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# Copyright Specialist

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Regan A. Smith  
General Counsel and Associate Register of Copyrights  
U.S. Copyright Office  
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Washington, D.C. 20559-6000  
regans@copyright.gov

**Re: Copyright Alternative in Small-Claims Enforcement (“CASE”) Act  
Regulations [Docket No. 2021–1] Initial Comment**

Dear Ms. Smith:

Implementation of the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act should focus on allowing for efficient, fair enforcement while also protecting the public, through education, clear opt-out procedures, and consideration of the applicability of copyright exceptions in all claims.

**Initiating CCB Proceedings, Notice, and Service of Notice and Claim**

One way the United States Copyright Office (“USCO”) can provide clear communication about copyright law is through the notice. Along with the standard information required by FRCP 4,<sup>1</sup> clear, succinct information about copyright should be included, along with links (with shortened urls) to more information on the USCO website. Information about how to find an attorney would also be helpful for people who are unfamiliar with the complexities of copyright and who may have never hired an attorney before. For defendants who decide to go ahead *pro se*, easy-to-understand information about next steps should be included, along with a website to go to for more information about navigating the process without an attorney. USCO should provide claimants with an accessible, fillable PDF template to ensure all notices cover the same information.

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<sup>1</sup> “...name the court and parties, be addressed to the defendant, provide contact information for the plaintiff, state the time a defendant must appear, notify the defendant that failure to appear will result in a default judgment, and be signed by the clerk and bear the court’s seal.”

Notices should include only the filled template, a copy of the copyrighted work, and a URL to or a description of the allegedly infringing use; any settlement offers or other negotiations should be sent separately to prevent confusion.

USCO should also be prepared for distrust from the general public around the Copyright Claims Board (“CCB”) and CCB proceedings. Current cultural norms encourage widespread proliferation of materials online, norms that are solidified by how easy social media and other online platforms make it to share (for example, through sharing and embedding features). Even a person who generally knows not to share copyrighted material may be skeptical of a CCB notice because of the abundance of fraudulent solicitations and scams—including many that appear to come from government agencies. For example, the IRS has seen a large amount of phishing scams around the economic payments that were issued by the federal government in response to the COVID-19 pandemic.<sup>2</sup> The IRS warns the general public to ignore texts, e-mails, phone calls, and other methods of communication and not provide any personal information.<sup>3</sup> Other government agencies are also affected by scammers; many Americans have received phone calls and letters from student loan companies falsely promising student loan forgiveness in connection with the Department of Education.<sup>4</sup>

Because of this proliferation of scams and phishing attempts, a reasonable person is likely to disregard a CCB notice as spam or otherwise ignore the notice,<sup>5</sup> potentially opening them up to an unappealable default judgement. Including contact information (of the claimant, of a USCO representative, etc.) along with an official USCO seal and a searchable docket number may help alleviate these issues. Creating an official page on the USCO website explaining how to identify a legitimate notice and warning of potential CCB related scams (when or if they crop up) are also steps USCO could take to avoid confusion from potential defendants. Just as importantly, USCO will need to do broad outreach about the CCB, USCO, and copyright in general to make sure the public is informed about the new claims system and are aware that they could potentially receive a notice from the CCB.

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<sup>2</sup><https://www.irs.gov/compliance/criminal-investigation/avoid-scams-related-to-economic-payments-covid-19>

<sup>3</sup><https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-warns-of-potential-covid-19-economic-impact-payment-scams>

<sup>4</sup> <https://studentaid.gov/articles/student-loan-scams/>

<sup>5</sup> For example, a study done by the PEW Foundation found that courts resolved over 70% of small claims debt collection actions with a default judgement.

<https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>

Along with providing educational information about copyright in the notice and on the CCB website, USCO should adopt a definition of “federal and state governmental entities.” Defining these entities will help avoid confusion and improper CCB claims against them. We suggest the following definition:

A state governmental entity is defined as any State, instrumentality of a State (such as state transportation commissions, public universities, and other organizations created by or pursuant to state statute and operated for public purposes), or officer or employee of a State or instrumentality of a State acting in his or her official capacity. A federal governmental entity is defined as the federal government, any instrumentality of the federal government, and any officer or employee of the federal government or instrumentality of the federal government acting in his or her official capacity.

