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Via online submission at [regulations.gov](https://www.regulations.gov)

RE: Copyright Alternative in Small-Claims Enforcement Act Regulations

Dear Mr. Greenberg and Mr. Riley:

Authors Alliance appreciates the opportunity to provide feedback as the U.S. Copyright Office (“the Office”) considers and develops regulations to govern the Copyright Claims Board (“CCB”) established by the Copyright Alternative in Small-Claims Enforcement Act (“CASE Act”).¹ Authors Alliance is a nonprofit organization with the mission to advance the interests of authors who want to serve the public good by sharing their creations broadly. We create resources to help authors understand and enjoy their rights and promote policies that make knowledge and culture available and discoverable.²

As a threshold matter, the goal of developing CCB regulations should be to make the forum accessible to individual authors and creators who wish to enforce or defend their rights under copyright but struggle to do so in federal court—the initial impetus behind the CASE Act.³ Authors Alliance is concerned that without carefully considered regulations that prioritize the needs of the intended beneficiaries of the CCB, the CASE Act will not serve the claimants who need access to an uncluttered and fair forum to address their claims or the respondents who need adequate protections to defend their lawful uses of copyrighted works. Consequently, we have spoken out in favor of a sensible copyright small claims process, and welcome this opportunity

¹ Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, 86 Fed. Reg. 16,156 (Mar. 26, 2021) (to be codified at 37 C.F.R. Chapter III).

² For more information about Authors Alliance, see *About Us*, Authors All., <http://www.authorsalliance.org/about>.

³ U.S. Copyright Office, Copyright Small Claims (2013) at 8-9
<https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

to provide feedback on CCB regulations to help ensure that the CCB is an accessible, fair, and efficient forum for our members and creators writ-large.

Informed by our experiences representing the interests of authors who want to serve the public good by sharing their creations broadly, we respectfully submit our input on the contents of notices, opt-out provisions, fees, the number of permissible cases, and the conduct of the parties. We have also provided input on two items we deem highly important for the Office to address: developing guidelines for dismissing claims unsuitable for the forum, and developing guidelines for statutory damages. Developing these sets of guidelines will help ensure that the forum remains efficient and accessible for the individual creators it is designed to benefit. We hope these comments will be helpful as the Office establishes regulations to govern the CCB and its procedures.

Sincerely,



Rachel Brooke
Staff Attorney, Authors Alliance



Brianna Schofield
Executive Director, Authors Alliance

A1. Content of Initial Notice

Authors Alliance commends the Office for recognizing the need for clarity, precision, and explanatory language in the contents of initial notices. The integrity of the proceedings before the CCB depends on participants making informed decisions about how and whether to participate in the small claims tribunal based on an accurate and complete understanding of their rights and responsibilities. For this reason, we support the development of a notice form that clearly conveys the nature of the proceedings, explains a respondent's ability to opt out, and describes the benefits and consequences of opting out of proceedings or appearing before the CCB.

Authors Alliance is concerned that many individual authors and creators will simply ignore notices they do not understand or believe to be legitimate. This creates a risk that the proceedings will become a trap for unwary respondents, as ignoring notices may result in binding default judgments against respondents that are subject to limited review in federal court. It is not uncommon for unsophisticated parties to ignore legal notices they do not understand in other contexts,⁴ and this same risk applies in the context of CCB proceedings. The risk is magnified by the fact that the CCB is a new government body, unknown to large swaths of the American public. Unlike a judicial summons to appear in state or federal court, which is more immediately recognizable, a CCB notice will be a new and unprecedented government form from an unknown government body.⁵ This makes CCB notices far from analogous to judicial summons or class action notices,⁶ which emanate from long-established judicial bodies which are likely to be more familiar to a majority of respondents. Because ignoring notices can result in binding default judgments against respondents, the normal information contained in a summons should be supplemented by a clear and comprehensive explanation of what the CCB is, how it is different from federal court, and the potential ramifications of failing to opt-out or appear before the CCB (i.e., a default judgment). Based on the risk of default judgments, the notice should also explain that decisions are subject to limited judicial review.

Many respondents may not understand the benefits and consequences of opting out of proceedings or appearing before the CCB. For this reason, we suggest that the notice also provide information that will help a respondent make an informed decision about whether to opt out or to proceed under the CCB's authority. For example, the notice should include information about the intended benefits of resolving the case before the CCB, such as: reduced costs, a streamlined procedure for straightforward claims, and a lower cap on statutory damages in the event a use is found to be infringing. That said, the notice should also describe situations for which the tribunal may not be a suitable venue for dispute resolution, including for cases that involve complex or novel questions of law and cases that would benefit from discovery and witness testimony. In sum, the Office should take seriously its responsibility to ensure that a

⁴ U.S. Copyright Office, *Copyright Small Claims: A Report of the Register Of Copyrights* (2013), at 98, <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> (summarizing evidence that individuals often ignore cease and desist letters).

