

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Parts 201, 220, 222, 224, 225, 226, 227, 228, 229, 230, 231, 232, and 233

[Docket No. 2021–8]

Copyright Claims Board: Active Proceedings and Evidence

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

ACTION: Final rule; request for comments.

SUMMARY: The U.S. Copyright Office is issuing a final rule establishing procedures governing active proceedings before the Copyright Claims Board and post-determination procedures. The final rule provides requirements regarding procedural practice, scheduling, conferences, discovery, written testimony, hearings, settlement, default and failure to prosecute, records, post-determination procedures, conduct of parties and limits on the number of claims that can be brought. The final rule also describes the procedures for “smaller claims” and solicits public comments on these regulations.

DATES: Effective June 16, 2022. Written comments must be received no later than 11:59 p.m. Eastern Time on November 14, 2022.

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’s website at <https://www.copyright.gov/rulemaking/case-act-implementation/active-proceedings/>. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov, or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of

2020¹ directs the Copyright Office (“Office”) to establish the Copyright Claims Board (“CCB”), an alternative forum to Federal court in which parties may seek resolution of copyright disputes that have a total monetary value of \$30,000 or less.² The CCB is designed to be accessible to *pro se* parties without formal legal training and others with little exposure to copyright law.³ The Office published a notification of inquiry (“NOI”) asking for public comments on the CCB’s operations and procedures.⁴ A subsequent notice of proposed rulemaking (“NPRM”) proposed regulations to govern active proceedings before the CCB and post-determination review, including on the CCB’s management of parties (*i.e.*, joinder, dismissal, default, failure to prosecute, party conduct, and numerical limits on cases that parties may bring); management of proceedings (*i.e.*, scheduling orders, amending pleadings, claim consolidation, settlement, hearings, “smaller” claims, and records); evidence and discovery (*i.e.*, written testimony, protective orders, interrogatories, requests for admission, document production, discovery disputes, and sanctions); and post-determination rehearing and the Register’s review.⁵

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

² See, e.g., H.R. Rep. No. 116–252, at 18–20 (2019); S. Rep. No. 116–105, at 7–8 (2019). Note, the CASE Act legislative history cited is for H.R. 2426 and S. 1273, the CASE Act of 2019, a bill nearly identical to the CASE Act of 2020. See H.R. 2426, 116th Cong. (2019); S. 1273, 116th Cong. (2019). In developing the CASE Act, Congress drew on model legislation in the Office’s 2013 policy report, *Copyright Small Claims* (2013), <https://www.copyright.gov/docs/smallclaims/usco-small-copyrightclaims.pdf> (“*Copyright Small Claims*”). Congress also incorporated the Office’s report and supporting materials into the statute’s legislative history. H.R. Rep. No. 116–252, at 19; S. Rep. No. 116–105, at 2.

³ See, e.g., H.R. Rep. No. 116–252, at 18–20; S. Rep. No. 116–105, at 7–8.

⁴ 86 FR 16156 (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>.

⁵ 86 FR 69890 (Dec. 8, 2021). The Office has also published separate notices and final rules implementing other aspects of the CASE Act. 86 FR 21990 (Apr. 26, 2021) (proposing regulations for expedited copyright registrations of works at issue in CCB proceedings, and a Freedom of Information Act (“FOIA”)–conforming amendment); 86 FR 49273 (Sept. 2, 2021) (proposing regulations for libraries and archives to opt out of CCB proceedings, and for parties to opt out of related class actions); 86 FR 53897 (Sept. 29, 2021) (proposing regulations regarding initial stages of CCB proceedings); 86 FR 74394 (Dec. 30, 2021) (proposing regulations regarding party representation by law students and representation of business entities); 86 FR 46119 (Aug. 18, 2021) (final rule concerning expedited registration and technical update to FOIA regulations); 87 FR 12861

This final rule marks the completion of all regulations required for the CCB to begin operations, but the Office expects to exercise its regulatory authority to promulgate additional CASE Act regulations going forward as it deems necessary. As noted in its CASE Act NOI, the Office has deferred exercising its regulatory authority on certain topics until a later date.⁶ For topics that the Office has already addressed by regulation, it will be monitoring how those regulations are functioning as the CCB starts hearing claims, including, for example: Whether the limitations on proceedings should be adjusted; whether the discovery regulations strike the right balance between allowing necessary access to information and being too burdensome; and whether hearing attendance limitations should be eased. Further, as with its other services,⁷ the Office will periodically review and potentially adjust any CASE Act-related fees. Additionally, the CASE Act requires the Office to conduct a future study on the CCB’s operations,⁸ which will likely prompt additional discussions regarding both regulatory and legislative changes. Finally, as further discussed below, the Office is soliciting additional public comments on its final regulations governing “smaller claims.”

The Copyright Alliance et al. urged the Office to “consider adopting the CASE Act implementing regulations on an interim basis at this stage” and postpone issuing final rules, or plan to publish another notice of inquiry seeking public comment on the efficacy of the rules after a year.⁹ While the Office declines to follow this suggestion, it understands the desire to provide additional feedback on whether the regulations are functioning as intended. The Office therefore encourages the public to provide any feedback regarding the CASE Act’s regulations and operations at any time via the Office’s *ex parte* meeting process,¹⁰ so that the Office has the opportunity to promptly address any unforeseen issues.

(Mar. 8, 2022) (partial final rule establishing regulations for designating agents for service of process); 87 FR 13171 (Mar. 9, 2022) (final rule establishing regulations concerning library and archives opt-outs and class actions); 87 FR 16989 (Mar. 25, 2022) (final rule establishing regulations for initiating proceedings and related procedures).

⁶ 86 FR 16156, 16165.

⁷ See, e.g., 85 FR 9374 (Feb. 19, 2020) (final rule establishing adjusted fees for services).

⁸ Public Law 116–260, sec. 212(d), 134 Stat. at 2199–2200.

⁹ Copyright Alliance et al. Initial Comments at 9.

¹⁰ Guidelines for *ex parte* meetings are available at <https://www.copyright.gov/about/small-claims/related-rulemakings.html>.

II. Discussion of Final Rule

A. Overview

The CASE Act's legislative history states that the Office should establish a process that is "accessible especially for *pro se* parties and those with little prior formal exposure to copyright laws."¹¹ Congress acknowledged that "federal court is effectively inaccessible to copyright owners seeking redress for claims of relatively low economic value, especially individual creators of limited resources,"¹² and sought to ensure "that copyright interests without high expected damages have some mode of enforceability."¹³ The Office anticipates that many CCB parties will appear *pro se* (i.e., without an attorney). In establishing the procedures to govern CCB proceedings, the Office is always guided by the CASE Act's goal to improve access to justice in copyright disputes by providing a simpler, yet fair alternative to Federal litigation.

In response to the NPRM, the Office received comments that articulated specific suggestions on CCB practices and procedures.¹⁴ Commenters urged the Office to strike a proper balance between two vital goals: Minimizing the complexities of Federal litigation practice that can deter parties from bringing and defending copyright claims, while establishing procedural safeguards so that each participant can fairly develop and prosecute or defend its case.¹⁵ Some commenters voiced concerns that the proposed regulations might be both too complex in certain respects¹⁶ and too vague in others,¹⁷ either of which could create problems,

particularly for *pro se* parties. As a result, the proposed regulations could put *pro se* parties at a disadvantage in proceedings against more sophisticated parties or representatives. The Office carefully reviewed the proposed rules with these comments in mind. As a result, the Office has made amendments to simplify the regulatory language while ensuring that sufficient procedural safeguards are in place to protect all parties.¹⁸

Some commenters cautioned that the Office should minimize complexity not only in the regulatory language but also in the substance of the rules. The Copyright Alliance et al. contended that "the primary problem is not that the language used in the regulations is complex, but rather that the procedures set forth in the regulations are extremely complex."¹⁹ Similarly, the MPA and RIAA jointly commented that "[c]omplex rules and procedures, and extensive discovery, are simply not necessary or appropriate for the type of cases that will be litigated in CCB, where the universe of relevant documents and information will typically be quite limited."²⁰ Some individuals expressed concern that the complexity of the proposed regulations is contrary to the intended purpose of the CCB²¹ and may foreclose their ability to utilize it.²² These commenters urged the Office to simplify the process so that it is more accessible to individuals.²³ The Authors Guild "emphasize[d] the importance of keeping the CCB process simple and easily navigable for individual creators who often make a living juggling several jobs and lack the knowledge or resources to manage the demands of a complicated legal process," and feared that the "proposed rule's complexity and the use of legalese undermines the very purpose of the CCB and will deter *pro se* parties from using the CCB."²⁴

The Office has addressed these concerns in the final rule, where possible. Some proposed procedures were simplified or eliminated, and the Office has revised the proposed rules in several respects to reduce the parties' procedural and knowledge burdens, as

discussed below. However, CASE Act proceedings will still require sufficient information and evidence sharing to ensure just determinations. Proof in copyright cases is typically fact-dependent.²⁵ Because the proceedings must be fundamentally fair to both claimants and respondents, all parties must have a reasonable opportunity to develop and submit the facts bearing on their claims and defenses. To provide a fair opportunity for presentation of the evidence, the procedures must allow for some degree of complexity in those situations where complexity is inherent in the factual context. Commenters also raised concerns about procedural complexities outside of the discovery process.²⁶ The Office has sought to further streamline and simplify procedural requirements throughout the proceedings where appropriate, while seeking to ensure that the procedures will be fair to all parties and address the various situations that may occur.

While most claims heard by the CCB will likely be fairly straightforward, the Office also must anticipate less straightforward claims and has promulgated regulations to accommodate both types. Even commenters asking for simpler rules recognized that certain circumstances would require more detailed regulations.²⁷

²⁵ See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) ("Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'") (quoting *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("The test for infringement of a copyright is of necessity vague. . . . Decisions must . . . inevitably be ad hoc.").

²⁶ E.g., Authors Guild Initial NPRM Comments at 3 (commenting that allowing third-party intervention "could add an additional level of complication that a *pro se* party likely will not have the legal knowledge or wherewithal to address in a response"); *id.* at 4 (noting the Office should "consider simplifying these rules [related to sanctions]"); Copyright Alliance et al. Initial NPRM Comments at 9 (encouraging the Office to "focus on ways to scale back on the requirements"); MPA & RIAA Initial NPRM Comments at 4–5 ("The NPRM's proposed rules for smaller claims are much too complex and allow much too much discovery"; proposing a smaller-claims system with "no discovery or motion practice permitted").

²⁷ E.g., Copyright Alliance et al. Initial NPRM Comments at 19 (proposing new requirement that parties certify, after a proceeding is over, their return or disposal of any discovery material received from other parties); *id.* at 20 (urging the Office to add a provision giving parties an opportunity to object before CCB removes confidentiality designation from any material); *id.* at 23 (proposing that the Office add a procedure allowing parties to seek leave to submit additional testimony or evidence after a hearing on the merits); Copyright Alliance et al. Reply NPRM Comments at 8 ("We . . . strongly urge the Office to *simplify the*

¹¹ H.R. Rep. No. 116–252, at 17; see also S. Rep. No. 116–105, at 9–10.

¹² H.R. Rep. No. 116–252, at 19 (quoting *Copyright Small Claims* at 8).

¹³ *Id.*

¹⁴ Comments in response to the NPRM are available at <https://www.regulations.gov/document/COLC-2021-0007-0001/comment>. References to comments responding to the NPRM are by party name (abbreviated where appropriate), followed by "Initial NPRM Comments" or "Reply NPRM Comments," as appropriate.

¹⁵ Amazon.com, Inc. ("Amazon") Initial NPRM Comments at 2; Engine Initial NPRM Comments at 2.

¹⁶ Authors Guild Initial NPRM Comments at 1–2; Anonymous I Initial NPRM Comments at 1; Anonymous II Initial NPRM Comments at 1; Copyright Alliance et al. Initial NPRM Comments at 8; H. Smith Initial NPRM Comments; Engine Initial NPRM Comments at 5; Motion Picture Assoc., Inc. ("MPA") & Recording Industry Assoc. of Am., Inc. ("RIAA") Initial NPRM Comments at 2–3; Music Creators of N. Am. Reply NPRM Comments at 3; Science Fiction & Fantasy Writers of Am., Inc. ("SFWA") Reply NPRM Comments at 2.

¹⁷ Engine Initial NPRM Comments at 2, 5–6, 7–8; Public Knowledge Initial NPRM Comments at 3; Southlaw Ent. Initial NPRM Comments; Verizon Initial NPRM Comments at 1–2; SFWA Reply NPRM Comments at 2–5.

¹⁸ See Authors Guild Initial NPRM Comments at 2.

¹⁹ Copyright Alliance et al. Reply NPRM Comments at 7.

²⁰ MPA & RIAA Initial NPRM Comments at 3.

²¹ H. Smith Initial NPRM Comments at 1; Anonymous I Initial NPRM Comments at 1.

²² H. Smith Initial NPRM Comments at 1; Anonymous I Initial NPRM Comments at 1; Anonymous II Initial NPRM Comments at 1.

²³ H. Smith Initial NPRM Comments at 1; Anonymous I Initial NPRM Comments at 1; Anonymous II Initial NPRM Comments at 1.

²⁴ Authors Guild Initial NPRM Comments at 1.

Continued

In addition to the regulations themselves, the Office intends to take many steps to help parties manage the process with or without legal counsel. A CCB Handbook, which will be available on the *CCB.gov* website and written in easy-to-understand language, will be a primary resource for parties navigating all aspects of CCB proceedings. The CCB Handbook was described in the NPRM and the Office received no comments critical of the proposal. The Authors Guild urged the Office to “invest heavily in developing a clear and easy to use handbook,” which “should spell out in plain language all the procedures that a party would need to follow to bring or defend a claim in the CCB, so that parties to proceedings can refer just to the handbook without having to look up and understand the regulations.”²⁸ While the statute and regulations govern CCB proceedings as a legal matter, the Authors Guild’s comment accurately sums up the Office’s guiding purpose in developing a CCB Handbook that can serve as a more convenient guide for all parties.²⁹ The CCB Handbook will be updated, as needed, based on interested parties’ feedback.³⁰ And as the regulations note, it will not override any existing statute or regulation.

Additional information on *CCB.gov* will provide details about each stage of a CCB proceeding. In addition, a user-friendly electronic filing system (“eCCB”) will simplify filings by walking the parties through each step of the claim, response, and counterclaim process, with prompts to help them fully present their positions, and by providing fillable forms for situations that may arise throughout the proceeding. Copyright Claims Attorneys and other CCB staff will be available to further guide parties through any difficulties that they encounter.

procedures proposed in the NPRM”); SFWA Reply NPRM Comments at 2 (commenting that “many writers and other creators will almost certainly be bewildered by the CCB’s rules and procedures”); *id.* at 6 (proposing that standardized interrogatories and document requests should be tailored “for different media, formats, and kinds of publication. For example, publication has different meanings for different media.”).

²⁸ Authors Guild Initial NPRM Comments at 2; *see also* Copyright Alliance et al. Initial NPRM Comments at 9–10 (urging Office to “create a handbook for parties that is *significantly* less complex than the regulations, easy to understand, and easy to follow”).

²⁹ *See also* Copyright Alliance et al. Reply NPRM Comments at 7 (anticipating the Handbook “will be an invaluable tool for *pro se* parties”).

³⁰ *See* Authors Guild Initial NPRM Comments at 2 (recommending that the Handbook be developed with input from stakeholders who represent potential parties before the CCB).