Employees of state and federal governmental entities should be covered under this exemption as long as the work was done in the scope of their employment. The government employee should be allowed to bring claims or have claims brought against them for matters that occurred outside the scope of their employment.

### **Additional CCB Practice and Procedures**

Default judgements will likely be common for a wide variety of reasons, including defendants’ skepticism of the proceedings and general ignorance of the CCB system and copyright generally. To protect these people--many of whom may not understand that they may have violated the law--damage awards in cases where the defendant defaults should be limited to actual damages, and proof of actual damages should be required. The required proof could include evidence of 1) a reasonable and readily available licensing fee and 2) evidence of lost sales or profits from contracts. USCO might also consider limiting damages to actual damages in a defendant’s first CCB claim. This would encourage first time defendants to participate in the system and prevent default judgements. In all cases, but especially in the case of default judgments, the CCB officers adjudicating the claim should consider whether the defendant’s use may have been a noninfringing use authorized by Copyright Act in §§107-122.

USCO should also require would-be claimants to demonstrate that they actively tried to resolve the matter without the assistance of the CCB. In some instances, the copyright holder will be able to settle the dispute without going through the CCB, leaving more CCB time and resources available for claims that cannot be resolved via any other

means. It would also help ensure that the potential defendant is aware of the conflict and mitigate potential default judgements.

To further help lower the likelihood of a default judgment, USCO should maintain a thorough and up-to-date website outlining how the CCB works. This website should include an informational manual that offers an in-depth outline of how CCB proceedings work. It should also include a page of frequently asked questions, answered in a way that the average person who is unfamiliar with copyright or the legal system would understand. These resources could emulate ones available on the TTAB<sup>6</sup> and PTAB<sup>7</sup> websites.

### **Opt-Out Provisions**

The opt-out provisions should be clear and include easy-to-follow instructions for defendants who would like to opt out. The provisions should also emphasize that the defendant will be bound by a CCB determination if they do not opt out in writing within 60 days, which could include being found liable for up to \$30,000. That 60-day date should be a “mailed by” date, if the person opting out seeks to opt out by mail and not a “received by” date, to allow for delays by the postal system. Including a postage paid envelope could help encourage responses and allow those who may not have stable internet access to easily send in their opt-out notice.

People and organizations who plan to opt out of all CCB proceedings should be allowed to do so in an efficient way and should not be required to send in an opt-out notice for each individual CCB claim. Although the statute carves out a blanket opt-out for libraries and archives with no fees and no renewal requirement, it does not keep USCO from establishing other blanket opt-out procedures, potentially with fees and renewal requirements. USCO should maintain a publicly available list of people and organizations that file blanket opt-outs or frequently opt out of proceedings. This list is necessary to keep copyright holders from wasting time, energy, and resources bringing CCB claims against defendants who have already decided to opt out of all CCB proceedings.

Libraries and archives that would like to file a blanket opt-out notice should be able to do so without needing to certify or prove their eligibility for uses authorized by 17 U.S.C. § 108. If a challenge is later brought concerning the library or archive’s status, the library or archive should be required to attest that they meet the requirements of 17 U.S.C. § 108 (a)(2) (“the collections of the library or archives are (i) open to the public,

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<sup>6</sup> <https://tbmp.uspto.gov/RDMS/TBMP/current>

<sup>7</sup> <https://www.uspto.gov/patents/ptab/ptab-inventors>

or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field”<sup>8</sup>. A nonprofit, educational institution that functions as a library or archive should also be considered eligible, as outlined in 17 U.S.C. § 108 (h)(1).

If an organization files a blanket opt-out notice, publicizes their intention to opt out of all proceedings through the USCO, or is otherwise exempt from having claims brought against them in the CCB, those opt-outs and exemptions should extend to their employees, as long as the conduct in question was done in the scope of their employment. If the conduct was done outside of the scope of the employee’s employment, the claim can be brought against them in their personal capacity, and they can decide whether to file an opt-out notice or continue with the claim.