⁵ Katherine Trendacosta, *Congress Continues to Ignore Dangerous Flaws of the CASE Act*, EFF Deeplinks Blog, Sept. 11, 2019, <https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act>.

⁶ See Kevin J. Hickey, Cong. Rsch. Serv., LSB10367, *The CASE Act of 2019: Establishing a Small-Claims Process for Copyright Disputes 5* (2019).

respondent can make an informed decision about the merits of electing or declining to participate in CCB proceedings.

A2. CCB Respondent Notifications: Second Notice

As explained in our response to A1, Authors Alliance supports design of notices that are clear, precise, and educate the recipient on the nature of the proceedings and the CCB in general in order to avoid the risk of CCB proceedings becoming a trap for unwary and unsophisticated respondents. At a minimum, the second notice should convey the same information contained in the first notice, in addition to a clear statement that this is the second and final notice that will be sent to the respondent and an explanation of the ramifications of failing to respond or opt out. To increase the likelihood that respondents understand the seriousness of the notice and are made aware of the proceedings and opt-out process, we recommend that the CCB itself issue the notice (rather than another entity acting “on behalf of” the CCB). This will minimize confusion about the nature of the proceedings and the entities involved.

B1. Respondent’s Opt-Out

Authors Alliance supports making the opt-out process as clear and simple as possible for respondents to navigate, based on the same concerns animating our responses to A1 and A2. The opt-out process, as contemplated, does not provide individual authors and creators with enough protection against binding default judgments.⁷ While Congress sought to create a “voluntary” tribunal with the passage of the CASE Act,⁸ the requirement that a respondent affirmatively opt out (rather than affirmatively opt in) undermines this intent. Consequently, the Office should ensure that the process of opting out is comprehensible and accessible to all respondents.

There is a strong likelihood that recipients of CCB notices who lack sophisticated legal knowledge or representation may not fully understand the implications of the proceedings, or even the opt-out procedure itself.⁹ As a result, without proper safeguards, the CCB will become an attractive forum for opportunistic claimants who could use the CCB to pursue dubious claims and obtain default judgments against respondents who fail to opt out in a timely manner.¹⁰ To protect against this undesirable result, the Office should ensure that the opt-out process is clear, navigable, and does not have undue hurdles such as complicated or restrictive opt-out methods.

Authors Alliance supports enabling respondents to opt out of CCB proceedings by a variety of different methods: electronically via email or an online form, by standard mail, and over the

⁷ Kerry Maeve Sheehan, *Copyright Law Has a Small Claims Problem. The CASE Act Won’t Solve it.*, Authors All., June 4, 2019, <https://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it>.

⁸ Kevin J. Hickey, Cong. Rsch. Serv., LSB10367, *The CASE Act of 2019: Establishing a Small-Claims Process for Copyright Disputes 2* (2019).

⁹ Ben Depoorter, *If You Build it, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 Berkeley Tech. L. J. 711, 725 (2018).

¹⁰ See, e.g., *id.*; Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 Berkeley Tech. L. J. 690, 704 (2018).

phone. We make this suggestion in furtherance of our view that an opt-out process should be simple and accessible to respondents, who are likely to possess different levels of legal and technical sophistication. Allowing a broad range of methods of opting out helps ensure that the broad range of respondents will be able to use one of them to opt out without unnecessary hurdles.¹¹ By allowing respondents to opt out electronically, via standard mail, and over the phone, the Office can make the process accessible to persons with a variety of disabilities and abilities, enhancing the accessibility of the forum for the individuals it is intended to benefit.¹²

Authors Alliance also encourages the Office to create a publicly accessible list of entities or individuals that indicate that they intend to consistently opt out of CCB proceedings, as contemplated in the Notification of Inquiry.¹³ As the Office recognizes, this would create efficiency for claimants who can avoid incurring filing fees for cases involving parties who intend to opt out, as well as for would-be respondents who can publicize their intent to opt out in advance and thereby reduce the potential for receiving notices. This is particularly important for authors and other creators who regularly use copyrighted content in reliance on an exception to copyright like fair use, who may be more likely to receive CCB notices based on ill-founded claims of infringement. We note that this system will not alleviate the importance of providing a clear and efficient mechanism for opting out, as the individuals and entities likely to take advantage of a public registry indicating their intent to opt out are more likely to be sophisticated creators or creators represented by legal counsel.

B2. Library and Archives Opt-Out

Authors Alliance regularly partners with libraries and archives to further our mission of representing the interests of authors who want to contribute to the commons of knowledge by sharing their creations broadly. Libraries and archives provide access to copyrighted works, enhancing the chance that authors' works are discovered. They also preserve cultural, scientific, and historical records, ensuring that authors' creative and intellectual legacies live on.

