



November 30, 2021

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U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559
202-707-8350

VIA ONLINE SUBMISSION

Re: Comments of Engine Advocacy Regarding Notice of Proposed Rulemaking on *Copyright Claims Board: Initiation of Proceedings and Related Procedures*

Dear Mr. Amer & Ms. Levandusky:

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. We appreciate the opportunity to submit this response to the U.S. Copyright Office's notice of proposed rulemaking concerning the *Copyright Claims Board: Initiation of Proceedings and Related Procedures*.

As we have previously noted, Engine, smaller tech companies, and numerous other organizations have raised substantial concerns that the Copyright Claims Board (CCB)—under the CASE Act as written—will be a fundamentally problematic venue for resolving alleged copyright infringement, and will expose everyday Americans, Internet users, and creators across the country to the risk of bankruptcy over even minor, accidental infringement or permissible fair use.¹ Importantly, startups

¹ E.g., Comments of Engine Advocacy in Response to *Copyright Alternative in Small-Claims Enforcement* (“CASE”) Act Regulations, Docket No. COLC-2021-0001 (Apr. 26, 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60885c92bebd5d771de0b680/1619549331226/2021.04.26+Comments+of+Engine+on+COLC-2021-0002.pdf>; Abby Rives, *CASE Act Does Not Offer Viable Solution to Online Infringement*, Engine (July 11, 2019), <https://www.engine.is/news/case-act-does-not-offer-viable-solution-to-online-infringement>; Abby Rives, *Startups Need Certainty, Not Unaccountability and Confusion in Copyright Law*, Inside Sources (Sept. 10, 2019), <https://www.insidesources.com/startups-need-certainty-not-unaccountability-and-confusion-in-copyright-law/>; Letter to Speaker Pelosi, Sen. Feinstein, & Sen. Harris from Automatic, GitHub, Patreon, Pinterest, Reddit (Oct. 3, 2019), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5d9664cdd8a0454502015eac/1570137293411/2>

that host user-generated content often lack the name recognition and the long-standing relationships with consumers that large companies have. If an Internet user or Internet-enabled creator is harassed, feels they are being treated unfairly, or unknowingly loses valuable constitutional protections because of the CASE Act, it could drive users away from a startup—relationships the startup cannot easily restore or replace.

Many of our concerns are a function of the statute itself, and we appreciate that the Copyright Office likely lacks regulatory authority to resolve them. Yet, as is true in all policy areas, Engine strives to seek solutions and remains committed to engaging with policymakers to try and promote copyright laws that work for startups and the users and creators that rely on them. To that end, we hope the following comments and perspectives—which echo many points we raised earlier in the year—can be useful as the Office continues to implement the CASE Act.

Setting CCB jurisdiction. The notice of proposed rulemaking leaves the question of claim suitability, and determining the CCB’s jurisdiction, to the CCB.² Especially here, where Congress did not dictate that the CCB should define the boundaries of its own jurisdiction,³ it is concerning that the Copyright Office is declining to. We encourage the Office to conduct rulemaking on what claims are suitable for CCB resolution, ensuring a transparent, democratic process delineates suitability