B. Management of Parties

1. Joinder and Intervention

The CASE Act requires dismissal of a claim for the failure to join a necessary party.³¹ The NPRM proposed a process for parties to bring the failure to join a necessary party to the CCB’s attention and for non-parties to seek to intervene in the claim.³² Except as noted below, the final rule makes no substantive revisions to what was proposed.

The Authors Guild commented that requests for joinder, consolidation, and intervention could be too complicated for *pro se* parties to address.³³ It opposed allowing intervention by third parties and suggested that, if a necessary party seeks to join a proceeding, “the CCB should simply schedule a conference to advise the parties that a third party has requested to join, explain the consequences of a joinder, and get both parties’ consent before allowing the joinder.”³⁴

The Office recognizes that concepts of joinder and necessary parties, as well as intervention, may be difficult for *pro se* parties to understand. The final rule simplifies the procedure for resolving a request to intervene by having such requests and any response filed via a simple form on eCCB. The CCB then may hold a conference to discuss the proposed intervention with the parties to the proceeding and the party seeking to intervene. If the party requesting intervention is found to be a “necessary” party, the claims will be dismissed if the parties do not consent to its addition or intervention.

2. Voluntary Withdrawal and Dismissal

Parties may voluntarily dismiss their own claims or counterclaims without prejudice before a response is filed.³⁵ Under the final rule, a claim or counterclaim cannot be voluntarily dismissed after a response, but the claimant or counterclaimant may request to withdraw the claim and the CCB will have discretion, with input from the parties, to dismiss the claim with or without prejudice. Factors to be considered by the CCB in exercising its discretion include the point in the proceedings at which the dismissal is requested and whether dismissal without prejudice is in the interests of justice.³⁶ Several commenters expressed

³¹ 17 U.S.C. 1506(f)(3)(A).

³² 86 FR 69890, 69906 (proposed 37 CFR 222.13(a)–(b)).

³³ Authors Guild Initial NPRM Comments at 2–3.

³⁴ *Id.* at 3.

³⁵ 17 U.S.C. 1506(q)(1)–(2).

³⁶ 86 FR 69890, 69907 (proposed 37 CFR 222.16(b)). While the concept of “the interests of justice” is subjective and will vary based upon the

support for the proposed rule, which provided for this discretion.³⁷ The Authors Guild suggested that “[t]he proposed Handbook should explain what ‘with prejudice’ and ‘without prejudice’ mean in plain English.”³⁸ The Office agrees, and will include such explanations in the CCB Handbook.

3. Default and Failure To Prosecute

a. Default Determinations

The CASE Act provides that the CCB may enter a default determination if “the respondent has failed to appear or has ceased participating in the proceeding.”³⁹ Under the proposed rule, respondents that do not respond to CCB deadlines will receive an opportunity to cure the first two times they miss a deadline without cause. After the third missed deadline, the CCB may proceed to a default judgment in its discretion without giving an opportunity to cure. This rule is designed to prevent respondents from taking advantage of the CCB proceedings to obtain what would amount to unlimited extensions of deadlines without seeking permission. Several commenters “commend[ed] the Office for developing a default procedure that balances the interests of the parties.”⁴⁰ Commenters took different views about the CCB’s discretion to commence default proceedings without providing the respondent another missed-deadline warning after a third missed deadline, and whether the CCB could consider defenses *sua sponte* on behalf of defaulted respondents, as discussed below.

Public Knowledge disapproved of the provision authorizing the CCB to begin default proceedings at its discretion

circumstances of a particular request to withdraw a claim, the Office does not understand the term to include withdrawal of a claim because a claimant wishes to seek higher damages in Federal court after discovery has been completed in a CCB proceeding.

³⁷ *See* Sergey Vernyuk Initial NPRM Comments at 1 (“I agree with this approach because it avoids harassment where a claimant files a claim and then dismisses it once a defense is mounted, only to reassert it later.”); Am. Intell. Prop. L. Assoc. (“AIPLA”) Initial NPRM Comments at 1–2 (“Post-response voluntary dismissals should generally be with prejudice, to protect the interests of respondents and reduce the chance of abuse or gamesmanship. . . . [But] the CCB should retain discretion to permit voluntary dismissal without prejudice where it is in the interests of justice.”); SFWA Reply NPRM Comments at 2 (“SFWA supports the amount of discretionary judgment accorded to the CCB, particularly with regard to granting dismissals without prejudice.”).

³⁸ Authors Guild Initial NPRM Comments at 3.

³⁹ 17 U.S.C. 1506(u).

⁴⁰ AIPLA Initial NPRM Comments at 2; *see also* Sergey Vernyuk Initial NPRM Comments at 1; Engine Initial NPRM Comments at 3; SFWA Reply NPRM Comments at 2.

without further warning notices after a respondent misses three deadlines without good cause.⁴¹ Copyright Alliance et al. disagreed with Public Knowledge and approved of the proposed rule, commenting that the CCB “has to draw the line at some point and cannot continue to reward a party that makes a practice of ignoring deadlines with extension after extension.”⁴² As the Office explained in the NPRM, “[t]his provision is aimed at encouraging timely participation and preventing respondents from repeatedly using the default provisions as a backdoor extension for deadlines.”⁴³ The final regulation spells out in greater detail the procedural steps leading up to a default determination and the steps taken after a request to vacate a default determination.

Public Knowledge also argued that the CCB should not “allow default judgments based merely on Claimant testimony,” which it contended would be “without any substantive evidence to support the claim,” and with “no opposing party to refute their testimony.”⁴⁴ Yet as Copyright Alliance et al. noted in reply, testimony *is* evidence.⁴⁵ When a respondent fails to appear after multiple notices, or ceases to participate by missing multiple deadlines, the statute states that the CCB “shall require the claimant to submit relevant evidence and other information in support of the claimant’s claim and any asserted damages” and determine whether that evidence supports a finding of default.⁴⁶ Public Knowledge’s position would leave the CCB powerless to fulfill that statutory authority. The implementing regulations provide extensive safeguards against defaults and give a respondent the opportunity to oppose the claimant’s testimony upon default.

Engine suggested that the Office should “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.”⁴⁷ In the default context, that comment is broadly consistent with the proposed rule that

“the Board shall consider whether the respondent has a meritorious defense.”⁴⁸ In contrast, Copyright Alliance et al. urged the CCB to refrain from invoking any defenses on behalf of defaulted respondents, stating, “the Office must recognize a clear distinction between permitting CCAs [Copyright Claims Attorneys] to assist parties in properly articulating their own legal arguments versus allowing the Board or the CCAs to provide legal advice to the parties or invoke arguments and defenses on their behalf, essentially becoming advocates for one party.”⁴⁹ Copyright Alliance et al. further contended that the CASE Act provision regarding defaults “does *not* include raising a defense that has not been properly raised by a respondent.”⁵⁰ However, the statute is not so absolute. Moreover, Federal courts are permitted to deny judgments in a plaintiff’s favor on default when a meritorious defense is present,⁵¹ and the legislative history indicates that the CCB “has both more statutory authority and a greater obligation to scrutinize the merits of a claim”⁵² when default is sought. “In cases where the respondent is absent, the Board is expected to carefully scrutinize the available evidence . . . and consider applicable affirmative defenses such as fair use, where warranted by the circumstances of the case.”⁵³ Furthermore, the statute requires that the CCB only issue relief after a default if the claimant’s submissions “are sufficient to support a finding in favor of the claimant under applicable law.”⁵⁴ By definition, if there is a clear defense to the case on the face of the submissions, there cannot be evidence sufficient to support a finding for the claimant. The Office is mindful that the CCB must maintain impartiality, as Copyright Alliance et al. insists,⁵⁵ but that does not preclude it

⁴⁸ 86 FR 69890, 69913 (proposed 37 CFR 227.3(a)).

⁴⁹ Copyright Alliance et al. Reply NPRM Comments at 9; *see also* MPA & RIAA Initial NPRM Comments at 8–9.

⁵⁰ Copyright Alliance et al. Reply NPRM Comments at 9–10 (discussing 17 U.S.C. 1506(u)).

⁵¹ *See, e.g., Gunnells v. Teutul*, 392 F. Supp. 3d 451, 453–54 (S.D.N.Y. 2019) (noting that courts should look at whether there is a “meritorious defense” before granting default judgment and deciding that copyright claims appeared to be outside the statute of limitations); *Pierson v. Gamer World News Entm’t, Inc.*, Case No. CV 18–10137–CJC (KSxx), 2019 WL 8064255, *3–4 (C.D. Cal. Sept. 20, 2019) (denying default judgment and ordering plaintiff to show cause why copyright infringement claim should not be dismissed based on the doctrine of fair use).

⁵² H.R. Rep. No. 116–252, at 24.

⁵³ *Id.* at 24–25.

⁵⁴ 17 U.S.C. 1506(u)(1).

⁵⁵ Copyright Alliance et al. Initial NPRM Comments at 14.

from requiring claimants to show that their claims can withstand relevant defenses present on the face of the claims. AIPLA proposed that, if the CCB determines that a defaulting respondent has a meritorious defense, the rules should permit the claimant to submit evidence relevant to the defense.⁵⁶ The Office has implemented this suggestion and, under the final rule, before the CCB finds for a defaulting respondent, it will provide the claimant with a tentative ruling and an opportunity to address it, including through the submission of further evidence.

b. Failure To Prosecute

The Copyright Alliance et al. observed that the proposed regulations allow respondents to cure default after “multiple missed deadlines,” but have no equivalent provision for claimants to cure a failure to prosecute.⁵⁷ The Office agrees that a similar procedure should be included for a claimant’s failure to prosecute and has added this to the final rule.

4. Bad-Faith Conduct

Parties and their representatives appearing before the CCB who engage in bad-faith conduct may be required to pay an award of reasonable costs and attorney’s fees.⁵⁸ Upon repeated bad-faith acts in CCB proceedings, parties and their representatives may be barred from participating in further proceedings for a year and have pending proceedings dismissed.⁵⁹ The proposed rule set forth procedures for the CCB to address bad faith *sua sponte* or upon a party’s allegations, providing opportunities for the accused to respond in writing and at a conference. Commenters supported the proposed regulation on bad-faith conduct. For instance, “SFWA strongly supports the [Office’s] proposed rules in section 232.3, which go a considerable way to protecting writers and legitimate publishers from being preyed upon by unscrupulous copyright trolls who file meritless claims and counterclaims falsely asserting that they represent the true owner of the copyright.”⁶⁰ Several commenters specifically approved the provision allowing the CCB to temporarily bar those who repeatedly

⁵⁶ AIPLA Initial NPRM Comments at 2 (discussing proposed 37 CFR 227.7(3)(a)); *see also* 86 FR 69890, 69913.

⁵⁷ Copyright Alliance et al. Initial NPRM Comments at 16 (discussing proposed 37 CFR 227.1(d), 228.2); *see also* 86 FR 69890, 69913–14.

⁵⁸ 17 U.S.C. 1506(y)(2).

⁵⁹ *Id.* at 1506(y)(3).

⁶⁰ SFWA Reply NPRM Comments at 2–3; *see also* Verizon Initial NPRM Comments at 1 (“We commend the Office for their commitment to prevent abuse.”).

⁴¹ Public Knowledge Initial NPRM Comments at 3–4; *see also* 86 FR 69890, 69913 (proposed 37 CFR 227.1(d)).

⁴² Copyright Alliance et al. Reply NPRM Comments at 10.

⁴³ 86 FR 69890, 69892.

⁴⁴ Public Knowledge Initial NPRM Comments at 4–5.

⁴⁵ Copyright Alliance et al. Reply NPRM Comments at 11 (citing proposed 37 CFR 227.2, 222.14(b)).

⁴⁶ 17 U.S.C. 1506(u)(1).

⁴⁷ Engine Initial NPRM Comments at 4.

act in bad faith from participating in further proceedings.⁶¹

The Copyright Alliance et al. proposed that the definition of “bad-faith conduct” should be explicit that it encompasses any action taken in support of a claim, counterclaim, or defense.⁶² The Office adopts this suggestion in the final rule. The Office also adopts Copyright Alliance et al.’s proposal to add the term “before the CCB” to the final rule, to make clear that its penalties apply to those who repeatedly act in bad faith before the CCB, and not necessarily elsewhere.⁶³ The Office also agrees with, and adopts, the Copyright Alliance et al.’s suggestion to clarify in the final rule that the penalties for repeated acts of bad faith may include a bar to not only “initiating proceedings,” but also “participating” in any capacity.⁶⁴

The Copyright Alliance et al. also commented that “the regulations should clearly articulate what is necessary to constitute a showing of bad-faith conduct.”⁶⁵ The Office does not consider the suggestion practical, as it cannot now anticipate every form in which misconduct may manifest itself in a CCB proceeding, and the CCB’s ability to respond to such misconduct should be in its discretion.⁶⁶ Instead, the CCB Handbook will provide illustrative examples of bad-faith conduct to help participants avoid such conduct.

The Copyright Alliance et al. urged that “anyone accused of bad-faith

conduct before the CCB should be notified of such accusation and given an opportunity to explain and defend their actions before a finding of bad-faith conduct is officially made and recorded.”⁶⁷ The proposed rule (and the final regulation) expressly provides an opportunity for parties and representatives accused of bad-faith conduct to respond, whether the accusation comes from another party or the CCB on its own initiative.⁶⁸ Copyright Alliance et al. expressed concern over whether that opportunity would be available if “the proceeding does not mature into an active case before the Board, or the case has otherwise been dismissed.”⁶⁹ Whether before, during, or after an active proceeding, an accusation of bad faith will trigger an opportunity to respond.⁷⁰

Amazon approved of the proposed regulation allowing the CCB to consider prior bad acts when assessing bad faith conduct and proposed that the rule should go further and mandate such consideration.⁷¹ The CCB will have the discretion to consider the relevant indicia of bad faith as it may arise. The Office does not believe it is appropriate to determine in advance what it must consider in any particular case.

Verizon suggested that the penalty of barring a party or representative who has acted in bad faith from initiating claims for a year, “while a good start, is not sufficient. Such a rule may send the wrong message that a party is free to act in bad faith at least once a year with no consequences.”⁷² Verizon proposed stronger “consequences up to and including, a ban on all future participation at the CCB.”⁷³ The CASE Act prescribes the penalty available for a bad faith determination.⁷⁴ Moreover, the Office does not agree that parties are “free to act in bad faith at least once a year,” because other penalties, including the awarding of attorney’s fees, are available to the CCB to impose after even a single act of misconduct.⁷⁵

The NPRM included a request for comments on whether the Office should publish a list of bad-faith actors barred from CCB proceedings, but the proposed

rule did not include such a list “because the Office believes that such a list would be unduly harsh, especially for non-attorneys.”⁷⁶ Several commenters advocated for this,⁷⁷ but the Office remains wary of the impact of a public bad-faith list and does not consider it necessary at this time. The determinations of the CCB will be available to the public,⁷⁸ and the eCCB will allow for searches of information about parties and attorneys appearing before the CCB, including any orders related to bad faith.

Finally, a few commenters raised specific concerns about the formatting and timing of filings raising or responding to assertions of bad faith.⁷⁹ The Office addresses these comments in the final rule as part of a broader revision of the regulations addressing the procedures for filing requests before the CCB, discussed below. These revisions specify the formatting and timing of party submissions to establish consistency and streamline the proceedings.

