



February 7, 2021

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U.S. Copyright Office
101 Independence Ave., SE
Washington, DC 20559
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VIA ONLINE SUBMISSION

Re: Comments of Engine Advocacy in Response to *Copyright Claims Board: Active Proceedings and Evidence*, Docket No. 2021-8

Dear Ms. Efthimiadis,

Engine is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with the 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 these comments to the U.S. Copyright Office’s (Office’s) Notice of Proposed Rulemaking (NPRM) regarding implementation of the Copyright Alternative in Small-Claims Enforcement (CASE) Act.

Engine previously commented on the Office’s March 2021 Notification of Inquiry (NOI) regarding Copyright Claims Board (CCB) procedures.¹ In that comment, we noted our worry—shared by many others—that the CCB “will be a fundamentally problematic venue for resolving alleged infringement, exposing everyday Americans to the risk of bankruptcy over even minor, accidental infringement or permissible fair use.”² Although our concerns stem largely from the structure of the CASE Act itself—and we recognize that the Office lacks the regulatory authority to resolve all of those concerns—we remain committed to engaging with policymakers to promote copyright laws that work for startups and the users and Internet-enabled creators that rely on them. To that end, our NOI comment addressed:

¹ See Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, 86 Fed. Reg. 16,156 (Mar. 26, 2021).

² Engine, Comment Letter on Notice of Inquiry Regarding Copyright Alternative in Small Claims Enforcement (“CASE”) Act Regulations 1-2 (Apr. 26, 2021) [hereinafter Engine NOI Comment], <https://perma.cc/2SZ5-4E3V> (citing various sources).

1. The initiation of CCB proceedings (including readability, waiver of service, opt-out procedures, and notification of defenses);
2. CCB practices and procedures (including discovery, default judgments, and considerations when limiting the number of cases); and
3. Other general topics (including public access to CCB data, the hiring of CCB officers, and the role and positioning of CCB attorneys).³

We appreciate the Office’s attention to these points, and we offer the following perspectives and suggestions specific to the Office’s current NPRM.

* * *

It is essential that the Office focuses on balance and fairness in its CCB implementation. Otherwise, CCB proceedings could open the door to overzealous copyright claims and abusive practices like “copyright trolling.”⁴ Unfair or unbalanced proceedings could also disadvantage rightsholders or those raising legitimate copyright claims before the CCB. We urge the Office to consider the needs of startups and Internet users, Internet-enabled creators, and digital entrepreneurs in its rulemaking process. Creating a fair and balanced CCB framework is key to supporting creativity, entrepreneurship, and innovation.

Inadequate or unbalanced CCB procedures would harm startup ecosystems in various ways. For one, startups—like all businesses—depend on and seek to serve their end users and customers. And startups are increasingly creating new digital services where artists connect with fans, new e-commerce platforms, and other new products that enable creativity and communication online.⁵ All of the creators, users, and entrepreneurs who rely on those startups are at risk of being accused of infringement or could have their own work infringed; these individuals may stop engaging with new platforms if they are repeatedly and/or wrongfully accused of copyright infringement before the CCB or if they feel that their experience with the CCB is unfair.

³ See generally *id.* at 2-12.

⁴ See, e.g., Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, WIRED (Jan. 17, 2014, 9:35 AM), <https://perma.cc/KAF4-EY5D>; Letter from Automatic, Discord, Etsy, GitHub, Patreon, Pinterest & Reddit to Sen. Mitch McConnell, Sen. Chuck Schumer, Rep. Nancy Pelosi & Rep. Kevin McCarthy 2 (Dec. 7, 2020), <https://perma.cc/7DYZ-5BHG> (discussing the existing practice of “overly-broad takedown notices from large rightsholders against small creators”); Daniel Takash, Opinion, *CASE Act Would Create a Drive-Through Window for Copyright Trolling*, NISKANEN CTR. (Oct. 8, 2019), <https://perma.cc/T292-QQSN>; Wayne T. Brough, Opinion, *If You Build It, They Will Troll*, INSIDESOURCES (Sept. 4, 2019), <https://perma.cc/SNB8-NEM4>.

