

*Before the*  
**United States Copyright Office**  
Washington, DC

*In re*

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

Docket No. 2021-1

**COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION  
AND INTERNET ASSOCIATION**

Pursuant to the notification of inquiry (“NOI”) published by the U.S. Copyright Office (“the Office”) in the Federal Register at 86 Fed. Reg. 16156 (Mar. 26, 2021), the Computer & Communications Industry Association (“CCIA”)<sup>1</sup> and Internet Association (“IA”)<sup>2</sup> submit the following comments responding to selected topics, as identified by the numbering provided in the Federal Register notice, regarding the proposed Copyright Claims Board (“CCB”).

Industry would support a copyright small claims framework that provides individual rightholders inexpensive relief from infringement while not enabling trolls or other abusive litigants to circumvent the existing safeguards provided by the federal judiciary. To realize that goal, it is essential that implementation of the CASE Act legislation preserve this delicate balance.

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<sup>1</sup> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.cciagnet.org/members>.

<sup>2</sup> Internet Association represents over 40 of the world’s leading internet companies. IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA’s mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

As the Office noted in its 2013 report on copyright small claims,<sup>3</sup> some kind of consent to a small claims proceeding is likely necessary to survive subsequent legal challenges,<sup>4</sup> since individuals must affirmatively waive constitutionally guaranteed rights of trial by jury and appellate relief. It is unclear whether a ‘negative option’ opt-out from jury trial and appellate rights is ‘voluntary’ for constitutional purposes. The Copyright Office can avoid unnecessary litigation by providing for an opt-in approach for administering a voluntary dispute resolution process that is less susceptible to challenge.

As the proposed CCB is not currently opt-in, the Office must balance considerations around public education and risk management regarding the right to opt-out while not improperly providing legal advice about costs and consequences. Considerations may vary as the process is used, and the Office may need to adopt additional user protections as legal developments and new technologies emerge.

In the 2006 Report on Orphan Works, the Register cited “substantial evidence” gathered during the preparation for the 1976 Act which demonstrated that formalities, when combined with “drastic penalties”, “served as a ‘trap for the unwary’” which substantially injured rightholders.<sup>5</sup> The Office should take steps to ensure that all parties fully understand the responsibilities and obligations for submitting to this process, the facts required to support the claims and defenses that will be reviewed, and the requirements for the tribunal to proceed with a finding. These steps are essential to know before a party chooses to participate in this dispute

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<sup>3</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>, at 28 n.172 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986)).

<sup>4</sup> *Cf. Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (2019); *Oil States Energy v. Greene’s Energy Group*, 138 S. Ct. 1365 (2018).

<sup>5</sup> Register of Copyrights, *Report on Orphan Works* (2006), <https://www.copyright.gov/orphan/orphan-report.pdf>, at 43.

resolution process, so that all parties have an informed basis on which to decide whether to voluntarily proceed. We provide the following recommendations to help achieve this objective.

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

It is critical that notifications to the public are clear about the right to opt-out in conspicuous, plain, and readily understandable language.

#### **1. Content of Initial Notice**

For allegations of infringement relating to online content, in addition to clear language about the right to opt-out, the initial notice should contain the specific URL for the allegedly infringing work, as well the work itself (*e.g.*, include a picture of the work if applicable).

#### **2. CCB Respondent Notifications (Second Notice)**

For the second notice, the CCB should arrange for electronic delivery via email where respondents have registered a designated agent, and otherwise arrange for U.S. Postal Service delivery alongside electronic delivery if easily derived from the complaint data, *e.g.*, an “abuse@” email address for a website.

#### **3. Service of Process and Designated Agents**

To facilitate an efficient and transparent process, companies should be able to designate one agent for all subsidiary firms.

### **B. Opt-out Provisions**

We strongly urge the Office to publish records on opt-outs, blanket or otherwise. If the Office tracks parties that choose to opt out, then it is effectively the same thing as “publiciz[ing] their intentions,”<sup>6</sup> and that creates government-approved data. This is consistent with the Office’s ongoing work to manage databases as part of its information technology modernization efforts and promotes transparency.

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<sup>6</sup> NOI at 16161.

