



from sound policy, the mandates of the CASE Act, or other principles of law.<sup>1</sup> We place particular emphasis on two topics that our members believe are of central importance to ensuring that CCB is a forum that upholds the due process rights of all litigants: 1) service; and 2) discovery.

## **II. TOPICS ADDRESSED BY THE NOTIFICATION OF INQUIRY**

### **A. The Overall Process: Keep It Simple.**

The initial-round comments evinced near universal agreement that the CCB process should be streamlined, straightforward, and easy to understand and navigate, including for *pro se* litigants. *See, e.g.*, Comments of the American Intellectual Property Law Association (“AIPLA”) at 1 (“As a general matter, AIPLA believes that it is important to keep the procedures as simple and accessible as possible given the nature of the claims the Copyright Claims Board (“CCB”) will hear and Congress’ intent that this be a new, simple, and low-cost process to resolve small copyright claims.”); Comments of the Coalition of Visual Artists at 15 (“[T]he purpose of the CASE Act is to establish a simplified process for simpler claims and disputes where participants are not required to hire an attorney if they feel confident in handling the case themselves.”); Comments of the Copyright Alliance *et al.* at 7 (“The procedures adopted by the Office should be objectively simple and easy to understand to the typical Claimant and Respondent.”). Commenters fully concur. We merely ask that, as the Office drafts regulations to fulfill this worthy goal, it also bear in mind the need for fairness to litigants of all types, including respect for their due process rights.

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<sup>1</sup> Commenters are all members of the Copyright Alliance, which filed comments in the initial and reply rounds. Commenters filed separately not necessarily because we disagreed with Copyright Alliance’s comments, but because, as representatives of large corporations, we wish to highlight certain issues most important to our members. Commenters stand with Copyright Alliance in support of the CASE Act and an effective and workable system for resolving small copyright disputes.

## **B. The Opt-Out Process: Make It Easy.**

Commenters agree with the many others who argued that opting out should be simple and easy, and should be accomplished either via a web form or, for those without internet access, a pre-printed form that could be sent to the Office. *See, e.g.*, Comments of Public Knowledge *et al.* at 14 (“The opt-out process must be quick and easy to exercise.”); Comments of Engine at 5 (“For potential respondents seeking to opt-out, the process should be simple and accessible.”); Comments of Authors Alliance at 4 (“Authors Alliance supports making the opt-out process as clear and simple as possible for respondents to navigate.”). If a party wishes to send a paper opt-out form to the Office, the regulations should require that it be done by means that creates a record of both the sending and delivery, including US Postal Service Certified Mail or Priority Mail, or reputable private courier such as FedEx or UPS.

Commenters do not agree with the suggestion by the Authors Alliance that respondents should be able to opt out by phone.<sup>2</sup> In order to create an unambiguous record, opting out should require some sort of writing, whether electronic (including a web form, with an email confirmation) or paper. Commenters do support the Office establishing clear instructions on the opt-out process, including a telephone help line that could inform callers how to exercise their opt-out right.

## **C. Service: Strict Compliance Required.**

Few initial-round comments addressed service. Commenters reiterate the need for the regulations to adopt a governing standard of “strict compliance” with service requirements, as

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<sup>2</sup> Comments of the Authors Alliance at 4-5.

due process demands. *See, e.g., Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir. 1991) (noting the “usual requirements of strict compliance with Rule 4”).

Regarding the voluntary directory of agents for service of process that the statute authorizes the Office to establish, *see* 17 U.S.C. §1506(g)(5)(B), Commenters wish to clarify how such a directory should address corporate “families” (including many of Commenters’ members) that are comprised of a parent and numerous subsidiaries and affiliates. In Commenters’ view, a corporate family should be permitted to submit a single form that covers all subsidiaries and affiliates, all of which agree to accept service upon the same agent (*e.g.*, CT Corporation).<sup>3</sup> However, that single form must list each individual entity (*i.e.*, each subsidiary and affiliate) that is covered by that form. The process under 18 U.S.C. §2257A (the “Pence Amendment”) by which entities, including some of Commenters’ members, make certifications to the Attorney General functions in a similar manner, and in Commenters’ experience works well. *See* 28 C.F.R. § 75.9(d) (“A single certification may cover all or some subset of all entities owned by the entity making the certification. However, the names of all sub-entities covered must be listed in such certification and must be cross-referenced to the matter for which the sub-entity served as the producer.”). To make such a directory effective, one must be able to search the directory not only for the main or parent entity that submitted the form, but also for any of the subsidiaries or affiliates listed in that form. A search for a listed subsidiary should return a result indicating that that subsidiary is listed on the form for the parent entity, with the information about the service agent (which would be the same for the parent entity and all other listed entities).

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<sup>3</sup> *Accord* Comments of Amazon.com, Inc. at 3 (“the Office should implement a system and database that allows a corporate parent to designate a single agent for *all* its subsidiaries in one submission”); Comments of the Computer and Communications Industry Association at 3; Comments of Verizon at 4.

