



## **LIBRARY COPYRIGHT ALLIANCE COMMENTS ON PROPOSED RULE FOR PREEMPTIVE OPT-OUT**

The Library Copyright Alliance (“LCA”) welcomes this opportunity to provide its comments on the Copyright Office’s September 2, 2021, Notice of Proposed Rulemaking (“NPRM”) regarding the procedures for libraries and archives to opt out of proceedings before the Copyright Claims Board (“CCB”) under 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.

LCA generally finds the proposed rule for the opt-out procedures, 37 C.F.R. § 223.2, acceptable. However, LCA strongly disagrees with the Copyright Office’s proposal that the preemptive opt-out not apply to library<sup>1</sup> employees operating within the scope of their employment. In its NPRM, the Office states that it “appreciates libraries’ and archives’ concerns that excluding individual employees from the blanket opt-out could hamper the effectiveness of that option by allowing parties to assert claims against such individuals when claims against the institution are unavailable.” Nonetheless, the proposed rule excludes employees from scope of the opt-out.

The Office asserts that including employees within the scope of the opt-out would be “inconsistent with principles of agency law.” The Office quotes the Third Restatement of Agency Law as stating the general rule that an actor remains subject to liability for actions taken by the actor within the scope of employment. This general rule, however, is irrelevant to the question of the applicability of the opt-out to employees. Of course an employee could be liable for an infringing act she takes within the scope of her employment. The question here is whether an employer’s decision to opt out from CCB proceedings should apply to its employees. In other words, should the employer be able to opt out on behalf of its employees? No principle of agency law prevents a principal from taking an action on behalf of an agent. Therefore, including

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<sup>1</sup> In these comments, a reference to libraries also includes archives.

employees within the scope of the preemptive opt-out is not inconsistent with principles of agency law.

The Office further asserts that including employees within the opt-out would “require a broad interpretation of the statutory text” because the “the CASE Act expressly offers the preemptive opt-out option to ‘a library or archives’ but does not mention employees.” To the contrary, the Office is interpreting the statutory text in an unreasonably narrow manner.

By providing libraries with the ability to opt out preemptively of CCB proceedings in 17 U.S.C. § 1506(aa)(1), 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.<sup>2</sup> Requiring individual library employees to opt out would defeat the Congressional intent manifested by the creation of the preemptive opt-out for libraries. 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. Section 1506(aa)(1) directs the Office to establish regulations allowing for a library “that does not wish to participate in proceedings before the Copyright Claims Board to preemptively opt out of such proceedings.” Contrary to this unambiguous direction, the Office is proposing a rule that would require a library to participate in CCB proceedings against its will in order to defend its employees.

Although some exceptions and limitation in the Copyright Act that apply to libraries explicitly reference employees, *see, e.g.*, 17 U.S.C. §§ 108 and 504(c)(2), others do not, *see, e.g.*, 17 U.S.C. §§ 121 and 121A.<sup>3</sup> Nonetheless, sections 121 and 121A obviously protect the employees of authorized entities; it would have made no sense for Congress to shield the authorized entities from liability for making and distributing accessible format copies, while leaving the authorized entities’ employees exposed. Likewise, it would have made no sense for Congress to enable libraries to opt out preemptively from CCB proceedings, while leaving the libraries’ employees subject to the CCB’s jurisdiction.<sup>4</sup>

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<sup>2</sup> This desire to minimize the administrative burden on libraries is manifested by Section 1506(aa)(3), which prohibits the Copyright Office from charging a library a fee to preemptively opt out or requiring a library to renew its decision to preemptively opt out.

<sup>3</sup> Almost all libraries are “authorized entities” within the meaning of sections 121 and 121A because they are nonprofit organizations or governmental agencies that have “a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other people with disabilities.” 17 U.S.C. § 121(d)(2).

<sup>4</sup> Further, it should be noted that in Section 1506(aa), Congress delegated to the Copyright Office the broad authority to establish regulations to effectuate the preemptive opt-out, including the

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procedures for opting out. Section 108, by contrast, created a much narrower role for the Copyright Office, *i.e.*, prescribing the requirements for the copyright warning to be posted on document supply request forms. 17 U.S.C. §§ 108(d)(2), 108(e)(2). Hence, the reference to employees in Section 108 does not suggest that Congress intended for the Copyright Office to exclude employees from the scope of the preemptive opt-out in Section 1506(aa).