C. Management of Proceedings

1. Limitations on Proceedings

The Office is authorized to limit “the permitted number of proceedings each year by the same claimant . . . in the interests of justice and the administration of the Copyright Claims Board.”⁸⁰ Congress explained that this power “functions as both a docket management tool for the Board and as protection against abusive conduct.”⁸¹ In the NPRM, the Office proposed limiting claimants to 10 proceedings filed in any 12-month period, and to limit private attorneys or law firms representing claimants to 40 proceedings in any 12-month period.⁸² The Office invited comments “as to whether these limitations strike the proper balance between the interests of the parties and the efficient management of the CCB’s work.”⁸³

⁷⁶ 86 FR 69890, 69894.

⁷⁷ AIPLA Initial NPRM Comments at 2; Verizon Initial NPRM Comments at 2; SFWA Reply NPRM Comments at 3.

⁷⁸ 17 U.S.C. 1503(a)(1)(I), 1506(b).

⁷⁹ See Amazon Initial NPRM Comments at 3 n.8 (“the Office should clarify” whether the page limit is for single- or double-spaced filings); *id.* at add. at A–24; Authors Guild Initial NPRM Comments at 4 (recommending extending the timeline to respond).

⁸⁰ 17 U.S.C. 1504(g).

⁸¹ H.R. Rep. No. 116–252, at 31; see 86 FR 69890, 69917 (proposed 37 CFR 233.2(a)) (prescribing rules pertaining to maximum number of CCB proceedings filed by a party).

⁸² 86 FR 69890, 69917 (proposed 37 CFR 233.2(a)).

⁸³ *Id.* at 69896.

⁶¹ Copyright Alliance et al. Initial NPRM Comments at 17–18 (“This is an important mechanism for protecting claimants and respondents from attorneys whose previous history of bad-faith conduct might put them in jeopardy.”); Amazon Initial NPRM Comments at 3 (“Amazon supports the Proposed Rule. In particular, Amazon believes the Office’s suggestion for a historical review of the accused party’s past legal claims is crucial.”); SFWA Reply NPRM Comments at 3 (“SFWA also agrees with AIPLA on the proposal to bar attorneys who have engaged in bad-faith conduct from representing parties before the CCB for the specified time periods.”); see 86 FR 69890, 69916–17 (proposed 37 CFR 232.4).

⁶² Copyright Alliance et al. Initial NPRM Comments at 16; see also SFWA Reply NPRM Comments at 3 (approving Copyright Alliance et al.’s proposed definition of bad-faith conduct); see, e.g., Engine Initial NPRM Comments at 8 (“[I]t 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.”).

⁶³ Copyright Alliance et al. Initial NPRM Comments at 18; see 86 FR 69890, 69916 (proposed 37 CFR 232.4(a)).

⁶⁴ Copyright Alliance et al. Initial NPRM Comments at 18; see 86 FR 69890, 69916 (proposed 37 CFR 232.4(d)).

⁶⁵ Copyright Alliance et al. Initial NPRM Comments at 17.

⁶⁶ See generally Verizon Initial NPRM Comments at 1 (anticipating that participants “will inevitably seek creative ways to abuse the CCB processes”).

⁶⁷ Copyright Alliance et al. Initial NPRM Comments at 17.

⁶⁸ See 86 FR 69890, 69916 (proposed 37 CFR 232.3(b)).

⁶⁹ Copyright Alliance et al. Initial NPRM Comments at 17.

⁷⁰ See 86 FR at 69916 (proposed 37 CFR 232.3(b)–(c)).

⁷¹ Amazon Initial NPRM Comments at 3–4 (referring to proposed 37 CFR 232.4(c)); *id.* at add. at A–38.

⁷² Verizon Initial NPRM Comments at 1–2.

⁷³ *Id.* at 2.

⁷⁴ 17 U.S.C. 1506(y)(3).

⁷⁵ *Id.* at 1506(y)(2).

Multiple commenters commended the proposed regulation. Engine commented, “[w]e 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.”⁸⁴ Verizon also expressed its support, stating, “[w]e commend the Office for their commitment to prevent abuse,” and cautioning that “bad actors could circumvent the yearly case cap [through] multiple corporate structures designed to handle smaller batches of cases.”⁸⁵

Some commenters supported the imposition of limitations, but disagreed with certain aspects of the Office’s proposed rule. For example, while SFWA supported limitations on the number of actions each year, it took the position that it would be unfair to count cases where a respondent opted out.⁸⁶ The Copyright Alliance et al. also argued that the limits should only apply to active proceedings.⁸⁷

The Office understands why commenters suggested that case limits be restricted only to active cases, but it finds the suggestion impractical. While active proceedings require more of the CCB’s resources, every new claim requires the CCB’s compliance review. This compliance review process requires several steps, including possible communication with the claimant before the claim is approved for service.⁸⁸

Further, a limitation on the number of filed claims is more easily managed. At the time of filing, it is impossible to determine when or if the case may become active. Some cases may become active several months after they are filed. A limitation on only active proceedings would leave claimants and attorneys in limbo during this time

regarding whether they have met their filing limit. By contrast, Copyright Claims Attorneys, parties, and representatives will be able to readily determine how many claims a party or attorney has filed in the preceding year by conducting a search on eCCB.

To address commenters’ concern that a claimant’s limit may be exhausted without a single proceeding becoming active, the Office has raised the number of cases that may be filed by each claimant per year. The final rule raises the limit to 30 proceedings in a 12-month period. The Copyright Alliance et al. commented that, because respondents can opt out, the 10-proceeding limit could “prevent a claimant that has never had a single case heard by the Board from bringing additional cases for the remainder of the year.”⁸⁹ Raising the limit will not eliminate that possibility, but it will create many more opportunities for claims to be resolved on the merits by CCB determinations.

Some commenters, while supporting the limits on a claimant’s filings, challenged the authority of the Office to limit the number of cases filed by attorneys, as compared to claimants. The Copyright Alliance et al. argued that “the Office lacks the authority to establish a limitation on the number of cases filed by attorneys.”⁹⁰ AIPLA commented that the limits on attorneys and law firms are “inappropriate” because, among other reasons, they “would impair claimants’ ability to retain counsel of their choice.”⁹¹ AIPLA proposed that the limit on counsel, if imposed, should be “applied on a per-attorney, not per-firm, basis.”⁹²

Several sections of the CASE Act authorize the Office and the CCB to limit the number of claims both to avoid abusive conduct and to ensure the CCB can operate in a timely and efficient manner. For example, the Act provides the CCB the authority to dismiss claims if the number or complexity of the claims exceed what “the Copyright Claims Board could reasonably administer.”⁹³ In another part of the Act, the Register is directed to issue regulations that will “provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings.”⁹⁴ The statute expressly contemplates that the Register

will adopt “mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party”⁹⁵ and the CASE Act’s legislative history notes the risk of abuse by vexatious claimants.⁹⁶ In promulgating these rules, the Office has given this topic close attention.

The Office believes that these stated goals of the CASE Act are best served by imposing reasonable limits on the number of proceedings that both claimants and counsel may bring. These limits will minimize the potential for abusive behavior—which can occur either by a party or counsel—and will ensure that the CCB can manage and conduct its proceedings effectively. Thousands of copyright infringement lawsuits are filed in Federal court each year, with the 6,209 filed in 2018 setting a new record.⁹⁷ The Office expects that a portion of those litigation matters will instead be filed as claims in the CCB once it commences operations, and that copyright owners heretofore dissuaded from enforcement by the prohibitive costs of litigation will bring additional claims before the CCB.⁹⁸ Permitting a handful of claimants or attorneys to monopolize the CCB’s resources with multiple filings would deny others the equitable opportunity to advance claims. Setting limits promotes the “efficient administration” of the CCB,⁹⁹ within the meaning of the statute, because it will maximize the number of claimants to whom the CCB can provide services. The Office is not persuaded otherwise by AIPLA’s comment that limitations on counsel “would impair claimants’ ability to retain counsel of their choice.”¹⁰⁰ The CCB is an extension, not a contraction, of available tribunals for certain copyright claims. The right to retain counsel does not confer a right for that chosen counsel to appear in every forum. The Office therefore does not believe the limitation impinges on the right to choose counsel. A claimant set on working with an attorney or law firm that has reached the annual maximum will be free to bring the claim instead in a Federal court or

⁸⁴ Engine Initial NPRM Comments at 7.

⁸⁵ Verizon Initial NPRM Comments at 1. The Office notes that under the final rule, actions taken to circumvent the limit may be subject to penalties as bad-faith conduct. See 86 FR 69890, 69917 (proposed 37 CFR 233.2(b)).

⁸⁶ SFWA Reply NPRM Comments at 3.

⁸⁷ Copyright Alliance et al. Initial NPRM Comments at 10. The Copyright Alliance et al. also suggested a higher limit should be applied to “smaller claims.” *Id.* The Office will not set a separate case filing limit for smaller claims at this time, but will monitor the CCB’s experience with smaller claims to determine if any future changes are needed.

⁸⁸ 37 CFR 224.1(c).

⁸⁹ Copyright Alliance et al. Initial NPRM Comments at 10.

⁹⁰ *Id.* at 11.

⁹¹ AIPLA Initial NPRM Comments at 2.

⁹² *Id.* at 3.

⁹³ 17 U.S.C. 1506(f)(3)(C).

⁹⁴ *Id.* at 1510(a)(1).

⁹⁵ *Id.*

⁹⁶ See S. Rep. No. 116–105, at 8.

⁹⁷ U.S. Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark* (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

⁹⁸ See *Copyright Small Claims* at 8–9 (“[T]he number of infringement actions actually filed in federal court likely significantly underrepresents the number of cases that copyright owners would choose to bring if they were able.”).

⁹⁹ 17 U.S.C. 1510(a)(1).

¹⁰⁰ AIPLA Initial NPRM Comments at 2.

wait until the attorney can file the case before the CCB at a future time.¹⁰¹

AIPLA also raised a concern that “enforcement of such a limit [on representatives] could unduly prejudice innocent claimants. . . . [C]laimants who pay the filing fee and file proceedings that count against their limit should not have their claims dismissed or rejected because a lawyer or firm exceeded its limit. Rather, the CCB could require withdrawal or substitution of counsel.”¹⁰² The Office agrees, and articulates a procedure in the final regulation in which, if an attorney or law firm files a new claim that exceeds its limit, that attorney or law firm must withdraw. The CCB may then issue a stay of proceedings for 60 days to allow the claimant to find substitute counsel or proceed *pro se*, which may be extended for good cause. The final rule also provides that a claim that exceeds a claimant’s limit will be dismissed without prejudice.

AIPLA commented that “[a] firm with hundreds of attorneys should not be subject to the same limit as a sole practitioner,”¹⁰³ and Copyright Alliance et al. commented that the limit on attorneys and law firms “fails to account for the variation in size from one firm to another (for example, an international law firm employing thousands of attorneys should be permitted to bring far more than 40 cases annually).”¹⁰⁴ After considering the comments regarding the proposed limitations, the Office has made adjustments in the final rule. The Office is increasing the limit on law firms to 80 filed proceedings in a 12-month period, while maintaining the limit of 40 per attorney.

Finally, the Office understands that it may benefit from the experience of seeing how these limitations on parties, attorneys, and firms work in practice. Accordingly, the Office will review and revisit the propriety of all limitations set for the number of filings permitted by parties, attorneys, and firms as necessary after seeing the types of filings it receives and considering the CCB’s workload.

¹⁰¹ The statute distinguishes “an attorney” who may represent a party from “a law student” who may do so instead. 17 U.S.C. 1506(d). Accordingly, the limitation on parties and attorneys does not apply to law students, law clinics, or *pro bono* legal services organization with a connection to the participating law student’s law school.

¹⁰² AIPLA Initial NPRM Comments at 2.

¹⁰³ *Id.* at 3.

¹⁰⁴ Copyright Alliance et al. Initial NPRM Comments at 11.

2. Applicability of Federal Rules of Civil Procedure and Federal Rules of Evidence

Some commenters criticized the proposed rule as too closely modeled on the Federal Rules of Civil Procedure and the Federal Rules of Evidence.¹⁰⁵ SFWA asserted that “it is imperative that the proposed rules grant more flexibility than the Federal Rules of Evidence and the Federal Rules of Civil Procedure, particularly in light of the number of non-lawyers who can be expected to represent themselves in CCB claims.”¹⁰⁶ This continues to be a goal of the Office as well. The Office drafted the CCB’s procedures to be considerably more flexible, accessible, and permissive than in Federal court.¹⁰⁷ The Office has reviewed the proposed rules in light of the comments about complexity and made further changes to tailor them to the needs of CCB parties, including removing all references to the Federal Rules of Civil Procedure and the Federal Rules of Evidence apart from stating that the CCB is not bound by those rules.

3. Written Requests and Other Filings

While the CASE Act generally prohibits the “formal motion practice”¹⁰⁸ that is at the heart of Federal civil procedure,¹⁰⁹ parties may “make requests to the Copyright Claims Board to address case management and discovery issues.”¹¹⁰ Commenters proposed that the CCB streamline and make the form of such requests more consistent. The Authors Guild advised against “unnecessary formatting requirements, such as page limits, font, and indent sizes,” and recommended word limits instead.¹¹¹ Copyright Alliance et al. suggested that the Office “focus on consistency,” setting a single formatting requirement for all party submissions, with each limited to either 5, 10, or 15 pages, and with the timelines for submissions plainly set forth.¹¹² In response to these comments, the Office has revised the regulations

¹⁰⁵ MPA & RIAA Initial NPRM Comments at 2–3; Copyright Alliance et al. Initial NPRM Comments at 8, 9; Authors Guild Initial NPRM Comments at 2.

¹⁰⁶ SFWA Reply NPRM Comments at 4.

¹⁰⁷ See 86 FR 69890, 69890 (noting the Office’s decision to not adopt Rules 19 and 20 of the Federal Rules of Civil Procedure).

¹⁰⁸ 17 U.S.C. 1506(m).

¹⁰⁹ See Fed. R. Civ. P. 6, 11, 12, 25, 50, 56, 59, 60, 62.1.

¹¹⁰ 17 U.S.C. 1506(m)(1).

¹¹¹ Authors Guild Initial NPRM Comments at 2.

¹¹² Copyright Alliance et al. Initial NPRM Comments at 9; see also Sergey Vernyuk Initial NPRM Comments at 2 (proposing consistent formatting requirements for documents prepared for submission to the CCB).

governing the formatting and timing of party submissions.

The final rule streamlines written requests by the parties into three tiers, with the majority falling under the first two tiers, which simply require use of a fillable form on eCCB subject to a character limit. All requests in tier one will be subject to a 4,000 character limit with a 7-day response time, and all party requests in tier two will be submitted through a 10,000 character limit with a 14-day response time. Accordingly, participants in eCCB proceedings will not have to worry about page limits, fonts, formatting, or different response times for the majority of requests and responses. Tier three is for more substantial written submissions (for example, party statements), which will also be uploaded to eCCB. With respect to tier three submissions, the Office has made changes to standardize the formatting, page limits, and response times in the final rule, where possible.

4. Scheduling Order

Under the proposed rule, requests to modify a proceeding’s scheduling order could be made orally or by letter and an objecting party would have three days to file a response after service of a letter request. However, the rule was silent about the timing of a response to an oral request, and Copyright Alliance et al. requested clarification.¹¹³ When an oral request is made at a hearing or conference, any other party may respond orally at that time or request a reasonable amount of time to submit a written response. In the final rule, any written submissions related to modification of the scheduling order will fall into the fillable form tier system.

5. Amending Claims and Counterclaims

Under the proposed rule, amended claims or counterclaims would be subject to compliance review by a Copyright Claims Attorney, and amending a claim after service would be prohibited without leave of the CCB.¹¹⁴ The only comments to address this rule supported it.¹¹⁵ In the final rule, the

¹¹³ Copyright Alliance et al. Initial NPRM Comments at 20 (discussing proposed 37 CFR 225.1(b)).

