9-2-2021

Small Claims Procedures for Library and Archives Opt-Outs and Class Actions

U.S. Copyright Office, Library of Congress.

governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any 1 year * * *.'' Therefore, neither a Small Government Agency Plan nor any other action is required under UMRA of 1995.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information under the Paperwork Reduction Act of 1995. 44 U.S.C. 3501–3521.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, DEA proposes to further amend 21 CFR part 1308, which we proposed to amend on August 11, 2021 at 86 FR 43983, as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

■ 1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

■ 2. Amend § 1308.11 by redesignating paragraph (f)(9) through (f)(11) as (f)(10) through (f)(12) and adding new paragraph (f)(9) to read as follows:

§ 1308.1 Schedule I.

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(f) * * *

(9) Methiopropamine (*N*-methyl-1-(thiophen-2-yl)propan-2-amine) 1478

* * * * *

Anne Milgram,

Administrator.

[FR Doc. 2021–18843 Filed 9–1–21; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 223

[Docket No. 2021–4]

Small Claims Procedures for Library and Archives Opt-Outs and Class Actions

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding the procedures for libraries and archives to opt out of proceedings before the Copyright Claims Board (''CCB'') and the procedures for a party before the CCB with respect to a class action proceeding, under the Copyright Alternative in Small-Claims Enforcement Act of 2020. The Office invites public comments on this proposed rule.

DATES: Comments on the proposed rule must be made in writing and received by the U.S. Copyright Office no later than 11:59 p.m. EDT on October 4, 2021.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *https://www.copyright.gov/rulemaking/case-act-implementation/library-opt-out.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Kevin. R. Amer, Acting General Counsel and Associate Register of Copyrights, by email at *kamer@copyright.gov,* or John R. Riley, Assistant General Counsel, by email at *jril@copyright.gov.* Each can be contacted by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020 [1] directs the Copyright Office to establish the Copyright Claims Board (''CCB'' or ''Board''), a voluntary tribunal within the Office comprised of three Copyright Claims Officers who have the authority to render determinations on certain copyright disputes with a low economic value. This notice of proposed rulemaking is being issued subsequent to a notification of inquiry (''NOI'') published in the **Federal Register** on March 26, 2021, which describes in detail the legislative background and regulatory scope of the present rulemaking proceeding.[2] The Office assumes the reader's familiarity with that document.

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] 86 FR 16156, 16161 (Mar. 26, 2021). Comments received in response to the March 26, 2021 NOI are available at *https://www.regulations.gov/document/COLC-2021-0001-0001/comment.* References to these comments are by party name (abbreviated where appropriate), followed by ''Initial NOI Comments'' or ''Reply NOI Comments,'' as appropriate.

A. Library and Archives Opt Out

The CASE Act directs the Register of Copyrights to ''establish regulations allowing for a library or archives that does not wish to participate in proceedings before the Copyright Claims Board to preemptively opt out of such proceedings.'' [3] The Office must also ''compile and maintain a publicly available list of the libraries and archives that have successfully opted out of proceedings.'' [4] In promulgating these regulations, the Register cannot ''charge a library or archives a fee to preemptively opt out of proceedings'' or ''require a library or archives to renew a decision to preemptively opt out of proceedings.'' [5]

For the purposes of this provision, the statute defines ''library'' and ''archives'' as ''any library or archives, respectively, that qualifies for the limitations on exclusive rights under section 108 [of title 17].'' [6] Section 108 provides exemptions to libraries and archives from liability for infringement for specified uses of copyrighted works.[7] For an institution to qualify for those exemptions, ''the collections of the library or archives [must be] . . . open to the public, or . . . available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized

[3] 17 U.S.C. 1506(aa)(1).

[4] *Id.* at 1506(aa)(2)(B).

[5] *Id.* at 1506(aa)(3)(A).

[6] *Id.* at 1506(aa)(3)(B). The CASE Act's legislative history does not discuss the library and archives opt-out provision. *See generally* S. Rep. No. 116–105 (2019); H.R. Rep. No. 116–252 (2019). Note, the CASE Act's legislative history cited is for S. 1273, 116th Cong. (2019) and H.R. 2426, 116th Cong. (2019), the CASE Act of 2019, bills largely identical to the CASE Act of 2020, with the notable exception that these earlier bills did not contain the libraries and archives opt-out provision.

