

**Before the  
LIBRARY OF CONGRESS**

	)	
	)	
In the Matter of	)	
	)	
	)	Docket No. 2021-6
Copyright Claims Board: Initiation of	)	
Proceedings and Related Procedures	)	
	)	
	)	

**COMMENT OF  
THE ORGANIZATION FOR TRANSFORMATIVE WORKS**

Jack I. Lerner  
Benjamin Brahm  
Megan Qiyu Wang  
UCI Intellectual Property, Arts,  
and Technology Clinic  
University of California, Irvine  
School of Law  
401 E. Peltason  
Irvine, CA 92617

Betsy Rosenblatt  
Chair of the Legal Committee  
Organization for Transformative  
Works  
228 Park Ave S #18156  
New York, NY 10003-1502

November 30, 2021

## I. Introduction

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fans and fanworks from commercial exploitation and legal challenge. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain,” to using storytelling to explore racial dynamics in media, to retelling the story as if a woman, instead of a man, were the hero. We represent individuals who find community and common ground in shared affection for and criticism of media in a world that is all too often divided and isolating. The OTW’s nonprofit website hosting transformative noncommercial works, the *Archive of Our Own*, has over 4.2 million registered users, hosts over 8.5 million unique works, and receives approximately 440 million page views per week.<sup>1</sup>

We submit this response out of concern for our members and users, most of whom are independent and unfunded creators. Their vast creative output depends significantly on the doctrine of fair use. The value of our members’ and users’ works is personal and communitarian more than it is economic (although the creation of noncommercial fanworks may have meaningful economic value as an avenue for networking and the building of professional skills); many of our members place a high value on the noncommercial nature of fanworks and fan communities, and wish to protect their works from commercial exploitation by third parties. At the same time, they receive no income from their fanworks, and do not have the resources to defend against unscrupulous or overreaching claims. Thus, even though some of our members may be “claimants,” our greatest concern is that Copyright Claims Board (“CCB”) procedures will be leveled against fans in attempts to obtain statutory damages for non-infringing fair uses. We are particularly concerned that individual members without funds to hire counsel will be targeted by unscrupulous claimants and mass filers via the CCB process.

We continue to have grave concerns about the constitutionality of this proceeding. As we commented in April,<sup>2</sup> the CCB very likely violates separation of powers principles, the Public Rights Doctrine and right to a trial by jury, and due process.<sup>3</sup> By removing the federal judiciary’s power to adjudicate important private rights and vesting legislative branch employees with that authority, the CASE Act violates the separation of powers. In addition, because the CCB will be adjudicating questions involving “the liability of one individual to another under the law,”<sup>4</sup> the CCB also violates the Public Rights doctrine.<sup>5</sup>

---

<sup>1</sup> See About the OTW, Organization for Transformative Works, [https://www.transformativeworks.org/about\\_otw/](https://www.transformativeworks.org/about_otw/) (last visited Nov. 30, 2021).

<sup>2</sup> Comment of Public Knowledge, Organization for Transformative Works, et al., *In the Matter of Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations* (Apr. 26, 2021) (Docket No. 2021-1).

<sup>3</sup> Indeed, the Copyright Office discussed the many constitutional problems with a copyright small claims proceeding in its 2013 report, *Copyright Small Claim: A Report of the Register of Copyrights*. See Part IV.

<sup>4</sup> See *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

<sup>5</sup> See *Stern v. Marshal*, 564 U.S. 462, 485 (2011); *Granfinanciera v. Nordberg*, 492 U.S. 56 (internal citations and quotations omitted).

The parallels that the September 29 Notice of Proposed Rulemaking draws to rules of federal procedure and related precedent<sup>6</sup> are dangerously misguided. There are many substantive and procedural differences between merely answering a federal complaint and deciding to be subject to the CCB. Once subject to the CCB, a respondent is locked into the system, losing not just their right to a jury trial but also their right to have their appeals heard by the courts. A decision with such significant ramifications should be held to a higher standard than federal complaints and answers.

We therefore reiterate the request we made in our April 2021 comment that the Copyright Office make it as easy as possible to understand the nature of a CCB claim and opt out of the process; and limit claimants' ability to proceed with claims before multiple adjudicators.<sup>7</sup> While such measures may not resolve the larger constitutional problems with the tribunal, the Register has a duty, at the very least, to do everything it can to provide a fair forum and to protect respondents from being exploited by ruthless, unethical parties who will seek to "game" the system.