While Commenters agree that potential respondents may submit a single form that covers all of a corporate family’s subsidiaries and affiliates (if the form individually lists such entities), we urge the Office to take particular care in this area to avoid undermining the bedrock principle of U.S. law that one corporate entity cannot be held liable for the acts of another, even when the two are related, through ownership or otherwise.<sup>5</sup> *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (“It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation...is not liable for the acts of its subsidiaries.”) (internal quotation marks omitted). To emphasize: if a claimant complains of acts by Company X, it must name Company X as the respondent and serve the claim on Company X (including via its listed service agent). Naming Company X’s parent or other affiliate, or serving any entity other than Company X itself, would not suffice. And Commenters would vigorously contest any argument by a claimant that it effectively served Company X, where service was made on Company X’s parent, subsidiary, or other corporate affiliate.<sup>6</sup>

Commenters note our agreement with those who argued that where an entity has elected to be listed in the directory of agents for service of process, service on such agents should be the exclusive means of service. *See* Comments of Verizon at 4 (“The regulations should make clear that if a complainant attempts to serve anyone other than the service agent (including a service provider’s designated agent under Section 512), such claim will not be considered valid notice or service under the CCB process.”).

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<sup>5</sup> This general principle is of course subject to the doctrine of veil-piercing, in the narrow circumstances where that exception to respecting corporate separateness applies. *See, e.g., Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000).

<sup>6</sup> Multiple entities within a single corporate family may of course specify the same agent for service of process (*e.g.*, CT Corporation). However, a claimant must still be required to file suit against, and serve, the correct entity.

#### **D. Discovery Must Be Significantly Limited.**

There was also broad agreement among the initial comments that discovery should be significantly limited, and that form discovery/questionnaires/mandatory disclosures of the type Commenters championed in our initial-round comments should largely, if not entirely, replace the type of “custom” discovery typical in typical litigation. *See, e.g.*, Comments of Amazon, Inc., at 6 (“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.”); Comments of Coalition of Visual Artists, at 4 (“A limited period of ‘discovery’ during which the automatic exchange of information (akin to FRCP 26 disclosures, but scaled back and simplified) is required and other discovery, including Form Discovery made available to the participants, is both limited and optional.”); Comments of AIPLA at 5 (“AIPLA recommends meaningful oversight of the process through standardized, presumptive disclosure obligations, conferences with Copyright Claims Attorneys as appropriate, readily accessible and easy to follow educational materials and forms, limitations on discovery requests, templates, and mandatory disclosures.”); Comments of CCIA at 5 (“Discovery should be limited to a small number of standardized interrogatories and requests for admission, [and] standardized categories of documents and mandatory initial disclosures....”); Comments of Science Fiction and Fantasy Writers of America at 3 (“The Copyright Office is entirely correct in emphasizing the critical need for streamlined, efficient discovery procedures.”).

Commenters reiterate the point we made in our initial comments that “in addition to the statutorily required claim, the claimant should be required to serve on the respondent, within 14 days after service of the initial claim, the standardized questionnaire/form discovery/mandatory

disclosures.”<sup>7</sup> Comments of the MPA, RIAA, and SIIA at 17. Requiring claimants to provide this information and material well in advance of the opt-out deadline will enable respondents to make informed decisions about whether CCB is the appropriate forum to resolve the claim.

We concur with Amazon’s statement that “[d]epositions are generally not permitted in small claims courts around the country and are a costly discovery tool,”<sup>8</sup> and again urge the Office to bar depositions entirely. The only comments that endorse depositions were those of the advocacy group Engine, which—despite labeling CCB a “a fundamentally problematic venue for resolving alleged infringement”<sup>9</sup>—argues that this highly intrusive discovery tool is necessary in actions under 17 U.S.C. §512(f), to obtain evidence of the respondent’s bad faith. *See* Comments of Engine at 8 (claimant in Section 512(f) case “may also need deposition testimony from the copyright owner (and relevant employees, where organizations are involved).”). But Engine’s own comments, which note (accurately) that “due to the issues involved, the discovery needed to prove subjective bad faith may implicate attorney-client privilege, which would—at the very least—complicate discovery,” *id.*, demonstrate exactly why depositions must be barred in the CCB context. In addition to the general concerns about the expense, burden, and intrusiveness of depositions noted in Commenters’ Initial Comments at 13, a small claims court is simply not appropriate for “complicate[d]” discovery involving nuanced issues of attorney-client privilege, disputes over which typically involve extensive litigation about complex legal and factual issues. It is highly unlikely that any respondent in a Section 512(f) action would agree to participate in

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<sup>7</sup> Such a deadline should not be at all onerous, as the claimant chooses its filing date, and thus has plenty of time to gather all evidence in its possession prior to filing its claim.

<sup>8</sup> Comments of Amazon.com, Inc. at 7.