[7] 17 U.S.C. 108.

field.'' [8] The Copyright Act of 1976's House Report provides further guidance as to entities intended to be covered by section 108:

> Under [section 108], a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.[9]

The House Report also notes that there may be factual questions as to whether libraries or archives ''within industrial, profitmaking, or proprietary institutions'' would qualify for the section 108 exemptions.[10]

In the NOI, the Office requested input on issues related to this opt-out provision, including whether the Office should require proof or a certification that a library or archives qualifies for the opt-out provision; which entities, principals, or agents should be allowed to opt out on behalf of a library or archives; how the opt-out provision would apply to library or archives employees; and various transparency and functionality considerations related to publication of the opt-out list.[11]

1. Proof or Certification Requirement

The NOI asked ''whether a library or archive should be required to prove or certify its qualification for the limitations on exclusive rights under 17 U.S.C. 108, and thus for the blanket opt-out provisions, and how to address circumstances where a library or archives ceases qualifying.'' [12] In comments submitted in response, parties representing libraries and archives generally opposed any requirement that these entities be required to ''prove'' that they qualify for the opt-out provision, although some supported a provision allowing such an entity to self-certify that it qualifies.[13] University Information Policy Officers and the University of Michigan Library stated that libraries and archives should not be required to certify their eligibility to submit a preemptive blanket opt-out notice.[14] AALL suggested that a self-certification approach ''would meet the intent of Congress, which created the preemptive opt out for libraries and archives to provide an efficient and streamlined system for these organizations and to help them avoid the burdensome administrative requirements of repeated opt outs.'' [15] LCA initially stated a library should only have to ''assert'' that it qualifies for the preemptive opt-out,[16] but subsequently suggested that self-certification would be preferred to a ''legal conclusion by a government agency that could influence a court's assessment concerning a library's qualification for section 108.'' [17]

Others suggested that an entity that preemptively opts out of CCB proceedings should be required to submit a formal affidavit or declaration ''certifying its limitations on exclusive rights under 17 U.S.C 108,'' [18] potentially under penalty of perjury.[19] The Copyright Alliance et al. argued that Congress granted libraries and archives ''a unique and narrow exception'' to preemptively opt out of CCB proceedings, but in doing so ''expressly limited the ability to blanket opt out to [libraries or archives] that qualify for the limitations on exclusive rights under section 108.'' [20] They voiced concern that ''[t]o allow entities to 'self-certify' would be to open the blanket opt out to any entity claiming to be a 'library' or 'archive' regardless of whether the entity rightfully qualifies under the law.'' [21]

AIPLA, AMI, and Copyright Alliance et al. proposed creating a Copyright Office or CCB procedure, separate from a CCB infringement proceeding, to review the qualifying status of a library or archives for the preemptive opt-out.[22] AIPLA recommended that ''anyone, including members of the public not bringing a CCB claim, should be permitted to challenge whether a Library or Archive qualifies [for the preemptive opt-out].'' [23] Both AIPLA and the Copyright Alliance et al. proposed that the Office could charge a fee for its review, with AIPLA suggesting that the fee would be ''paid by the challenger if the CCB finds the Library or Archive still qualifies, and by the Library or Archive if it is found not to comply.'' [24] Finally, the Copyright Alliance et al. proposed an additional mechanism to address any circumstance where a federal court ''determines that [an] entity does not qualify for the section 108 exceptions.'' [25] In such a case, the court or the entity would be directed to notify the Copyright Office of that determination, so that it can ''reconsider the blanket opt-out after giving the [library or archive] an opportunity to defend its status.'' [26]

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[8] *Id.* at 108(a).

[9] H.R. Rep. No. 94–1476 at 74.

[10] *Id.*

[11] 86 FR 16156, 16161 (Mar. 26, 2021).

[12] *Id.*

[13] Am. Ass'n of L. Libraries (''AALL'') NOI Initial Comments at 1–2; Univ. of Mich. Library NOI Initial Comments at 4–5.

[14] Univ. of Mich. Library NOI Initial Comments at 4–5 (''Libraries and archives that would like to file a blanket opt-out notice should be able to do so without needing to certify or prove their eligibility for uses authorized by [section] 108.''); Univ. Infor. Pol'y Officers NOI Reply Comments at 1 (''libraries and archives should not be required to certify their eligibility in order to submit a preemptive blanket opt-out''); *see also* Library Copyright All. (''LCA'') NOI Initial Comments at 1 (''it should be sufficient for the library merely to assert that it meets the statutory definition''). *But see* LCA NOI Reply Comments at 2 (contemplating a preemptive opt out by ''certification'').

[15] AALL NOI Initial Comments at 1–2; *see also* Anthony Davis Jr. & Katherine Luce NOI Initial Comments at 2 (''If there is any approval or certification process, it should not be onerous.'').

[16] LCA NOI Initial Comments at 1.

