

**Society of American Archivists
Council Meeting
November 10, 12, 2021
Virtual Meeting**

**Consent Agenda: Ratify Council Interim Actions
(Prepared by Governance Manager Felicia Owens)**

BACKGROUND

Current parliamentary policy agrees on validating board decisions made remotely, and ratifying the Council's online and conference call decisions via the Consent Agenda does not conflict with any existing SAA policy.

DISCUSSION

Given the Council's use of an e-mail discussion list to function as a group and make decisions remotely, approving interim Council actions via the Consent Agenda contributes to streamlining the group's work and improves access to the interim decisions of SAA's elected decision makers.

RECOMMENDATION

THAT the following interim actions taken by the Council in October 2021, be ratified:

- Approved comments, drafted by the Intellectual Property Working Group, for the US Copyright Office on proposed small claims procedures for library and archives opt-outs and class actions. (Appendix) (October 1, 2021)
- Approved the [August 2, 2021](#), and [August 12, 2021](#), Council virtual meeting minutes. (October 26, 2021)



October 4, 2021

Kevin. R. Amer
Office of the General Counsel
U.S. Copyright Office
LM-403, James Madison Building
101 Independence Avenue, SE
Washington, DC 20559

*Comments on Proposed Small Claims Procedures for
Library and Archives Opt-Outs and Class Actions*

Dear Mr. Amer:

The Society of American Archivists (SAA) has read with interest the procedures for libraries and archives to opt out of proceedings before the Copyright Claims Board as proposed in the Copyright Office’s Notice of Proposed Rulemaking of September 2, 2021. SAA is the oldest and largest national professional association of archivists in North America, representing more than 6,000 archivists employed by businesses, universities, governments, libraries, and historical organizations.

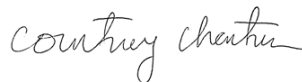
SAA is largely comfortable with the procedures in the proposed 37 CFR Part 223. Considering that the possible damages associated with an appearance before the Copyright Claims Board (CCB) are far from “small” for most archives, it is important that the regulations make compliance with the procedures as simple and straightforward as possible, thus ensuring that archives are not inadvertently penalized for failing to follow highly technical procedures. The proposed regulations, by and large, accomplish that goal.

There is one major exception, however. It is hard to comprehend how excluding archives’ employees acting in accordance with directions that they have received from their supervisors from the blanket opt-out can be compatible with the clear intention of the law. Archives cannot do anything on their own; they act only through the operations of their employees. Failure to include employees acting within the scope of their employment from the blanket opt-out available to archives in effect removes that opt-out option. All archives staff will need to be trained to be alert to receiving a notice from an unfamiliar agency that might appear to be phishing or ransomware spam—and they must immediately respond or be at personal risk of a default judgment of up to \$30,000 per alleged infringement.

Archives staff will need to be reminded continuously to alert the appropriate officials in a timely fashion so that the institution can determine its best response. Staff will be rightfully uncomfortable if they are personally liable to the CCB, even if their employer may not be. This could inadvertently lead some employees to refuse to perform certain functions given their precarious position, producing an undue chilling effect on the important work of providing access to our nation's cultural heritage. And if the unfortunate employee should actually come before the CCB, the archives will have to decide if it wishes to participate in that action in spite of any effort it may have made to opt-out of the proceedings. In effect, Congressional intent to minimize the administrative burden that the CCB could pose for archives and libraries would be negated.

The solution is simple. If the law's requirement that archives not wishing to participate in CCB proceedings have the option to preemptively opt out of such proceedings is to be maintained, then the Copyright Office must extend that preemption to employees acting on behalf of the archives.

Sincerely,

A handwritten signature in cursive script that reads "Courtney Chartier".

Courtney Chartier
President, Society of American Archivists
president@archivists.org