⁵ See, e.g., ENGINE, *STARTUP AGENDA 2022*, at 6-7 (2022), <https://perma.cc/4D7X-95M3> (discussing and quoting examples).

This problem is particularly acute for startups, which do not have longstanding relationships with their users.⁶ For startups, customers are easier to lose and new users are more costly to obtain.⁷ Copyright litigation procedures that enable improper claims could therefore drive away users and hurt startups' bottom lines. These concerns are compounded by the fact that the CCB can award up to \$30,000 per case. This is a lot of money to most Americans, and it could put startup users at risk of bankruptcy.⁸

In addition, startups themselves may be parties to CCB proceedings and therefore have a direct interest in fairness and balance. If the CCB allows improper copyright claims to proceed and/or awards unwarranted damages, it could deter startup innovation and creativity and make it even harder for content-generating startups to draw users.

In order to help prevent abuse of the CCB—including overly broad copyright enforcement, large fines for minor infringements, or threats that inappropriately chill user speech and creativity—Engine submits the following recommendations to the Office.

I. The CCB should adopt procedures that promote fairness in both default and non-default settings.

We agree that it is “important to have safeguards against defaults where possible, and to ensure that parties are given adequate notice before a default can be issued.”⁹ To that end, we support the Office’s proposals regarding written notice to defaulting respondents and the availability of default reversal “in the interests of justice.”¹⁰

But we remain concerned that the CCB will still be seen as (and treated as) a default judgment mill.¹¹ In order to mitigate this perception (and reality), we urge the Office to revisit our previous recommendations to ensure balanced and fair proceedings for all respondents, including for parties who appear pro se and in default judgments.¹² Specifically, the Office should (1) require the CCB to

⁶ Cf. *Enhancing Data Security: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 117th Cong. (2021) (statement of Kate Tummarello, Executive Director, Engine), <https://perma.cc/12LU-GZMF> (“Startups often don’t have the name recognition or long-standing relationship with consumers that larger companies do. While high profile data breaches of large corporations and major retailers may take up headlines and congressional attention, those companies live to see another day. For a startup, one data breach can drive away users and investors and ruin a company.”); Simeinski, *supra* note 4 (noting that some companies misuse takedown notices to silence criticism and “target even lawful fair use of their work”).

⁷ Abdo Riani, *Customer Retention: The Fundamental Pillar of Startup Marketing*, FORBES (Dec. 27, 2021, 12:14 PM EST), <https://perma.cc/AX5Y-YT5Q> (“Customer acquisition is expensive, and it makes economic sense only if the lifetime value of the customer is enough to support the acquisition cost and any other direct costs at the very minimum.”).

⁸ *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU, <https://perma.cc/7ZZ8-L9LJ> (last updated Oct. 18, 2021) (finding the median household income in the United States to be \$67,521 in 2020); Press Release, Pub. Knowledge, Public Knowledge Urges Congress to Re-examine CASE Act (July 18, 2019), <https://perma.cc/BE5V-E9TT> (“The bill would allow an unappealable tribunal to assign damages of up to \$30,000, or nearly half the income of the average American household.”).

⁹ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. 69,890, 69,891 (Dec. 8, 2021).

¹⁰ *See id.* at 69,891-92.

¹¹ Concerns that the CCB will become a default judgment mill start at the initiation of proceedings. And here again, fully addressing this concern is likely outside the Office’s authority and stems from the statute itself. But as the Office thinks about rules that can mitigate unfairness around default, we encourage it to also focus on the initiation stage and consider respondents who may not fully understand the implications of receiving a notice, as well as those who may inadvertently ignore such a notice (without bad faith) or fail to opt out in time.