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

USCO should strive to make the CCB proceedings as transparent as possible. Full records should be published, including any accepted or denied appeals to the CCB or the Register. Statistics of cases and appeals should be published regularly, as is done by the U.S. Patent and Trademark Office (USPTO).<sup>9</sup> Readily available information and statistics will make it easier for USCO to audit the CCB, a process that should be done after the first six months and then annually thereafter. Publicly available records and statistics would also make the system more efficient; potential claimants could look at the records and make a decision on whether or not to bring their claim based on how similar claims were resolved.

### **Fees**

Filing fees for CCB claims should be high enough to recoup as much of the costs of running the CCB system in order to ensure that the cost is not passed on to taxpayers. For the first year, the filing fee should be set at \$300 per claim and should not be staggered depending on the stage the claim is in or how many CCB officers review it. Although this fee may seem high compared to the fees of most state small claims courts, it is important to remember that potential damages are higher than the damages allowed in all state small claims courts and are far higher than the allowed amounts in

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<sup>8</sup> <https://www.law.cornell.edu/uscode/text/17/108>

<sup>9</sup> <https://www.uspto.gov/patents/ptab/statistics>

the majority of state small claims courts.<sup>10</sup> The \$300 fee is also lower than the filing fees at TTAB (currently \$600/700)<sup>11</sup> and PTAB (currently \$420).<sup>12</sup>

After a year of running the CCB, USCO should compare the cost of running CCB to the amount of money brought in from filing fees. The filing fee for the next year should then be lowered--or raised if the cost of running the CCB is high--to the amount necessary to cover any costs. USCO should also consider raising the filing fee for claimants who file multiple CCB claims in a year. For example, California raises the filing fee by \$25-70 for claimants who have filed more than 12 claims in the previous 12 months.<sup>13</sup> Raising the fee for heavy users of the system will ensure that those using it most frequently are bearing the costs for the system, while also discouraging filing high quantities of frivolous claims.

### **Permissible Number of Cases**

Yearly limits will help the CCB system run efficiently and will help discourage bulk filings or other troll-like behaviour. Eight states (California,<sup>14</sup> Colorado,<sup>15</sup> Kansas,<sup>16</sup> Kentucky,<sup>17</sup> Michigan,<sup>18</sup> Missouri,<sup>19</sup> Montana,<sup>20</sup> and New York<sup>21</sup>) limit the number of claims an individual or organization can bring in a year, week, or month. States that have yearly limits allow 10-25 cases per year,<sup>22</sup> except California, which only allows two claims over \$2,500 a year.<sup>23</sup>

The number of CCB claims an individual should be able to bring in a year should be on the lower end of the range (10-12 claims per year). This limit will still allow the individual to potentially be awarded \$360k per year, which is far more than is allowed

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<sup>10</sup> <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html>

<sup>11</sup> <https://tmep.uspto.gov/RDMS/TFSR/current#/current/r-cf2ffb86-73b2-4c9a-a9e5-47725b97dbdc.html>

<sup>12</sup> <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#PTAB%20Fees>

<sup>13</sup> California has a staggered fee system depending on claim amount until the claimant has filed 12 claims. [https://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](https://www.dca.ca.gov/publications/small_claims/basic_info.shtml)

<sup>14</sup> <https://www.courts.ca.gov/1062.htm?rdeLocaleAttr=en>

<sup>15</sup> <https://leg.colorado.gov/sites/default/files/images/olls/crs2016-title-13.pdf>

<sup>16</sup> [https://ag.ks.gov/docs/publications/small-claims-court.pdf?sfvrsn=c34ffb4c\\_6#:~:text=No%20individual%20or%20busi%2D%20ness,court%20in%20one%20calendar%20year](https://ag.ks.gov/docs/publications/small-claims-court.pdf?sfvrsn=c34ffb4c_6#:~:text=No%20individual%20or%20busi%2D%20ness,court%20in%20one%20calendar%20year)