[17] LCA NOI Reply Comments at 2.

[18] Ben Vient NOI Initial Comments at 3 (suggesting that ''[t]o the extent that a Library or Archive wishes to keep its opt-out current with the CCB, it is the responsibility of the Library or Archive to have an Affidavit or Declaration with its current Director on file with the CCB'').

[19] Am. Intell. Prop. L. Ass'n (''AIPLA'') NOI Initial Comments at 4; Copyright Alliance, Am. Photographic Artists, Am. Soc'y for Collective Rights Licensing, Am. Soc'y of Media Photographers, The Authors Guild, CreativeFuture, Digital Media Licensing Ass'n, Graphic Artists Guild, Indep. Book Pubs. Ass'n, Music Creators N. Am., Nat'l Music Council of the United States, Nat'l Press Photographers Ass'n, N. Am. Nature Photography Ass'n, Prof. Photographers of Am., Recording Academy, Screen Actors Guild-Am. Fed. of Television and Radio Artists, Soc'y of Composers & Lyricists, Songwriters Guild of Am. & Songwriters of N. Am. (''Copyright Alliance et al.'') NOI Initial Comments at 20; Science Fiction and Fantasy Writers of Am. NOI Reply Comments at 2 (agreeing that ''a library or archive should make its declaration under penalty of perjury''); *see also* Ass'n of Medical Illustrators (''AMI'') NOI Initial Comments at 2 (''AMI strongly believes that [library and archives] proof and certification should be a requirement in implementing regulations'' and ''that the pre-emptive opt-out is not available to companies that are not eligible for Internal Revenue Code of 501[(c)(3)] treatment.'').

[20] Copyright Alliance et al. NOI Reply Comments at 12–13.

[21] *Id.*

[22] AIPLA NOI Initial Comments at 4 (''If the CCB determines that a Library or Archive does not qualify, the Library or Archive should be permitted to appeal the decision for a fee.''); Copyright Alliance et al. NOI Initial Comments at 20 (same); *see* AMI NOI Initial Comments at 2 (''Library/Archive opt-outs should be open to public comment and granted for 2-year terms then must reapply (using the 1201 exemption to prohibition on of circumvention process as a potential model).''); Univ. of Mich. Library NOI Initial Comments at 4–5 (''If a challenge is later brought concerning the library or archive's status, the library or archive should be required to attest that they meet the requirements of [section] 108(a)(2).'').

[23] AIPLA NOI Initial Comments at 4.

[24] *Id.;* Copyright Alliance et al. NOI Initial Comments at 20 (''If it is determined that a [library or archives] does not qualify, the [library or archives] should be permitted to request that the Board reconsider the decision for a fee (the statute only precludes a fee to apply not to request reconsideration when the application is denied).'').

[25] Copyright Alliance et al. NOI Initial Comments at 20; *see* Copyright Alliance et al. NOI Reply Comments at 14–15 (same); AIPLA NOI Initial Comments at 4 (same).

[26] Copyright Alliance et al. NOI Initial Comments at 20; *see* Copyright Alliance et al. NOI Reply

LCA did not support such a proceeding and suggested that, if a claimant wishes to bring a claim against a library or archives that it believes is ineligible for the preemptive opt out, ''it can file a claim against the library [or archives] with the CCB, indicating that the library [or archives] does not meet the [statutory] requirements.'' [27] At that point, the CCB would review the claim to determine ''[i]f the claimant has pled facts sufficient to indicate that the library no longer is eligible for the preemptive opt-out,'' and then the library or archives would be served with a notice and given the opportunity to either ''demonstrate that it still meets the requirements of section 108(a)(2), and thus that its preemptive opt-out is still valid,'' or ''opt out of that specific proceeding before the CCB.'' [28]

While taking no position on any process for a library or archives to ''claim status . . . for purposes of a blanket opt-out,'' the Motion Picture Association (''MPA''), Recording Industry Association of America (''RIAA''), and Software and Information Industry Association (''SIIA'') asked that the Office make clear that ''an entity's status as a library or archive for the purposes of opting out under CCB does not constitute a determination of that entity's status, and may not be cited as such, in any other context, including in any federal court litigation in which that entity is a party.'' [29]

The Office appreciates parties' comments on this issue and proposes that any library or archives that wishes to take advantage of the statutory preemptive opt-out option must submit a self-certification that it ''qualifies for the limitations on exclusive rights under section 108.'' [30] In doing so, the Office is seeking to balance the statutory goals of ensuring that *only* libraries and archives are eligible for a preemptive opt-out, but also that any such entities are not overly burdened in effecting that election. The proposed rule also requires that any library or archives that has been found by a federal court not to qualify for the section 108 exemptions report this information to the CCB.