¹² Engine NOI Comment, *supra* note 2, at 8-9.

focus on actual damages, and to anchor any award to the actual harm or the price to license a work if statutory damages are requested;¹³ (2) require the CCB to review (and, in the case of default, request) evidence of actual harm and comparable licenses; and (3) require the CCB to consider common defenses (such as noninfringement, innocent infringement, fair use, and licensure) *sua sponte* in each case, including before entering a default judgment and awarding damages.

Partly in response to Engine’s (and other commenters’) prior recommendations, the NPRM expresses concern that regulations that “increase the claimant’s burden in proving damages or circumscribe the kinds of damages available in the case of a default beyond what is already provided in the statute could incentivize respondents to avoid engaging with CCB proceedings due to the perception that the claimant is not likely to be able to prove or to be awarded significant damages.”¹⁴ To the extent that the Office is concerned about differing rules “in the case of default,”¹⁵ we continue to believe that our recommendations should apply to all judgments rendered by the CCB. In other words, the claimant’s burden should be the same, and the CCB should be directed to focus on actual harms and evaluate whether a respondent has common defenses, in both default *and* non-default settings. These are vital practices for CCB proceedings generally, and adhering to them in both default and non-default cases can promote proceedings that are fairer and more balanced.¹⁶

The Office’s concern that these safeguards might incentivize respondents to affirmatively choose a default is misplaced. On the one hand, if a respondent has credible defenses or arguments for limited damages (and chooses not to opt out), he or she would not plausibly prefer to keep those quiet in hopes that procedural rules would lead to an equally positive default outcome. On the other hand, it would be manifestly unfair to the large number of respondents who will likely default for “non-strategic” reasons—such as missed notices, lack of knowledge, or confusion or fear—to be subject to vastly higher damages awards than what is actually warranted under the facts because of a lack of safeguards.

Consider a respondent who may have infringed but whose infringement caused actual harm (say, lost licensing revenue) of at most \$150. Procedures (such as those proposed in the NPRM) that favor statutory damages and do not focus on actual harm would subject such a respondent to a damages award of up to \$15,000. A “small claims” system that could cost a respondent—including one who does not know to appear or does not understand copyright law, let alone their available defenses—a crippling sum, 100 times the amount of actual harm, would be at odds with principles

¹³ See, e.g., *Wondie v. Mekuria*, 742 F. Supp. 2d 118, 124-25 (D.D.C. 2010) (considering evidence of and calculations regarding actual harm when setting a statutory-damage award in a default judgment case); see also *ME2 Prods., Inc. v. Ahmed*, 289 F. Supp. 3d 760, 763-64 (W.D. Va. 2018) (awarding the minimum amount of statutory damages in a default judgment case); *Buttnugget Publ’g v. Radio Lake Placid, Inc.*, 807 F. Supp. 2d 100, 111-12 (N.D.N.Y. 2011) (ordering a hearing on damages in a default judgment copyright case where statutory damages were sought).

¹⁴ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69,891. According to the Office, this could “increase, not reduce, the risk that the CCB would be perceived as a default judgment mill.” *Id.* at 69,891-92.

¹⁵ *Id.* at 69,891.

¹⁶ It is important to tether damages to the actual harm done, and to consider common defenses whether or not they are raised, regardless of whether the respondent actually appears before the CCB. Awarding a \$15,000 judgment for a minor infringement makes little sense even if the respondent appears, and considering common defenses in all cases will protect pro se and unsophisticated respondents.

of fundamental fairness.¹⁷ And that system is not warranted or excused because of a small, at-best speculative risk that a few respondents might seek to game the default process. Instead, the recommendations above should be instituted for all judgments, including in default proceedings, to avoid unfairness.

If any concerns about strategic default remain, the Office should consider collecting data on which, and what types of, respondents are in fact defaulting. This will help the Office better understand who, if anyone, is misusing the default judgment process and what, if any, additional steps need to be taken to prevent abuse and/or craft additional procedures to ensure fairness for all parties. For more on CCB data collection, see Part IV below.

II. The Office should consider ways to streamline and tailor CCB discovery tools, including ways to make the system accessible to pro se parties.