¹¹⁴ See 86 FR 69890, 69905 (proposed 37 CFR 222.11).

¹¹⁵ Amazon Initial NPRM Comments at 6; SFWA Reply NPRM Comments at 4. Amazon proposed adding language to the regulation that would make explicit that a party may seek the CCB’s leave for “amendments after the opt-out period has expired.” Amazon Initial NPRM Comments at add. at A–4. The Office sees no need for revision because that was already the effect of the proposed regulation. See 86 FR 69890, 69905 (proposed 37 CFR 222.11(d)).

Office is also prohibiting amendments to claims during the opt-out period. The Office believes that allowing claim amendments during the opt-out period would require additional compliance review and service, and cause undue administrative difficulty, delay, and burdens on respondents.

In the final rule, written submissions related to requests for leave to amend claims will fall into the fillable form tier system. The final rule also clarifies that a claim or counterclaim may be freely amended if it is found to be noncompliant as part of the Board's compliance review. However, if a request for leave to amend is granted, then the pleading may only be amended as identified in the request.

6. Consolidation and Severance

The NPRM proposed that proceedings that involve the same parties or arise out of the same facts and circumstances may be consolidated for purposes of conducting discovery, submitting evidence, or holding hearings, but not for purposes of CCB determinations and any damages award.¹¹⁶ Regarding severance, the NPRM noted that in ordinary circumstances, Copyright Claims Attorneys likely will be able to identify during their compliance review instances where multiple claims involving disparate facts and circumstances have been asserted, and can require that the claimant separate out these unrelated claims.¹¹⁷ However, the Office also proposed a rule permitting the CCB to sever proceedings with respect to some or all parties, claims, and issues where it becomes evident that a proceeding includes distinct claims involving disparate facts and circumstances that would be inappropriate to resolve in a single proceeding.¹¹⁸

Commenters expressed concern about these provisions. The Authors Guild cautioned that *pro se* parties might not know how to respond to a request to sever or consolidate proceedings, and urged that claims be consolidated or severed only by authority of the CCB.¹¹⁹ AIPLA and SFWA expressed concerns about the impact that severance and consolidation would have on the CASE Act's caps on damages.¹²⁰ In light of these comments and concerns expressed

by commenters cautioning against perceived complexities in the proposed rules as a whole,¹²¹ and following a review of the statutory framework regarding consolidation and severance, the Office has concluded that the proposed rule is redundant in light of other provisions in the statute.

The CASE Act prohibits a claimant from combining more than one claim in a single proceeding unless all of the claims "arise out of the same allegedly infringing activity or continuous course of infringing activities and do not, in the aggregate, result in the recovery of such claim or claims for damages that exceed the [CASE Act's monetary damages] limitations."¹²² Hence, a proceeding initiated by a claimant that includes multiple claims involving disparate facts and circumstances would not survive compliance review, and the claimant would be required to file separate proceedings for each of the claims. Because the statute already provides a mechanism to address the issues that the proposed rule on severance would have addressed, the final rule does not include such a provision.

In contrast, the provision permitting consolidation will permit the CCB to achieve efficiencies in managing multiple proceedings filed by a claimant against the same respondent when those proceedings arise out of the same facts and circumstances. In such cases, the CCB may consolidate matters such as discovery, the submission of evidence, and hearings, while rendering separate determinations for each proceeding. Because consolidation only combines certain procedural steps and does not actually join the claims into a single proceeding, the existing caps on damages for each proceeding will continue to apply. The Office is mindful of the concern expressed by the Authors Guild that *pro se* parties may not know how to respond to a request to sever or consolidate proceedings¹²³ and, consistent with the Authors Guild's recommendation, has retained the language reserving the authority to consolidate proceedings to the CCB.

7. Settlement

Commenters generally supported the proposed rule on settlement conferences,¹²⁴ while proposing certain

procedural and textual amendments. The NPRM requested comments concerning the role of the Copyright Claims Officer who presides over a settlement conference, specifically concerning that Officer's role in a final determination.¹²⁵ AIPLA commented, "parties are more likely to participate in settlement discussions if the Officer presiding over the settlement conference is not deciding the merits. We believe the Office's proposed structure, in which the Officer presiding over settlement discussions is recused from the final decision except to break a tie, is permitted under the plain language of the statute."¹²⁶ Copyright Alliance et al. favored the proposal that the presiding settlement Officer would serve only as a tiebreaker in the final determination, adding that the "Officer should be permitted to review the record and sit in on hearings, etc., but should not be permitted to actively participate in the discussions in any manner that might influence the independence of the remaining two Officers."¹²⁷ The Office agrees, and the final rule incorporates the commenters' suggestions. The final rule provides for the recusal of the Officer who presides over a settlement conference unless required as a tiebreaker in the final determination.

The proposed rule provided that the CCB "shall encourage voluntary settlement between the parties of any claims or counterclaims,"¹²⁸ and the Office solicited comments "on whether the CCB should be able to order a settlement conference where it sees a possible benefit to holding a conference even where one or more parties object."¹²⁹ SFWA cautioned against "mandating settlement conferences where there is extreme animosity or a significant power imbalance between parties."¹³⁰ Verizon urged that the settlement process should "be done on a fully voluntary and mutually agreeable basis," and "urge[d] the Office to exercise caution regarding the notion of 'encouraging' settlements to ensure the CCB process is not converted from an adjudicatory body into a settlement collection process."¹³¹ The legislative history is explicit that the CASE Act "reflects an intent to encourage compromise and settlement" and is

¹¹⁶ 86 FR 69890, 69905–06 (proposed 37 CFR 222.12).

¹¹⁷ *Id.* at 69897.

¹¹⁸ *Id.*

¹¹⁹ Authors Guild Initial NPRM Comments at 3.

¹²⁰ AIPLA Initial NPRM Comments at 3; SFWA Reply NPRM Comments at 4. See 17 U.S.C. 1504(e)(1)(A)(ii) (caps on statutory damages for infringement claims per work infringed); *id.* at 1504(e)(1)(D) (cap on total damages per proceeding).

¹²¹ See *supra* note 18.

¹²² 17 U.S.C. 1504(c)(6).

¹²³ See Authors Guild Initial NPRM Comments at 3.

¹²⁴ See SFWA Reply NPRM Comments at 5 ("[W]e believe the proposed rules are sensible and straightforward."); AIPLA Initial NPRM Comments at 3 ("We commend the Office's desire to encourage voluntary settlement.");

¹²⁵ 86 FR 69890, 69898.

¹²⁶ AIPLA Initial NPRM Comments at 3.

¹²⁷ Copyright Alliance et al. Initial NPRM Comments at 19.

¹²⁸ 86 FR 69890, 69907 (proposed 37 CFR 222.17(a)).

¹²⁹ *Id.* at 69898.

¹³⁰ SFWA Reply NPRM Comments at 5.

¹³¹ Verizon Initial NPRM Comments at 2.

“designed to promote compromise.”¹³² Indeed, AIPLA specifically “commend[ed] the Office’s desire to encourage voluntary settlement.”¹³³ Nevertheless, mindful of commenters’ concerns, the Office is modifying the rule’s text to state that the CCB shall “facilitate,” and not “encourage,” settlement. This is consistent with the statutory text, under which facilitating settlement is one of the Copyright Claims Officers’ express functions.¹³⁴

Under the proposed rule, before parties participate in a settlement conference, they are required to email their position statements to the presiding Copyright Claims Officer and, if the parties agree, the parties shall “serve” their statements on the other participating parties.¹³⁵ Upon a suggestion by the Authors Guild,¹³⁶ the Office changes the language of the provision from “serve” to “send,” to clarify that formal service is not required when the parties exchange settlement statements.

8. Records and Publication

The CCB’s final determinations will be made available on a publicly-accessible website, and the statute directs the Office to establish regulations related to the publication of other records and information.¹³⁷ As stated in the NPRM, the “proposed rule seeks to balance public access with the confidentiality interests of the parties.”¹³⁸

The NPRM also noted that the CCB will generally create hearing transcripts through “standard speech to text transcript technology that is available with the CCB’s videoconferencing system,” and invited comments on “whether such informal raw transcripts, which may contain various errors, should be added to the official record.”¹³⁹ The Copyright Alliance et al. commented “that hearing transcripts should not be made public as a part of the official record.”¹⁴⁰ Sergey Vernyuk favored making the transcripts available to promote transparency.¹⁴¹ At this time, the Office does not believe that publishing the uncorrected transcripts is

advisable, given the potential for errors, although the parties will have the ability to request and pay for an official reporter. The Office may reevaluate this position over time based on further experience and review of the transcripts.

The final rule limits attendance at hearings to the parties and their representatives, except with leave of the CCB.¹⁴² While Sergey Vernyuk proposed making hearings open to the public by default and “seal[ed]” only with leave,¹⁴³ the Office is concerned that the virtual nature of CCB proceedings may pose technological or security concerns if they are fully open to the public. The Office will consider reevaluating the issue in the future.

D. Discovery and Evidence

In the NPRM, the Office proposed a discovery process intended to be a streamlined, easy-to-use system that offered standardized discovery requests. Several commenters supported the Office’s proposed system of standardized discovery. For example, AIPLA wrote that it “believes that the proposed approach to written discovery is sound and supports the establishment of standard interrogatories and document requests. . . . These procedures will go a long way towards making discovery manageable for *pro se* claimants and respondents.”¹⁴⁴ Amazon, the Authors Guild, and SFWA all submitted similar comments supporting the Office’s proposed use of limited, standardized discovery.¹⁴⁵ Engine added that the “CCB-issued interrogatories and document requests . . . go some way towards addressing our concerns about the early disclosure of relevant evidence and combatting discovery abuse.”¹⁴⁶

Some commenters considered the scope of discovery too broad under the proposed regulations. MPA and RIAA commented that, if the CASE Act is

“implemented without significant cabinining, the discovery rules for CCB would result in significant burdens for litigants to propound, respond to, and dispute discovery, overwhelming the amount in dispute, undermining the effectiveness of the system, and leading both potential claimants and respondents to opt out.”¹⁴⁷ Copyright Alliance et al. stated that “the discovery process should be limited by requiring that all discovery requests, including requests for production of documents, be: (i) Narrowly targeted; (ii) highly likely to result in the production of evidence that is directly relevant to the claims and defenses; and (iii) serve the goal of efficient resolution of the case in light of the nature of the claims and defenses and the amount in dispute.”¹⁴⁸

The Office has carefully reviewed its proposed regulations with these comments in mind. It has made changes to the regulations regarding interrogatories and document requests to ensure that the scope of allowed discovery is not overly extensive. The Office believes that the final rule provides for a discovery process that is properly tailored to assist in resolving claims before the CCB, and is substantially narrower than what the Federal rules allow. In addition, on a case-by-case basis, parties will need to show good cause to conduct additional discovery. Moreover, a party concerned that the scope of discovery is too broad may raise the issue during the pre-discovery conference held in each case, identifying any of the standard requests that may be overly burdensome or not relevant.

When the Office proposed a small-claims system for copyright, it suggested that “the parties likely will not have access to extensive discovery and will instead be limited to presenting the most critical evidence. Cases will be developed using abbreviated procedures, in shorter time frames, in order to simplify and speed the process.”¹⁴⁹ The Office believes that the proposed regulations serve this vision. It has endeavored to establish a process that, while streamlined, is also just.¹⁵⁰ Commenters generally recognized this important balance, and as stated above,

¹⁴² 86 FR 69890, 69915 (proposed 37 CFR 229.1(c)).

¹⁴³ Sergey Vernyuk Initial NPRM Comments at 1.

¹⁴⁴ AIPLA Initial NPRM Comments at 4.

¹⁴⁵ Amazon commented, “[t]he Office’s proposed mechanisms, including standardized discovery requests and limitations on the production of electronically stored information (‘ESI’), will promote an efficient and inexpensive discovery process in CCB proceedings. . . . Amazon strongly supports the use of CCB-issued interrogatories and document requests, and limited requests for admissions.” Amazon Initial NPRM Comments at 4 (footnote omitted). The Authors Guild, “applaud[ed] the use of standard forms for discovery requests” and “strongly agree[d] with the use of standard interrogatories and standard document requests.” Authors Guild Initial NPRM Comments at 4. SFWA “strongly approve[d] of standardized interrogatories and RFPs.” SFWA Reply NPRM Comments at 6.

¹⁴⁶ Engine Initial NPRM Comments at 5.

¹⁴⁷ MPA & RIAA Initial NPRM Comments at 5.

¹⁴⁸ Copyright Alliance et al. Initial NPRM Comments at 15.

¹⁴⁹ *Copyright Small Claims* at 103.

¹⁵⁰ As the Office previously stated, “[a]ny system to adjudicate small claims must grapple with the nature and amount of discovery to be permitted. . . . [T]he broad availability of discovery and related frustration of discovery-related disputes are significant factors in the timing and expense of federal litigation. At the same time, it is difficult to resolve a dispute fairly without access to relevant information.” *Id.* at 124.

¹³² H.R. Rep. No. 116–252, at 24.

¹³³ AIPLA Initial NPRM Comments at 3.

¹³⁴ 17 U.S.C. 1503(a)(1)(F), 1506(r)(1)(A); *see also id.* at 1502(b)(3)(A)(iii) (requiring that one Copyright Claims Officer shall have experience in alternative dispute resolution).

¹³⁵ 86 FR 69890, 69907–08 (proposed 37 CFR 222.17(d)).

¹³⁶ Authors Guild Initial NPRM Comments at 3.

¹³⁷ 17 U.S.C. 1506(t)(3).

¹³⁸ 86 FR 69899.

¹³⁹ *Id.*

¹⁴⁰ Copyright Alliance et al. Initial NPRM Comments at 22.

¹⁴¹ Sergey Vernyuk Initial NPRM Comments at 1.

supported the idea of standardized discovery.¹⁵¹

Standardized discovery has the key benefit of reducing the burden on parties to develop their own discovery requests, particularly for those parties appearing *pro se*. At the same time, it must be broad enough to capture common issues that will arise in the majority of proceedings. But that does not mean that all such requests are appropriate for every claim, and additional limitations on the scope of discovery may be called for in some circumstances. Where this is the case, a party should bring this to the CCB's attention in a conference.

The Authors Guild requested that the CCB notify parties that they have a duty to update information they provide in response to interrogatories and to disclose responsive documents no longer in their possession.¹⁵² As currently drafted, the regulation both imposes a duty to update and obligates parties "to preserve all material documents."¹⁵³ These duties will be addressed in the CCB Handbook and in the parties' pre- and post-discovery conferences.

The Authors Guild also suggested that the CCB "should give reminders for deadlines."¹⁵⁴ The Office considers the request impracticable for discovery-related deadlines that will be triggered by exchanges between the parties outside of eCCB, but is working to have eCCB send out email reminders related to certain deadlines that require a filing.

AIPLA noted that it "supports the requirement that parties meet and confer regarding [discovery] disputes, before raising the issue with the CCB," but warned that the requirement should not become a means for parties "to avoid disputes by failing to meet and confer."¹⁵⁵ A party's failure to confer will not prevent the CCB from addressing discovery disputes when needed. The final rule provides that parties whose reasonable efforts to confer are frustrated can explain the steps taken to resolve the dispute before seeking CCB assistance when requesting a conference.

