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Comments Concerning Proposed CASE Act Regulations: Small Claims Procedures for Library and Archives Opt-Outs and Class Actions.

TO: Shira Perlmutter,
Register of Copyrights and Director of the US Copyright Office,

Kevin R. Amer,
Acting General Counsel and Associate Register of Copyrights
Copyright Office

via electronic submission at
https://www.regulations.gov/commenton/COLC-2021-0003-0001

RE: Notice of Proposed Rulemaking (86 Fed. Reg. No. 168, September 2, 2021)
37 CFR Part 223. Docket No. 2021-4

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

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 Proposed Rulemaking.

General Comments

The CASE Act directs the Registrar of Copyrights to establish rules permitting "a library or archive" to preemptively opt out of Copyright Claims Board proceedings and to maintain a public list of libraries and archives that have done so. However, the term "library or archives," as used in Section 108 of the Copyright Act of 1976, is not defined. Accordingly, in our previous reply comments on the Notice of Inquiry,[1] SFWA articulated a significant concern: It is vital that digital pirates do not succeed in cloaking themselves in the mantle of legitimate libraries and archives as a way to opt out of all CCB proceedings. At this point, we are highly concerned that the CO's proposed rules at 37 CFR 223.2 will enable Internet pirates to do precisely this through a self-certification procedure coupled with a minimal review process by the CCB.

As the CO undoubtedly knows, websites abound, both public and on the Dark Web, offering illegal copies of in-copyright books to download. Some of them describe themselves as "libraries" or "archives" to mislead others. We predict that the savviest owners of these websites will apply for pre-emptive opt-out and remake their appearance to seem to be offering books. Whatever criteria or sources of information the Copyright Office uses for its determinations will be the starting point for entities such as these to attempt to game the system and escape the duty to answer each and every claim submitted to the small claims tribunal.

The CO correctly notes[2] that the library and archive exception of Section 108 of the Copyright Act was enacted over forty years ago, when Congress could not have anticipated the Internet or subsequent advances in digital technology that make possible websites dedicated to digital piracy of copyrighted works. "Library or archives" is a term whose commonly-understood meaning is rooted in the analog world of paper documents. Certainly the authors of the Section 108 exception never intended this exception to cover the illegal copying and distribution of pirated books.

Accordingly, we urge the CO to make sure the CCB has not only the authority, but also the affirmative obligation to look beyond a mere declaration in determining whether an entity is actually a library or archive in accordance with case law when there is strong reason to do so.

Lest the CO think this is a hypothetical concern, we would like to draw its attention to the complaint filed in Hachette Book Group, et al. v. Internet Archive, et al., (U.S.D.C. S.D.N.Y. #1:20-cv-04160).[3] In this lawsuit, several of the largest US publishers alleged that the Internet Archive engaged in copyright

[1] SFWA, Reply Comments Concerning Proposed Regulations for the CASE Act, https://downloads.regulations.gov/COLC-2021-0001-0049/attachment_1.pdf

[2] https://www.copyright.gov/policy/section108/

[3] https://publishers.org/wp-content/uploads/2020/06/Filed-Complaint.pdf

infringement of 1.3 million books. The complaint alleges that the Internet Archive willfully and illegally duplicates entire books on an industrial scale. It also charges that the defendants are distributing the pirated books on public-facing websites so as to grossly exceed legitimate library services. An investigation by the National Writers Union[4] discovered that the extent of their distribution of in-copyright material exceeds even what is being alleged.

We strongly advise the CO to refrain from placing entities on its list of libraries and archives that have opted out if those entities are parties in ongoing, related litigation. While a specific case wends its way through the Federal judicial system, it would be highly inappropriate for the CO's rules to permit the alleged infringer to enjoy the status of a library or archives. Moreover, the CO's official acceptance of a self-serving declaration could well affect the course of the judicial proceeding and its ultimate outcome. Accordingly, the CO rules should specify that its determination will be held in abeyance pending the resolution of ongoing litigation.

The CO's proposed rule would allow the CCB to determine that an entity does not qualify[5] for a pre-emptive opt-out. Unfortunately, the proposed rule does not set out any criteria or characteristics that would be used to make this disqualification, instead relying on a nebulous standard in which the facts stated in the opt-out submission "are implausible or conflict with sources of information that are known to the Copyright Claims Board or the general public".[6] Although it is indeed possible for a party to assert a claim that an entity is improperly included on a public opt-out list for libraries and archives, and to provide supporting material for review, it appears that the entity would stay on the list until a final determination is made. This could take many months or years. Accordingly, the better approach would be for the CCB to refrain from granting the entity status as a library or archives until such time as it has conducted an adequate review. If the entity's status is likely to be materially affected by an ongoing judicial proceeding such as the aforementioned Hachette case, it makes good sense to hold off on devoting scarce CCB resources to making a determination that may only need to be revisited following the resolution of litigation.

SFWA also objects to permitting pre-emptive opt-outs by individuals who claim to be employees of websites responsible for uploading infringing material. These individuals ought not be deemed "employees acting within the scope of their employment." It stretches the concept of "employee" beyond the breaking point to sweep in individuals who contribute materials to a website but who

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[4] https://nwu.org/what-is-the-internet-archive-doing-with-our-books/
[5] https://www.govinfo.gov/content/pkg/FR-2021-09-02/pdf/2021-18567.pdf, p.49273
[6] https://www.govinfo.gov/content/pkg/FR-2021-09-02/pdf/2021-18567.pdf, p. 49275

have not entered into an employee/employer relationship with the owners of the website and who receive no compensation whatsoever for contributing materials to that site.

II. Conclusion

As SFWA has stated previously, there are a number of reasons that the CASE Act small claims process will be useless for most book and story authors, but if pirate sites are allowed to claim pre-emptive opt-outs, the Copyright Office will effectively foreclose any realistic possibility of addressing the single largest source of copyright infringement authors and publishers face. Doing so is contrary to Congressional intent when it enacted the CASE Act.

We recommend that the CO include in its final rules a provision specifying that an entity existing exclusively or primarily as a website on the Internet that facilitates or allows downloads of unauthorized in-copyright material, and anyone who contributes unauthorized in-copyright material to such an entity, shall not qualify as a library or archive under 17 U.S.C. 108 and shall not be eligible for the pre-emptive opt-out.

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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