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Comments Concerning Proposed Regulations for the CASE Act

TO: Regan A. Smith,
General Counsel and Associate Register of Copyrights
Copyright Office

via electronic submission at
<https://www.regulations.gov/commenton/COLC-2021-0001-0001>

RE: Notice of Inquiry (Fed. Reg. 2021-06322, March 26, 2021)
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Agency Docket No. 2021-1. Document Number: 2021-06322

Science Fiction and Fantasy Writers of America, Inc. (SFWA) respectfully submits the following comments concerning the Copyright Office's Notice of Inquiry.

Statement of Interest

SFWA is a 501(C)(3) membership organization of over 2,000 commercially published writers of science fiction, fantasy, and related works. Its membership includes writers of both stand-alone works and short fiction published within other works.

SFWA is not a subsidiary of any other entity, and is entirely owned by its membership. SFWA has no subsidiaries or other ownership interest in

any other organization that may be affected by this Inquiry.

I. Summary of Comments

SFWA has watched the progress of the CASE Act in its various incarnations with interest and participated in several meetings with members of Congress during 2020. SFWA supported the bill despite some misgivings about its voluntary nature and implementation, especially regarding its potential for abuse by “copyright trolls.” As it stands, our concerns are three-fold, and, unfortunately, can only be somewhat mitigated by intelligent implementation.

Although it’s difficult to envision exactly what kinds of cases will be brought before the CCB, we can say that it will not be useful for many if not most of SFWA’s membership, that is, writers who publish novels and short fiction. The first barrier to using the small claims tribunal is the need to identify and locate the infringer. The vast majority of infringements that affect our members are posted or published anonymously or pseudonymously. Even when there is a real name attached, it may be impossible to obtain the information needed to serve them.

Secondly, assuming that the party can be identified and located, the voluntary nature of the process means that virtually every infringer will opt out. There is no incentive to do otherwise, unless the infringed author is fully prepared to take the matter to federal court. Most SFWA members do not have the resources to do so, which is why a small claims copyright court seemed like such a good idea in the first place.

Finally, it may be inevitable that any successful CCB action will require a lawyer, which will also put the tribunal out of reach. Needless to say, when the CCB starts trying cases, knowledge of the ways to avoid being caught and tried will spread exponentially on the Internet. While there are undoubtedly some situations in which the CCB will work admirably, especially for photographers and graphic artists [who](#) have strongly supported the Act, the combination of anonymity, noncompulsory nature, and possibility of high legal fees leaves most writers in the same position they were in before, with no feasible way to protect their copyrights.

SFWA's comments below are on sections of the call for comments. Not all sections are commented upon. Comments that do not directly match a

request for comments are grouped in Section III.

II. Subjects of Inquiry

II-A: Notice and Service of Notice

The Copyright Office is entirely correct in emphasizing the critical need for streamlined, efficient discovery procedures. In our experience, most instances of copyright infringement of written works tend to be clear-cut and the facts readily established. As a practical matter, the injured author whose work -- be the work short fiction or a novel -- has been plagiarized shouldn't need to hire a lawyer to obtain relief from the CCB.

Most importantly, SFWA believes that the notice to the infringer should be standardized by the Copyright Office. In no case should the claimant be allowed to send threatening or misleading language that implies opting out will result in taking the matter to federal court or any other consequences. As we stated above, we believe that most canny infringers will opt out. Further, we are especially concerned about parties who are unaware of the intricacies of copyright law and who innocently posted material on the Internet. For their sakes, the notice needs to be as matter-of-fact as possible, without legal jargon.

Notices should be sent in both electronic form and by postal mail with delivery tracking enabled to ensure delivery. Should only one form of address be known after a good faith search -- either an email or postal address -- only that single form or address should be allowed.

II-B: Opt-Out Provisions

After being properly served, respondents may opt out of a CCB proceeding. The procedures for opting out should be kept as simple and straightforward as possible under the terms of the Act. As with other legal filings before the CCB, the requirements of any written notices must be kept as simple and clear cut. Opt-out notices should not be so complex that they would require an attorney's attention.

SFWA believes that opt-out notices should be sent in both electronic form and by postal mail with delivery tracking enabled.

II-B1: Creation of a Publicly Accessible List of Those Who Have Opted Out

SFWA believes that it is important to have a publicly accessible list of those individuals and entities who have opted out of CCB proceedings in the past. Such a list could, among other considerations, save potential claimants the time and money of filing against those who are most likely to just opt out.

II-C1: Discovery

Under the Federal Rules of Civil Procedure, overly burdensome discovery requests can add years to the resolution of cases, thereby leading to abuse and stymying justice. When considering specific models for discovery, SFWA urges the Copyright Office to keep in mind the needs of plaintiffs of modest means acting pro se.

