



LIBRARY COPYRIGHT ALLIANCE COMMENTS ON CASE ACT NOTICE OF INQUIRY

The Library Copyright Alliance (“LCA”) welcomes this opportunity to provide its comments on the Copyright Office’s March 26, 2021 Notice of Inquiry (“NOI”) on regulations implementing the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act. LCA consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations collectively represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year. U.S. libraries spend over \$4 billion annually purchasing or licensing copyrighted works.

As the NOI recognizes, the CASE Act requires the Office to promulgate regulations setting forth procedures for libraries and archives to preemptively opt-out of proceedings before the Copyright Claims Board (“CCB”). 17 U.S.C. § 1506(aa)(1). By providing libraries¹ with the ability to opt-out preemptively of CCB proceedings, Congress clearly intended to ease the administrative burden repeated opt-outs could impose on libraries, and the attendant risk that a library might inadvertently fail to opt-out in a timely manner. Accordingly, the guiding principle for regulations adopted by the Office to implement the preemptive opt-out is that the process should be as simple and straightforward as possible.

Turning to the specific questions asked in the NOI:

1. A library should not be required to “prove” that it meets the definition of a library or archive under 17 U.S.C. § 108(a)(2), and therefore is eligible for the preemptive opt-out. Instead, consistent with the guiding principle articulated above, it should be sufficient for the library merely to assert that it meets the statutory definition.

¹ In these comments, a reference to libraries also includes archives.

It is hard to imagine a situation where a library that initially meets the requirements of section 108(a)(2) would change its policies and no longer be open to the public or to unaffiliated researchers. But if such a situation did arise, a claimant interested in pursuing a claim against the library before the CCB should file its claim against the library, indicating that that the library is no longer eligible for the preemptive opt-out. At that point, the library should be given the opportunity to either: 1) demonstrate that it still meets the requirements of section 108(a)(2), and thus that its preemptive opt-out is still valid; or 2) opt out of that specific proceeding before the CCB.

2. As the NOI recognizes, in many cases, a library is not a separate legal person, but is part of larger organization. Because of the wide range of possible organizational structures, the regulation should allow the preemptive opt-out to be exercised by any person with the authority to take legally binding actions on behalf of the library in connection to litigation. This would enable an organization to opt out preemptively on behalf of its library (or libraries) without changing its existing legal structure.

Because some institutions have many different libraries, an official with the appropriate authority should be able in a single process to exercise a preemptive opt-out with respect to all the eligible libraries within the institution. For example, if a university has 20 different libraries, the responsible university official should be able to submit a single form to opt-out preemptively on behalf of some or all of the 20 libraries, rather than submit 20 separate forms. Similarly, a public library system could have many branch libraries, so the responsible official at the system level should be able to submit a single form for some or all of these branch libraries.

3. The list of libraries that have successfully opted out of CCB proceedings should be publicly available on the Copyright Office's website. The list should be updated whenever a library opts out preemptively.

4. The Office should include a regulatory provision making clear that once a library opts-out preemptively, CCB claims cannot be brought against employees of the library acting within the scope of their employment. Further, the regulation should provide that CCB claims cannot be brought against the institution housing the library (or the institution's employees) on account of the actions taken by the library or library employees acting within the scope of their employment. Otherwise, a claimant could easily circumvent the opt-out, and Congress's intent in establishing the preemptive opt-out for libraries would be frustrated.

Consider the following example. The general counsel of a university has opted out of CCB proceedings on behalf of the university library. The library digitizes the 100,000 World War II-era photographs in its collection. The heir of one of the many photographers whose works were in the collection objects to the digitization. The heir should not be able to bring a CCB claim against library employees such as the library director or the employees that digitized the photographs. Requiring this array of library employees to opt-out of individual CCB claims brought against them would defeat the purpose of the preemptive opt-out. Likewise, the heir should not be able to bring a CCB claim against the university or its board of directors on account of the alleged infringement. Once again, requiring an individual opt-out would undermine the objective of the preemptive opt-out established by Congress, particularly when considering the large number of potential claimants that could emerge in connection to a mass digitization project.

Additionally, because, as noted above, most libraries are not legal persons, the most appropriate way to interpret the intended scope of the preemptive opt-out for libraries is that it apply to all claims arising out of the library's actions, regardless of whether the named respondent is an employee of the library or the institution containing the library.

5. The Office indicates that the CASE Act's establishment of a blanket-opt out for libraries suggests that the Office lacks the authority to adopt other blanket opt-outs by regulation. LCA disagrees that such a negative implication was created by the preemptive opt-out for libraries. The Act directs the Office to promulgate regulations for a library preemptive opt-out with certain features, specifically no fees and no renewal requirement. Thus, no negative implication would apply to the Office's authority to adopt a preemptive opt-out for other entities without those specific features.

If the Office decides that it does not have the authority to establish a blanket opt-out for entities other than libraries, it should nonetheless maintain a list of entities that intend to opt out of any CCB claims brought against them. As the NOI correctly notes, such a list would benefit claimants by enabling them to avoid incurring filing fees by serving claims upon entities that would invariably opt out.

6. Finally, a library that preemptively opts out should have the ability to revoke its opt-out and subject itself to the jurisdiction of the CCB. A library should not forever be excluded from the CCB process because it exercises a preemptive opt-out at one point in time.

We look forward to working with the Copyright Office as this rulemaking proceeds.

Respectfully,

Jonathan Band

Library Copyright Alliance Counsel

jband@policybandwidth.com

April 26, 2021