The Office will accept the facts stated in the opt-out submission unless they are implausible or conflict with sources of information that are known to the Office or the general public.[31] If the Office believes, based on such information, that the entity does not qualify, it will communicate to the submitter that it does not intend to add the entity to the preemptive opt-out list, or that it intends to remove the entity from the list. The Office will then allow the submitter to provide evidence supporting the entity's eligibility for the exemption. If, after reviewing the submitter's response, the Office determines that the entity does not qualify, the entity will not be added to, or will be removed from, the opt-out list. If the Office determines that the entity does qualify, it will be added to, or remain on, the opt-out list. Either determination will constitute final agency action under the Administrative Procedure Act.[32]

With respect to the requests to allow third-party challenges to an institution's eligibility for the preemptive opt-out, the Office does not believe it is necessary to establish a procedure for such objections that is separate from the CCB's adjudication of individual cases. Such a process would seem an inefficient use of CCB resources, as it could require the Board to resolve disputes over an institution's status before any claim involving that entity has been made. As LCA notes, a party seeking to bring a claim against a library or archives that it believes is improperly on the opt-out list may file the claim with the CCB and include the basis for that conclusion in its statement of material facts. If, during its review of the claim for compliance, the CCB determines that the claimant has alleged facts sufficient to support the conclusion that the entity is ineligible, and the claim is otherwise compliant, the claimant will be instructed to proceed with service on the respondent. The respondent may then include in its response any information to demonstrate that it is in fact eligible, or may simply opt out of that specific proceeding. This process is reflected in the proposed rule.

2. Persons Allowed To Opt Out on Behalf of a Library or Archives

The NOI noted the ''prevalence of libraries and archives being located within larger entities, including but not limited to colleges and universities or municipalities,'' and asked for comments ''addressing which entities, principals, or agents may opt out on behalf of a library or archive, as well as any associated certifications.'' [33] In response, LCA suggested that Office regulations ''should allow the preemptive opt-out to be exercised by any person with the authority to take legally binding actions on behalf of the library in connection to litigation.'' [34] In its view, ''[b]ecause some institutions have many different libraries, an official with the appropriate authority should be able in a single process to exercise a preemptive opt-out with respect to all the eligible libraries within the institution.'' [35] Other commenters suggested that those with the authority to opt out on behalf of a library or archives could include a university agent (*e.g.,* a dean or associate dean) or a law firm.[36] In contrast, AMI contended that ''a blanket, institutional opt-out should not be permitted'' for institutions or entities containing multiple archives.[37] It argued that ''[o]therwise, a complainant could have wasted money and time on bringing an action only to have it thrown out because of ignorance of institutional affiliation of the infringer.'' [38]

The Copyright Alliance et al. suggested that ''[w]here a [library or archives] is a part of a larger entity or municipality, such that the [library or archives] itself does not have standing to act as a Claimant or Counterclaimant on its own, only the larger entity or municipality should be allowed to request the blanket opt-out on behalf of the [library or archives].'' [39] They reasoned that ''[b]ecause the blanket opt-out could have major implications on an entity's exposure to liability, only the larger entity should be allowed to make that decision.'' [40]

The Office generally agrees with LCA's suggestion that the authority to exercise the preemptive opt-out option should belong to any person with the authority to take legally binding actions

Comments at 14–15 (same); AIPLA NOI Initial Comments at 4 (same).

[27] LCA NOI Reply Comments at 2.

[28] *Id.*

[29] MPA, RIAA & SIIA NOI Reply Comments at 10. LCA agreed that any status determination by the CCB should not be treated as conclusive in other contexts. LCA NOI Reply Comments at 1–2.

[30] 17 U.S.C. 1506(aa)(4); *see also* Copyright Alliance et al. NOI Reply Comments at 13 n.7 (opposing ''comments suggesting that the CCB adopt a definition of 'libraries and archives' other than the definition articulated in the statute''). *But see* Authors Alliance NOI Initial Comments at 5–6 (''[W]e support a broad definition of 'libraries and archives' which encompasses public libraries, academic libraries, and other institutions serving the essential functions of preservation and sharing of knowledge and culture.'').

[31] *See* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 309.2 (3d ed. 2021) (noting the Office's similar approach regarding registration materials).

[32] 5 U.S.C. 704 (''[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.'').

[33] 86 FR at 16161.

[34] LCA NOI Initial Comments at 2.

[35] *Id.*

[36] AALL NOI Initial Comments at 2; Anthony Davis Jr. & Katherine Luce NOI Initial Comments at 2.

