Before the
United States Copyright Office
Washington, DC

In re

Copyright Claims Board: Initiation of Proceedings and Related Procedures	Docket No. 2021-6

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of proposed rulemaking published by the U.S. Copyright Office ("the Office") in the Federal Register at 86 Fed. Reg. 53897 (Sept. 29, 2021), extended at 86 Fed. Reg. 59327 (Oct. 27, 2021), and further extended at 86 Fed. Reg. 64100 (Nov. 17, 2021), the Computer & Communications Industry Association ("CCIA")[1] submits 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").

As the Office noted in its 2013 report on copyright small claims,[2] some kind of consent to a small claims proceeding is likely necessary to survive subsequent legal challenges,[3] since individuals must affirmatively waive constitutionally guaranteed rights of trial by jury and appellate relief. It remains unclear whether a 'negative option' opt-out from jury trial and appellate rights is 'voluntary' for constitutional purposes, and thus the process remains flawed.

[1] 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.ccianet.org/members.

[2] 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)).

[3] *Cf. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018).

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 prospective CCB is not presently 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. It is critical that any notifications to the public are clear about the right to opt out in conspicuous, plain, and readily understandable language. 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 of Copyrights cited "substantial evidence" gathered during the preparation for the 1976 Act which demonstrated that formalities, when combined with "drastic penalties," created a "trap for the unwary" that substantially injured copyright holders.[4] Given the potential for default determinations in CCB proceedings and respondents' exposure to substantial damages, the Copyright Office should avoid introducing excessive formalities into the CCB process. Congress intended for the process to be streamlined and easy to navigate for all involved. Accordingly, the Office should take steps to ensure that all parties fully understand their rights and responsibilities, so that all parties have an informed basis on which to decide whether to voluntarily proceed. CCB proceedings should not be a "trap for the unwary." We provide the following recommendations to help achieve this objective.

A. Initiating a Claim

The Office should use this opportunity to provide simple techniques to rid the system of abuse that would not unduly burden the Office. For example, they should consider a requirement

[4] U.S. Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (Jan. 2006), https://www.copyright.gov/orphan/orphan-report.pdf, at 43.

that there is a sworn statement from the copyright holder of the claim (to avoid third parties initiating fraudulent claims). And where applicable, they should require a copy of the Digital Millennium Copyright Act ("DMCA") notice filed.

The Office should also endeavor to make clear what claims are not suitable, such as in a forthcoming manual. For example, claims of secondary liability should be categorically excluded.

C. Service of Initial Notice

2. Service of Process and Designated Agents

Some aspects of the proposed rule are not consistent with the Copyright Alternative in Small-Claims Enforcement ("CASE") Act's goal of making service efficient and predictable for all parties, including corporate respondents. The CASE Act provides that "[a] corporation, partnership, or unincorporated association that is subject to suit in courts of general jurisdiction under a common name shall be served by delivering a copy of the notice and claim to its service agent." 17 U.S.C. § 1506(g). It further provides that "[a] corporation, partnership, or unincorporated association that is subject to suit in courts of general jurisdiction under a common name may elect to designate a service agent to receive notice of a claim against it before the Copyright Claims Board by complying with requirements that the Register of Copyrights shall establish by regulation." *Id.* Where a corporation *does* elect to designate a service agent with the Copyright Office pursuant to regulation, service on that corporation's designated service agent should be the exclusive means of effecting service on that entity, as contemplated in the statute. Attempts by claimants to serve prospective respondents through any other means or channel should be deemed ineffective. We recommend a closer alignment between the final rule and the statute when it comes to service of process and the designation of a service agent.

Moreover, to facilitate the efficient and transparent service process that Congress intended, corporations should be able to designate one service agent for all of their subsidiary firms in a single registration in which they name the subsidiaries. The proposed rule does not allow for such consolidated registration. Corporations with subsidiaries should be required to list them under that single registration. By requiring large firms with multiple products and subsidiaries to register each subsidiary separately, the proposed rule has the potential to create confusion for claimants, especially those proceeding without counsel. It will also create a gratuitous administrative burden for corporate respondents. There should be flexibility to add or remove subsidiary firms from registered designations as necessary.

F. Opt-Out Procedures

When building its electronic case management system, the Copyright Office should ensure that the process is as easy and frictionless for respondents as it is for claimants. In the absence of a blanket opt-out for all types of respondents, the process to opt out of individual claims should not create an undue burden on those wishing to do so.

In the interest of efficiency and convenience, the opt-out process should be as fully automated as possible. As the proposed rule contemplates, respondents should be able to opt out by completing a simple online form with predefined, fillable fields for any necessary information. The proposed rule suggests that opting out online will require both a verification code and the docket number for the case. It is not clear why opting out online should require use of an extra code that is not required in paper opt-outs. The statute doesn't require it, and it's not hard to see how it might become a "trap for the unwary." Where users are required to transcribe complex unique codes from paper notices into online form fields, scrivener's errors are common.

To avoid such errors, it should be sufficient for any respondent seeking to opt out to do so by identifying the docket number for the case, whether they are opting out by mail or online.

For the avoidance of error, the online opt-out form should not permit a respondent to submit a form for processing if that form lacks any requisite information or contains information in the wrong format. If a form submission is rejected for being incomplete or erroneous in some way, the rejection should occur in real time, and the system's user interface should clearly highlight where the error is so that the user can see and correct it in real time. Any fields that were completed correctly should remain populated in the event that a submission is initially rejected for processing because it lacks information or contains incorrectly formatted information. A user resubmitting an initially rejected form should not have to re-enter any information that was initially entered correctly. Overall, the form submission process should be designed so that respondents seeking to opt out should not be able to accidentally waive their right to opt out by making trivial errors in the completion of forms.

The proposed rule indicates that a signed affirmation will be necessary to complete the opt-out process. The online and paper forms should both prefill the language required in the affirmation, and the online form should allow the user to generate an electronic signature in real time — i.e., there should be no wet signature or manual signature requirement that entails printing the form and scanning it back into digital format for online submission. The opt-out process should be able to be completed in a single online session. Respondents who opt out by completing the online form should receive an automated confirmation by email and should have the ability to print out the confirmation in a printer-friendly format immediately following the form submission.

In the DMCA, there are very specific rules governing the form of notice, but some defective notices can trigger an obligation on a service provider's part to go back and get a compliant notice. There should be similar flexibility when it comes to recognizing substantially compliant attempts to opt out of CCB proceedings. Where an attempted opt-out is formally defective but reasonably conveys the respondent's intent to opt out, the Copyright Office should promptly notify the respondent of the defect and allow them an opportunity to cure. An example might be where the respondent correctly identifies the docket number for the case but uses an incorrect verification code.

Respectfully submitted,

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