Libraries and archives frequently rely on fair use and other exceptions in the uses they make of copyrighted works,¹⁴ and the CCB proceedings could well generate new ill-founded claims against libraries and archives, undermining the preservation and access efforts that benefit authors. A robust and usable library and archives opt-out provision is therefore important to maintain the health of the library and archives ecosystem. For these reasons, we support a broad definition of "libraries and archives" which encompasses public libraries, academic libraries, and other institutions serving the essential functions of preservation and sharing of knowledge and

¹¹ See *Disability Health and Inclusion Strategies: Universal Design*, CDC, <https://www.cdc.gov/ncbddd/disabilityandhealth/disability-strategies.html#UniversalDesign> (summarizing how "making products, communications, and the physical environment more usable by as many people as possible" furthers goals of enhancing accessibility).

¹² U.S. Copyright Office, *supra* note 4, at 8-9.

¹³ 86 Fed. Reg. 16161 (Mar. 26, 2021).

¹⁴ Letter from Jonathan Band, Couns., Library Copyright All., to Hon. Nancy Pelosi, Speaker, U.S. House of Reps., and Hon. Kevin McCarthy, majority leader, U.S. House of Reps. (Oct. 21, 2019), <https://www.librarycopyrightalliance.org/wp-content/uploads/2019/11/2019.11.08-CaseLetter.pdf>.

culture. We also caution the Office against requiring libraries to “prove” their qualifications under 17 U.S.C. § 108 in order to take advantage of the opt-out provision, as this would also take up precious resources that could better be used elsewhere to serve the public good. Non-profit libraries or archives open to the public generally qualify,¹⁵ and this condition can easily be verified by the Office or the CCB without a library or archive having to take on the burden of proving its qualification.

F. Fees

Authors Alliance urges the Office to develop a tiered fee structure for CCB proceedings to ensure that the forum is as accessible as possible to the copyright holders who most need, and would most benefit from, a small claims process: independent authors and creators who cannot afford to press their claims in federal court. While modest fees for filing claims would make the CCB more accessible to individual creators and authors,¹⁶ they risk making the forum even more attractive to large entities and corporate actors, incentivizing these parties to bring more claims than they would otherwise. Variable fee structures are one way to mitigate this problem, and have been utilized by other small claims tribunals to meet similar aims.¹⁷ The Office could 1) implement higher fees for corporate actors, which are in general more well-resourced than individual creators, 2) implement a “sliding scale” of fees depending on the level of damages the claimant seeks, as small claims courts have done in other contexts, and 3) require larger filing fees for parties that have repeatedly brought claims in order to deter this behavior.¹⁸ While these considerations will go some small way towards keeping the forum open to the parties the forum was intended to benefit, we remain concerned that opportunistic actors will not be deterred since the statute mandates that filing fees shall not “exceed the cost of filing an action in a district court of the United States,”¹⁹ a modest fee for well-resourced actors.

G. Permissible Number of Cases

While Authors Alliance does not propose a threshold for the permissible number of cases brought by a particular party within a calendar year—without knowing how many claims will be brought before the CCB in a year, it is difficult to propose a sensible threshold—we commend the Office on its attention to this matter.

As discussed, the CCB is intended to help individual authors and creators who lack the resources to pursue their infringement claims in federal court.²⁰ If the Office were to allow parties to bring unlimited numbers of claims in a calendar year, its docket could become cluttered with opportunistic claims, reducing efficiency and working against the interests of individual creators who want prompt access to the forum. Indeed, so-called “copyright trolls” have already had this

¹⁵ 17 U.S.C. § 108(a).

¹⁶ Samuelson & Hashimoto, *supra* note 10, at 703.

¹⁷ Depoorter, *supra* note 9, at 731.

¹⁸ *See id.*

¹⁹ 17 U.S.C. § 1510(c).

²⁰ U.S. Copyright Office, *supra* note 4, at 9.

effect on federal dockets.²¹ Establishing a meaningful limit on the number of cases that can be brought by a given party in a calendar year will help ensure that the forum is not abused by corporate or well-resourced actors who buy up copyrights and bring an excessive number of claims in order to profit from litigation.²²

Authors Alliance suggests that the Office continue to seriously consider this matter and work to establish a preliminary threshold for the permissible numbers of cases brought by a party in a given year before the CCB commences operations. Because the CCB is a new entity, it would be prudent to revisit this threshold as the CCB begins its operation to ensure the regulations meet their goal of making the forum accessible to individuals with copyright claims while deterring corporate actors from taking advantage of CCB procedure in order to profit financially.

