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Reply Comments Concerning Proposed Regulations for the CASE Act

TO: Regan A. Smith,
General Counsel and Associate Register of Copyrights
Copyright Office

via electronic submission at
https://www.regulations.gov/commenton/COLC-2021-0001-0001

RE: Notice of Inquiry (Fed. Reg. 2021-06322, March 26, 2021)
Document Citation: 86 FR 16156
Agency Docket No. 2021-1. Document Number: 2021-06322

Science Fiction and Fantasy Writers of America, Inc. (SFWA) respectfully submits the following comments concerning the Copyright Office's Notice of Inquiry.

Statement of Interest

SFWA is a 501(c)(3) membership organization of over 2,000 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published in anthologies, magazines, and in other works.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in any other organization that may be affected by this Inquiry.

I. General Comments

Copyright Alliance

SFWA endorses the comments submitted by the **Copyright Alliance**.

Ability of CCB to Function

SFWA is especially concerned by the size of the CCB. Even if the administration of handling claims and opt-outs is largely automated, the full process of adjudication could easily overwhelm the CCB, resulting in long waits. We find it difficult to understand how three Copyright Claims Officers will be able to keep up with the number of cases that are likely to be filed. We realize that changing the number of officers will require an amendment to the Act, but analyzing workload of the Copyright Claims Officers and potentially recommending an increase in the number of officers should be high on the priorities for the Copyright Office.

II-B: Opt-Out Provisions

Defining Libraries and Archives

The CASE Act does not specifically define the term “Libraries and Archives." However, it is clear that these institutions must engage in the activities specified in 17 U.S.C. 108 to be permitted to opt out of CCB proceedings. These statutory requirements are vital. SFWA has seen a growing problem in which digital pirates attempt to cloak themselves in the mantle of an “archive” when they do not perform traditional archival functions.

For this reason, we agree with the comments submitted by **Ben Vient**, saying that “A Library or Archive opting-out must provide an Affidavit or Declaration from the entity’s Director certifying its limitations on exclusive rights under 17 U.S.C 108.” Further, SFWA agrees with the **American Intellectual Property Law Association**, that the library or archive should make its declaration under penalty of perjury, but we urge the CCB to look beyond this declaration to decide whether an institution is actually a library or archive in accordance with case law.

Several organizations, including the **American Association of Law Libraries**, the **Library Copyright Alliance**, and the **University of Illinois Library** and the **University of Michigan Library** urge language making it clear that employees of libraries and archives -- *acting in the scope of their employment* -- should be included in the organization’s opt-out.

SFWA has no major objection to such a provision, so long as care is taken to ensure that employees are in fact acting within the proper scope of their employment and within the limits of 17 U.S.C 108.

We agree with those commenters who believe that the Act does not preclude establishment of blanket opt-outs for organizations other than libraries and archives.

In its comments, **Amazon** encourages the USCO to "provide an option for corporate entities to indicate that they will, as a rule, opt out of CCB actions." While we are not enthusiastic about allowing such a blanket opt-out for corporations, SFWA recognizes that it would help reduce the work load on the CCB by warning potential claimants that an organization would likely opt-out of any proceedings.

II-B1: Creation of a Publicly Accessible List of Those Who Have Opted Out

SFWA believes strongly that the CCB should set up a Web site listing all individuals and organizations who have opted-out of CCB proceedings. The list also should show if an organization has issued a blanket opt-out. For individuals, the list should clearly show how many cases have been filed against the person and how many opt-outs have been filed.

Any fees charged for maintaining an opt-out list for organizations (or individuals) that are not libraries or archives should kept as low as possible and should only reflect the actual costs of maintaining the list.

II-C1:Discovery

In their comments, **Engine** first discusses elements of mandatory initial discovery that appear reasonable, so long as such discovery does not limit the ability of claimants to gather the information they may need to pursue their claims. **Engine** suggests that discovery could be easily abused.

In their comments, **Amazon** states that "As a general matter, Amazon supports a very limited discovery scheme for CCB proceedings, as it will reduce litigation costs and expedite the resolution of claims." Other comments support a limited discovery.

While SFWA recognizes that there is a real danger that discovery will drive up the costs of cases, we believe it is important to remember that discovery can be vital to the progress of any case. In particular, non-party discovery should not be automatically excluded: further relevant evidence and information identifying potential additional parties can often be found in the documents and records obtained from nonparties.

We also believe that a party should certainly be able to obtain documents from entities such as web hosts without having to bring them in as parties, as such documents could be vital to a case.

We recognize, however, that if a case is complicated enough that it needs a great deal of discovery, it probably belongs in federal court and not before the CCB.

II-D: Public Access to Records and Proceedings and Case Management System for CBB Filings

SFWA believes that the CCB should set up a Web site that contains copies of all papers filed with the CCB and all CCB rulings in an easily accessible format, as well as a complete listing of all claimants and respondents, with sufficient information to disambiguate them.

II-F: Fees

SFWA believes that the USCO should formulate procedures to prioritize those creators the CASE Act was designed to help, i.e. those who cannot afford to file in federal court. As mentioned in the **Authors Guild**'s comments, authors are earning less and less from their work, in most cases barely earning enough to get by.

Many of the commenters, including SFWA, recommended keeping the fees as low as possible, given the objective of the CCB to make defending copyrights affordable.