Discovery is a core component of adjudicating any dispute, yet it can be highly complex. Here again, balance is essential: parties at the CCB must be able to collect the evidence they need to defend themselves, but without ample care and safeguards, parties who lack legal experience may not know what to ask for, or may be subject to abuse—tipping the scales further in favor of repeat players and parties with resources. The NPRM currently limits the discovery process, for example, by favoring CCB-issued interrogatories and document requests. These limits go some way towards addressing our concerns about the early disclosure of relevant evidence and combatting discovery abuse, but we urge the Office to consider how to further streamline and simplify discovery disclosures in all (or most) proceedings—particularly with an eye towards parties who are appearing pro se and trying to navigate the discovery process on the fly. We also recommend that the Office adopt rules to account for the fact that parties may need some (perhaps limited) flexibility to adjust discovery in appropriate cases and in response to facts learned during discovery.

A. The Office should simplify the language of CCB-issued discovery requests.

We applaud the Office’s efforts to simplify the discovery process for claimants and respondents—and by using standardized, CCB-issued interrogatories and request forms, the proposed Rule may alleviate some confusion and curtail some of the risk of abuse. We are concerned, however, that these specific procedures—and in particular, the language used in the proposed Rule—remain too complex for parties who lack legal expertise. The standard interrogatories proposed by the NPRM, for example, ask parties to provide “[a] description of documents relevant to the claims and defenses,”¹⁸ while respondents asserting noninfringement of a derivative work must relay “the preexisting elements in the [derivative] work, including ownership of those preexisting elements, and rights to use those preexisting elements.”¹⁹ These questions, often vaguely phrased, might be familiar (though still difficult enough to parse) for attorneys, but unclear for pro se parties who are encountering the discovery process for the first time.

¹⁷ *Cf., e.g.,* Cass Cnty. Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (noting that “statutory damages have evolved and now are intended not only to put the plaintiff in the position he would have been but for the infringement, but also, and arguably preeminently, to punish the defendant”).

¹⁸ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69,910.

¹⁹ *Id.*

Unless the language on these forms is made more accessible to the many parties who may appear before the CCB (often without counsel), the use of CCB-issued discovery requests, as drafted, is likely to structurally advantage sophisticated claimants. Parties with counsel and/or litigation experience will have a better sense of how to strategically navigate discovery requests. Unsophisticated parties, meanwhile, may unwittingly make responses that hurt their own case.

To address these concerns, and to ensure that the discovery process is equitable for all parties involved, we recommend that the Office simplify the language of the CCB-issued discovery forms, and urge the Office to consult with appropriate experts, like copyright litigators with experience representing individual plaintiffs and defendants, communications professionals, or legal aid lawyers.²⁰ Engine appreciates the Office’s prior statement of its intent to “use plain-language fillable forms throughout various stages of CCB proceedings.”²¹ Scholars and advocates have long recognized the importance of creating legal forms and documents with “plain language” as a way of increasing access to justice for pro se litigants, and have developed best practices for making legal materials as clear and understandable as possible.²² These same principles should extend to CCB discovery tools. Making these discovery request forms more accessible to pro se respondents will help reduce the likelihood that more sophisticated claimants can unfairly leverage unclear or complex language to their benefit—and at the expense of everyday Internet users.

B. The Office should consider how best to attend to the need for flexibility in discovery in appropriate cases.

We endorse efforts to streamline the discovery process in CCB proceedings. But it is also important to ensure that these efforts do not come at the expense of parties gaining access to the information they need to make their case.