[37] AMI NOI Initial Comments at 2.

[38] *Id.*

[39] Copyright Alliance et al. NOI Initial Comments at 20.

[40] *Id.* at 20–21.

on behalf of the library or archives in connection with litigation. The proposed rule incorporates this approach. Further, the Office does not see a reason to restrict the ability of an institution to submit a preemptive opt-out election for multiple libraries or archives that are the part of the same institution in a ''blanket'' fashion, as the use of separate submissions would be inefficient. Any preemptive opt-out election involving multiple libraries or archives, however, should separately identify the individual libraries or archives to be covered by the submission, as opposed to providing a collective description such as ''all university libraries.''

3. Transparency and Functionality Considerations

The NOI also asked for input ''related to transparency and functionality considerations with respect to its publication of the list of libraries and archives that have opted out.'' [41] Commenters generally agreed that the list of libraries and archives that have preemptively opted out of participating in CCB proceedings should be made publicly available online.[42] The Office agrees, and accordingly the list will be maintained on the Board's website.

4. Application of the Opt-Out Provision to Persons in the Course of Their Employment

Finally, the NOI asked parties to comment on whether the Office ''should include a regulatory provision that specifies that this opt out extends to employees operating in the course of their employment.'' [43] Commenters representing libraries and archives supported such a rule, while others, including AIPLA and the Copyright Alliance et al., were opposed.

Several library representatives, including AALL, LCA, the University of Illinois Library, and the University of Michigan Library, advocated for regulatory language specifying that the preemptive opt-out extends to employees operating in the course of their employment.[44] As the University of Illinois Library argued, ''[t]o provide a blanket opt out provision to libraries yet potentially hold employees liable when working within the scope of their employment would be to eviscerate the opt out provision as the work of libraries is conducted by its employees, not by the entity itself.'' [45] AALL and the University of Illinois Library also argued that such a rule would be consistent with section 108,[46] which extends the statutory exemption for libraries and archives to ''any of [the library or archives'] employees acting within the scope of their employment.'' [47]

In further support of this approach, LCA argued that Copyright Claims Attorneys, who are required to review new claims to ensure that they comply with the statute and regulations, would be able ''to determine from the claim's statement of material facts whether the respondent is a library employee acting with the scope of her employment.'' [48] It argued that such a determination would be no less burdensome ''than to determine whether the respondent is a library that has preemptively opted-out of CCB proceedings, a Federal or State governmental entity,'' or ''a person or entity residing outside of the United States''—all of which have to be determined by the CCB before a claimant is allowed to proceed with a claim.[49] LCA also contended that ''[a]n employee's failure to opt out inevitably would result in the library becoming enmeshed in the CCB proceeding on behalf of the employee, contrary to Congressional intent.'' [50]

The Copyright Alliance et al. opposed extending the libraries and archives opt-out provision to employees acting within the scope of their employment, arguing that ''[w]hether an employee is operating within the course/scope of their employment is a question of fact that would need to be determined by the CCB.'' [51] In their view, ''[i]f a claim is brought against an individual, and it is determined that the claim should have been brought against a [library or archive] that has elected to blanket opt-out, the claim should be dismissed.'' [52] AIPLA added that ''[d]eciding whether to extend a blanket opt out to employees would require the CCB to determine *ex parte* whether employees were operating in the course of their employment,'' which would ''undermine the adversarial process and increase the burden on the CCB.'' [53] Both AIPLA and the Copyright Alliance et al. noted that individuals who are potentially acting within the scope of their employment have the option to opt out of any CCB proceeding themselves.[54] AMI similarly stated that it did not support regulations that would ''shield [a library or archive] employee from liability for actions taken in the course of employment, but not authorized or otherwise sanctioned by the employer [who opted out of the CCB process].'' [55]

The Office appreciates libraries' and archives' concerns that excluding individual employees from the blanket opt-out could hamper the effectiveness of that option by allowing parties to assert claims against such individuals when claims against the institution are unavailable. Such a rule, however, seemingly appears inconsistent with principles of agency law and would require a broad interpretation of the statutory text. While it is generally true that an employer may be liable for the actions of employees taken within the scope of their employment,[56] the Office does not understand that principle to mean that suits against the employee individually are precluded in such circumstances. Rather, as a general rule, ''[u]nless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.'' [57] Moreover, the CASE Act expressly offers the preemptive opt-out option to ''a library or archives,'' but does not mention employees.[58] The

[41] 86 FR at 16161.