## **1. Respondent's Opt-out**

The Office should maintain a register of blanket opt-outs, consistent with statutory intent. While the statute does not specifically authorize blanket opt-outs outside of libraries and archives, the entire CCB structure is built on a mutual consent framework, and so a decision by a party that it does not and will not consent to CCB review is consistent with the spirit of the statute and helps to avoid the potential for the opt-out process to serve as a formality with drastic consequences for the unwary.

## **2. Library and Archives Opt-outs**

In addition to the blanket opt-out for libraries and archives, the Office should consider blanket opt-out for other parties. In the absence of a blanket opt-out, the process to opt out should remove rather than establish burdens on potential parties. For example, the Office should consider requiring that the claimant attach an opt-out form to the claim, and it should provide an option for a party to electronically file the opt-out. There should be no fee for a party to opt out of this voluntary process.

Similarly, even if the Office does not adopt a blanket opt-out for other entities, it should maintain a list of people who intend to opt out, so that claimants do not bring cases against them in the CCB. The Office may also want to consider mechanisms for rescinding a blanket opt-out.

## **C. Additional CCB Practice and Procedures**

### **1. Discovery**

The Office should permit blanket opt-out of all discovery, and there should be no third-party discovery; to streamline proceedings more than federal litigation, evidence should be limited to what parties have and can obtain from publicly available information on digital services consistent with their privacy policies and terms of service. There should also be a

prohibition on third-party discovery given the lack of subpoena power accorded to the CCB. If third-party discovery were to be permitted in CCB proceedings, there must be streamlined opt-out from claims and blanket opt-out from third-party discovery. As mentioned *supra*, the CCB structure is built on a mutual consent framework, so a blanket opt-out provision from third-party discovery in the absence of a prohibition on third-party discovery would be consistent with statutory intention.

Any discovery should be limited. However, paper-only discovery may increase fraudulent representations. Federal Rule of Civil Procedure (“FRCP”) Rule 16-like pre-trial conferences could decrease the chances of abuse and allow Copyright Claim Officers to make educated assessments of fraudulent behavior and bad faith. Discovery should be limited to a small number of standardized interrogatories and requests for admission, standardized categories of documents and mandatory initial disclosures, and a requirement to produce any material inconsistent with a position taken in the proceedings, in order to streamline the process. In lieu of a FRCP Rule 26(f) conference, motion practice similar to the Patent Trial and Appeal Board where any non-routine discovery can only be sought with permission could also help streamline the process.

Matters that require a significant amount of electronically stored information or other documentary evidence may not be a good fit for the CCB, so rather than have standardized versions of those procedures it may be more sensible to consider whether the discovery is even required in the first place.

## **2. Protective Orders**

Similarly, a protective order could flow along with standardized and presumptive limits on discovery.

## **5. Other Rules of Practice and Procedure; Evidentiary Rules**

To the extent not covered in the provisions for sanctioning attorneys, discussed *infra*, there should be an equivalent to FRCP Rule 11 to prevent bad faith pleadings. If significant documentary discovery were to be allowed, an equivalent of the Federal Rules of Evidence could be helpful. An equivalent of FRCP Rule 12 procedures for initial defenses could also be helpful to further streamline proceedings and deter abuse of the process. Rules regarding joinder or for other proceedings where the rights of multiple parties are implicated may also be necessary, including if some parties but not all opt out, however in such circumstances the case itself may not be appropriate for CCB resolution.

### **D. Public Access to Records and Proceedings; Certifications; Case Management System Considerations**

Public access to records and proceedings could be facilitated by a transparent, free electronic filing and management system for parties to check the CCB docket and verify determinations. Additionally, the electronic docket could also automatically email registered parties to let them know that a claim was filed against them.

### **G. Permissible Number of Cases**

The Office should cap the number of proceedings one plaintiff (or other parties in interest) may bring at 10 cases per year.<sup>7</sup> Because shell entities are a common feature of copyright troll litigation, the cap on the number of proceedings that a small claims plaintiff may bring before the small claims tribunal should be strengthened to ensure that it binds all real parties in interest (“RPI”), to prevent circumvention of the cap through assignees, proxies, or shell entities. An RPI disclosure requirement may also be helpful in limiting abusive litigants.