[019.10.03 Letter+re+CASE+Act-2.pdf](#); Letter to Sen. Wyden from Automattic, Etsy, GitHub, Patreon, Pinterest, Reddit (May 15, 2020), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5ebef732cb8c5651cdc49832/1589573426981/20.05.15+Letter+to+Senator+Wyden+re+CASE+Act.pdf>; Anthony Marcum, *Potential Pitfalls of the CASE Act*, R Street Institute (July 16, 2019), <https://www.rstreet.org/2019/07/16/potential-pitfalls-of-the-case-act/>; Daniel Takash, Opinion, *CASE Act Would Create a Drive-Through Window for Copyright Trolling*, Niskanen Center (Oct. 8, 2019), <https://www.niskanencenter.org/op-ed-case-act-would-create-a-drive-through-window-for-copyright-trolling/>; Letter to Sen. Lindsey Graham & Sen. Dianne Feinstein from Association of College Research Libraries et al. (July 17, 2019), <http://www.ala.org/advocacy/sites/ala.org/advocacy/files/content/Sign-ons/ReCreate-Coalition-Letter-to-Oppose-CASE-Act.pdf>; Kerry Maeve Sheehan, *Copyright Law Has a Small Claims Problem. The CASE Act Won't Solve It*, Author’s Alliance (June 4, 2019), <https://www.authorsalliance.org/2019/06/04/copyright-law-has-a-small-claims-problem-the-case-act-wont-solve-it%E2%BB%BF/>; Letter to Members of House of Representatives from ACLU (Oct. 21, 2019), <https://www.aclu.org/letter/aclu-vote-recommendation-hr-2426-case-act>; Wayne T. Brough, Opinion, *If You Build It, They Will Troll*, Inside Sources (Sept. 4, 2019), <https://www.insidesources.com/if-you-build-it-they-will-troll/>; Press Release, Re:Create Coalition, Re:Create Statement on the CASE Act (Oct. 22, 2019), https://www.recreatecoalition.org/press_release/recreate-statement-on-the-case-act/; Letter to Sen. Lindsey Graham & Sen. Dianne Feinstein from Consumer Tech. Assoc. (July 10, 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/09/CTA-Letter-CASE-Act.pdf>; Stan Adams, *The CASE Act: The Road to Copyright Trolling is Paved with Good Intentions*, Center for Democracy & Tech. (July 17, 2019), <https://cdt.org/insights/the-case-act-the-road-to-copyright-trolling-is-paved-with-good-intentions/>; Katharine Trendacosta, *Congress Continues to Ignore the Dangerous Flaws of the CASE Act*, Elec. Frontier Found. (Sept. 11, 2019), <https://www.eff.org/deeplinks/2019/09/congress-continues-ignore-dangerous-flaws-case-act>; Press Release, Public Knowledge, Public Knowledge Urges Congress to Re-examine CASE Act (July 18, 2019), <https://www.publicknowledge.org/press-release/public-knowledge-urges-congress-to-re-examine-case-act/>.

² Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. 53897, 53899 (Sept. 29, 2021) [hereinafter “Notice”].

³ Cf. *Do You Know Who Will Decide Whether Your Next Dispute is Subject to Arbitration?*, Troutman Sanders (Mar. 22, 2018), <https://www.troutman.com/insights/do-you-know-who-will-decide-whether-your-next-dispute-is-subject-to-arbitration.html> (discussing how “[c]ourts determine whether a dispute is subject to arbitration, also known as questions of ‘arbitrability,’ unless the parties agree to submit arbitrability disputes to the arbitrator”).

(e.g., when it comes to controlling the number of proceedings and the scope of appropriate subject matter).⁴

Waiver of Service. In prior submissions to the Office, we noted concerns about the use of intimidating or misleading language when claimants are asking respondents to waive service of process.⁵ While the notice of proposed rulemaking notes this concern,⁶ the Office has not proposed any mechanisms to alleviate it. Instead, the Office merely notes it will provide standard forms for requesting waiver of service, which alone does not (and cannot) preclude claimants from including additional information in their communications with respondents. It is that additional information that gives rise to our concern. For example, in the patent context, it is common for patent assertion entities to attach standard complaints to correspondence seeking nuisance value settlements over baseless allegations of infringement.⁷

As we previously noted:⁸

For many individuals, the first time they learn about the CCB will be either (a) when they receive a pre-filing demand letter or (b) when they receive a request they waive service of process. The Office will likely have little—if any—insight into demand letter practice. And while the Office may not be able to control what parties say when requesting a waiver of service, it may be able to reduce the chance that requests for waivers are used in a way that introduces abuse, harassment, or misinformation.

