



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

P.O. Box 3238
Enfield, CT 06083-3238

Comments Concerning Proposed CASE Act Regulations: Copyright Claims Board: Initiation of Proceedings and Related Procedures

TO: Kevin R. Amer,
Acting General Counsel and Associate Register of Copyrights
Copyright Office

*via electronic submission at
www.regulations.gov/commenton/COLC-2021-0004-0001*

RE: Notice of Proposed Rulemaking (86 Fed. Reg. No 186, September 29, 2021) 37 CFR Parts 201, 220, 222, 223, and 224. Docket No. 2021-6

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

SFWA thanks the Copyright Office for allowing us to comment on the specifics of the Copyright Claims Board's (CCB) forms and operating procedures for filing and responding to claims put before it. We are pleased to see that the

Office has decided to set the filing fee at \$100, as we and many others suggested, the lowest that could have been chosen. Setting the filing fee low may encourage those with limited means, which includes many writers, to file claims against those who infringe their copyrights.

That said, in many respects the devil is in the details with the CCB and implementation of the CASE Act. The success or failure of this remarkable new tribunal will depend on getting those details right. Our primary concern with the proposed rules is that they do not meet the goal of the CASE Act of making it possible for average Americans to initiate and respond to complaints without engaging counsel. We are also concerned that the format of the initial notice as designed will needlessly alarm recipients, giving rise to misunderstanding of the voluntary nature of the process and to copyright trolling on a massive scale, despite the anti-trolling provisions of the Act.

II. § 222.2 Initiating a proceeding; the claim.

Proposed section 222.2(c) specifies that the claim must include nine distinct elements, some of which have numerous sub-elements. This will make for a form that rivals some of the IRS forms in complexity. It will deter would-be claimants and send the clear message that one needs pricy legal counsel to even attempt to get in the door. Needless to say, this will deter most authors and creator small-businesses from availing themselves of the new process, contrary to Congress's goals in enacting the CASE Act. We suggest a simpler initial form, with the very specific goal of informing the respondent of the specifics of the alleged infringement: the title(s) or other identifier of the work(s) involved, the date they were identified as infringing, and the URL they were located at if on the internet or a physical location if not. This would resemble the current format of a DMCA notice. The claimant should be required to provide the remainder of the information that the CCB needs to process a claim only after the respondent has opted in.

SFWA also notes that proposed section 222.2(c)(5), (6), and (7) contain references to "paragraph (b)(2)(iii)," which does not exist. It is possible that the references should be to "paragraph (c)(2)(iii)."

III. § 222.3(a) and § 222.4(a) Content of initial notice to respondent and second notice

The form that the CCB creates for initiating a claim is critical. Both the tone and appearance of this initial notice is crucial to the success of the CCB tribunal. Get it wrong and the unintended consequences will multiply. Legalisms and formal language run the risk of bringing out the copyright trolls, both amateur and professional.

Accordingly, the form must be clear so that a respondent need not possess any knowledge of copyright law or experience with legal matters to successfully opt out. The first and foremost thing that the form should communicate is the

VOLUNTARY nature of the participation in a CCB hearing. No caveats should be added to this statement; there should be no mention of federal court or any other consequences of opting out. There are no direct consequences to opting out. The initial notice proposed in this draft § 222.3(a) will unnecessarily intimidate potential respondents. Item #7 should be item #1 and should be printed in larger type than the remainder of the notice and/or boldface. It would not be too strong to have it printed in red. Similarly, the short sixty-day deadline for opting out should be highlighted so that it is not buried in a welter of detail where it will be easily overlooked. The form must clearly convey to the respondent that they do not have to participate if they don't want to, and, although they must formally opt out, there will be no further action if they do so. Similarly, the second notice to the respondent described in § 222.4(a) must also be written in plain English that emphasizes respondent's ability to determine whether they wish to participate, without creating the erroneous impression that the government requires participation.

SFWA urges the Copyright Office to make a draft version of the initial notice and the second notice available for public comment. Doing so will help ensure that these key documents are vetted as to their clarity and lack of coercive or threatening language. There is no question that many individuals who have never been served with a legal notice will be getting these. To some degree it's impossible to underestimate the legal knowledge they have. The Copyright Office has a chance to make this a genuine people's process by choosing communication over obfuscation.

IV. § 223.1(g) and (h) Effect of Respondent's opt-out on Refiled Claims and Unrelated Claims.

We are concerned about the operation of proposed section 223.1(g) and (h) regarding the effect of a respondent's having previously opted out when a complainant subsequently files a new claim against that respondent. It makes good sense for the CCB to dismiss the claim if it covers "the same acts and the same theories of recovery." It is also sensible for unrelated claims based on different acts and theories not to be subject to automatic dismissal. While preemptive dismissal is a well-intentioned effort to prevent *res judicata*, determining if acts have been previously litigated is usually not a clear-cut matter. In a copyright situation, where a work can be reprinted illegally in multiple places and forms, *res judicata* is even muddier and more ambiguous.

Unfortunately, the NPRM provides no examples as to which acts and theories are different and which ones are not. If a respondent previously opted out when the claimant asserted that the respondent infringed the copyright for a specific work, and then the respondent allegedly infringes the copyright for a new edition of the same work, is this a different act? If the work is the same except that it contains a new foreword, or one additional short story or essay or a new afterword, does the respondent's first opt out extend to the more recent work?

Given that opting out is so absurdly easy, these provisions should be construed in favor of the claimant.

SFWA is also concerned that claimants are not permitted to opt out of counterclaims. The one-sided nature of this ban means that respondents enjoy more rights than claimants. The claimant unfairly bears the burden of paying the filing fee, initiating the process, and assuming the risk of being subjected to a counterclaim. In cases where each party believes it was wronged by the other, the respondent is placed at a distinct advantage by being able to force the case through the CCB process.

V. Conclusion

SFWA looks forward to the opportunity to provide follow-up input on these issues as well as whatever additional subjects may arise during the course of this rule making.

Respectfully submitted for SFWA,

Michael Capobianco, Co-Chair,
SFWA Legal Affairs Committee
Author, Past President, SFWA;

James W. Fiscus, Co-Chair,
SFWA Legal Affairs Committee
Author, Past Member, SFWA Board of Directors;

Rosemary Claire Smith, Member,
SFWA Legal Affairs Committee
Author and attorney;

Elisabeth Anne Leonard, Member,
SFWA Legal Affairs Committee
Author and attorney;

Glenn Hauman, Member,
SFWA Legal Affairs Committee
Author and Publisher;

Jeffe Kennedy (ex officio)
Author, SFWA President