[42] AIPLA NOI Initial Comments at 5; Copyright Alliance et al. NOI Initial Comments at 21; LCA NOI Initial Comments at 2.

[43] 86 FR at 16161.

[44] LCA NOI Reply Comments at 3; Univ. Information Policy Officers NOI Reply Comments at 1; AALL NOI Initial Comments at 2; Anonymous II NOI Initial Comments at 1; Anthony Davis Jr. & Katherine Luce NOI Initial Comments at 2; LCA NOI Initial Comments at 3; Univ. of Ill. Library NOI Initial Comments at 2; Univ. of Mich. Library NOI Initial Comments at 5; *see also* Science Fiction and Fantasy Writers of Am. NOI Reply Comments at 2 (noting ''no major objection to such a provision, so long as care is taken to ensure that employees are in fact acting within the proper scope of their employment and within the limits of 17 U.S.C. 108'').

[45] Univ. of Ill. Library NOI Initial Comments at 2.

[46] AALL NOI Initial Comments at 2 (citing 17 U.S.C. 108); Univ. of Ill. Library NOI Initial Comments at 2 (citing 17 U.S.C. 108(a)).

[47] 17 U.S.C. 108(a).

[48] LCA NOI Reply Comments at 3.

[49] *Id.* (citing 17 U.S.C. 1504(d)(3)–(4)).

[50] *Id.*

[51] Copyright Alliance et al. NOI Initial Comments at 21.

[52] *Id.*

[53] AIPLA NOI Initial Comments at 5.

[54] *Id.* at 5; Copyright Alliance et al. NOI Reply Comments at 14.

[55] AMI NOI Initial Comments at 2.

[56] *See, e.g.,* Alan Latman & William S. Tager, *Study No. 25: Liability of Innocent Infringers of Copyrights* 145 (1958) (''The normal agency rule that a[n] [employer] is liable for [the employee's] wrongful acts committed within the scope of employment has been considered applicable to copyright infringement.''), *reprinted in* Subcomm. on Patents, Trademarks, and Copyrights, S. Comm. on the Judiciary, 86th Cong., Copyright Law Revision: Studies 22–25 135 (Comm. Print 1960); *see also, e.g., Lowry's Reports, Inc.* v. *Legg Mason, Inc.,* 271 F. Supp. 2d 737, 746 (D. Md. 2003) (holding that employer was potentially liable for the infringing conduct of its employee-agent).

[57] *Restatement (Third) of Agency* sec. 7.01 (Am. Law. Inst. 2006).

[58] 17 U.S.C. 1506(aa)(1).

proposed rule accordingly does not include such a provision.

Some commenters further requested that the Office promulgate a regulation expanding the statutory opt-out provision to a library's larger institution,[59] such as a university, or to that larger institution's students, staff, adjunct, and faculty.[60] For the same reasons just noted, however, such a rule is inconsistent with the statute's express limitation of this option to libraries and archives.[61]

5. Other Proposals

Commenters asked the Office to promulgate certain additional rules related to participation by libraries and archives. First, some commenters requested that the Office consider including regulations allowing a library or archives to revoke or rescind its preemptive opt-out election.[62] As LCA explained, ''[a] library should not forever be excluded from the CCB process because it exercises a preemptive opt-out at one point in time.'' [63] The Copyright Alliance et al. opposed this proposal.[64] As an alternative, they suggested that the Office could create a ''two-tiered system,'' with the first tier allowing for permanent opt outs and the second tier requiring recertification of the institution's opt-out decision ''on an annual basis.'' [65] In their view, this approach ''would have the additional benefit of acting as a routine 'audit' to ensure that [libraries or archives] taking advantage of the blanket opt-out continue to meet the qualifications for section 108.'' [66]

The Office generally agrees that a library's or archives' opt-out election should not be irreversible. Indeed, permitting such an institution to rescind an opt-out would help advance the statutory goal of encouraging participation in the CCB system. The proposed rule accordingly provides that a library or archives may rescind a preemptive opt-out election by providing written notification of such intent to the CCB. To avoid potential abuses and to limit the impact on CCB resources, the proposed rule provides that an institution may make no more than one such rescission per calendar year.

In addition, two commenters proposed rules to address errors and abuses involving the opt-out process. LCA urged the Office to establish procedures to address circumstances where a Copyright Claims Attorney erroneously allows a claim to proceed against a library.[67] Verizon proposed regulations to ''deter those who repeatedly abuse the opt-out process,'' including the ability ''to impose monetary fines on bad faith filers'' and ''the ability to ban such parties from future use of the CCB process.'' [68] While these suggestions are related to the preemptive opt-out provisions for libraries and archives, they are more appropriately considered in future CASE Act rulemakings addressing errors in and abuses of CCB procedures generally.