We encourage the Office to require claimants submit the entire waiver package to the CCB—everything they send to the recipient, including any cover letter—at the same time they send it to the respondent. This would discourage the use of intimidating or misleading language and provide CCB access to information about waiver requests so it could intervene if problematic patterns emerge.⁹ For those claimants that merely send the Copyright Office’s standard forms, nothing changes, but for those sending additional material, bringing transparency around that additional material could prove valuable in preventing abuse of the system.

Access to communications between parties and CCB employees. Likewise, the Copyright Office should mandate that any correspondence between claimants and CCB officials (CCB Attorneys, Officers, staff, etc.) be produced in discovery, so respondents can see the full scope of what was communicated. While we still urge the Copyright Office to implement rules and organizational structures to avoid *ex parte* communications between claimants and CCB officials,¹⁰

⁴ See, e.g., 17 U.S.C. § 1506(f)(3)(C) (addressing certain bases for claim suitability).

⁵ Engine Comments, *supra* note 1, at 3-4.

⁶ Notice, *supra* note 2, at 53901-2.

⁷ See, e.g., Joe Mullin, *Patent Stunner: Under Attack, Nation’s Most Notorious “Troll” Sued Federal Gov’t*, ArsTechnica (Jan. 14, 2014), <https://arstechnica.com/tech-policy/2014/01/patent-stunner-under-attack-nations-most-notorious-troll-sues-federal-govt/> (MPHJ would include draft complaints with threatening demand letters); David Cohen, *Patent Demand Letters – The Kinds of Letters You Might Receive (Part 2)*, JD Supra (July 11, 2020), <https://www.jdsupra.com/legalnews/patent-demand-letters-the-kinds-of-63368/>.

⁸ Engine Comments, *supra* note 1, at 3-4 (citations omitted).

⁹ Engine Comments, *supra* note 1, at 3-4.

¹⁰ Engine Comments, *supra* note 1, at 11.

especially unless and until the Office takes those steps, it is vital that respondents have equal access to the communications between claimants and the Office.

Defenses. We agree the Office must dedicate careful attention to the appropriate presentation of possible defenses¹¹ and reiterate our previous comments on notifying recipients about those potential defenses.¹² In addition to providing information about defenses directly to respondents and posting it on the CCB website(s), we encourage the Office to prepare a checklist form of defenses that respondents can use when answering a complaint/asserting defenses during a proceeding. And the CCB should, as a matter of course, evaluate each of the defenses on the checklist *sua sponte* in each case, including when respondents proceed *pro se* and when the CCB awards damages in the context of a default judgment.¹³

Other Issues. The current notice of proposed rulemaking leaves some critical questions about initiating proceedings unanswered, like the readability of relevant notices and the details of how respondents will opt-out.¹⁴ As the Office fulfills its intent to “use plain-language fillable forms throughout various stages of CCB proceedings,”¹⁵ we reiterate prior comments urging the Office to

craft notices that are readable, accounting for the fact that recipients are expected to comprise everyday Internet users—including children or other groups that may lack technical savvy—and they are expected to proceed *pro se*. . . . The Office should consider drafting all notices and related materials at an eighth grade reading level (or below). And it should consider hiring communications professionals to draft these documents (instead of relying on attorneys who are accustomed to writing in “legalese”) The Office should also consider translating notices into multiple languages, so that recipients can read and understand regardless of whether and how comfortable they are with the English language.¹⁶

When it comes to the opt-out provisions, the Office proposes an online opt-out notification form or paper delivery. Beyond that, it appears the details and language of the opt-out provisions have not been fleshed out. Consistent with our comments on readability, we encourage the Office to consult with experts in communication in finalizing (and periodically revisiting) the details of opt-out procedures.¹⁷ In addition, the Office needs to understand who respondents are and how they interact (and are able to interact) with its online or printed forms. If someone lacks access to a printer or a connected device compatible with the Office’s online forms, that cannot be the reason a respondent loses her constitutional rights.

¹¹ See, e.g., Notice, *supra* note 2, at 53903.

¹² Engine Comments, *supra* note 1, at 4-5.