H. Conduct of Parties and Attorneys

Authors Alliance supports regulations that would deter bad-faith actors from pursuing additional claims before the CCB, including a general limitation on the number of claims that can be brought in a calendar year (see section G). If a claimant is found to be acting in bad faith through making overzealous or excessive claims, CCB regulations should bar the party from bringing further claims before the CCB for a period of one calendar year. In crafting the finer points of these regulations, the Office should consider 1) the identity of the claimant (e.g., individual versus corporate actor), 2) the extent of damages sought, and 3) the number of claims brought by a given party over the course of a calendar year.

I. Other Issues: Guidelines for Dismissal for Unsuitability and Guidelines for Statutory Damages

As the Office considers regulations to govern the CCB and its procedures, we encourage the Office to consider other ways in which it can ensure that the CCB develops into a respected, accessible, and efficient forum for independent authors and creators to enforce their copyrights and to vindicate their right to use others' copyrighted works in lawful ways. To achieve this goal, the CCB must operate under principles designed to discourage abuse of the forum. The Office should proactively reduce the likelihood that the CCB becomes a default judgment mill dominated by opportunistic claimants by 1) developing guidelines for the types of cases suitable for the CCB forum, and 2) developing guidelines to govern statutory damages awards.

Guidelines for Dismissal for Unsuitability

The statute requires the CCB to dismiss a claim or a counterclaim without prejudice if it concludes that the matter is unsuitable for determination by the CCB, including if the CCB concludes that it lacks an essential witness, evidence, or expert testimony, or if the determination of a relevant issue of law or fact exceeds the subject matter competence of the CCB.²³ Yet the

²¹ See Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1117 (2015) (finding that 43% of copyright lawsuits filed in 2013 were multi-defendant John Doe lawsuits dominated by a few major players).

²² Samuelson & Hashimoto, *supra* note 10 at 703.

²³ 17 U.S.C. § 1506(f)(3).

statute provides little guidance for the CCB to use when deciding whether a claim is suitable for the forum.

To help mitigate the harm and distrust that would follow if the CCB were to review claims that exceed its expertise and ability to fairly adjudicate within the confines of the small claims process, the Office should develop guidelines to help the CCB determine when a case is suitable for CCB proceedings. For example, the CCB's accelerated process and limited discovery mean that it is only equipped to handle simple, straightforward infringement claims in settled areas of law. Claims that involve complex issues of fact—such as fair use determinations—or uncertain areas of law belong in a federal court before Article III judges with the expertise and resources to more thoroughly address all the factual and legal issues involved. Similarly, the CCB should avoid cases involving secondary liability, which involve complex determinations that cannot be adequately addressed in the limited proceedings contemplated by the CASE Act. Leaving these cases with the CCB tribunal would harm both authors trying to enforce their copyrights and those trying to defend their rights to use copyrighted works, as the CCB will not be able to adequately resolve the issues involved. By setting guidelines for the CCB to follow when determining whether or not to hear a claim, the Office could help ensure the integrity of the CCB proceedings.

Guidelines for Statutory Damages

With lower barriers for claimants and availability of disproportionate statutory damages awards, there is a significant risk that the CCB becomes a magnet for unscrupulous claimants. To mitigate this issue, the Office should develop principles to guide the award of statutory damages in CCB proceedings.

Based on patterns in federal copyright litigation, it is highly likely that a majority of claimants before the CCB will request the maximum allowable statutory damages, up to \$15,000 per work (with a maximum of \$30,000 per proceeding).²⁴ Viewed in concert with the low cost procedure of bringing a CCB claim and the likelihood that respondents may ignore notices or otherwise innocently fail to opt out, this result could be devastating for individual creator respondents. To make matters worse, arbitrary and excessive statutory damages incentivize unscrupulous plaintiffs to intimidate and extract settlements from individuals accused of infringement.²⁵ Faced with the risk of a high statutory award, many defendants opt to settle, even when they have a valid defense. There is no reason to believe the same would not be true for claims brought to the CCB.

While valid claims of infringement that have caused actual harm should be justly compensated, the reality is that license fees for a copyrighted work (e.g., what the claimant allegedly lost when the respondent allegedly infringed) are often far below \$15,000, making these damages disproportionate to the problem they seek to address.²⁶ The Office can mitigate the deleterious

²⁴ Samuelson & Hashimoto, *supra* note 10, at 703-704.

²⁵ See Pamela Samuleson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 480-491 (2009).

²⁶ See Depoorter, *supra* note 9, at 713.

effects of unjust statutory damages awards in the CCB by providing guidelines for the CCB to use when deciding whether to award statutory damages. For example, the guidance should indicate that the CCB should require that the claimant specify the actual damages they suffered, and the CCB should aim to award actual damages over statutory damages in most cases. The Office may also specify other factors that the CCB should consider when deciding whether to award statutory damages, such as whether the use was commercial or noncommercial. In short, the Office's guidance should provide that the CCB should endeavor to award damages that are proportional to the actual harm caused by the infringement, and should be particularly mindful to avoid statutory damages in cases of noncommercial uses.