II-D: Public Access to Records and Proceedings and Case Management System for CCB Filings

The public should have full access to all case files, records, proceedings, and other case management information for all CCB cases. The case management system created for CCB cases should be easily accessed by individuals without legal training and should not require an attorney to navigate the system. SFWA understands that parties to a case will need to create accounts to file documents and otherwise participate electronically in the action, but we believe the public should be able to view CCB case records and documents free of charge and without creation of an account. In particular, it should not repeat the grievous errors of the PACER system, which is both complex and expensive. We suggest that the San Francisco Superior Court's system could be used as an example when creating the management system for the CCB.

II-F: Fees

SFWA urges the Copyright Office to adopt a filing fee of \$100, which is the minimum filing fee permissible under the statute. The Copyright Office correctly notes the benefit of keeping fees low in order to encourage the public to take advantage of the service. With a new program such as this one, it is important to avoid a financial impediment to obtaining much-needed relief. Please bear in mind that many writers operate as small businesses whose income is modest and fluctuates from year to year. A good number of them must supplement the proceeds from their writing by working other jobs to pay the rent and provide for their families. In the interest of simplicity and reducing confusion, the same \$100 filing fee should apply to all proceedings, regardless of whether heard by the CCB or a single CCB Officer.

III. Additional Comments

III-A. Scope of Proceedings

SFWA suggests that the court be extremely careful in how it crafts and implements its procedures. We do not want to see a process in which the only infringers who are caught and up in the system are grandmothers or their equivalents, who post memes or other material on the Web under their real names and can be easily talked into opting in. It would be ironic and defeat the fundamental purpose of the CASE Act if the result was that the only people who find themselves before the CCB are those who are least likely to cause significant damage.

While the CCB's proceedings won't be effective in providing relief for most copyright violations, there will undoubtedly be some situations that it is eminently suited for. The most obvious is a dispute involving fair use where both the copyright holder and infringer think they are in the right. The infringer would most likely be easily identified and served. And neither party could afford to take the matter to federal court. At this point we cannot tell how common these types of cases will be.

The Copyright Office has considerable latitude in designing and implementing the procedures outlined in the CASE Act. How these procedures will actually work and what sorts of cases the CCB will handle are still murky. Accordingly, SFWA is glad to see that CCB's procedures will be re-evaluated after a period of operation. As with many Federal programs, a number of unintended consequences will arise that will need to be addressed.

SFWA recognizes that the CCB's reach is limited to United States jurisdictions. The unfortunate result of this is to keep the many copyright infringers in foreign jurisdictions outside of the reach of the CCB, no matter how egregious their actions may be.

SFWA urges the CCB to take into consideration how failure to meet contractual obligations to pay authors appropriately and on time may be considered theft of copyright, bringing such disputes under the jurisdiction of the CCB.

III-B. CCB Practices and Procedures.

SFWA believes that the CASE Act should be implemented in ways that make it easy for individuals to both file claims and opt out of claims without the assistance of counsel. Complex rules requiring an attorney

would undercut the very purpose behind the Act. The rules enacted by the Copyright Office should be designed to allow claimants to act through attorneys if they wish, but without requiring them to do so. Fees should also be kept to the minimum allowed by the Act to ensure access to the process for the widest range of individuals.

One of SFWA's main questions is how many cases the CCB will be able to handle per year? An overloaded court with long waits contributes to additional impediments, thereby discouraging meritorious claimants. Consequently, SFWA urges that this problem be handled, if it arises, by prioritizing actions brought by creators over publishers and other copyright holders. Another sensible approach is to prioritize cases brought pro se over those being handled by lawyers.

III-C: Permissible Number of Cases

SFWA supports sensible limits on the total number of cases a claimant may file per year to prevent abuse of the new process and to ensure that the CCB may devote adequate resources to meritorious cases brought by authors. It is not uncommon for an author to find that some or even all of their books have been posted on pirate websites. If the author's career spans decades and/or the author is prolific, this could easily include dozens of works. Hence, it's vital for authors to be able to bring a single case against an infringer who has pirated many of the author's individual works. It's equally important to permit the author to add additional instances of infringement to an ongoing case as these copyright violations come to light without having to pay an additional fee. Conversely, it is just as important to prevent intellectual property (IP) thieves from using CCB proceedings against writers whose work they have stolen. Accordingly, CCB should be able to consolidate individual proceedings involving identical plaintiffs and defendants, either on its own or at the request of either the plaintiff or the defendant.

IV. Conclusion

SFWA believes that the problems raised by the opt out nature of the CCB's procedures may be insurmountable, but when both parties choose to participate, the process needs to be as easy, inexpensive, and as user-friendly as possible for everyone involved.

SFWA looks forward to the opportunity to provide input on whatever additional subjects may arise during the course of this rule making.

Respectfully submitted for SFWA,

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