The proposed rule required parties to certify discovery responses, and the

final rule clarifies the scope of certification. The producing party must certify that interrogatory responses are accurate and truthful, and that documents produced are genuine and unaltered, to the best of that party's knowledge. The Authors Guild asked the Office to provide the specific wording of the required certification in the CCB Handbook and on CCB forms.¹⁵⁶ The Office agrees, and plans on providing certification language in the CCB Handbook. The Office also intends to create forms for responding to standard interrogatories, and expects to include the certification.

Amazon supported the certification requirement and suggested further requiring parties to certify that they have reviewed the CCB's standard protective order, and that any materials they designate as confidential fit the protective order's definition of "confidential."¹⁵⁷ To keep the required certification easy to use and understand by all parties, the Office is not inclined to make it more complicated or include a reference to protective orders that will only be present in certain cases.¹⁵⁸ However, the Office notes that protective order violations may constitute bad-faith conduct.

As noted above, in response to the comments received, the Office has conducted a complete review of all of the discovery regulations to ensure they are narrowly tailored and to make them more understandable to the general public. Specific changes that have been adopted are discussed below. Guidance will also be available to the parties through the Copyright Claims Attorneys, and the CCB Handbook will have detailed easy-to-understand instructions about the discovery process.

1. Protective Orders

The Office is incorporating commenters' amendments to the proposed rule on protective orders. Amazon proposed that the categories of discovery material subject to designation as "confidential" should include advertising plans not previously disclosed to the public.¹⁵⁹ Amazon also proposed a regulatory revision specifying that parties "must" (rather than "are expected to") attempt to resolve disputes over confidentiality designations before bringing such

disputes to the CCB.¹⁶⁰ The Office understands the benefits of having parties first discuss these issues directly before engaging with the CCB. At the same time, the Office is sensitive to the expertise imbalance that could occur when, for example, one party is represented and one party is *pro se*. The Copyright Alliance et al. urged that the proposed rule, which allowed the CCB to unilaterally de-designate materials labeled "confidential," should provide the affected party a chance to object beforehand.¹⁶¹ The final rule makes each of these requested amendments, and the CCB will be tasked with ensuring that the protective order procedures are not misused when one party is *pro se*.

2. Interrogatories

As noted above, commenters generally favored the CCB's use of standard form interrogatories.¹⁶² SFWA proposed that the interrogatories "should be standardized for different media, formats, and kinds of publication."¹⁶³ The Office does not believe that multiple versions of standardized interrogatory requests are required at this time, but will consider the adoption of different versions in the future. Under the final rule, parties that require media-specific discovery may request it under the process for additional discovery.

Engine raised a concern that the language in the standard interrogatories, as summarized in the proposed regulation, might be "difficult enough to parse[] for attorneys" and "unclear for *pro se* parties who are encountering the discovery process for the first time."¹⁶⁴ The Office has reviewed the proposed rule and made some simplifying revisions. Further, the Office notes that the rule describes the interrogatory categories, but does not include their final text. The actual interrogatory forms will adopt easy-to-understand language, and the Office intends to provide instructional materials, *e.g.*, through the CCB Handbook, to guide the parties.

Engine also commented that section 512(f) misrepresentation claims are likely to require more and different interrogatories than a standard CCB misrepresentation discovery would provide, and, in particular, "[t]he CCB-

¹⁵¹ See, *e.g.*, Engine Initial NPRM Comments at 6 ("efforts to streamline the discovery process . . . [should] not come at the expense of parties gaining access to the information they need to make their case").

¹⁵² Authors Guild Initial NPRM Comments at 4 (discussing proposed 37 CFR 225.2(f) & 225.4(f)(4)).

¹⁵³ 86 FR 69890, 69912 (proposed 37 CFR 225.4(f)(5)).

¹⁵⁴ Authors Guild Initial NPRM Comments at 3.

¹⁵⁵ AIPLA Initial NPRM Comments at 4 (discussing proposed 37 CFR 225.5(a)); see 86 FR 69890, 69912.

¹⁵⁶ Authors Guild Initial NPRM Comments at 4.

¹⁵⁷ Amazon Initial NPRM Comments at 4, add. at A-15.

¹⁵⁸ See 86 FR 69890, 69908 (proposed 37 CFR 222.18(a)) (noting that protective orders only apply "[a]t the request of any party").

¹⁵⁹ Amazon Initial NPRM Comments at 4 n.19, add. at A-12.

¹⁶⁰ *Id.* at add. at A-13.

¹⁶¹ Copyright Alliance et al. Initial NPRM Comments at 20.

¹⁶² See AIPLA Initial NPRM Comments at 4; Amazon Initial NPRM Comments at 4; Authors Guild Initial NPRM Comments at 4; Engine Initial NPRM Comments at 5; SFWA Reply NPRM Comments at 6.

¹⁶³ SFWA Reply NPRM Comments at 6.

¹⁶⁴ Engine Initial NPRM Comments at 5.

issued interrogatories for [section] 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.”¹⁶⁵ It proposed “eliminating the good cause requirement for an initial number of additional discovery requests in [section] 512(f) claims.”¹⁶⁶ The Office does not agree that this exception to the standard discovery rules is necessary. If a party asserting or responding to a section 512(f) claim believes that it needs additional information that is not captured by the standard misrepresentation interrogatories, it may make a request to propound further interrogatories under the provisions pertaining to additional discovery.

Sergey Vernyuk requested a definition or further explanation of which documents count as “material.”¹⁶⁷ A “material” document is one that could be used to prove or disprove a fact that is in dispute in a proceeding and may have influence on the outcome of the proceeding. As the universe of “material” documents is unlimited, rather than put forward any sort of list in the regulations, the Office intends to provide guidance to *pro se* parties and provide examples in the CCB Handbook.

Finally, SFWA also proposed that the Office make the interrogatories “available for comment separately so that individual creator groups can fine tune them for maximum clarity.”¹⁶⁸ The Office appreciates the interest and will welcome feedback once the forms are final and publicly available, but finds that an additional round of public comment would be impractical as the CCB is due to commence operations shortly.

3. Requests for Admission

The CASE Act specifically refers to “written requests for admission, as provided in regulations established by the Register of Copyrights.”¹⁶⁹ This is a standard form of discovery in Federal civil litigation.¹⁷⁰ The NPRM proposed limiting parties to ten requests for admission, with compound requests barred.¹⁷¹ Some commenters, however, strongly advocated for eliminating them from CCB proceedings entirely.¹⁷²

MPA and RIAA commented that requests for admission (“RFAs”) are “prone to use of tendentious language by both the propounder of the RFA as well as the responding party, resulting in semantic battles between sophisticated attorneys that are unlikely to advance the adjudication of a copyright small-claims matter. . . . Drafting and responding to RFAs would consume significant time, and likely for little benefit.”¹⁷³ The MPA and RIAA also voiced “serious doubts that many *pro se* litigants, either claimants or respondents, would be able to engage in meaningful exchange of RFAs and responses—or engage in motion practice to resolve potential disputes about them.”¹⁷⁴ The Authors Guild opined that requests for admission “could prove to be a trap for *pro se* parties litigating against sophisticated parties.”¹⁷⁵ Likewise, Copyright Alliance et al. opposed the use of requests for admission on grounds of the complexity and burden.¹⁷⁶

Some commenters did not object to the use of requests for admission in CCB discovery, and one strongly supported including them on a limited basis. Sergey Vernyuk agreed with the Office’s decision not to provide standard forms, leaving the content of the requests up to the parties.¹⁷⁷ AIPLA considered the Office’s proposed ten-request limit “reasonable,”¹⁷⁸ and Amazon “strongly support[ed] . . . limited requests for admission.”¹⁷⁹

The Office finds the comments requesting the elimination of requests for admission persuasive and believes that the elimination from the ordinary case would significantly streamline discovery without substantially affecting parties’ ability to develop the facts. The final rule classifies requests for admission as a form of additional discovery that the CCB may allow “on a limited basis” and “for good cause shown.”¹⁸⁰ They will not be available as “of right,” and requesting parties must provide the specific RFAs they seek to propound and show good cause for each. These restrictions are consistent with suggestions by the

commenters who opposed the use of RFAs.¹⁸¹

4. Production of Documents

Some commenters, including some who approved of the CCB-issued standardized discovery requests,¹⁸² contended that specific document requests described in the proposed rule are too broad. The NPRM proposed requiring parties responding to infringement claims or counterclaims to produce “documents related to” revenues, profits, and deductible expenses “directly related to the sale or use of the allegedly infringing material.”¹⁸³ To “safeguard against overbroad and potentially irrelevant discovery related to this type of financial information,” Amazon suggested that infringement respondents instead should be required to produce only “documents sufficient to show” those matters, arguing that the NPRM version of the request “may result in unintended and burdensome discovery.”¹⁸⁴ The Office agrees that this is a reasonable limitation and the final rule reflects the change.

Some commenters proposed excluding certain categories of documents from the standardized requests. These proposals have not been adopted in the final rule. For example, Copyright Alliance et al. commented that “a party should not be entitled to discovery related to past licensing fees assessed by a copyright owner.”¹⁸⁵ The Office believes that a copyright owner’s licensing practices, and the licensing history of the infringed work and similar works, may be relevant to determining damages. Discovery of such relevant evidence should not be categorically excluded.

For misrepresentation claims, Amazon recommended that respondents should be required to produce only “documents sufficient to show” the truth or falsity of representations made in the notification or counter-notification, rather than all “[d]ocuments pertaining to” those matters, which could “result in

¹⁸¹ See MPA & RIAA Initial NPRM Comments at 7; Copyright Alliance et al. Initial NPRM Comments at 15.

¹⁸² See Amazon Initial NPRM Comments at 4 (supporting standardized interrogatories and document requests).

¹⁸³ 86 FR 69890, 69911 (proposed 37 CFR 225.4(c)(5)).

¹⁸⁴ Amazon Initial NPRM Comments at 5, add. at A–22.

¹⁸⁵ Copyright Alliance et al. Initial NPRM Comments at 15 n.6; see also MPA & RIAA Initial NPRM Comments at 5 (stating that discovery “should not extend to other transactions in which either party may have engaged, even if they are similar to the case at bar”).

¹⁶⁵ *Id.* at 6–7.

¹⁶⁶ *Id.* at 7.

¹⁶⁷ Sergey Vernyuk Initial NPRM Comments at 2.

¹⁶⁸ SFWA Reply NPRM Comments at 6.

¹⁶⁹ 17 U.S.C. 1506(n).

¹⁷⁰ See Fed. R. Civ. P. 36.

¹⁷¹ 86 FR 69890, 69911 (proposed 37 CFR 225.3(a)–(b)).

¹⁷² See Authors Guild Initial NPRM Comments at 4; Copyright Alliance et al. Initial NPRM Comments at 15; MPA & RIAA Initial NPRM Comments at 6–7.

¹⁷³ MPA & RIAA Initial NPRM Comments at 6.

¹⁷⁴ *Id.* at 6–7.

¹⁷⁵ Authors Guild Initial NPRM Comments at 4.

¹⁷⁶ Copyright Alliance et al. Initial NPRM Comments at 15.

¹⁷⁷ Sergey Vernyuk Initial NPRM Comments at 1 (citing 86 FR 69890, 69900).

¹⁷⁸ AIPLA Initial NPRM Comments at 4.

¹⁷⁹ Amazon Initial NPRM Comments at 4.

¹⁸⁰ 17 U.S.C. 1506(n)(1).

overbroad, irrelevant, and burdensome discovery.”¹⁸⁶ The Office believes the proposed change could be read to permit a respondent to produce only exculpatory documents “sufficient to show” that its statements were true, while withholding documents that support the misrepresentation claim. However, to limit the universe of potentially responsive documents, the Office revises the rule to “[d]ocuments directly pertaining to” truth or falsity.

“[T]o make clear that parties are permitted to withhold privileged documents,” Copyright Alliance et al. proposed that the Office should revise the proposed rule on the standard production of documents by excluding documents “privileged or protected from disclosure.”¹⁸⁷ The Office is concerned that introducing such legal terminology may prove counter-productive, especially when dealing with *pro se* parties, but the Office recognizes the importance of the attorney-client privilege. The final rule specifies that confidential communications between a party and its counsel reflecting or seeking legal advice related to the merits of the proceeding shall be considered privileged categorically and need not be produced. Parties seeking to withhold other types of documents must first seek and receive leave of the CCB.

MPA and RIAA contended that two provisions in the proposed rule (requiring production of “[a]ll documents related to damages” and “[a]ll other documents of which the party is reasonably aware that conflict with the party’s claims or defenses”) “seem to encompass large volumes of documents that are *not* directly related to the dispute itself.”¹⁸⁸ While the Office considers both categories of documents relevant, it also recognizes that other categories in the proposed rule cover the same subject matter.¹⁸⁹ Thus, it is removing the broad category “[a]ll documents related to damages” from the final rule and narrowing the other request by adding the phrase “in the proceeding” to the request for documents that conflict with the party’s claims or defenses.

Commenters raised concerns about the scope of a party’s obligation to search for responsive documents and

electronically stored information (*e.g.*, email) to produce in discovery, with Amazon stating that such searches should not be of the documents of any of the party’s agents, employees, representatives, or others acting on the party’s behalf without limitation, but rather those whom the party reasonably believes would or should have responsive documents.¹⁹⁰ In the final rule, the Office has limited the files that must be searched to files in the party’s possession or under their control, to the files of any of the party’s agents, employees, representatives, or others acting on the party’s behalf “who the party reasonably believes may have responsive documents.”

The Office disagrees with Amazon’s suggestion that the rule should state that “parties are *not* required to run custodial email searches to locate responsive documents.”¹⁹¹ If a party reasonably believes that responsive documents are in its possession or under its control, including in emails and computer files, it must conduct a reasonable search. For that reason, the Office also disagrees with MPA and RIAA’s position that “[s]earches for responsive documents should be limited to the responding party itself,” and should not reach the files of its “agents, employees, representatives, or others acting on the party’s behalf.”¹⁹² If a third party’s files are under the party’s control, they are not inaccessible, and the efficient resolution of CCB claims will require reasonable searches for the limited universe of documents subject to production. The final rule also establishes an explicit reasonable investigation standard for discovery responses.

The Copyright Alliance et al. noted that the proposed rule, which set out a baseline expectation for manual searches of electronically stored information “that are easily accomplished by a layperson,”¹⁹³ appeared to prohibit parties from conducting more extensive searches.¹⁹⁴ The Office never intended its rule to prohibit parties who want to conduct such searches from doing so. Adopting Copyright Alliance et al.’s suggestion,

the Office revises the rule to provide that such searches “need not,” rather than “shall not,” exceed that baseline. The Copyright Alliance et al. further noted that the proposed rule treats document productions that “include large amounts of irrelevant or duplicative material,”¹⁹⁵ commonly referred to as “document dumps,”¹⁹⁶ as acts of “*per se* ‘bad faith.’”¹⁹⁷ Copyright Alliance et al. suggested that the CCB should retain the discretion to make determinations of bad faith “in light of all relevant context.”¹⁹⁸ The Office agrees, and the final rule modifies the proposed regulation by providing that such voluminous productions “may,” rather than “shall,” constitute bad-faith conduct.

5. Depositions

Depositions will not be permitted in CCB proceedings. Testimony is primarily submitted in written form and oral testimony is presented only at a hearing conducted before the CCB.¹⁹⁹ Commenters asked the Office to make the prohibition of depositions explicit²⁰⁰ and the final rule does so.