These concerns are especially pronounced in § 512(f) misrepresentation cases, which are likely to require different and/or more extensive fact-finding than what is currently contemplated by the CCB-issued discovery tools. As we noted in our NOI comment, to succeed on a § 512(f) case, a claimant must prove that an improper notice-sender knew that they were doing something wrong.²³ This is an extremely high evidentiary bar and would require that a claimant have—at the very least—

²⁰ Several writing and marketing experts have identified an eighth-grade reading level as ideal for consumer materials, and Engine has advocated in the past for the CCB to draft its materials at an eighth-grade reading level. *See, e.g.*, Kelly Ann Jones, *Think Like A Marketer, Write Like An 8th Grader*, RAVEN MEDIA, <https://perma.cc/F7B3-2VXF> (archived Feb. 6, 2022); Shane Snow, *This Surprising Reading Level Analysis Will Change the Way You Write*, CONTENTLY (Jan. 28, 2021), <https://perma.cc/AY2B-JKEM>; Samuel Becher, Opinion, *Are Online Agreements Readable?*, REGUL. REV. (Mar. 4, 2019), <https://perma.cc/NRU4-GCPR>.

²¹ Copyright Claims Board: Initiation of Proceedings and Related Procedures, 86 Fed. Reg. 53,897, 53,898 (Sept. 29, 2021); *see also* Engine NOI Comment, *supra* note 2, at 2-3; Engine, Comment Letter on Notice of Proposed Rule Regarding Copyright Claims Board: Initiation of Proceedings and Related Procedures 4-5 (Nov. 30, 2021), <https://perma.cc/A37Y-FPNT>.

²² *See, e.g.*, Julie Clement, Fern Fisher & Maria Mindlin, *Legal Self-Reliance: Empowering Consumers Through Plain Language*, MICH. BAR J., April 2021, at 42; *JRLN Brief: Plain Language Resources for 100% Access (SLRN 2015)*, SELF-REPRESENTED LITIG. NETWORK <https://perma.cc/AG6A-NKHW> (archived Feb. 6, 2022); *New Developments in Plain Language in State Courts*, NAT’L CTR. FOR STATE CTS. (June 2, 2021), <https://perma.cc/8A3R-TCD4>.

²³ *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004) (“A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.” (citation omitted)).

access to items like emails, text messages, and even deposition testimony from the copyright owner. The CCB-issued interrogatories for § 512(f) cases, as they are currently phrased, are unlikely to capture the full range of evidence that a claimant would need to prove subjective bad faith. Moreover, during a CCB proceeding, as the discovery process begins to surface new facts of the case, discovery findings may point to additional and important evidence that the litigants may not have previously considered.

To ensure that parties can obtain the evidence they need in these particular cases, we recommend that the Office consider how to tailor rules to ensure parties have the flexibility they need, e.g., to request additional discovery in response to facts learned during the proceeding. The process set forth in the NPRM would allow the CCB to grant a request for additional discovery upon a showing of good cause.²⁴ The Office might make this standard more permissive—for example, by eliminating the good cause requirement for an initial number of additional discovery requests in § 512(f) claims—while continuing to balance the needs of the case against the burden of discovery on any party. Loosening this standard will give parties more room to tailor the discovery process to the needs of their case without unduly burdening unsophisticated parties or needlessly prolonging litigation.

III. The Office should protect against additional ways that claimants could abuse the CCB.

We strongly support the Office’s attention to trying to prevent abuse of the CCB process, and appreciate the proposal to cap the number of CCB proceedings that a party may bring in any twelve-month period to ten cases. This rule, and the limit on private attorneys and law firms representing claimants in no more than forty CCB proceedings in any twelve-month period, are useful ideas to help curb abuse of the CCB.

But these limitations do not address all the concerns about potential for abuse. For one, the Office should take steps to try to prevent claimants from circumventing these limits. For example, claimants should not be permitted to use shell companies to bring claims or to obfuscate asset ownership and corporate ties such that they are pursuing litigation via the CCB under multiple names. Those sorts of practices have become increasingly routine in intellectual property assertion.²⁵ To address this concern, the Office could require that claimants disclose, among other things: their corporate ownership, parents, subsidiaries, and affiliates; who has ownership interest in the party and the work; and any other entities that have a financial interest in the outcome of the case. This

²⁴ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69,909.