In this comment, we identify several concerns with the proposed rule set forth in the Copyright Office's September 29, 2021 Notice of Proposed Rulemaking. The proposed rule runs counter to the language of the CASE Act and Congressional intent in several respects, and devises a process that could allow unscrupulous claimants to exploit inequities and require respondents to make an irreversible decision about their constitutional rights without adequate information. These deficiencies exacerbate the constitutional concerns surrounding this new form of adjudication.

We urge the Copyright Office to revise the proposed rule to:

- Strengthen procedures to deter fraud and abuse by unscrupulous claimants;
- Improve the information provided in notices and the information required to be included in a claim; and
- Revise the Copyright Claims Attorney "claim review" procedure to prohibit ex parte communications and to construe claims fairly.

We also make two additional suggestions for improvements.

Without these changes, the proposed rule will establish a deeply unfair process in which respondents will be forced make important decisions about key constitutional rights without sufficient information. Worse, the Copyright Office will have left the door open to abuse of respondents and misuse of the process by unscrupulous copyright plaintiffs.

---

<sup>6</sup> Copyright Claims Board: Initiation of Proceedings and Related Procedures, Docket No. 2021-6, Notice of Proposed Rulemaking, 86 Fed. Reg. 53897 (proposed Sept 29, 2021) (hereinafter "September 29, 2021 NPRM").

<sup>7</sup> Comment of Public Knowledge, Organization for Transformative Works, et al., *In the Matter of Copyright Alternative in Small-Claims Enforcement ("CASE") Act Regulations*, 6-9, 19 (Apr. 26, 2021) (Docket No. 2021-1).

## **II. The Copyright Office should establish additional protections against abuse by copyright trolls and deceitful claimants.**

We are very concerned that unscrupulous or unethical claimants will opportunistically exploit the CCB process to intimidate, harass, or mislead respondents into participating in the CCB process when it might be in their best interest to opt out. We urge the Copyright Office to impose stricter rules that deter such conduct.

In recent years, the federal courts have been beset with a wave of copyright litigation featuring plaintiffs or attorneys who file copyright infringement lawsuits in large numbers.<sup>8</sup> These “frequent filers” have been known to commit a range of inappropriate, fraudulent, or unethical conduct, including:

- Filing a copyright infringement action or threatening to do so without having registered the allegedly infringed work.<sup>9</sup> The law is clear that registration is required to file an action in federal court and threats of suit without registration are improper;<sup>10</sup>
- Filing actions or making demands based on misrepresentations of the law, including representing that the target of a demand letter could be liable for statutory damages even though the work in question is not eligible for statutory damages;<sup>11</sup>
- Filing actions based on insufficient information;<sup>12</sup>
- Filing actions using mass boilerplate letters;<sup>13</sup>
- Falsely claiming respondents didn’t respond to settlement offers;<sup>14</sup>
- Directly contacting individuals or entities who are represented by counsel;<sup>15</sup> and
- Harassing or repeatedly contacting the target of a cease and desist letter.

This type of misconduct is neither novel, nor unique to a few copyright trolls, and we are very concerned that claimants will try similar tactics before the Copyright Claims Board. The Copyright Office should use its discretion to discourage and disincentivize them.

---

<sup>8</sup> Mathew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105 (2015).

<sup>9</sup> *Usherson v. Bandshell Artist Mgmt.*, No. 19-CV-6368 (JMF), 2020 WL 3483661, at \*8-9 (S.D.N.Y. June 26, 2020).

<sup>10</sup> *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 203 L. Ed. 2d 147 (2019).

<sup>11</sup> *Rock v. Enfants Riches Deprimes, LLC*, No. 17-CV-2618 (ALC), 2020 WL 468904, at \*4 n.6 (S.D.N.Y. Jan. 29, 2020).

<sup>12</sup> Report and Recommendation, *United States of America v. Paul R. Hansmeier and John L. Steele*, No. 16-CR-334, at 2-4 (D. Minn. July 24, 2017)(Adopted Sept. 8, 2017).

<sup>13</sup> *In the Matter of John Lawrence Steele*, Supreme Court M.R. No. 28663, Commission No. 2016PR00068, at 3 (Ill. May 18, 2017).

<sup>14</sup> *Usherson*, 2020 WL 3483661 at \*5-7.

