



Science Fiction and Fantasy Writers of America, Inc. (SFWA)

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Comments Concerning Proposed CASE Act Regulations: Small Claims Expedited Registration Procedures and FOIA Conforming Amendment

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 Proposed Rulemaking (86 Fed. Reg. 21990, April 26, 2021)
37 CFR Parts 201, 203 and 221 FR Doc. 2021-08570

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

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 in anthologies, magazines, and in 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 Proposed Rulemaking.

I. General Comments

As noted by the call for comments, “Congress created the CCB to address the challenges of litigating copyright cases in federal court, including the significant costs and time required.”

The great majority of our members are running small businesses as writers, and have limited financial resources. SFWA believes that two actions will help the Copyright Office (CO) meet the requirements of the law: ensuring that fees are low and do not act as a barrier to timely registration and allowing group registration of works.

We agree with most of the comments made by the Copyright Alliance in its final draft, which we had an opportunity to review. We also agree that the term "unduly burdensome" should be defined, but we disagree that the workload of the Copyright Office is an appropriate standard for an agency that has been underfunded by Congress for decades, and has thus been understaffed and overworked. Using the workload of a chronically understaffed agency to define "unduly burdensome" could easily lead to a broad denial of legitimate requests for expedited registration.

II-A. Expedited Registration and Special Handling

SFWA agrees with the proposed rule stating that expedited registration only be available after filing a claim or counterclaim and after the respondent either opted in or does not opt out in time. The proposed rule enables claimants to avoid spending additional money to register when it is not required.

The regular Special Handling fee of \$800, as the Office states, is “inelastic.” To avoid making fees so high that they deter participation, the Act and the notice of proposed rulemaking (NPRM) state that fees for a case before the CCB have to be below the \$400 fee for filing a case in federal court. That includes any fee for expedited registration. The CO proposes a fee of \$50 per registration. While this amount does not seem excessive on its face, a writer with a number of short stories that need to be registered before a case can proceed could easily face hundreds of dollars in fees.

The \$50 fees can obviously add up quickly if a writer discovers that multiple works have been pirated by the same person or entity, a situation that is common in this age of copyright piracy. It appears to us that the \$400 cap artificially limits expedited registration to eight works per claim. This restriction will likely increase the financial burden on individual writers/copyright holders and increase the work load on the CCB.

To overcome this problem, SFWA proposes that the CO include language in the rule clarifying that expedited group registration for works before the CCB is allowed. Expedited group registration will allow the CCB to deal with more

works from a single creator pirated by a single respondent, a situation, as we note above, that is common.

If a general group registration provision is impractical, the CO should allow the filing of multiple expedited registrations that qualify for existing group registration categories for the group registration fee plus a single expedited registration fee covering all these works.

We are concerned with allowing the CO to determine that expedited registration would be "unduly burdensome" and thus deny a request. The proposed rule sets no standards for making this determination. Because the request then goes in the regular queue, the CCB case would be placed on hold for a long time pending the CO's issuance or denial of copyright registration. As we note above, using the workload of a chronically understaffed agency to define "unduly burdensome" could easily lead to a broad denial of legitimate requests for expedited registration.

Even so, the CASE Act is an improvement over the status quo following the Supreme Court opinion in the *Fourth Estate* case. (*Fourth Estate Public Benefit Corp. v. Wall-Street.com* 139 S.Ct. 881 (2019))

We urge the CO to add to the proposed rule explicit language defining what "unduly burdensome" means in the context of expedited registration, especially as an undue burden on one entity could easily reduce the burden on another party.

SFWA supports the proposal from the CO to refund fees if it denies the request for expedition.

II-B. Freedom of Information Act (FOIA)

The CO proposes technical amendments to its FOIA regulations at 37 CFR 201.3 and 203.1 to exempt the CCB's proceedings from public disclosure, except for determinations published on the CO's website and related records and information. In crafting amendments to the FOIA rules, the CO must balance two competing interests. First, it must provide access to materials that government decision makers rely upon so as to ensure public accountability and to guard against arbitrary and capricious decisions. On the other hand, it must take care to safeguard the significant privacy interests of those seeking to use this new tribunal to remedy injustices done to them.

For example, a writer enjoying consistent sales figures from a series of books sold on Amazon.com may provide the CCB with financial information showing a sudden and marked decrease in these amounts beginning soon after the books were pirated by a copyright infringer. This private financial information can be key to establishing the amount of monetary damages sustained. It is

vitaly important that the CO's FOIA final rules operate to prevent this sensitive, confidential data from being placed on its website or released in response to a FOIA request. The absence of adequate safeguards could easily discourage many writers and creators of copyrighted works, whom the CASE Act is intended to help, from bringing claims or raising counterclaims.

IV. Conclusion

SFWA believes that expedited group registration, with total fees kept low, offers a way for the CCB to deal fairly with what could well be a large number of cases. Further, FOIA rules must carefully balance competing interests of public accountability through adequate documentation of agency decision-making with respect for the confidential financial information provided by private parties during the discovery process.

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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