

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of Copyright Claims Board: Initiation of Proceedings and Related Procedures)))))	Docket No. 2021-6 Submitted November 30, 2021
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**COMMENTS OF THE

MOTION PICTURE ASSOCIATION, INC.,
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
AND SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION**

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”), the Recording Industry Association of America, Inc. (“RIAA”), and the Software and Information Industry Association (“SIIA”) (together, “Commenters”) are pleased to provide comments in response to the Notice of Proposed Rulemaking (“NPRM”) regarding Copyright Claims Board: Initiation of Proceedings and Related Procedures, published at 86 Fed. Reg. 53,897 (Sep. 29, 2021) (Docket No. 2021-6).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA’s member companies are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

RIAA is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. Our membership – which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses – creates, manufactures and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

SIIA is the principal U.S. trade association for the software and digital content industries. With over 440 member companies, SIIA is the largest association of software and content publishers in the country. Its members range from start-up firms to some of the largest and most recognizable corporations in the world. With members ranging from large multinational corporations to sole proprietorships, SIIA’s members view the CASE Act as a potentially promising way to resolve copyright disputes.

Commenters welcome the enactment of the CASE Act, and the establishment of a Copyright Claims Board (“CCB”), which will provide a voluntary forum, separate and distinct from the federal district courts, for the resolution of relatively low-dollar copyright disputes. This system holds out the promise of benefiting both claimants and respondents, who may choose in such cases to opt for the relatively informal procedures and monetary limits contemplated by the statute, over the extensive formality, process, and expense typical of federal litigation. The CASE Act addresses a real problem and holds out the promise of providing a real solution.

Commenters commend the Copyright Office for its work drafting the proposed rule regarding initiation of claims and related procedures. We will not comment on the vast majority of the proposed rule, with which we agree, nor on more minor areas of disagreement. Instead, we focus

here only on those few points with which we have the most concern and that we believe depart from sound policy or the law. We respectfully request the Office revise the forthcoming final rule as follows:

II. DESIGNATION OF AGENT FOR SERVICE OF PROCESS

A. Designated Agent as Exclusive Means of Service

The statute 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)(5)(A). “If such service agent has *not* been designated, service shall be accomplished” either by complying with state-law service requirements, or by delivering the notice and claim to specified individuals. *Id.* § 1506(g)(5)(A)(i)-(ii) (emphasis added). But where a corporation, partnership, or unincorporated association wishes to designate an agent for the purpose of being served under the CCB, the statute authorizes the Office to establish a process for designation of such agents. *Id.* § 1506(g)(5)(B).

In response to the Notification of Inquiry,¹ Commenters argued that “if an entity elects to be listed in this directory, service upon the service agent it lists in the directory should be the exclusive means for serving that entity.”² The NPRM notes Commenters’ proposal, *see* 86 Fed. Reg. at 53,901, but the proposed rule does not include it. Commenters respectfully request that the final rule incorporate such an “exclusive means” provision, which is consistent with the statute, and would benefit both claimants and respondents.

¹ Notification of Inquiry (“NOI”) regarding Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, 86 Fed. Reg. 16,156 (March 26, 2021) (Docket No. 2021-1).

² Motion Picture Association, Inc., Recording Industry Association of America, Inc., and Software and Information Industry Association Initial Comments at 7, available at <https://www.regulations.gov/comment/COLC-2021-0001-0023>. Verizon similarly argued that the designated agent should be the exclusive means of service. *See* Verizon Initial NOI Comments 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.”).

Such an “exclusive means” requirement would benefit claimants by providing a single means for service, pre-approved by the respondent, which would reduce potential confusion and uncertainty caused by the availability of multiple means of service, each with their own specific technical requirements. Given that many claimants will be proceeding *pro se*, and that “strict compliance” is the standard governing service, *see, e.g., Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir. 1991), simplicity is especially important in this context.

An “exclusive means” provision would also benefit respondents, by providing them the certainty of knowing that all CCB claims would be received in the same manner, including, if they choose, by email. *See* proposed 37 C.F.R. § 222.5(b)(7)(i). Some of our member companies employ large numbers of employees that are sometimes spread across multiple buildings in multiple cities. This is even more true during the COVID pandemic and the likely hybrid work environments to follow. Ensuring that all claims are served on a single agent, designated by the corporation, organization or unincorporated association helps ensure that claims do not get lost within large entities. Because failure to opt-out can lead to a default judgment, it is critical that claims not be inadvertently lost – and the risk of that occurrence outweighs the burden on a claimant of having to adhere to a particular method of service.

Finally, an “exclusive means” provision would benefit all litigants by reducing the possibility of disputes regarding whether service was properly made in any particular case.