¹³ E.g., *Buttnugget Publishing v. Radio Lake Placid, Inc.*, 807 F. Supp. 2d 100, 106, 110-12 (N.D.N.Y. 2011) (noting that courts considering default judgment motions consider whether defendant has a meritorious defense, and delaying entry of damages in a default judgment case until after an evidentiary hearing).

¹⁴ See, e.g., Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, 86 Fed. Reg. 16156, 16159 (Mar. 26, 2021) (discussing accessibility of notices and need to tailor language to litigants expected to proceed *pro se*); Engine Comments, *supra* note 1, at 2-3, 5-6.

¹⁵ Notice, *supra* note 2, at 53898.

¹⁶ Engine Comments, *supra* note 1, at 2-3 (citations omitted).

¹⁷ See, e.g., Engine Comments, *supra* note 1, at 5-6.

How to ensure readability and sufficient communication of public documents is beyond Engine’s core expertise, but these points are critical. In addition, those stakeholders reading and submitting responses to the Copyright Office’s Federal Register notices may lack this expertise. We urge you to take any necessary steps in a transparent fashion, for example reaching out proactively to the right experts and collecting data necessary to develop these materials.

Timing of notice & responses. The rules implicated in this notice are economically significant and controversial, and the Copyright Office must adequately explore the concerns raised and engage the public in a meaningful fashion.¹⁸ Indeed, the CCB will have the power to enter judgments that would force the average American household into bankruptcy.¹⁹ Yet this notice initially offered a comment window of 30 days.²⁰ This is half the time typically afforded for meaningful public input.²¹ The Copyright Office eventually extended the comment window by two weeks, and then again by nearly two weeks.²² However, the timing of those extensions rendered them of limited practical value. The Copyright Office announced the first two-week extension on October 27, 2021, two days before the initial comment window was set to close; and the second extension was announced in the Federal Register on November 17, five days after the second comment window was set to close.

This truncated and staggered approach to soliciting public input will make it difficult for the Office to collect meaningful perspectives from all interested stakeholders. If someone reading the initial notice thought that thirty days was not enough time for them to prepare responsive comments, finding out on the eve of the initial deadline that there was a new two week window available, that two weeks would also not be enough time to prepare a response. Instead, this approach to timing the public engagement during rulemaking promotes a situation where the Office hears mostly from insiders, and in which the Office will be unable to hear from many small businesses and members of the public who stand to lose the most from the new structure the Office is implementing. We urge the Office to undertake a more inclusive, predictable process before adopting any new rules.

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¹⁸ Engine has raised similar concerns in the past, over other agencies’ truncated or staggered comment windows which frustrate the fundamental goals of public participation. *See, e.g.*, Comments of Engine Advocacy in Response to Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board, Docket No. PTO-C-2020-0055, at 15-16 (Dec. 3, 2020),

https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5fca4fad1a258d244fec7ba7/1607094191551/20.12.03_Comments+to+Docket+PTO+C+2020+0055.pdf.

¹⁹ *See, e.g.*, Public Knowledge, *supra* note 1.

²⁰ Notice, *supra* note 2.

²¹ *Cf.* Executive Order 12866, Sec. 6 (a meaningful opportunity for public comment “in most cases should include a comment period of not less than 60 days”); *The Reg Map*, ICF 10 (2020), *available at* https://www.reginfo.gov/public/reginfo/Regmap/REG_MAP_2020.pdf (similar).

²² Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 FR 59327 (Oct. 27, 2021); Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 FR 64100 (Nov. 17, 2021). The Office separately announced this second extension in an email on November 10, 2021. *See* U.S. Copyright Office Further Extends Comment Period for Copyright Claims Board Initiating Proceedings Rulemaking (Nov. 10, 2021), <https://www.copyright.gov/newstnet/2021/934.html>.

Thank you again for the opportunity to provide these comments. Engine remains committed to engaging with the Office on how CASE Act implementation may impact startups, and the users and Internet-enabled creators that rely on them.