B. Class Actions

A CCB proceeding does not have any effect on a class action proceeding in federal district court.[69] If, however, a party in an active CCB proceeding ''receives notice of a pending or putative class action, arising out of the same transaction or occurrence'' as the claim at issue before the CCB, the CASE Act provides that party with two choices.[70] The party must either ''opt out of the class action, in accordance with regulations established by the Register,'' or seek dismissal of the CCB proceeding in writing.[71] In the NOI, the Office asked for public comment on ''any issues that should be considered relating to regulations governing dismissal or opt-outs related to class action proceedings, including specific proposed regulatory language.'' [72]

Two parties provided comments on this issue. The Copyright Alliance et al. suggested that ''[i]f a party receives notice of a class action and wishes to dismiss the case before the CCB, the regulations should require that party to notify the CCB and the other parties to the case within 10 business days following receipt of the class action notice.'' [73] The MPA, RIAA, and SIAA did not suggest a specific time period, but suggested that ''a party learning of a class action during the pendency of a proceeding and wishing to exercise a class-action opt-out should be required to do so promptly after learning of the class action.'' [74] The MPA, RIAA, and SIIA also voiced concerns that a delayed opt out decision ''risks wasting effort and expense by the litigants and the CCB, and the amount of wasted effort and expense increases with the passage of time.'' [75]

The Office has proposed a fourteen-day period for a party to either opt out of the class action or to seek dismissal of the CCB proceeding. If a party chooses to opt out of the class action, he or she must file written notice of that intent with the CCB within fourteen days after filing such notice with the court. The proposed rule authorizes the Board to extend these time periods for good cause.

List of Subjects in 37 CFR Part 223

Copyright, Claims.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes to amend Chapter II, Subchapter B, of title 37 Code of Federal Regulations to read as follows:

SUBCHAPTER B—COPYRIGHT CLAIMS BOARD AND PROCEDURES

■ 1. The heading of Subchapter B is revised to read as set forth above.
■ 2. Part 223 is added to read as follows:

PART 223—OPT-OUT PROVISIONS

Sec.
223.1 [Reserved]
223.2 Libraries and archives opt-out procedures.
223.3 Class action opt-out procedures.

Authority: 17 U.S.C. 702, 1510.

§ 223.1 [Reserved]

§ 223.2 Libraries and archives opt-out procedures.

(a) *Opt-out notification.* (1) A library or archives that wishes to preemptively opt out of participating in Copyright Claims Board proceedings under 17 U.S.C. 1506(aa) may do so by submitting written notification to the Copyright Claims Board. The notification shall include a signed certification under penalty of perjury that the library or archives qualifies for the limitations on exclusive rights under section 108 of title 17.

(2) The submission described in paragraph (a)(1) of this section shall list the name and physical address of each

[59] LCA NOI Initial Comments at 3.

[60] Anonymous II NOI Initial Comments at 1.

[61] 17 U.S.C. 1506(aa)(1); *see also* 86 FR at 16161 (''Congress did not establish a blanket opt-out for any entities other than libraries and archives, and in that case, it did so expressly by statute. This suggests that the Office lacks authority to adopt other blanket opt-outs by regulation.'' (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *Lindh* v. *Murphy,* 521 U.S. 320, 330 (1997))).

[62] Anthony Davis Jr. & Katherine Luce NOI Initial Comments at 2; CCIA & IA NOI Initial Comments at 4; LCA NOI Initial Comments at 3.

[63] LCA NOI Initial Comments at 3.

[64] Copyright Alliance et al. NOI Reply Comments at 12–13.

[65] *Id.* at 13.

[66] *Id.*

[67] LCA NOI Reply Comments at 4.

[68] Verizon NOI Initial Comments at 3–4.

[69] 17 U.S.C. 1507(b).

[70] *Id.* at 1506(q)(3).

[71] *Id.* at 1507(b)(2); 1506(q)(3).

[72] 86 FR at 16161.

[73] Copyright Alliance et al. NOI Initial Comments at 21.

[74] MPA, RIAA & SIIA NOI Initial Comments at 9.

[75] *Id.*

library or archives to which the preemptive opt out applies and shall be signed by a person with the authority described in paragraph (c) of this section. The library or archives must also provide a point of contact for future correspondence, including phone number, mailing address, and email address and shall notify the Copyright Claims Board if this information changes.

(3) The Copyright Claims Board will accept the facts stated in the submission described in paragraphs (a)(1) and (2) of this section, unless they are implausible or conflict with sources of information that are known to the Copyright Claims Board or the general public.