Given the highly technical nature of service requirements and the “strict compliance” standard, Commenters urge the Office to provide claimants with clear, simple, plain-English instructions for effecting valid service. Such instructions should include a requirement that claimants search the online database of service agents, and, if they locate the respondent’s agent, a mandate that they serve the respondent via that agent, with step-by-step instructions how to do so.

Again, it is in the interest of both claimants and respondents that service is made properly, and that disputes over the validity of service are minimized.

B. Single Form for all Entities within a Corporate Family; No Cap on Trade Names

In our reply comments to the NOI, Commenters argued that 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).”³ Our proposal on this point echoed those of Amazon.com, Inc., the Computer and Communications Industry Association, and Verizon.⁴ Regrettably, the proposed rule rejects this proposal, instead providing:

Related or affiliated corporations, partnerships, or unincorporated associations that are separate legal entities (e.g., parent and subsidiary companies) must file separate service agent designations, although a submitter may designate the same service agent for multiple corporations, partnerships, or unincorporated associations.

Proposed 37 C.F.R. § 225.2(b)(3). Commenters urge the Office to reconsider permitting a corporate family to register all affiliated corporate entities on a single form. Such a system would be vastly more efficient for registrants, particularly those—including Commenters’ members—that are members of large corporate families comprised of multiple affiliated entities. To be clear, the single form for a corporate family would still need to list each specific affiliated entity, and claimants should be able to search the electronic directory for both the parent entity and any other affiliates that the parent had listed on its form. And, if the Office implements our suggestion, Commenters have no objection to the registration fee remaining at \$6 per entity, even if multiple affiliated entities are listed on the same form.

³ Motion Picture Association, Recording Industry Association of America, and Software and Information Industry Association NOI Reply Comments at 4, available at <https://www.regulations.gov/comment/COLC-2021-0001-0044>.

⁴ 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 the Office may be seeking to emulate the existing process for designating agents to receive notifications of claimed infringement under the DMCA, there are significant differences between the two systems, and thus no compelling reason for CCB to mimic the DMCA system in all respects. Commenters anticipate needing to register many more agents under CCB than under the DMCA. Under the DMCA, entities only need registered agents when they transmit, cache, store, or provide information-location tools regarding content provided by third parties. With CCB, by contrast, potential respondents that deal frequently with copyrighted works will likely register any entity that might conceivably be sued—a much broader universe. Moreover, it is Commenters’ understanding that the Office has engaged a vendor to build the IT infrastructure for CCB from scratch, suggesting that it does not merely plan to adapt the existing DMCA agent system to CCB. Thus we do not believe there exist technical impediments to the “single form” process we favor.

As noted in Commenters’ reply comments to the NOI, 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 their 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.”). Commenters believe that such a system would work equally well for designated agents for service of process in the CCB.

This provision also sets a cap of five on the number of trade names or “d/b/a names” a corporation may include on a service agent designation. Commenters do not understand the purpose of setting a cap on d/b/a’s. If a single entity does business under different names, all such names should be included on the same designation. It makes no sense to split them up on different forms. Many of Commenters’ members, particularly in the recorded music industry, have imprints or labels

under which they operate that are simply trade names, not legally distinct entities. Importantly, their corporate legal functions are handled by a single department. For these companies, being able to designate a service agent for all of its d/b/a's on a single form (and make any needed changes on a single form) is essential.

III. OPT-OUT

A. The respondent to a counterclaim should not be permitted to opt out of litigating the counterclaim in CCB—unless that respondent claimant drops its original claim.

The NPRM notes that “[t]he proposed rule does not provide a mechanism for the respondent to [a] counterclaim to opt out of the proceeding,” and “encourages comment on this issue, including as to whether such a process is permitted under the statute.” 86 Fed. Reg. at 53,904.

The respondent to a counterclaim (i.e., the original claimant) should *not* be permitted to opt out of litigating the counterclaim in CCB—*unless that original claimant drops its claim*, thus resulting in dismissal of the entire CCB case. Permitting a counterclaim respondent to opt out while still prosecuting its initial claim would lead to unfair and inefficient results. The counterclaim respondent—i.e., the original claimant—is the party that initially chose to litigate in CCB rather than federal court. When that original claimant/counterclaim respondent filed its claim in CCB, it did so knowing that the original respondent could file a counterclaim in that forum. Thus there is no surprise or unfairness in requiring that original claimant/counterclaim respondent to litigate in CCB a counterclaim permitted by the statute, i.e., one arising out of the same transaction or occurrence. *See* 17 U.S.C. § 1504(c)(4). It would be inefficient and potentially duplicative to permit a counterclaim respondent to opt out of CCB, and instead require that counterclaimant to litigate in federal court its claim over the same transaction or occurrence that is the subject of the CCB case.