²⁵ See, e.g., Complaint ¶¶ 5-7, 14-15, *In re MPHJ Tech. Invs., LLC*, No. C-4513 (F.T.C. Mar. 13, 2015), <https://perma.cc/SUC7-9STU> (detailing how MPHJ used over eighty different subsidiary names in asserting low-quality patents against thousands of small businesses); Joe Mullin, *Patent Trolls Want \$1,000—for Using Scanners*, ARS TECHNICA (Jan. 2, 2013, 6:30 AM), <https://perma.cc/6YZU-YYRL> (similar); Kate Cox, *Prenda Law Porn-Troll Saga Ends with Prison for Founder*, ARS TECHNICA (July 10, 2019, 7:56 AM), <https://perma.cc/S4KZ-NK5P> (detailing Prenda Law’s use of shell companies to “copyright troll” individuals and companies); Jonathan Stroud, *Miles to Go Before We Sleep*, REGULATION, Spring 2018, at 48, 51 (outlining how shell companies are used to enable abusive patent assertion); Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 599-601 (2018) (noting that the corporate entities used to conduct copyright trolling are likely “the same entity or are at least controlled by the same people”).

would mirror the corporate disclosure requirements of, for example, the Federal Rules of Appellate Procedure²⁶ and some district court rules.²⁷

In addition, it is important to recognize that a substantial portion of abusive intellectual property assertion occurs through demand letters that are sent before any complaint is filed. As a result, limitations on how many CCB proceedings a party may file per year can solve only part of the abuse problem. We recommend that the Office consider ways to mitigate this concern, perhaps through disclosure requirements about the number of demand letters a claimant has sent, or rules that permit the CCB to consider the volume of demand letter activity when awarding fees or determining damages in a particular case.

IV. Data collection and public transparency are critical to the operation of the CCB.

Especially during the first few years of the CCB's implementation, data will be an essential component of understanding how the CCB is operating, what is and is not working, and what improvements might be made. As mentioned above, such data could also be crucial to assessing any problems or unfairness that emerge in default proceedings.

To this end, we recommend the Office consider collecting and making data sets available in a transparent and anonymized fashion. This could include, for example, statistics on the number of cases filed, the number of defaulting respondents, and the number of opt-outs. It could also include data on waivers of service of process, how often defaulting respondents later try to correct their default and either opt-out or participate, and the type and amount of damages awards made. If there are any concerning patterns or opportunities for improvement, Congress and the Office will need to be able to review this data to inform future policymaking.

Public transparency and accessibility will also be critical to disseminating the results of CCB proceedings and the workings of the CCB generally. According to the NPRM, "each final determination of the CCB will be made available on a publicly accessible website."²⁸ We applaud the Office's efforts to make CCB rulings widely available and we encourage the Office to develop a system and website that is free to access, searchable, and simple and easy for less-sophisticated parties and the general public to use. We would suggest, for example, that the CCB's website model itself closer to databases like the Supreme Court's electronic docket system, rather than the more complex (and expensive) PACER system, and that the CCB's website allow for natural language searching of CCB decisions based on, for example, key terms, subject matter, type of claim, and/or parties involved, rather than simply docket number.

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Engine appreciates the opportunity to provide these comments. Although we remain concerned with the CASE Act framework and the CCB generally, we remain committed to engaging with the

²⁶ FED. R. APP. P. 26.1 ("Any nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.").

²⁷ See, e.g., Memorandum and Order at 8, *Pipeline Prods., Inc. v. Madison Cos., LLC*, 446 F. Supp. 3d 733 (2020) (No. 15-cv-04890), 2018 WL 3055869, at *4, ECF No. 195 ("Discovery requests under Rules 33 and 34 may encompass information of nonparty entities if they are under the control of a named party.").

²⁸ Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. at 69,899.

Office on specific processes and procedures as CASE Act implementation moves ahead. And as the Office continues to implement CCB procedures, we hope it will take the interests of startups, small innovators, Internet users, Internet-enabled creators, and digital entrepreneurs into account.

Respectfully submitted on behalf of Engine,

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