<sup>15</sup> Paul Levy, *Consumer Warning: Copyright Trolling by Higbee and Associates*, Consumer Law & Policy Blog (Feb. 12, 2019), <https://pubcit.typepad.com/clpblog/2019/02/consumer-warning-copyright-trolling-by-higbee-and-associates.html>.

Fortunately, Congress shared our concerns, and enacted measures to discourage this kind of behavior. Section 1506(y)(2) of the CASE Act allows the CCB to impose costs and fees upon any party that “pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, then, unless inconsistent with the interests of justice.”<sup>16</sup> In addition, if the party engages in such activity more than once per 12 months, the CCB has the authority to bar the party from initiating any claims before the CCB. And Section 1504(g) also allows the Register to establish the rules limiting the number of proceedings a claimant may file each year before the CCB.<sup>17</sup>

Despite clear congressional intent to protect CCB proceedings from abuse, the proposed rule does nothing to address this entirely foreseeable misconduct, even though much of the misconduct is likely to occur in the initiation of CCB proceedings and related procedures that are the subject of this rulemaking. The Copyright Office should modify the proposed rule to address the entire panoply of improper behavior that the CCB is likely to encounter.

The Copyright Office should establish penalties that apply to any communications between parties that includes baseless or improper claims. In particular, we strongly recommend that the Copyright Office specifically identify certain types of misrepresentations about the consequences of declining to opt out of the CCB, particularly regarding situations in which the allegedly infringed work is not registered (in which case suit cannot be brought in federal court until registration, and no statutory damages or attorney’s fees are available). These include:

- Misrepresentations as to the possibility that claimant will be able to obtain statutory damages in federal court;
- Misrepresentations as to the claimant’s ability to file suit in federal court; and
- Misrepresentations about claimant’s ability to seek attorney’s fees in federal court.

The final rule should include a range of sanctions designed to deter misrepresentations such as these and other misconduct. Such sanctions should include default judgment for the respondent, and a bar to participation in the CCB. In addition, sanctions should apply not only to claimants, but to any attorneys who commit the types of misconduct identified above.

Along similar lines, the Copyright Office should establish firm sanctions against harassment, badgering, or hectoring of respondents, and against knowingly contacting parties who are already represented by counsel.

---

<sup>16</sup> 17 U.S.C § 1506(y)(2) (2021).

<sup>17</sup> 17 U.S.C § 1504(g) (2021).

### **III. The Copyright Office should improve the information provided in notices and specify certain information that must be included in a claim**

#### **A. Improve notice of CCB proceeding**

To satisfy the Due Process clause of the Constitution, notice must be reasonably calculated, under the circumstances, to inform all interested parties that a legal proceeding is pending and that it could adversely affect their interests.<sup>18</sup> Congress has made clear that it intended the CCB process to be accessible to pro se participants. If that is to be the case, notice must be significantly more robust and clear than in a typical adjudication. We are concerned that respondents may acquiesce to the CCB process without being fully informed as to the practical and legal implications of their decision.

The proposed rule inadequately addresses this concern: it does not ensure that key information will be included in the notice, and permits information to be presented in a way that confuses the respondent. For example, the proposed rule would require the notice to state “that the consequence of opting out is...the claimant will have to determine whether to file a lawsuit in a federal district court”<sup>19</sup> but not that the claimant may have significantly lower damages in federal district court than in the CCB. Worse, while the proposed notice format describes the CCB, it fails to describe key substantive and procedural differences between the CCB proceeding and federal court, other than the right to a jury. It does not explain what it means for the parties if a work is not registered. This information must be provided in easily understandable terms that do not require legal research or knowledge of the copyright system.

The issue of notice underscores our concern that this proceeding cannot satisfy the requirements of due process: it is extremely difficult to formulate proper notice for a lay audience that fully and clearly expresses the complex interplay between registration status, time of infringement, and other factors. These factors can be difficult to evaluate even for copyright attorneys, not to mention laypersons. It is therefore extremely important that the Copyright Office spell out clearly the implications of one’s decision whether to opt out.

We suggest the Copyright Office adopt the following amendments to the rule, which may help to ameliorate these problems:

First, the notice should explain the impact of registration or lack thereof on the respondents’ rights—both in federal court and in the proceeding. Specifically, the notice should make clear that if the allegedly infringed work is not yet registered, the claimant cannot file a suit in federal court until it the work is registered, cannot obtain attorney’s fees in federal court, and cannot obtain statutory damages in federal court unless the infringement is ongoing. (And, as we discuss in the next section, the claim should clearly and prominently indicate whether the work is registered.)