6. Expert Disclosure

The statute provides that “in exceptional cases,” the CCB may permit “expert witness testimony . . . for good cause shown.”²⁰¹ The proposed rule adds that “[t]he use of expert witnesses in proceedings before the Board is highly disfavored and requests shall be rarely granted” and provides that the CCB will grant a request “only in exceptional circumstances and upon a showing that the case cannot fairly proceed without the use of the expert.”²⁰² Some commenters proposed requiring parties to disclose any intent to use an expert witness at an early stage in the proceeding, whether in the claim or before the response.²⁰³ If adopted, the proposal would let parties weigh the costs of retaining rebuttal experts at a

¹⁹⁵ 86 FR 69890, 66912 (proposed 37 CFR 225.4(f)(3)).

¹⁹⁶ See *id.* at 66901.

¹⁹⁷ Copyright Alliance et al. Initial NPRM Comments at 16.

¹⁹⁸ *Id.*

¹⁹⁹ 17 U.S.C. 1506(o)(2), (p).

²⁰⁰ MPA & RIAA Initial NPRM Comments at 7; Copyright Alliance et al. Initial NPRM Comments at 15; cf. Amazon Initial NPRM Comments at 5–6, add. at A–15 (noting that “depositions are generally not permitted in small claims courts around the country and are a costly discovery tool” and requesting that the Office clarify that they only are permitted “upon a showing of good cause”).

²⁰¹ 17 U.S.C. 1506(o)(2).

²⁰² 86 FR 69890, 69909 (proposed 37 CFR 225.1(e)).

²⁰³ MPA & RIAA Initial NPRM Comments at 7–8; Copyright Alliance et al. Initial NPRM Comments at 21.

¹⁸⁶ Amazon Initial NPRM Comments at 5, add. at A–23; 86 FR 69890, 69911 (proposed 37 CFR 225.4(e)(2)).

¹⁸⁷ Copyright Alliance et al. Initial NPRM Comments at 22 (discussing proposed 37 CFR 225.4(a)).

¹⁸⁸ MPA & RIAA Initial NPRM Comments at 6; 86 FR 69890, 69911 (proposed 37 CFR 225.4(a)(2)–(3)).

¹⁸⁹ See 86 FR 69890, 69911 (proposed 37 CFR 225.4(b)(7), (c)(5)).

¹⁹⁰ Amazon Initial NPRM Comments at 4–5, add. at A–23 (discussing proposed 37 CFR 225.4(f)(1)–(2)), MPA & RIAA Initial NPRM Comments at 6 (discussing proposed 37 CFR 225.4(f)(2)); see 86 FR at 66911–12 (proposed 37 CFR 225.4(f)(1)–(2)).

¹⁹¹ Amazon Initial NPRM Comments at 4–5, add. at A–23.

¹⁹² MPA & RIAA Initial NPRM Comments at 6 (discussing proposed 37 CFR 225.4(f)(2)); see also 86 FR 69890, 66912 (proposed 37 CFR 225.4(f)(2)).

¹⁹³ 86 FR at 66912 (proposed 37 CFR 225.4(f)(2)(i)).

¹⁹⁴ Copyright Alliance et al. Initial NPRM Comments at 21–22.

stage when opting out or voluntarily dismissing would still be viable alternatives. However, the Office considers the proposed requirement impractical. The CCB will rarely, if ever, allow expert testimony. In all likelihood, parties will rarely request it, considering the typical costs of experts compared to the maximum damages recoverable.²⁰⁴ Moreover, a party often will not know if it needs an expert until it sees the other side's evidence. Accordingly, although expert testimony will rarely be allowed, the intention to request it need not be disclosed at the beginning of CCB proceedings.

7. Written Testimony

Commenters requested that the CCB provide parties with "instructions about how to draft written testimony and what should be included."²⁰⁵ The Office intends to provide such guidance in the CCB Handbook, and takes note of the specific topics that commenters suggested for inclusion.

The Office is making two changes to the proposed regulations on written testimony to make the process more accessible to *pro se* parties. First, parties are provided 15 additional days (45 total) to file response testimony and 7 additional days (21 total) to file reply testimony.²⁰⁶ Second, the Office is streamlining the proposed regulations by omitting certain provisions regarding witness sponsorship of documentary evidence,²⁰⁷ as these are overly burdensome and other regulatory provisions suffice to ensure authentication.²⁰⁸ The Office will also be creating forms that will make the submission of materials with party statements easier.

E. Hearings

Noting that the statute appears to require virtual hearings, although permitting "alternative arrangements" for submission of physical or other nontestimonial evidence that cannot be

presented virtually,²⁰⁹ the Office solicited comments on whether the statute can be read to allow an in-person hearing when all parties request it and can attend.²¹⁰ Two commenters opined that the statute does not appear to permit such hearings, beyond the limited situations it specifically describes.²¹¹ Another commenter "agree[d] with the Office's proposal that in-person hearings be permitted if requested by all parties," but did not cite any statutory authority for this position.²¹² The final rule provides for virtual proceedings, except as expressly described in the statute. Recognizing that the CCB is a new tribunal which has not yet held a hearing, the Office does not take a position at this time regarding whether, in exceptional circumstances, additional in-person proceedings may be permissible.

The proposed rule stated that "[c]onferences may be held by one or more Officers."²¹³ At the same time, the Office solicited comments in the NPRM on whether it is authorized to have Copyright Claims Attorneys conduct non-substantive hearings to streamline the proceedings.²¹⁴ Two comments addressed the point. AIPLA commented that it believes such a procedure is permissible, and added, "[a]ll parties should retain the right to have any given conference held by an Officer."²¹⁵ The Copyright Alliance et al. commented "that there should be a presumption that those conferences will be held by Officers, however Copyright Claims Attorneys should be permitted to hold those conferences if deemed necessary to ensure that proceedings are 'streamlined.'"²¹⁶

The Office makes no changes to the final rule with respect to this subject. It concludes that the statute clearly describes the duties of the Copyright Claims Officers and those of the Copyright Claims Attorneys.²¹⁷ Among other duties, Officers shall: (1) Determine the claims and defenses asserted by the parties; (2) rule on "scheduling, discovery, evidentiary, and other matters"; (3) conduct hearings and conferences; and (4) make damage awards.²¹⁸ At the same time, the CASE

Act authorizes the Attorneys "[t]o provide assistance to the Copyright Claims Officers in the administration of the duties of those Officers under" the statute and "[t]o provide assistance to members of the public with respect to the procedures and requirements of the [CCB]."²¹⁹ The Office is of the view that 17 U.S.C. 1503(a)(2)(A) and (B) provide flexibility as to how the Attorneys may assist the Officers and communicate with the public, including parties, regarding the "procedures and requirements" of the CCB. For example, the Attorneys may communicate with the parties regarding administrative, scheduling, or logistical matters, allowing such nonsubstantive matters to be resolved more quickly. If the Attorney's communication with the parties reveals an unresolved substantive issue or dispute, the issue will be referred to an Officer and a conference may be scheduled.

The proposed regulation would have barred post-hearing submissions of additional testimony or evidence "unless at the Board's specific request."²²⁰ The Copyright Alliance et al. proposed allowing such submissions with leave of the CCB.²²¹ The Office agrees and adopts the proposed amendment.

The Authors Guild argued against requiring *pro se* parties to conduct direct or cross examinations of testifying witnesses and suggested that the CCB conduct the questioning of witnesses instead.²²² The Office notes that no parties are required to ask questions of witnesses, but it does not think parties should be denied this option just because they appear *pro se*. As described earlier, the Office envisions that any questioning of witnesses during hearings will be significantly less formal than in Federal court proceedings. *Pro se* parties will not be expected to master, or indeed have any familiarity with, evidentiary rules concerning the questioning of witnesses. Officers also will take an active role in managing hearings and will have the ability to ask their own questions of witnesses to ensure that testimony is fully developed.

The Copyright Alliance et al. criticized the proposed rule's references to direct examination, cross-examination, redirect examination, and witness impeachment as inappropriately reliant on Federal

²⁰⁴ See generally *Pharmacy Records v. Nassar*, 729 F. Supp. 2d 865, 874, 879 (E.D. Mich. 2010) (awarding defendant costs of \$10,325 for expert musicologist and \$18,142.57 for computer forensics expert in copyright case), *aff'd*, 465 F. App'x 448 (6th Cir. 2012).

²⁰⁵ Copyright Alliance et al. Initial NPRM Comments at 22; see also Authors Guild Initial NPRM Comments at 3 ("The proposed Handbook should explain exactly what should be provided in the written testimony, including documentary evidence and witness and party statements, in addition to providing lists of topics, sample documents, and forms.").

²⁰⁶ See 86 FR 69890, 69906 (proposed 37 CFR 222.14(a)).

²⁰⁷ See *id.* (proposed 37 CFR 222.14(b)(1)(ii), (b)(2)(iv)).

²⁰⁸ See *id.* at 69909 (proposed 37 CFR 225.1(a)(1)).

²⁰⁹ 17 U.S.C. 1506(c)(2).

²¹⁰ 86 FR 69890, 69902–03.

²¹¹ Copyright Alliance et al. Initial NPRM Comments at 22; SFWA Reply NPRM Comments at 6.

²¹² AIPLA Initial NPRM Comments at 4.

²¹³ 86 FR 69890, 69905 (proposed 37 CFR 222.10(b)(2), (b)(8), (c)).

²¹⁴ *Id.* at 69896.

²¹⁵ AIPLA Initial NPRM Comments at 3.

²¹⁶ Copyright Alliance et al. Initial NPRM Comments at 18.

²¹⁷ 17 U.S.C. 1503(a)(1), (a)(2).

²¹⁸ *Id.* at 1503(a)(1)(A), (C), (E), (G)(i).

²¹⁹ *Id.* at 1503(a)(2)(A)–(B).

²²⁰ 86 FR 69890, 69907 (proposed 37 CFR 222.15(f)).

²²¹ Copyright Alliance et al. Initial NPRM Comments at 23.

²²² Authors Guild Initial NPRM Comments at 3.

procedures and too procedurally complex for *pro se* parties.²²³ The Office is modifying the final rule to clarify that CCB hearings will not mirror Federal courtroom practices and procedures. For example, questioning during hearings will be significantly less formal and regimented than Federal hearings and trials. The CCB Handbook will also greatly help CCB participants through the process. In addition, unlike in Federal court, Copyright Claims Officers will guide participants through the process of a hearing, including how to submit witness testimony. The final rule therefore provides, using less legal jargon, that parties may ask questions of witnesses, and eliminates the provision on formal objections to evidence during a hearing. Due to the CCB proceeding's nature and the likelihood that there may be *pro se* participants on one or both sides, the Office does not believe that such a process is necessary and might be disruptive to proceedings or allow represented participants to take advantage of *pro se* participants.

AIPLA commented, “[a]bsent justification, parties should not be permitted in CCB proceedings to rely on documents in their case-in-chief that they failed to produce during discovery. Even if not produced in discovery, such documents should be permitted in rebuttal, consistent with federal district court practice.”²²⁴ The comment is generally consistent with the proposed rule.²²⁵ However, to streamline the procedures, minimize legalese, and accommodate parties who may not be familiar with formal rules of evidence, the Office is modifying the final rule to provide in more direct terms that exhibits not submitted in written testimony may not be used at a hearing without leave of the CCB.

F. Post-Determination Review

The proposed rule included procedures related to the two levels of review of final CCB determinations described in the statute: Reconsideration by the CCB and review by the Register of Copyrights.²²⁶ The Office received no comments related to requests for reconsideration, and

implements those regulations in the form proposed in the NPRM.

The statute provides that a party may request review by the Register of Copyrights if the CCB denies that party's request for reconsideration.²²⁷ It does not expressly state whether the non-requesting party, if it loses the reconsideration request, may request the Register's review.²²⁸ The NPRM did not provide a process for the non-requesting party to seek the Register's review after reconsideration. The Office invited comment on this issue.²²⁹

Two commenters responded.²³⁰ AIPLA approved of not allowing such review, stating, “[o]ne purpose of the Act is to provide a simple and speedy process. . . . [P]ost-determination proceedings should be kept to a minimum. The best way to give effect to the statute as written, while keeping post-determination proceedings to a minimum, is to restrict the Register's review to a party losing a request for reconsideration.”²³¹ On the other hand, Sergey Vernyuk questioned the fairness in denying the ability to seek the Register's review to a party who initially received a favorable determination only to have it reversed on reconsideration.²³² He proposed that a non-requesting party that loses on reconsideration could seek reconsideration itself, “and if that second reconsideration request is denied . . . then at that point both parties had sought reconsideration and can thus seek the Register's review.”²³³

The Office agrees that it would be unfair if a party who had initially prevailed, but subsequently finds itself on the losing side after a request for reconsideration, had no recourse. Under the statute, the CCB's determination after granting reconsideration constitutes an “amended final determination.”²³⁴ The Office concludes that the party that opposed the initial request for reconsideration may request reconsideration or amendment by the CCB of the amended final determination.²³⁵ If that party is

unsuccessful before the CCB, it may then request review by the Register.

AIPLA further commented that “the proposed filing fee of \$300 is appropriate for Register review. The amount is both affordable and high enough to discourage prolonging proceedings.”²³⁶ There were no contrary comments. The Office is maintaining the proposed fee.

G. Additional Considerations

1. Data Collection

Engine recommended that the Office collect and make available data sets, in a transparent and anonymized fashion, including statistics on the number of cases filed, defaulting respondents, opt-outs, 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.”²³⁷ Engine asserted that collecting data could assist the Office in developing procedures that are fair to all parties and that prevent abuse, including enabling the Office to identify which, if any, categories of respondents may be misusing the default process.²³⁸ As one of the four overarching goals in Copyright Office's recently released *Strategic Plan 2022–2026*, the Office intends to “enhance the development and use of data as an evidentiary foundation for policymaking and to improve measurements of organizational performance, and will make more data easily accessible to both internal and external audiences.”²³⁹ Consistent with this goal, the CCB will be tracking data relevant to its operations internally and, while the scope of that data collection is still undetermined, the Office will ultimately issue a public report on the CCB that will likely include data related to its operations.

2. Other Issues

The Copyright Alliance et al. pointed out that the proposed regulation inconsistently referred to “attorneys” as either included in, or distinct from, “parties.”²⁴⁰ The Office has clarified references in the final rule, made other modest revisions for the purpose of

²²³ Copyright Alliance et al. Initial NPRM Comments at 8.

²²⁴ AIPLA Initial NPRM Comments at 4.

²²⁵ See 86 FR 69890, 69909 (proposed rule 37 CFR 222.19(e)) (“Exhibits not submitted as part of written testimony may be shown to a witness on cross-examination or redirect examination only for the purposes of impeachment or rehabilitation. Copies of such exhibits must be distributed to the Board and other parties before being shown, unless the Board directs otherwise.”).

²²⁶ *Id.* at 69915 (proposed 37 CFR pts. 230, 231); see 17 U.S.C. 1506(w)–(x).

²²⁷ 17 U.S.C. 1506(x).

²²⁸ *Id.*; see also 86 FR 69890, 69903.

²²⁹ 86 FR 69890, 69903.

²³⁰ Sergey Vernyuk Initial NPRM Comments at 2; AIPLA Initial NPRM Comments at 5.

²³¹ AIPLA Initial NPRM Comments at 5.

²³² Sergey Vernyuk Initial NPRM Comments at 2.

²³³ *Id.*

²³⁴ 17 U.S.C. 1506(w).

²³⁵ *Cf. id.* at 1506(x) (providing that when the Register reviews a final determination and remands it to the CCB for reconsideration “and for issuance of an amended final determination. Such amended final determination shall not be subject to further consideration or review” by the CCB or the Register).

²³⁶ AIPLA Initial NPRM Comments at 5.

²³⁷ Engine Initial NPRM Comments at 8.

²³⁸ *Id.* at 5.