<sup>17</sup> <http://kyjustice.org/small-claims-faqs#3>

<sup>18</sup> [https://www.legislature.mi.gov/\(S\(5vxgplhbezbercheberg2w\)\)/mileg.aspx?page=getObject&objectName=mcl-600-8407](https://www.legislature.mi.gov/(S(5vxgplhbezbercheberg2w))/mileg.aspx?page=getObject&objectName=mcl-600-8407)

<sup>19</sup> <https://www.courts.mo.gov/page.jsp?id=704#:~:text=A%20person%20may%20file%20one,court%20in%20any%20calendar%20year>

<sup>20</sup> <https://dojmt.gov/consumer/guide-to-small-claims-court/>

<sup>21</sup> <https://www.nycourts.gov/COURTS/nyc/smallclaims/pdfs/smallclaims.pdf>

<sup>22</sup> This includes Colorado (18), Kansas (20), Kentucky (25), Missouri (12), and Montana (10).

<sup>23</sup> <https://www.courts.ca.gov/1062.htm?rdeLocaleAttr=en>

in most small claims courts across the country.<sup>24</sup> Organizations should be similarly limited to five claims a year. This conforms to the spirit of the CASE Act, which is meant to benefit individuals who lack the resources to litigate their claims on the federal level. Only the legal or beneficial copyright holder should be able to bring a CCB claim; USCO should not allow third-party organizations to bring CCB claims on behalf of the legal or beneficial copyright holder.

### **Conduct of Parties and Attorneys**

Attorneys who have been suspended or disbarred from the practice of law, especially those who have specifically been sanctioned for bad-faith and troll-like behavior in copyright cases, should not be allowed to participate in CCB proceedings. USCO should create a set of rules of professional conduct for the CCB, including sanctions for parties who violate the established rules. These rules could be based on the rules from USPTO<sup>25</sup> or on rules and codes created by state bar associations.

### **Other Subjects**

Implementation of the CCB will require significant copyright education efforts from USCO. From our experience, most people know very little, if anything, about copyright. Worse, those who do know at least a little bit about copyright are sometimes mistaken or are relying on copyright myths that are not actually true under the law. The formation of the CCB will require a renewed need for clear *ex ante* communication to the public about copyright law, especially with regard to how infringement occurs, the defenses to copyright infringement, and potential consequences of infringing, including statutory damages.

USCO should also be very clear about the kinds of claims that can be brought to the CCB. The CASE Act allows the CCB to decide “copyright infringement claims (asserted by copyright holders), claims seeking a declaration of noninfringement (asserted by users of copyrighted works or other accused infringers), and misrepresentation claims under 17 U.S.C. 512(f).”<sup>26</sup> Potential claimants may not know whether or not their claim falls under that umbrella and having a list that covers exactly what CCB can or will hear can save would-be claimants time and money. There are also other issues--like determinations of authorship, decisions on publication dates, and complexities with regard to termination--that will likely come up for adjudication in CCB claims and

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<sup>24</sup> For example. California only allows individuals to bring claims up to \$10,000, and those individuals can only bring a claim of over \$2,500 twice a year.

<sup>25</sup><https://tbmp.uspto.gov/RDMS/TFSR/current#/current/c-ofe6c1a4-638b-465e-96do-ab249e9e393a.html>

<sup>26</sup> 17 U.S.C. 1504(c)(1)–(3).



decisions. USCO should consider how these issues will be addressed by the CCB, potentially by focusing on hiring CCB officers and staff who have an in-depth knowledge of copyright and the other areas of law (for example, contract law) that are frequently intertwined with it.

Although the NOI addresses a variety of concerns we have about implementing the CASE Act, there are issues in the Act that cannot be cured during implementation. We believe that the only way to have an efficient, fair, and truly voluntary system for small claims copyright issues is to create a system that is opt in, not opt out, that allows for appeal through the federal court system. There may also be some issues that will not arise until the CCB system is functioning; a pilot period of six months to a year may be necessary to test the program and work out any unexpected kinks.

We appreciate the chance to provide feedback on implementing the CASE Act and the CCB and are happy to provide any other information or comments that USCO may need, including through participation in any round tables or other discussion groups.

Respectfully submitted,

*Raven Lanier*

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