Second, the Copyright Office should publish the exact language of the anticipated notice, and conduct a rulemaking that permits the public to comment on this language. As

---

<sup>18</sup> *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

<sup>19</sup> Proposed 37 C.F.R. §222.3(a)(7), September 29, 2021 NPRM at 53906.

we discuss above, proper notice is both very important and very difficult to accomplish, and for this reason the Copyright Office must carefully select language and phrasing to ensure lay understanding. Input from all participants will help prevent the final form from being confusing and from being overly broad or narrow. We urge the Office to provide a prototype of this form and an opportunity to comment on it.

Third, the final rule should remove the option for the CCB to outsource to private parties the sending of notices.<sup>20</sup> We think there is a serious risk that third-party notices could confuse recipients as to whether the notice is an official correspondence from government agency, as opposed to a scam or marketing literature—a concern the Copyright Office itself has also articulated.<sup>21</sup> In order that respondents understand the gravity of the notice; understand that it is from the government; and are made sufficiently aware of the proceedings and opt-out process, we recommend that the CCB itself issue the notice, rather than another entity acting “on behalf of” the CCB.<sup>22</sup>

### **B. Require more information to be included in a claim**

Under the Proposed Rules, the only substantive information respondents will receive before they make a decision to participate in a CCB proceeding—and forfeit their constitutional rights to an appeal and a trial by jury—are the notice form provided by the Copyright Office and the claim served along with it. The information contained in these documents must be sufficient to fully inform the party of facts sufficient to make this irreversible decision. Yet Section 222.2(c) of the proposed rule requires only that claimants indicate “where the alleged act(s) of infringement occurred,<sup>23</sup> identify the work’s “title,”<sup>24</sup> and “describe the facts leading the claimant to believe the work has been infringed.”<sup>25</sup> These requirements are so vague and open-ended that they could permit a scenario in which respondents are forced to decide whether to waive key constitutional rights without being able to determine exactly where the infringement occurs or what work was infringed.

Here is an example. Imagine a mom-and-pop gardening store that creates a website incorporating many photos of butterflies. Under the proposed rule, the gardener could receive notice of a CCB claim identifying “a photo of a butterfly” as the allegedly infringing work, or “a photo of a butterfly” as the allegedly infringed work, without specifying *which* photo of a butterfly is infringing or *which* photo has allegedly been infringed. The proposed rule would also possibly permit the claimant to state only that the location of the infringement is the gardening store’s website, without specifying the exact location on the website where the image is being displayed. This would not be enough to identify the work in question or the nature of the infringement, and yet the owners of gardening store would be forced to make an irreversible decision about their constitutional rights based on this limited information. The final rule must require, at a

---

<sup>20</sup> Proposed 37 C.F.R. §222.4, September 29, 2021 NPRM at 53907.

<sup>21</sup> September 29, 2021 NPRM Supplemental Information Section E at 53902.

<sup>22</sup> Proposed 37 C.F.R. §222.4, September 29, 2021 NPRM at 53907.

<sup>23</sup> *Id.* at §222.2(c)(5)(iii)(F), page 53905.

<sup>24</sup> *Id.* at §222.2(c)(5)(ii)(A).

<sup>25</sup> *Id.* at §222.2(c)(5)(iii)(D).

minimum, enough specificity in the claim to avoid putting respondents in this untenable position. A reasonable approach would be to require claimants provide a copy of the copyrighted work they allege is infringed and the work they allege is infringing; or for works located online, to provide not simply URLs where the copyrighted work and allegedly infringing work may be found, but more specifically URLs pointing to the copyrighted work and allegedly infringing works and no other works.

The Copyright Office has stated that in order to accommodate claimants, it is reluctant to impose a pleading standard more stringent than that of federal court. In court, however, defendants have multiple options to force further disclosure before the trial begins, and the act of answering a federal complaint does not require the defendant to forgo key constitutional rights; if there is not sufficient information to understand how and whether the defendant has infringed, the defendant can deny a claim on the basis of insufficient information.<sup>26</sup> Not so in the CCB. Respondents have no formal opportunity to challenge the content of the claims *or even find out more about them* before they must decide whether to opt out.