²³⁹ U.S. Copyright Office, *Strategic Plan 2022–2026*, 9 (Jan. 2022), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2022-2026.pdf>.

²⁴⁰ Copyright Alliance et al. Initial NPRM Comments at 18. Under the CASE Act, “party” is defined to mean both a party and a party's attorney, as applicable. .’ 17 U.S.C. 1501(3).

clarity, and corrected typographical errors.

H. Smaller Claims

The CASE Act provides that the Register shall establish regulations to provide for the determination of “smaller claims,” *i.e.*, claims in which total damages sought do not exceed \$5,000.²⁴¹ Such smaller claims must be determined by not fewer than one Copyright Claims Officer.²⁴² The Office issued proposed rules governing smaller claims in its NPRM, including provisions limiting discovery to “standard interrogatories, requests for admission, and the standard production of document requests provided by the CCB,” prohibiting expert testimony, and prohibiting hearings.²⁴³ The Office also asked for comments addressing whether the proposed rule struck “a proper balance between streamlining the [CCB’s] process while providing the procedural protections available to other claims before the CCB.”²⁴⁴

SFWA supported the proposed rule.²⁴⁵ MPA and RIAA and the Copyright Alliance et al. advocated for further streamlined procedures, especially for eliminating standard discovery in smaller claims proceedings.²⁴⁶ MPA and RIAA stated that “permitting even the standard types of discovery in these ‘smaller’ cases is too much; the costs involved with propounding, responding to, and potentially disputing discovery matters through motion practice, would quickly exceed the maximum \$5,000 in dispute.”²⁴⁷ The Copyright Alliance et al. suggested that “[e]liminating discovery would make the [smaller] claims process much more attractive to claimants seeking damages awards of less than \$5,000 and to respondents who would be much more amenable to participating in the small claims process (and not opting out) if there was no discovery.”²⁴⁸ The Copyright Alliance et al., however, would allow for discovery in smaller claims proceedings “upon a showing of good cause or where the CCB [O]fficers need to ask questions to complete the record and make a determination,” though it would limit this discovery to “only a few

specific items that are relevant, probative, and likely to impact the outcome of the case.”²⁴⁹

On review, the Office agrees that a more expedited and less formal process is appropriate for smaller claims. The final rule streamlines the smaller claims process by using written submissions and informal conferences to minimize party burdens and by allowing the presiding Officer to take a more active role in case management. Discovery will be significantly limited, if allowed at all. The extent of any discovery will typically be addressed at an initial conference, which will take the place of the pre-discovery conference held in non-smaller claims proceedings. The smaller claims proceeding will also allow for a party position statement, a merits conference to discuss the evidence and the issues presented, a tentative finding of facts by the presiding Officer, the opportunity for parties to respond to those findings, and a final determination. Additional details about these steps are provided below.

The initial conference will allow a presiding Officer to discuss the claims and defenses with the parties and to determine whether any discovery beyond the evidence appended to the claim and response should be required. Consistent with the Copyright Alliance et al.’s suggestion,²⁵⁰ any request for the production of information or documents that the presiding Officer may approve will be narrowly tailored to the issues raised in the proceeding and highly likely to lead to production of relevant evidence. In addition, the presiding Officer will ensure that such request will not result in an undue burden on any party. Parties will provide the requested evidence to each other, along with any additional evidence they intend to use to support their claims and defenses.

After the exchange of evidence between the parties, each party shall file the evidence it wishes the presiding Officer to consider and may submit a written statement outlining its position, as well as statements from witnesses. These written statements are the only submissions allowed—no responsive statements will be permitted. Further, parties may not submit expert testimony for consideration. The presiding Officer will then hold a merits conference, at which the parties and the Officer will fully discuss the claims, counterclaims, defenses, and evidence. Each party will

have an opportunity to respond to the evidence and any other submissions provided by the other party. The Officer may also hear from and question any witnesses present at the conference. After this, the Officer will issue preliminary findings of fact to which each party will have an opportunity to respond. The Officer will have the discretion to hold another conference, if necessary. After considering any responses to the preliminary findings of fact, the Officer will issue a final determination.

In addition to these important changes, the final rule clarifies procedures related to the timing of the smaller claims election, requesting a smaller claims proceeding, and the content of the initial and second notice in a smaller claims proceeding. The Copyright Alliance et al. sought clarification about the consequences of a smaller claims respondent filing a counterclaim for damages above the smaller claims limit.²⁵¹ Under the final rule, a counterclaim for damages above the smaller claims limit is not permitted. A respondent who is not content with a counterclaim limited to \$5,000 may decline to use the smaller claims track and either use the standard proceeding by bringing a separate claim against the original claimant or bring the claim to Federal court.

Further, the rule makes clear that a claimant may change its election from proceeding as a smaller claim proceeding to a standard proceeding (or from a standard proceeding to a smaller claim proceeding) before service of the initial notice. If the claimant makes such an election, it must request an updated initial notice before serving the notice on a respondent.²⁵²

Finally, the final rule clarifies that when a claimant elects a smaller claims proceeding, the initial notice and second notice to the respondent will differ in some respects from the notices issued with standard claims. Smaller claims notices will indicate that the

²⁵¹ *Id.* at 20.

²⁵² The Copyright Alliance et al. stated that “section 1506(q) of the Copyright Act gives the claimant the ability to change its mind, dismiss the claim without prejudice, and refile the claim under the procedures for standard small claims if it decides that discovery is necessary.” *Id.* at 12. The Office disagrees with any suggestion that 17 U.S.C. 1506(q) provides an independent basis for a claimant to voluntarily dismiss a claim after a respondent files a response. Section 1506(q) only allows a claimant to voluntarily dismiss a claim before a respondent files a response. *See* 17 U.S.C. 1506(q). Section 222.17(c) of the regulations governs voluntary dismissal of claims after a response is filed and only allows for voluntary dismissal without prejudice when either the CCB determines that such dismissal would be in the interests of justice or if the parties agree in writing.

²⁴¹ 17 U.S.C. 1506(z).

²⁴² *Id.*

²⁴³ 86 FR 69890, 69898–99, 69912–13 (Dec. 8, 2021).

²⁴⁴ *Id.* at 69898–99.

²⁴⁵ SFWA Reply NPRM Comments at 5.

²⁴⁶ MPA & RIAA Initial NPRM Comments at 3–5; Copyright Alliance et al. Initial NPRM Comments at 12–13.

²⁴⁷ MPA & RIAA Initial NPRM Comments at 4.

²⁴⁸ Copyright Alliance et al. Initial NPRM Comments at 12.

²⁴⁹ *Id.* at 12.

²⁵⁰ *See id.* (stating that discovery, when permitted, “should be limited to only a few specific items that are relevant, probative, and likely to impact the outcome of the case”).

claim is a smaller claim and provide a brief explanation of the procedural differences between smaller claims and standard claims. While the Office intended to provide such information under its authority to “[i]nclude any additional information” in the initial or second notices,²⁵³ it makes sense to make this requirement explicit in its regulations.

The Office believes that its updated, streamlined procedure for smaller claims substantially addresses commenters’ concerns, will provide a clear alternative to both the CCB’s standard proceeding and to Federal litigation, and will ultimately incentivize claimants to use the CCB’s smaller claims procedures where appropriate. While this updated rule is a logical outgrowth of the NOI, NPRM, and public comments, the Office is offering the public the opportunity to submit additional comments on the smaller claims final regulations so it can determine whether they strike the proper balance between streamlining the smaller claims process and providing sufficient procedural protections to all parties.

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 220

Claims, Copyright, General.

37 CFR Parts 222, 224, and 225 Through 233

Claims, Copyright.

Final Regulations

For the reasons stated in the preamble, the U.S. Copyright Office amends chapter II, subchapters A and B, of title 37 Code of Federal Regulations, to read as follows:

Subchapter A—Copyright Office and Procedures

PART 201—GENERAL PROVISIONS

■ 1. The general authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

* * * * *

■ 2. In § 201.3, in table 4 to paragraph (g), add paragraph (g)(3) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Section and the Copyright Claims Board.

* * * * *

(g) * * *

TABLE 4 TO PARAGRAPH (g)

Copyright claims board fees	Fees (\$)
* * * *	*
(3) Filing fee for review of a final CCB determination by the Registrar	300

Subchapter B—Copyright Claims Board and Procedures

■ 3. Revise part 220 to read as follows:

PART 220—

GENERAL PROVISIONS

Sec.

220.1 Definitions.

220.2 Authority and functions.

220.3 Copyright Claims Board Handbook.

220.4 Timing.

220.5 Requests, responses, and written submissions.

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

§ 220.1 Definitions.

For purposes of this subchapter:

(a) *Active proceeding* denotes a claim in which the claimant has filed proof of service and the respondent has not, within the sixty day opt-out period, submitted an opt-out notice to the Copyright Claims Board (Board).

(b) *Authorized representative* means a person, other than legal counsel, who is authorized under this subchapter to represent a party before the Board.

(c) *Bad-faith conduct* occurs when a party pursues a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact. Such conduct includes any actions taken in support of a claim, counterclaim, or defense and may occur at any point during a proceeding before the Board, including before a proceeding becomes an *active proceeding*.

(d) *Default determination* is a *final determination* issued as part of the default procedures set forth in 17 U.S.C. 1506(u) when the respondent does not participate in those procedures.

(e) *Final determination* is a decision that concludes an *active proceeding* before the Board and is binding only on the participating parties. A *final determination* generally assesses the merits of the claims in the proceeding, except when issued to dismiss a claimant’s claims for failure to prosecute.

(f) *Initial notice* means the notice described in 17 U.S.C. 1506(g) that is served on a respondent in a Board proceeding along with the claim.

(g) *Second notice* means the notice of a proceeding sent by the Board as described in 17 U.S.C. 1506(h).

(h) *Standard interrogatories* are written questions provided by the Board that a party in an *active proceeding* must answer as part of discovery.

(i) *Standard requests for the production of documents* are written requests provided by the Board requiring a party to provide documents, other information, or tangible evidence as part of discovery in an *active proceeding*.

§ 220.2 Authority and functions.

The Copyright Claims Board (Board) is an alternative forum to Federal court in which parties may voluntarily seek to resolve certain copyright-related claims regarding any category of copyrighted work, as provided in chapter 15 of title 17 of the United States Code. The Board’s proceedings are governed by title 17 of the United States Code and the regulations in this subchapter.

§ 220.3 Copyright Claims Board Handbook.

The Copyright Claims Board may issue a handbook explaining the Board’s practices and procedures. The handbook may be viewed on, downloaded from, or printed from the Board’s website. The handbook will not override any existing statute or regulation.

§ 220.4 Timing.

When the start or end date for calculating any deadline set forth in this subchapter falls on a weekend or a Federal holiday, the start or end date shall be extended to the next Federal workday. Any document subject to a deadline must be either submitted to the Board’s electronic filing system (eCCB) by 11:59 p.m. Eastern Time on the date of the deadline or dispatched by the date of the deadline.

§ 220.5 Requests, responses, and written submissions.

(a) *Requests and responses submitted through fillable form.* Unless this subchapter provides otherwise or the Board orders otherwise, documents listed under this subsection shall be submitted through a fillable form on eCCB and shall comply with the following requirements:

(1) *Tier one requests and responses.* Requests and responses to requests which are identified under this subsection shall be filed through the fillable form on eCCB and be limited to 4,000 characters. Any party may submit a response to a request identified in this subsection within seven days of the filing of the request. The Board may deny such a request before the time to

²⁵³ 37 CFR 222.3(a)(16), 222.4(a)(16).

submit a response expires, but the Board will not grant a request before the time to submit a response expires, unless the request is consented to by all parties. There shall be no replies from a party that submits a request, absent leave of the Board. Tier one requests and responses shall include:

(i) Requests to amend a scheduling order and responses to such requests under § 222.11(d)(2) of this subchapter;

(ii) Requests for a general conference or discovery conference (those not involving a dispute) and responses to such requests under § 222.11(c), § 225.1(c), or § 226.4(g) of this subchapter;

(iii) Statements as to damages under § 222.15(b)(3) of this subchapter;

(iv) Requests for a hearing under § 222.16(c) of this subchapter;

(v) Requests to withdraw claims or counterclaims under § 222.17 of this subchapter;

(vi) Requests for a settlement conference and responses to such requests under § 222.18(b)(2) of this subchapter;

(vii) Requests to stay proceedings for settlement discussions or requests to extend the stay of proceedings for settlement discussions, and responses to such requests, under § 222.18(f) of this subchapter;

(viii) Joint requests for a dismissal under § 222.18(g) of this subchapter;

(ix) Requests for the standard protective order under § 222.19(a) of this subchapter;

(x) Requests to remove a confidentiality designation and responses to such requests under § 222.19(a)(5) of this subchapter;

(xi) Requests for a custom protective order under § 222.19(b) of this subchapter;

(xii) Requests to use not previously submitted evidence at a hearing and responses to such requests under § 222.20(d) of this subchapter;

(xiii) Requests to modify the discovery schedule and responses to such requests under § 225.1(b) of this subchapter;

(xiv) Requests to withhold additional documents as privileged and responses to such requests under § 225.3(g) of this subchapter;

(xv) Requests to issue a notice regarding a missed deadline or requirement and responses to such requests under § 227.1(a) or § 228.2(a) of this subchapter;

(xvi) Responses to a Board-issued notice regarding a missed deadline in the default context under § 227.1(c) of this subchapter;

(xvii) Responses to a Board-issued notice regarding a missed deadline in

the failure to prosecute context under § 228.2(c)(2) of this subchapter;

(xviii) Requests to designate an official reporter for a hearing and responses to such requests under § 229.1(d) of this subchapter;

(xix) Requests to withdraw representation under § 232.5 of this subchapter; and

(xx) Requests not otherwise covered under § 220.5(d).

(2) *Tier two requests and responses.* Requests and responses to requests which are identified under this subsection shall be filed through the fillable form on eCCB and be limited to 10,000 characters, not including any permitted attachments. Any party may file a response within 14 days of the filing of the request or the order to show cause. The Board may deny a request before the time to submit a response expires, but the Board will not grant a request before the time to submit a response expires, unless the request is consented to by all parties. There shall be no replies from a party that submits a request, absent leave of the Board. Tier two requests and responses shall include:

(i) Requests to amend pleadings and responses to such requests under § 222.12(d)(2) of this subchapter;

(ii) Requests to consolidate and responses to such requests under § 222.13(c) of this subchapter;

(iii) Requests to intervene by a third party and responses to such requests under § 222.14(c) of this subchapter;

(iv) Requests to dismiss for unsuitability and responses to such requests under § 224.2(c) of this subchapter;

(v) Requests for additional discovery under § 225.4(a)(4) of this subchapter. Such requests must enter each specific additional discovery request (e.g., the specific interrogatories, document requests or requests for admission sought) within the fillable form;

(vi) Responses to requests for additional discovery under § 225.4(a)(4) of this subchapter;

(vii) Requests to serve requests for admission and responses to requests to serve requests for admission under § 225.4(c) of this subchapter;

(viii) Requests to be able to present an expert witness and responses to such requests under § 225.4(b)(2) of this subchapter;

(ix) Requests for a conference to resolve a discovery dispute under § 225.5(b) of this subchapter. Such requests must attach any inadequate interrogatory responses or inadequate request for admission responses and may attach communications related to the discovery dispute or documents

specifically discussed in the request related to the inadequacy of the document production;

(x) Responses to requests for a conference to resolve a discovery dispute under § 225.5(b) of this subchapter. Such responses may attach communications related to the discovery dispute or produced documents specifically pertinent to the dispute;

(xi) Requests for sanctions and responses to such requests under § 225.5(e)(1) of this subchapter;

(xii) Requests for a third-party to attend a hearing and responses to such requests under § 229.1(c) of this subchapter;

(xiii) Responses to an order to show cause regarding *bad-faith conduct* under § 232.3(b)(1) of this subchapter;

(xiv) Requests for a conference related to alleged *bad-faith conduct* and responses to such requests under § 232.3(b)(2) of this subchapter;

(xv) Responses to an order to show cause regarding a pattern of *bad-faith conduct* under § 232.4(b)(1) of this subchapter; and

(xvi) Requests for a conference related to a pattern of alleged *bad-faith conduct* and responses to such requests under § 232.4(b)(2) of this subchapter.