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<sup>7</sup> Just last week, the Seventh Circuit said a plaintiff “is a copyright troll” engaged in an “intellectual property shakedown” for filing “more than 100 such suits in the last decade or so,” or an average of 10 cases a year. *Design Basics, LLC, and Carmichael & Dame Design, Inc. v. Signature Construction, Inc. et al.*, No. 19-2716 (7th Cir. Apr. 23, 2021). See also *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (7th Cir. 2017).

## H. Conduct of Parties and Attorneys

Bad actors frequently file fraudulent or abusive copyright claims in efforts to stifle speech and disrupt commerce. Abusive behavior includes fraudulent notices, as well as over-reaching reports purportedly based on copyright that in fact are attempts to censor legitimate speech, even complete fabrications to remove content considered undesirable by the claimant. Publicly documented examples of misuse that CCIA and IA member companies have experienced include extortion schemes;<sup>8</sup> blatant disregard for fair use;<sup>9</sup> copyright abuse as a business model, such as reputation-related removals masquerading as copyright;<sup>10</sup> abuse to target competitors in online marketplaces;<sup>11</sup> and flawed automated systems that broadly target unrelated content.<sup>12</sup> Some companies have received retaliatory “floods” of batch notices from large rightholders for strategic purposes.<sup>13</sup> Responding to these bad-faith claims costs time, money, and resources, not only for CCIA and IA member companies but also for the adjudicators.

Given the prevalence of copyright abuse in other venues, the Office must do more to deter bad faith filings in the CCB. This may include barring or suspending attorneys, as well as permitting the CCB to sanction bad actors to their respective bar associations. The Office should also consider publishing a list of bad faith complainants who are barred from using the CCB

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<sup>8</sup> Julia Alexander, *YouTube gets alleged copyright troll to agree to stop trolling YouTubers*, The Verge (Oct. 15, 2019), <https://www.theverge.com/2019/10/15/20915688/youtube-copyright-troll-lawsuit-settled-false-dmcatakedown-christopher-brady>.

<sup>9</sup> Brief for Amici Curiae Automattic Inc., Google Inc., Twitter Inc., and Tumblr, Inc., *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2015) (No. 13-16106), available at [https://www.eff.org/files/2015/10/30/lenzautomattic\\_google\\_twitter\\_tumblr\\_amicus.pdf](https://www.eff.org/files/2015/10/30/lenzautomattic_google_twitter_tumblr_amicus.pdf).

<sup>10</sup> Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), <https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>.

<sup>11</sup> Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), <https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html>.

<sup>12</sup> Ernesto Van der Sar, *Bizarre DMCA Takedown Requests Censor EU ‘Censorship’ News*, TorrentFreak (Aug. 11, 2018), <https://torrentfreak.com/bizarre-dmca-takedown-requests-censor-eu-censorship-news-181011/>.

<sup>13</sup> See Jennifer Urban *et al.*, *Notice and Takedown in Everyday Practice* (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628), at 72.

process at any given time. However, considerations should also be made for *pro se* parties who have not repeatedly abused the system, to avoid being overly punitive to small businesses or independent creators.

There should be a robust certification requirement that operates as a vetting or screening system for fraud and abuse, including use of a verifiable physical address, sworn submission by the actual claimant, and direct communications from the purported rightholder. The Office should make clear that the proceeding has not “commenced” until after the Copyright Claims Attorney has approved the claim for service.<sup>14</sup> Coupled with the requisite compliance screening, this will limit harassing or improper use of the CCB and make clear to all parties when a CCB action has technically commenced. The Office should also consider exercising its general rulemaking authority to adopt a blanket rule excluding secondary liability cases from the CCB, especially given evidentiary constraints of the CCB that may make it an inappropriate venue for such claims.

Respectfully submitted,

Ali Sternburg  
Senior Policy Counsel  
Computer & Communications  
Industry Association

Jonathan Berroya  
Senior Vice President  
and General Counsel  
Internet Association

April 26, 2021

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<sup>14</sup> This is consistent with the statute, which provides that “to commence a proceeding” a claimant “shall, *subject to such additional requirements as may be prescribed by regulations . . .* file a claim with the Copyright Claims Board.” 17 U.S.C. § 1506(e) (emphasis added). This gives the Office authority to require by regulation that the proceeding has not commenced until after the Claims Attorney has approved the filing for service.