<sup>9</sup> Comments of Engine at 1.

CCB if its “relevant employees” (plural) might be deposed, and asked about potentially privileged communications, as Engine suggests would be necessary.

Commenters also reject the suggestion that the discovery rules should be different for different types of claims. While of course the type of information relevant in a particular case will vary depending on the nature of the claims and defenses and the specific facts and circumstances, one set of discovery rules can account for such differences, and should govern—just as the Federal Rules of Civil Procedure apply in all cases in federal court, whether the claims involve copyright, civil rights, or CERCLA.

Lastly, Commenters strongly disagree with the recommendation by Amazon that the Office use the Copyright Royalty Board (“CRB”) regulations “as a guide when promulgating any specific discovery rules for the CCB.” Comments of Amazon.com, Inc. at 6-7. As Commenters noted in our initial-round comments, “in [our] experience, discovery in Copyright Royalty Board proceedings, which often involve disputes worth millions or even billions of dollars, tends to be quite broad-ranging, and discovery disputes frequent and expensive to litigate. Thus we do not view CRB as a useful model for CCB.” Comments of MPA, RIAA, and SIIA at 10 n.9.

**E. All Defenses, Including Fair Use, Must be Allowed.**

Several comments argued that any claim potentially giving rise to a fair use defense should be categorically excluded from CCB. *See* Comments of the Authors Alliance at 8; Comments of Electronic Frontier Foundation at 3; Comments of Public Knowledge *et al.* at 18-19. Commenters disagree. Imposing such a rule would contravene the statute; Congress clearly intended that CCB will adjudicate cases involving fair use. *See* 17 U.S.C. §1504(c)-1504(c)(5) (“The [CCB] may render determinations with respect to...[a] legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under

this subsection.”); *see also* H.R. Rep. No. 116-252,<sup>10</sup> at 25 (noting in the context of default that “the Board [CCB] is expected to carefully scrutinize the available evidence, and consistent with district court practice, [] consider applicable affirmative defenses *such as fair use*, where warranted by the circumstances of the case.”) (emphasis added). Congress surely would not have intended that the CCB consider fair use *sua sponte* when the respondent defaults, but not when it appears to assert such a defense.

And categorically excluding cases involving potential fair uses would significantly diminish the utility of this forum. If respondents are barred from asserting fair use (or any defense, for that matter), they will be much more likely to exercise their opt-out right, and take their chances in federal court, where no such bar on defenses exists. Public Knowledge *et al.* argue that respondents should not be permitted to argue fair use because that defense “is a complicated, mixed question of law and fact that requires balancing factors on a case-by-case basis,” invoking the Supreme Court’s recent decision in *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183 (2021). Comments of Public Knowledge *et al.* at 18. This straw man can be easily knocked down. No one, Commenters included, believes that CCB is the appropriate forum for a complex, multi-billion dollar case like *Google v. Oracle*. But there are plenty of cases where the CCB could easily determine, based upon review of a limited universe of evidence, whether a use is fair or not. For example, if a photographer brings an infringement claim in CCB over the brief display of a photo in the background of a scene in a documentary, the respondent producer may well prefer to have the case decided in CCB rather than federal court, and should have the right to assert any available defense, including fair use. Excluding all such cases from CCB would benefit neither claimants nor respondents in situations where both prefer to resolve

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<sup>10</sup> Available at <https://www.congress.gov/116/crpt/hrpt252/CRPT-116hrpt252.pdf>.

their small copyright dispute—including a dispute where fair use is at issue—in this forum. And of course if a respondent served with a claim believes it has a valid fair use defense but considers federal district court the more appropriate forum, it can always opt out.

#### **F. Blanket Opt-Out by Libraries and Archives**

The statute provides that libraries and archives may exercise a blanket opt-out from CCB claims. 17 U.S.C. §1506(aa). Importantly, “[f]or purposes of this subsection, the terms ‘library’ and ‘archives’ mean any library or archives, respectively, that qualifies for the limitations on exclusive rights under section 108.” *Id.* §1506(aa)(4). Thus the statute precludes the Office from agreeing to the suggestion of the Authors Alliance that the Office adopt “a broad definition of ‘libraries and archives’ which encompasses public libraries, academic libraries, and other institutions serving the essential functions of preservation and sharing of knowledge and culture.” Comments of Authors Alliance at 5. The statute is unambiguous: The definition of those terms must be consistent with Section 108.

Commenters also reiterate the point we made in our initial comments: The “regulations must make clear that an entity’s status as a library or archive for the purposes of opting out under CCB does not constitute a determination of that entity’s status, and may not be cited as such, in any other context, including in any federal court litigation in which that entity is a party.” Comments of MPA, RIAA, and SIIA at 9.

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Commenters and their members thank and commend the Office for its work toward implementing the CASE Act. We look forward to providing further input and working with the Copyright Office going forward.

Respectfully submitted,



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