



LIBRARY COPYRIGHT ALLIANCE REPLY COMMENTS ON CASE ACT NOTICE OF INQUIRY

The Library Copyright Alliance (“LCA”) welcomes this opportunity to reply to comments submitted to the Copyright Office in response to its 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 reply comments address two issues raised by the American Intellectual Property Law Association (“AIPLA”) and the Copyright Alliance (“CA”): 1) eligibility for the preemptive opt-out for libraries and archives; 2) applicability of the preemptive opt-out to library employees acting within the scope of their employment.

I. Eligibility for the Preemptive Opt-Out.

CA states that “the opt-out process should be as simple as possible.” CA Comments at 17. Nonetheless, CA demands that libraries “be required to prove their qualification for section 108 and the blanket opt-out, under penalty of perjury.” *Id.* at 20. Moreover, CA asserts that “there should be a process to allow anyone, including members of the public who may not be seeking to bring a claim before the CCB, to challenge whether a L/A still qualifies” for the blanket opt-out. The AIPLA Comments on the library opt-out are “strikingly similar” to those of CA; we won’t speculate on who copied whose comments because we assume the copying was done with the authorization of the copyright owner. *See* AIPLA Comments at 4. The justification for requiring a library to prove its eligibility under penalty of perjury, and allowing anyone to challenge the library’s eligibility, is that “a decision by the Copyright Office that a L/A qualifies for the section 108 exceptions could influence a court’s assessment of section 108” in separate litigation. CA Comments at 20.

The Motion Picture Association, the Recording Industry Association of America, and the Software and Information Industry Association of America have a much more practical way of addressing this concern. They take no position on the library blanket opt-out process, simply requesting instead that the regulations “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.” MPA Comments at 9. This approach is far more consistent with the voluntary nature of the proceeding generally and the opt-out in particular. Providing third persons with the opportunity to challenge a library’s eligibility for the preemptive opt-out would require the Copyright Office to make a determination whether the library, in fact, met the 17 U.S.C. § 108 standard, which would lead precisely to the result AIPLA and CA seek to avoid: a legal conclusion by a government agency that could influence a court’s assessment concerning a library’s qualification for section 108. By contrast, if a library self-certifies its eligibility for the preemptive opt-out, there is no Copyright Office determination which could implicate other litigation. Moreover, since a library could simply opt-out of a CCB proceeding in the event that a third-party prevailed in the eligibility challenge suggested by CA and AIPLA, that entire process would be futile.

To be sure, if a rightsholder believes that a library is no longer eligible for the preemptive opt-out, it can file a claim against the library with the CCB, indicating that the library does not meet the requirements of 17 U.S.C. § 108(a)(2). If the claimant has pled facts sufficient to indicate that the library no longer is eligible for the preemptive opt-out, a notice should be served on the library giving it 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.

The regulations should not require that a library’s certification of its eligibility to opt out preemptively be made under a standard more rigorous than that imposed on claimants. The standard in 17 U.S.C. § 1506(y)(2) of “certification of accuracy and truthfulness of statements made by participants” in proceedings before the CCB should be applied uniformly.¹

¹ The Copyright Office should ignore the suggestion by the Association of Medical Illustrators that libraries be required to renew their preemptive opt out biannually in a proceeding similar to the section 1201 triennial rulemaking. Such a process is contrary to the plain language of 17 U.S.C. § 1506(aa)(1).

II. Scope of the Preemptive Opt-Out.

Both AIPLA and CA argue that a library's blanket opt-out should not apply to library employees acting within the scope of their employment. AIPLA argues that "deciding whether to extend a blanket opt out to employees would require the CCB to determine *ex parte* whether employees were acting with the scope of their employment." AIPLA Comments at 5. Doing so "would undermine the adversarial process and increase the burden on the CCB." *Id.* Similarly, CA argues that whether an employee is acting within the scope of her employment "is a question of fact to be determined by the CCB." CA Comments at 21. Both AIPLA and CA overlook the structure of the CCB proceedings, where a Copyright Claims Attorney ("CCA") reviews each claim when it is filed "to ensure that the claim complies with this chapter and applicable regulations." 17 U.S.C. § 1506(f)(1). This review is *ex parte* and non-adversarial; it occurs before the respondent has even been served notice of the claim. It would be no more burdensome for the CCA to determine from the claim's statement of material facts whether the respondent is a library employee acting with the scope of her employment, than to determine whether the respondent is a library that has preemptively opted-out of CCB proceedings, a Federal or State governmental entity, 17 U.S.C. § 1504(d)(3), or a person or entity residing outside of the United States. 17 U.S.C. § 1504(d)(4). Indeed, it would be more burdensome on the CCB to proceed with a claim against a library employee who would just opt out as soon as she is served with the claim, as she invariably would.

Furthermore, requiring individual library employees to opt out would defeat the Congressional intent manifested by the creation of the preemptive opt-out for libraries. 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. If claims could be filed against individual library employees concerning their actions within the scope of their employment, the library administration would need to devote resources to ensure that they all opted-out properly within the allotted time. An employee's failure to opt out inevitably would result in the library becoming enmeshed in the CCB proceeding on behalf of the employee, contrary to Congressional intent.² Given the voluntary nature of the proceedings, the preemptive opt-out should be interpreted and applied in the broadest manner possible.

² For the same reasons, the exclusion of claims against federal or state governmental entities should apply to employees of such entities acting within the scope of their employment.

III. Summary Dismissal of Complaint

The regulations should create a procedure for addressing the situation where the CCA incorrectly finds that a claim is compliant and the claim is served on a respondent, *e.g.*, the claim is brought against a library (or an employee of a library) that has preemptively opted out, or a federal or state governmental entity. 17 U.S.C. § 1506(f)(3) authorizes the CCB to dismiss an unsuitable claim. There should be a means for a respondent to request summary dismissal on the grounds that the claim is unsuitable. Making such a request should be no more difficult than opting out of the CCB proceeding. Indeed, the opt-out webform developed by the Copyright Office should include a box the respondent can check off to request summary dismissal on unsuitability grounds. The respondent may be reluctant to opt-out because that could be viewed as a concession that the CCB had jurisdiction in the first place. And the respondent shouldn't be forced to incur the cost of drafting a request to the CCB to correct a mistake made by a CCA. A simple click-on request for summary dismissal would address this concern.

Respectfully,

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