(4) If a federal court determines that an entity described in paragraph (a)(1) of this section does not qualify for the limitations on exclusive rights under section 108 of title 17, that entity must inform the Copyright Claims Board of that determination and submit a copy of the relevant order or opinion, if any, within fourteen days after the determination is issued.

(5) A library or archives may rescind its preemptive opt-out election under this section, such that it may participate in Copyright Claims Board proceedings, by providing written notification to the Copyright Claims Board in accordance with such instructions as are provided on the Copyright Claims Board website. A library or archives may submit no more than one such rescission notification per calendar year.

(6) The notification described in paragraph (a)(1) of this section shall be submitted to the Copyright Claims Board in accordance with such instructions as are provided on the Copyright Claims Board website.

(b) *Review of eligibility.* (1) The Copyright Claims Board will maintain on its website a public list of libraries and archives that have preemptively opted out of Copyright Claims Board proceedings pursuant to paragraph (a) of this section. If the Register determines pursuant to paragraph (a)(3) of this section that an entity does not qualify for the preemptive opt-out provision, the Office will communicate to the point of contact described in paragraph (a)(2) of this section that it does not intend to add the entity to the public list, or that it intends to remove the entity from that list, and will allow the entity to provide evidence supporting its qualification for the exemption within thirty days. If the entity fails to respond, or if, after reviewing the entity's response, the Register determines that the entity does not qualify for the limitations on exclusive rights under section 108 of title 17, the entity will be not be added to, or will be removed from, the public list. If the Register determines that the entity qualifies for the limitations on exclusive rights under section 108 of title 17, the entity will be added to, or remain on, the libraries and archives preemptive opt-out list. This provision does not limit the Office's ability to request additional information from the point of contact listed pursuant to paragraph (a)(2) of this section.

(2) A party seeking to assert a claim under this section against a library or archives that it believes is improperly included on the public list described in paragraph (b)(1) of this section may file the claim with the Copyright Claims Board pursuant to 17 U.S.C. 1506(e) and applicable regulations. The claimant must include in its statement of material facts allegations sufficient to support that belief. If the Copyright Claims Board 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 complaint, the claimant will be instructed to proceed with service of the claim. The respondent may include in its response any factual statements in support of its eligibility.

(3) Any determination made under paragraph (b)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(c) *Authority.* Any person with the authority to take legally binding actions on behalf of a library or archives in connection with litigation may submit a notification under paragraph (a) of this section.

(d) *Multiple libraries and archives in a single submission.* A notification under paragraph (a) of this section may include multiple libraries or archives in the same submission if each library or archives is listed separately in the submission and the submitter has the authority described under paragraph (c) of this section to submit the notification on behalf of all libraries and archives included in the submission.

§ 223.3 Class action opt-out procedures.

(a) *Opt-out or dismissal procedures.* Any party to an active proceeding before the Copyright Claims Board who receives notice of a pending or putative class action, arising out of the same transaction or occurrence as the proceeding before the Copyright Claims Board, in which the party is a class member, shall either opt out of the class action or seek written dismissal of the proceeding before Copyright Claims Board within fourteen days of receiving notice of the pending class action. If a party seeks written dismissal of the proceeding before Copyright Claims Board, upon notice to all claimants and counterclaimants, the Copyright Claims Board shall dismiss the proceeding without prejudice.

(b) *Filing requirement.* A copy of the notice indicating a party's intent to opt out of a class action proceeding must be filed with the Copyright Claims Board within fourteen days after the filing of the notice with the court.

(c) *Timing.* The time periods provided in paragraphs (a) and (b) of this section may be extended by the Copyright Claims Board for good cause shown.

Dated: August 24, 2021.

Shira Perlmutter,

Register of Copyrights and Director of the U.S. Copyright Office.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2020–0648; FRL–8787–01–R10]

Air Plan Approval; AK; Eagle River Second 10-Year PM_{10} Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the Eagle River, Alaska (AK) limited maintenance plan (LMP) submitted on November 10, 2020, by the Alaska Department of Environmental Conservation (ADEC or ''the State''). This plan addresses the second 10-year maintenance period after redesignation for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). An LMP is used to meet Clean Air Act (CAA) requirements for formerly designated nonattainment areas that meet certain qualification criteria. The EPA is proposing to determine that Alaska's submittal meets the CAA requirements. The plan relies upon control measures contained in the first 10-year maintenance plan and the determination that the Eagle River area currently monitors PM_{10} levels well below the PM_{10} National Ambient Air Quality Standards (NAAQS or ''the standard'').