The Office's treatment of pro se parties should cut both ways; there are likely to be just as many—and possibly many more—pro se respondents as there will be claimants. Yet while the Office's position on pleading standards considers the challenges claimants may face, it ignores the serious disadvantage that lax pleading standards would impose on respondents. Of course, by permitting claimants to put respondents at a disadvantage in this way, the proposed rule exacerbates the CASE Act's serious constitutional problems.

We suggest the Copyright Office adopt the following amendments to the rule to address these problems:

First, the final rule should require that claims clearly and prominently indicate whether the work in question is registered or unregistered, using graphical elements such as boldface to make the registration status prominent and easy to find. Pro se respondents cannot be expected to recognize or understand the difference between a registration number and effective date of registration on the one hand, and the service request number and application date on the other. It would be reckless and unfair to require anything less than a requirement to declare *the registration status itself* clearly and prominently—with a phrase such as “THIS WORK HAS NOT YET BEEN REGISTERED” or “THIS WORK WAS REGISTERED WITH THE COPYRIGHT OFFICE AS OF [DATE].”

Second, if infringement occurs on a website that respondent is alleged to control, the final rule should require that the claim identify the URL of the specific place on the site where the alleged infringement is occurring, not just the front page of the site: one that points to the allegedly infringed upon work and no other work. If the infringement occurs in a video, claimants should be required to specify with a timestamp and screenshot, or similar information, where exactly in the video the alleged infringement is occurring.

---

<sup>26</sup> Fed. R. Civ. P. 8(b)(5) (“A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”); Wright & Miller, 5B *Fed. Prac. & Proc. Civ.* (4th ed.) §1262.



Along similar lines, if the allegedly infringed work is a photograph or illustration, the final rule must require claimants to attach a copy of the infringing work. If the work in question is not a photograph or illustration, the claimant must be required to attach a copy of the work or other information sufficient to identify which work is being infringed; it is not sufficient for claimants to specify only a title.

Finally, in addition to these requirements, the final rule should permit respondents to delay their decision to opt out until they have received information sufficient to respond to the claim. And the final rule should specify that “sufficient information to respond” includes the exact location (including exact URL or timestamp) of the alleged infringement, and if a photograph or illustration, a copy of the image.

#### **IV. The Copyright Office should revise the Copyright Claims Attorney “claim review” process to prevent ex parte communications and prohibit unfair legal assistance by Copyright Office staff.**

##### **A. Prohibit ex parte communications**

The CASE Act seeks to ensure the fairness of the procedure by prohibiting *ex parte* communications, providing that “any party to a proceeding before the Copyright Claims Board shall refrain from ex parte communications with the Copyright Claims Officers and the Register of Copyrights concerning the substance of any active or pending proceeding before the Copyright Claims Board.”<sup>27</sup> This provision, which has been present since the outset of the legislative process,<sup>28</sup> is particularly important given that many participants in the CCB process will be representing themselves. Rules against ex parte communications are important not only because they ensure fairness, but also because such communications undermine the legitimacy of the forum in which the adjudication is taking place.<sup>29</sup>

Despite the clear language of the statute, the proposed rule appears to permit *ex parte* communications between Copyright Claim Attorneys and parties to the proceedings. Section 224.1 of the proposed rule provides that, after the initial claim review,

...the Copyright Claims Attorney will notify the party that submitted the document . . . by (1) [i]nforming the claimant or counterclaimant that the claim or counterclaim has been found to comply . . . or (2) [i]nforming the claimant or counterclaimant that the claim or counterclaim, respectively, does not comply with the applicable statutory and regulatory requirements and identifying the noncompliant issue(s) . . . .

---

<sup>27</sup> 17 U.S.C. §1503(f) (2021).

<sup>28</sup> CASE Act of 2016, H.R. 5757, 114th Cong §1503(f) (2016).

<sup>29</sup> ABA Model Rules of Judicial Conduct Canon 2, R. 2.9 and Comment (2020): Roberta K. Flowers, *An Unholy Alliance: I The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. LAW REV. 251 (2000).

The proposed rule anticipates that Copyright Claims Attorneys will analyze the legal claims and, in the case of non-compliance, identify the noncompliant issue(s) and communicate those findings to the claimant. The claimant will then have leave to amend their complaint and again have it analyzed by Copyright Claims attorneys for statutory and regulatory compliance. Shockingly, however, the proposed rule does not require that these communications be made public or even shared with respondents. Without such a requirement, the proposed rule effectively permits Copyright Claims Attorneys to give *ex parte* legal advice to claimants.

