company or other corporate structure; these entities may own some or all of the individual creator's copyrights, and as such may sue for infringement. These parties should not be worse off as a result of legitimate business operations. Additionally, Engine's proposal that claimants be required to make corporate disclosures in excess of what is required even in federal court is not only unduly burdensome and intrusive, but would have a potential chilling effect on parties seeking access to justice.

If the Office believes this to be a genuine concern, we would not oppose the issue being analyzed in the study the Office is required to conduct within the first three years of the Board's operation and re-evaluate based on the results of that study. However, unless such a problem is documented via that study, the views expressed by these organizations suggest a solution in search of a problem that does not exist.

4. Safeguards

In its comments, Engine proposes that the Office incorporate into the regulations "disclosure requirements about the number of demand letters a claimant has sent, or rules that permit the CCB to consider the volume of demand letter activity when awarding fees or determining damages in a particular case." Our concerns with this proposal are two-fold:

1. Engine's comments imply that the sending of numerous demand letters is necessarily an "abusive" practice, when in reality, due to the practical inability to access federal courts because of the expense of litigation, the vast majority of copyright owners have been left with no recourse for infringement other than the sending of cease and desist letters and demand letters (letters that are routinely ignored). This line of reasoning

²⁶ It makes even less sense when one considers the damages caps in relation to the cost of setting up a shell company.

assumes that copyright owners are so called “copyright trolls” simply for attempting to enforce their rights. One thing can be deduced from the fact that a bona fide copyright owner has been forced to send numerous cease and desist or demand letters—that their works have been infringed numerous times. If someone is a bad actor, there will be indicators of such, but the number of attempts to enforce their legitimate rights is not one of them.²⁷

2. 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. In addition to being incredibly unjust and inappropriate, the Board lacks the authority to limit damage awards based on a party having attempted to enforce their legitimate copyright interests through the use of a demand letter.

5. Actual vs. Statutory Damages

In its comments, Engine suggests that the CCB should be required to (1) “focus on actual damages, and to anchor any award to the actual harm or the price to license a work if statutory damages are requested” and (2) “review (and, in the case of default, request) evidence of actual harm and comparable licenses.” The problem with this suggestion is that it is a roundabout way of undermining a claimant or counterclaimant’s right to be awarded statutory damages by insisting that statutory damages be tied to actual harm, which is a metric for measuring *actual* damages. In 2012, the U.S. Court of Appeals for the Eighth Circuit addressed this precise argument when it said,

²⁷ The preemptive rules suggested by Engine assume all copyright owners are bad actors. That view is not supported by law or fact and should not be incorporated into the regulations. Each of the CCB officers have extensive experience in copyright law and in the rare instance when someone is acting in bad faith, we trust that each of the officers can identify someone who is intentionally abusing the system or acting in bad faith and enforce the rules accordingly.

The Supreme Court in *Williams*, however, disagreed that the constitutional inquiry calls for a comparison of an award of statutory damages to actual damages caused by the violation. 251 U.S. at 66, 40 S.Ct. 71. Because the damages award "is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state." *Id.* The protection of copyrights is a vindication of the public interest, *Sony Corp. of Am.*, 464 U.S. at 429, 104 S.Ct. 774, and statutory damages are "by definition a substitute for unproven or unprovable actual damages." *Cass Cnty. Music Co.*, 88 F.3d at 643. For copyright infringement, moreover, statutory damages are "designed to discourage wrongful conduct," in addition to providing "restitution of profit and reparation for injury. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233, 73 S.Ct. 222, 97 L.Ed. 276 (1952).²⁸

This is especially critical given that actual damages are notoriously difficult to prove in the copyright context. In addition, as courts and the Office have noted, if statutory damages are assessed based solely on the licensing fee, this would encourage "efficient infringement." In its Report, the Office goes into detail about why actual damages are difficult to prove, adding that, "For these reasons, statutory damages have long played an important role in the protection of copyright interests. In addition, many view statutory damages as essential to deterring infringing conduct. If all that can be recovered from an infringer at the end of a lawsuit is what the infringer would have paid for a license in the first place, exploiters of copyrighted works have little reason not to adopt a 'take now, pay later' philosophy."

This does not mean that statutory damage awards are arbitrary or that the CCB will award maximum damages where the circumstances of the case would not warrant such an award. Statutory damages are assessed on a case-by-case basis, and courts take into account a host of considerations in determining the appropriate award of statutory damages. Requiring the Board to "anchor" awards of statutory damages to actual harm would undermine Congress' deliberate decision in the CASE Act, and in copyright law more broadly, to grant a claimant or counterclaimant the right to statutory damages. The Office should continue to reject any suggestions which seek to undermine the availability of statutory damages before the CCB.

²⁸ *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909-910 (8th Cir. 2012).

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 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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