LIBRARY COPYRIGHT ALLIANCE COMMENTS ON PROPOSED RULE FOR COMPLIANCE REVIEW BY COPYRIGHT CLAIMS ATTORNEY

The Library Copyright Alliance ("LCA") welcomes this opportunity to provide its comments on the Copyright Office's September 29, 2021, Notice of Proposed Rulemaking ("NPRM") regarding the compliance review by the Copyright Claims Attorney ("CCA") of claims 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.

This comment focuses on the interplay between the compliance review by the CCA under proposed 37 C.F.R. § 224.1 and the preemptive opt-out for libraries and archives under proposed 37 C.F.R. § 223.3. Specifically, section 224.1(b) should be amended to require the CCA's compliance review, when a CCB claim is brought against a library,[1] to include consideration of whether the library has preemptively opted-out of CCB proceedings. Although consideration of the library's preemptive opt-out status is implicitly part of the CCA's compliance review in section 224.1 as proposed, the regulation should eliminate any possible ambiguity by explicitly requiring such consideration.

Under proposed section 224.1(b)(2), the CCA "shall review the claim…for compliance with all the legal and formal requirements for a claim" before the CCB. This review requires consideration of the claim's compliance with "the requirements set forth in 17 U.S.C. 1504(c), (d), and (e)(1)." Section 1504(d)(3) excludes claims against federal and state governmental entities. Thus, the CCA is explicitly required to determine whether the respondent is a federal or state governmental entity, and if it is, the CCA must issue a finding that the claim is noncompliant. But if the respondent is a library that is not part of a federal or state governmental agency, is the CCA required under 224.1(b)(2) to consult the section 223.3(b)(1) "public list of libraries and archives that have preemptively opted out" of CCB proceedings? And if the library is on that list, must the CCA issue a finding that the claim is noncompliant?

[1] In this comment, a reference to libraries also includes archives.

Presumably, if a library has preemptively opted out, a claim brought against it does not comply "with all the legal and formal requirements for a claim," and the CCA must find it noncompliant in the course of her compliance review.[2] Further, proposed section 223.2(b)(2) suggests that consideration of the preemptive opt-out status is part of the CCA's compliance review. Under that section, a party seeking to assert a claim against a library that it believes is improperly included on the public opt-out list is permitted to submit a claim with a statement of material fact allegations sufficient to support its belief. At that point, if the CCB determines, "as part of its review of the claim pursuant to 17 U.S.C. 1506(f), that the claimant has alleged facts sufficient to support the conclusion that the library or archives is ineligible for the preemptive opt-out, and the claim is otherwise compliant," the claim can proceed. This language implies that if a claim is brought against a library that is on the opt-out list, and the claimant provides no evidence that the library was improperly included on the opt-out list, the CCA should find the claim to be noncompliant.

But rather than rely on these presumptions, suggestions, and implications, section 224.1 should directly state that when a claim is brought against a library, the CCA must consult the preemptive opt-out list. If the library is on the list, the CCA must find the claim noncompliant or unsuitable unless the claimant meets its burden of proving that the library was improperly included on the preemptive opt-out list.

Respectfully,

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[2] Alternatively, a claim against a library that has preemptively opted out is "unsuitable" under 17 U.S.C. 1506(f)(3), and the CCA should dismiss it under proposed section 224.2.