The America Invents Act of 2011 (“AIA”) provides a potential source of instruction for policies on *ex parte* communications. The AIA created the processes of inter partes review and post grant review<sup>30</sup> in which third parties can present evidence challenging a patent’s validity to the Patent Trial and Appeal Board. In setting up these proceedings, the United States Patent and Trademark Office saw fit to include strong protections against *ex parte* communications.<sup>31</sup> And in the pre-AIA *ex parte* reexamination procedure, Congress provided that when the Director makes a determination as to whether a substantial new question of patentability has been raised by a third party, a copy of the decision will be added to the official file of the patent, mailed to the patent owner, and mailed to the person requesting reexamination.<sup>32</sup> These measures ensure transparency and promote fairness. The Copyright Office should implement similar rules for the CCB.

We urge the Copyright Office to revise the proposed rule to comply with Section 1503(f) of the CASE Act as follows:

First, the final rule should require that the CCB make public in a searchable database all rejected claims, and all communications between Copyright Claims Board staff and claimants that are made pursuant to 17 U.S.C § 1506(f) and proposed 37 U.S.C. §224.1.<sup>33</sup>

Second, where the respondent is identified in a claim that is rejected, the final rule should require that the claimant attach all rejected claims and all correspondence between the claimant and CCB staff made pursuant to the Section 224.1 review process to the notice and claim served on the respondent pursuant to 17 U.S.C§ 1506(g) and §222.3(a)<sup>34</sup>. In order to prevent fraud, the CCB should also be required to attach rejected claims and correspondence between the claimant and CCB to the notices it sends.

Third, the CCB must make these communications available in the case’s docket in the electronic filing system.

---

<sup>30</sup> 35 U.S.C §§ 311-329 (2021).

<sup>31</sup> 37 C.F.R. § 42.5(d) (2021) (“Communication regarding a specific proceeding with a Board member defined in 35 U.S.C. 6(a) is not permitted unless both parties have an opportunity to be involved in the communication.”).

<sup>32</sup> 35 U.S.C. § 303 (2021).

<sup>33</sup> Proposed 37 C.F.R. §224.1, September 29, 2021 NPRM at 53912.

<sup>34</sup> *Id.* at §222.3(a), page 53906.

These amendments will ensure that both parties have equal access to any decisions rendered by the Office related to the dispute in which they are participating.

### **B. Apply regular claim construction principles in accordance with Congressional intent**

The Copyright Office indicates that “as contemplated by Congress, the CCB will ‘construe liberally’ any information in the claim to satisfy regulatory requirements during claim review.”<sup>35</sup> But to construe liberally “any information” goes beyond Congress’s intent. The House Report instructs that “*if the parties are proceeding pro se*, their papers and assertions are [to be] construed liberally in favor of adjudicating applicable claims and defenses.”<sup>36</sup> It does *not* instruct that any and all claims should be construed liberally. To do so would violate long-standing procedural principles and provide an unwarranted, unfair advantage to claimants.

We urge the Copyright Office to revise the proposed rule to make clear that regular claim construction principles apply, and that the information in claims should only be “construed liberally” when the claimants are *pro se*.

### **V. Additional suggestions for improvement**

Finally, we offer two suggestions for improvement to the proposed rule.

First, we note that the Copyright Office anticipates both claimants and respondents will be encouraged to engage pro bono legal counsel or seek assistance from law school clinics.<sup>37</sup> These organizations, while often very helpful, cannot always respond as quickly as private counsel due to lack of capacity or the academic calendar. The final rule should permit respondents to delay the opt-out decision for up to 270 days to allow for consultation with counsel.

Second, we note an apparent drafting error in Sections 222.2(c)(5) and (6) of the Proposed Rule. The provisions contain references to subsections (b)(2)(i) and (ii), respectively, but it appears they may actually have been intended to refer to subsections (c)(2)(i) and (ii). The Copyright Office may wish to review this provision.

---

<sup>35</sup> September 29, 2021 NPRM at 53898.

<sup>36</sup> H.R. Rep. No. 116–252 at 22 (emphasis added).

<sup>37</sup> 17 U.S.C. § 1506(d)(2) (2021).