Accordingly, Commenters propose that if the original respondent files a counterclaim, the original claimant/counterclaim respondent should be able to “opt out” only by dismissing its

original claim. In that scenario, the regulations should trigger dismissal of the counterclaim as well, thus disposing of the entire case.⁵ Such a rule would reinforce the principle that CCB is the proper forum only when both parties choose to litigate there; no party should be forced to litigate either a claim or counterclaim in CCB against its will. And no party should be able to pursue a claim in CCB while simultaneously opting out of litigating a counterclaim filed against it, which could result if the rules were to allow opting out of a counterclaim without also requiring dismissal of the original claim.⁶

A. Effect of Opt-Outs

Proposed 37 C.F.R. §§ 223.1(g) & (h) address the effect of opt-outs on refiled and unrelated claims. These provisions refer to claims “covering” or “involving” “the same acts and the same theories of recovery.” *Id.* Commenters do not believe “theories of recovery” is the correct standard here. Rather, the language should mirror that in the statute, *see* 17 U.S.C. § 1504(c)(4)(B) and the proposed regulations, *see* Proposed 37 C.F.R § 222.8(a), regarding allowable counterclaims. We thus suggest the following edits to Proposed 37 C.F.R. §§ 223.1(g) & (h):

- (g) *Effect of opt-out on refiled claims.* If the claimant attempts to refile a claim against the same respondent(s), ~~covering arising out of the same acts and the same theories of recovery~~ transaction or occurrence that is the subject matter of the original claim after the

⁵ At that point, either party could still choose to pursue its claim or counterclaim in federal court. *See* 17 U.S.C. § 1507(e) (“The failure or inability to assert a counterclaim in a proceeding before the Copyright Claims Board shall not preclude the assertion of that counterclaim in a subsequent court action or proceeding before the Copyright Claims Board.”).

⁶ The NPRM invites comment on whether the statute allows for counterclaim opt-outs. The statute is silent on this point. The most relevant language provides, “Upon the written request of a claimant that is received *before* a respondent files a response to the claim in a proceeding, the Copyright Claims Board shall dismiss the proceeding, or a claim or respondent, as requested, *without prejudice*.” 17 U.S.C. § 1506(q) (emphasis added). While in the scenario we describe, the dismissal would come *after* the respondent files a response, nothing in Section 1506(q) or any other provision in the statute precludes dismissal at that point.

respondent's initial opt-out notification, the Board will apply the prior opt-out election and dismiss the claim.

(h) *Effect of opt-out on unrelated claims.* The respondent's opt-out for a particular claim will not be construed as an opt-out for claims ~~involving~~ arising out of different transactions or occurrences that are the subject matter of the original claim ~~acts or different theories of recovery.~~

IV. DESCRIPTION OF MONETARY RELIEF SOUGHT

The proposed regulations detailing the information that must be included in a claim and counterclaim specifies that the party must “describe[] and estimate[] the monetary harm suffered....” Proposed §§ 222.2(c)(8) & 222.8(c)(6). But “monetary harm” is not the correct phrase here. First, a copyright claimant may sue for the infringer's profits, which is generally not described as “monetary harm”. More importantly, that phrase overlooks the fact that when a party seeks statutory damages, it need not prove “monetary harm,” and may in fact recover statutory damages even in the absence of “monetary harm.” *See, e.g., L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (“Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or the profits reaped by defendant....”) (citation and quotation marks omitted). Likewise, the language in the following sentence of the proposed rule focuses on actual damages, while ignoring the possibility of statutory damages, and thus should be deleted. We therefore suggest the following edits to Proposed Sections 222.2(c)(8) and 222.8(c)(6):

A statement describing and estimating the ~~monetary harm suffered~~ damages sought by the claimant(s) [or counterclaimant, in the case of 222.8(c)(6)] ~~as a result of the alleged activity.~~
~~For claims of infringement, this statement may address the copyright owner's actual~~

~~damages and the profits received by respondent(s) that are attributable to the alleged infringement;~~

V. LIST OF DEFENSES

The Office “seeks comment on whether providing a list of defenses (or a link to lists of defenses) that are commonly pleaded in copyright infringement suits would be productive at this, or any, stage in the case, and how to ensure that a respondent understands the defenses available and only asserts those that are applicable.” 86 Fed. Reg. at 53,903. Commenters believe the Office should merely provide a list of common defenses to claims of copyright infringement—as well as defenses to claims for declaration of non-infringement and violations of 17 U.S.C. § 512(f).

However, the Office should also make clear that the applicability of any such defense depends on the specific claims and facts in the case, and should take care not to encourage respondents to assert any particular defense unless there is an adequate factual and legal basis to do so. Also, the Office should refrain from offering legal advice, *see* 37 C.F.R. 201.2(a)(3) (Copyright Office prohibited from providing specific legal advice), or from any statements that could appear to favor either claimants or defendants. The CCB materials should provide links to educational materials that the Office has already developed or might develop in the future, and which *pro se* claimants may find useful.⁷

⁷ See <https://copyright.gov/what-is-copyright/>

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

Respectfully submitted,



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