In their filing, the **Copyright Alliance** said:

> The sum of any filing fees for commencing a claim should be significantly less than the fee for federal court (as close to $100 as possible), and the initial fee should account for no more than a small portion of the total to minimize the financial loss to the Claimant if the Respondent ultimately opts out. A secondary fee can be charged once the case becomes active. . . .
>
> The fees should be staggered to minimize the financial loss to the Claimant in the event that the Respondent ultimately opts out. The initial fee, which would be due upon filing, should be no more than $25. The secondary fee would be due after the opt-out period elapses, and the total of these fees should be as close to $100 as possible. Minimizing the financial loss that results from a Respondent's opt out is essential to the success of the system

The **Copyright Alliance** also stated that fees should be "no more than the actual cost to the Office for providing the service." SFWA strongly agrees.

Although we disagree with the **Authors Alliance** on many of their comments, we very much like their suggestion of a tiered fee structure, with individual authors/creators filing pro se or with pro bono legal aid being eligible for the lowest tier of fees. It makes no sense affording Claimants with paid legal

representation and/or corporations a reduced fee, and they should be required to bear whatever costs the CCB accrues in adjudicating the Claim.

Other suggestions made by the **Authors Alliance** need further consideration as to what their effect may be. A "sliding scale" based on the level of damages might make sense, but we predict that in many cases the Claim will be based on statutory damages, which will be determined by the CCB, not the Claimant, and only after the case has concluded. Requiring larger fees for parties that have repeatedly brought claims might also help reduce the caseload of the CCB, but it would make more sense to handle this by limiting the number of cases a party may bring and giving priority to individual creators.

We strongly disagree with the fee comments by the **Motion Picture Association, Inc**., the **Recording Industry Association**, and the **Software & Information Industry Association**.

> The say: "The statue prescribes a fee of $100 up to the amount for filing and action in federal district court (currently $402). Any amount within this range seems reasonable and appropriate."

The **Motion Picture Association** includes **Netflix**, **Paramount Pictures**, **Sony Pictures**, the **Disney Studios**, and other major corporations. For them, the higher fees would be insignificant, and the difference between $100 and $402 would mean little to them, but for individual creators filing pro se or being aided by attorneys working pro bono. Higher fees could prevent them from filing a case.

Higher fees would act as an unacceptable bar to use of the CCB.

III-A. Scope of Proceedings

SFWA believes that the CCB is intended to provide a resource for ***small*** claims. Procedures should not be adopted to attempt to squeeze large claims into the CCB. Not all cases will be appropriate for the CCB, and allowing large claims that are inappropriate for a small claims court would clog the CCB with parties having significant financial and legal resources who are attempting to do a run-around of the slow speed, complexity, and expense of federal court.

III-B. CCB Practices and Procedures.

Negotiations and alternative dispute resolution

The **Coalition of Visual Artists** urges use of negotiations to settle disputes:

> "We hope that receiving a Claim Notice from the CCB will motivate recalcitrant Respondents to negotiate a settlement regarding the use of the work instead of continuing with the claim process. We would like the

> CCB officers to suggest a resolution between parties and settlement at the outset, and set a period for settlement conference before continuing further steps in the process."

SFWA agrees, and urges the CCB to encourage use of negotiations and other alternative dispute resolution. Such actions could significantly reduce the burden on the CCB. As we stated in our initial response, however, this negotiation should only take place *after* the Respondent has opted in, and communications between the parties before they have opted in should be limited to standard forms created by the CCB.

Protective Orders and Confidentiality of Documents

SFWA believes that information obtained during CCB proceedings should be made as fully available to the public as possible but is not opposed to reasonable protections being afforded to proprietary information if the CCB determines such protections are in the interests of justice.

The new rules must ensure that the CCB scrupulously observes FOIA Exemption 4 to prevent disclosure of claimants' and respondents' confidential commercial and financial information, in accordance with the Supreme Court's recent opinion in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). Similarly, the CCB needs to take care to comply with the Privacy Act by preventing disclosure of all personally identifiable information (PII). Obvious examples of materials that must be redacted prior to public release include a writer's or small publisher's pricing strategies and home address.

SFWA has read the comments submitted by the **Administrative Conference of the US** and strongly believes that their recommendations provide a good roadmap for best practices for the CCB. In particular, SFWA encourages the CCB to look to Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94314 (Dec. 23, 2016), and Recommendation 2016-6, Self-Represented Parties in Administrative Proceedings, 81 Fed. Reg. 94319 (Dec. 23, 2016) for guidance.

III-C: Permissible Number of Cases

SFWA continues to support sensible limits on the total number of cases a claimant may file each year to prevent abuse of the new process and to ensure that the CCB may devote adequate resources to meritorious cases brought by authors. We also recognize that it is sadly all too easy for an author to have many or most of their books posted on pirate websites. That said, at the beginning of a new program such as this, it strikes us that a hard and fast numerical quota for cases a claimant may bring will run serious risks of being arbitrary and capricious in the absence of either a limit provided in the CASE Act or an established track record for the CCB.

We also want to point out that even if CCB receives substantially more cases than it can address in a given year, the fact that claimants filed these cases could have the salutary effect of curbing that infringer or other infringers and discourage them from future acts of piracy as to these particular works or this claimant. Hence, cutting off the claimants' abilities to file these claims works against the purposes of the CASE Act.

IV. Conclusion

SFWA believes that the problems raised by the opt-out nature of the CCB's procedures may be insurmountable, but when both parties choose to participate, the process needs to be as easy, inexpensive, and as user-friendly as possible for everyone involved.

SFWA looks forward to the opportunity to provide input on whatever additional subjects may arise during the course of this rule making.

Respectfully submitted for SFWA,

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