(b) *Tier three: Uploaded written submissions.* (1) Unless the Board orders otherwise, written submissions not identified as tier one or tier two requests and responses under this section shall be uploaded to eCCB (with the exception of settlement statements under § 222.18(d) of this subchapter), shall comply with the applicable page limitations and response times set forth in this subchapter for such documents, and shall—

(i) Include a title;

(ii) Include a caption;

(iii) Be typewritten;

(iv) Be double-spaced, except for headings, footnotes, or block quotations, which may be single-spaced;

(v) Be in 12-point type or larger; and

(vi) Include the typed or handwritten signature of the party submitting the document.

(2) Documents considered tier three submissions shall include:

(i) Direct party statements and response party statements under § 222.15(b)(3) of this subchapter;

(ii) Reply party statements under § 222.15(c)(3) of this subchapter;

(iii) Settlement position statements under § 222.18(d) of this subchapter;

(iv) Requests to reconsider determinations to dismiss for unsuitability and responses to such requests under § 224.2(b)(2) of this subchapter;

(v) Smaller claims position statements under § 226.4(d)(2)(ii) of this subchapter;

(vi) Responses to smaller claims Board-proposed findings of fact under § 226.4(e)(1);

(vii) Claimant written direct party statement in support of default under § 227.2(a) of this subchapter;

(viii) Claimant response to Board determination after default that evidence is insufficient to find for claimant under § 227.3(a)(2) of this subchapter;

(ix) Response to notice of proposed *default determination* under § 227.4(a) of this subchapter;

(x) Requests to vacate a *default determination* and responses to such requests under § 227.5(c) of this subchapter;

(xi) Request to vacate a dismissal for failure to prosecute and responses to such requests under § 228.2(e) of this subchapter;

(xii) Requests for reconsideration under § 230.2 of this subchapter;

(xiii) Responses to requests for reconsideration under § 230.3 of this subchapter;

(xiv) Requests for review by the Register of Copyrights under § 231.2 of this subchapter; and

(xv) Responses to requests for review by the Register of Copyrights under § 231.3 of this subchapter.

(c) *Replies*. Other than written testimony submitted pursuant to § 222.15 of this subchapter, replies to any responses to requests or written submissions shall not be permitted, unless otherwise provided for in this subchapter or permitted by the Board.

(d) *Other requests and responses*. Any requests to the Board not specified in this part can be submitted by filing a request not otherwise covered under paragraph (a)(1) of this section. Depending on the nature of the request, the Board shall advise the parties whether the request is permitted and, if so, if and by when the response must be filed.

PART 222—PROCEEDINGS

■ 4. The authority citation for part 222 continues to read as follows:

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

■ 5. Add § 222.1 to read as follows:

§ 222.1 Applicability of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

The rules of procedure and evidence governing proceedings before the Copyright Claims Board (Board) are set forth in this subchapter. The Board is not bound by the Federal Rules of Civil

Procedure or the Federal Rules of Evidence.

■ 6. In § 222.3:

■ a. In paragraph (a)(15), remove “and”;

■ b. Redesignate paragraph (a)(16) as paragraph (a)(17); and

■ c. Add a new paragraph (a)(16).

The addition reads as follows:

§ 222.3 Initial notice.

(a) * * *

(16) In the case of a proceeding in which the claimant has requested under § 222.2(c)(1) that the proceeding be conducted as a smaller claim under 37 CFR part 226, include a statement that the proceeding shall be conducted as a smaller claim and a brief explanation of the differences between smaller claims proceedings and other proceedings before the Board; and

* * * * *

■ 7. Amend § 222.4 as follows:

■ a. In paragraph (a)(15), remove “and”;

■ b. Redesignate paragraph (a)(16) as paragraph (a)(17); and

■ c. Add a new paragraph (a)(16).

The addition reads as follows:

§ 222.4 Second notice.

(a) * * *

(16) In the case of a proceeding in which the claimant has requested under § 222.2(c)(1) that the proceeding be conducted as a smaller claim under 37 CFR part 226, include a statement that the proceeding shall be conducted as a smaller claim and a brief explanation of the differences between smaller claims proceedings and other proceedings before the Board; and

* * * * *

■ 8. Amend § 222.8 by revising paragraph (f) to read as follows:

§ 222.8 Response.

* * * * *

(f) *Failure to file response*. A failure to file a response within the required timeframe may constitute a default 17 U.S.C. 1506(u), and the Board may begin proceedings in accordance with part 227 of this subchapter.

■ 9. Amend § 222.10 by revising paragraph (d) to read as follows:

§ 222.8 Response to counterclaim.

* * * * *

(d) *Failure to file counterclaim response*. A failure to file a counterclaim response within the timeframe required by this section may constitute a default under 17 U.S.C. 1506(u), and the Board may begin default proceedings under part 227 of this subchapter.

■ 10. Add §§ 222.11 through 222.20 to read as follows:

Sec.

* * * * *

222.11 Scheduling order.

222.12 Amending pleadings.

222.13 Consolidation.

222.14 Additional parties.

222.15 Written testimony on the merits.

222.16 Hearings.

222.17 Withdrawal of claims; dismissal.

222.18 Settlement.

222.19 Protective orders; personally identifiable information.

222.20 Evidence.

§ 222.11 Scheduling order.

(a) *Timing*. Upon receipt of the second payment of the filing fee set forth in § 201.3(g) of this subchapter and after completion of the 14-day period specified in the Board's order pursuant to § 222.7, the Board shall issue an initial scheduling order through eCCB, subject to § 222.7(b)(1).

(b) *Content of initial scheduling order*. The scheduling order shall include the dates or deadlines for:

(1) Filing of a response to the claim by the respondent;

(2) A pre-discovery conference with a Copyright Claims Officer (Officer) to discuss case management, including discovery, and the possibility of resolving the claims and any counterclaims through settlement;

(3) Service of responses to *standard interrogatories*;

(4) Service of documents in response to *standard requests for the production of documents*;

(5) Requests for leave to seek additional discovery;

(6) Close of discovery;

(7) A post-discovery conference with an Officer to discuss further case management, including the possibility of resolving the claims and any counterclaims through settlement; and

(8) Filing of each party's written testimony and responses, pursuant to § 222.15.

(c) *Conferences*. In addition to those identified in paragraph (b) of this section, the Board may hold additional conferences, at its own election or at the request of any party. Requests for a conference and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. All conferences shall be held virtually.

(d) *Amended scheduling order*. The Board may amend the initial scheduling order—

(1) Upon the clearance of a counterclaim by a Copyright Claims Attorney pursuant to § 224.1(c)(1) of this subchapter, to add a deadline for the service of a response by a claimant to a counterclaim and to amend other previously scheduled dates in the prior scheduling order;

(2) Upon request of one or more of the parties to an *active proceeding* submitted through eCCB. Requests to amend the scheduling order and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter;

(3) As necessary to adjust the schedule for conferences or hearings or the staying of the proceeding;

(4) As necessary to facilitate settlement pursuant to § 222.18; or

(5) Upon its own initiative in the interests of maintaining orderly administration of the Board's docket.

§ 222.12 Amending pleadings.

(a) *Amendments before service.* A claimant who has been notified pursuant to § 224.1(c)(2) of this subchapter that a claim does not comply with the applicable statutory and regulatory requirements may freely amend any part of the claim as part of an amended claim filed under 17 U.S.C. 1506(f)(1)(B). A claimant who has been notified pursuant to § 224.1(c)(1) of this subchapter that a claim has been found to comply with the applicable statutory and regulatory requirements may freely amend the claim once as a matter of course prior to service. Any claim that is amended shall be submitted for compliance review under § 224.1(a) of this subchapter.

(b) *Amendments during the opt-out period.* A claimant may not amend a claim during the opt-out period for any respondent.

(c) *Amendment of counterclaim before response.* A counterclaimant may freely amend its counterclaim once as a matter of course prior to filing of the response to the counterclaim. The filing of any amended counterclaim shall suspend the time for responding to the counterclaim and the counterclaim shall be submitted for compliance review under § 224.1(a) of this subchapter. A counterclaimant who has been notified pursuant to § 224.1(c)(2) of this subchapter that a counterclaim does not comply with the applicable statutory and regulatory requirements may amend any part of the counterclaim as part of an amended counterclaim filed under 17 U.S.C. 1506(f)(2). The counterclaim respondent shall file a response to the amended counterclaim within 30 days following compliance review approval of the amended counterclaim.

(d) *All other amendments.* In all other cases, a party may amend its pleading only with the Board's leave. If the Board grants leave, any amendment shall be submitted for a compliance review under § 224.1(a) of this subchapter.

(1) *Time to respond.* Unless the Board orders otherwise or as otherwise

covered by this subchapter, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 30 days after the Board's notification that the amended pleading is compliant, whichever is later.

(2) *Procedure for request for leave to amend.* The party seeking leave to amend must submit a request to the Board setting forth the reasons why an amended pleading is appropriate. Requests for leave to amend and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(3) *Standard for granting leave to amend.* In determining whether to grant leave to amend a pleading, the Board shall grant leave if justice so requires after considering whether any other party will be prejudiced if the amendment is permitted (including the impact the amendment might have on a respondent's right to opt out of the proceeding), whether the proceedings will be unduly delayed if the amendment is permitted, and whether the basis for the amendment reasonably should have been known to the amending party before the pleading was served or during the time period specified in paragraph (a) of this section, along with any other relevant considerations. If leave is granted, it shall only be granted regarding the specific amendments described in the request.

§ 222.13 Consolidation.

(a) *Consolidation.* If a claimant has multiple *active proceedings* against the same respondent or that arise out of the same facts and circumstances, the Board may consolidate the proceedings for purposes of conducting discovery, submitting evidence to the Board, or holding hearings. Consolidated proceedings shall remain separate for purposes of Board determinations and any damages awards.

(b) *Timing.* The Board may consolidate proceedings at any time upon its own authority or following consideration of a request by any party, with reasonable notice and opportunity to be heard provided to all affected parties.

(c) *Procedure.* The party seeking consolidation must submit a request to the Board setting forth the reasons for the request, requesting a conference with the Board and the parties from each affected case, and providing the Board with the docket numbers for each affected proceeding. Requests for consolidation and any responses thereto

shall follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(d) *Standard for granting request.* In determining whether to grant a request to consolidate, the Board shall balance the need for and benefits of consolidation with the timeliness of the request and whether any undue prejudice has resulted from the delay in making the request.

§ 222.14 Additional parties.

(a) *When applicable.* A necessary party is a person or entity whose absence would prevent the Board from according complete relief among existing parties, or who claims an interest related to the subject of the proceeding such that reaching a determination in the proceeding may impair or impede that person's or entity's ability to protect that interest as a practical matter, or in whose absence an existing party would be subject to a substantial risk of incurring double, multiple, or inconsistent obligations because of that interest.

(b) *Failure to join a necessary party.* At any time, any party who believes in good faith that a necessary party has not been joined, and therefore the case is unsuitable for Board proceedings, may file a request according to the procedures set forth in §§ 220.5(a)(2) and 224.2(c) of this subchapter. Any party opposing the request may file a response according to the procedures set forth in §§ 220.5(a)(2) and 224.2(c). If the Board determines that a necessary party has not been joined, it shall dismiss the proceeding without prejudice as unsuitable for CCB proceedings pursuant to § 224.2.

(c) *Intervention of a necessary party.* At any time, a third party seeking to intervene on the ground(s) that it is a necessary party may file a request setting forth the reasons for the request and requesting a conference with the Board. Requests to intervene and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter. After evaluating the parties' submissions, the Board may hold a conference between the parties to the proceeding and the intervening party to address the request.

(d) *Board determination.* (1) If the Board determines that the intervening party is not a necessary party, it shall deny the request and resume the proceeding, unless all parties agree that the party should be joined.

(2) If the Board determines that the intervening party is a necessary party, it shall—

(i) Permit the intervening party to join the proceeding, if no party indicated

that it opposed the request to intervene; or

(ii) Dismiss the proceeding without prejudice, if any party indicated that it opposed the request to intervene.

§ 222.15 Written testimony on the merits.

(a) *Timing.* After the close of discovery and by the times specified within the scheduling order, any party asserting a claim or counterclaim shall file written direct testimony in support of that claim or counterclaim. Any party responding to a claim or counterclaim shall file written response testimony within 45 days following the date of service of written direct testimony. Any party who asserted a claim or counterclaim may file written reply testimony within 21 days following the date of service of written response testimony. All written testimony shall be uploaded to eCCB.

(b) *Direct and response testimony.* Written direct and response testimony shall consist of documentary evidence and a party statement, and may include witness statements.

(1) *Documentary evidence.* (i) Documentary evidence must be accompanied by a statement that lists each submitted document and provides a brief description of each document and how it bears on a claim or counterclaim; and

(ii) Direct or response documentary evidence shall only include documents that were served on opposing parties pursuant to the scheduling order, absent leave from the Board, which shall be granted only for good cause.

(2) *Witness statements.* A witness statement must—

(i) Be sworn under penalty of perjury by the witness;

(ii) Be detailed as to the substance of the witness's knowledge and must be organized into numbered paragraphs; and

(iii) Contain only factual information based on the witness's personal knowledge and may not contain legal argument.

(3) *Party statement.* A party statement—

(i) Shall set forth the party's position as to the key facts and damages, as well as any position as to the law;

(ii) Need not have a table of contents or authorities;

(iii) Shall be limited to 12 pages, other than any optional table of contents or authorities, and shall meet the requirements set forth in § 220.5(b) of this subchapter;

(iv) For a claimant or counterclaimant seeking damages for copyright infringement, shall include a statement as to whether the party is electing to

seek statutory damages or actual damages and any profits. Alternatively, at any stage of the proceedings, either before or after the submission of written testimony, a claimant or counterclaimant may submit a statement following the procedures set forth in § 220.5(a)(1) of this subchapter indicating the election of the form of damages. This election may be changed at any time up until *final determination* by the Board; and

(v) For a respondent or counterclaim respondent, may include a statement as to whether, if found liable on a claim or counterclaim, the party would voluntarily agree to an order to cease or mitigate any unlawful activity. Such an election must be made, or changed if made earlier, no later than the filing of the respondent's or counterclaim respondent's party statement, or at a hearing if one is ordered by the Board. Such an election may be considered in appropriate cases by the Board in determining an amount of damages, if any, pursuant to 17 U.S.C. 1504. Such a statement will not be considered by the Board in any way in making its determination as to liability, and shall be considered only as to damages.

(c) *Reply testimony.* Written reply testimony must be limited to addressing or rebutting specific evidence set forth in written response testimony. Written reply testimony may consist of documentary evidence, witness statements, and a party statement as set forth in this paragraph (c).

(1) *Documentary evidence.* In addition to the requirements of paragraph (b)(1) of this section, documentary evidence presented by a party as part of written reply testimony must be limited to documentary evidence required to contradict or rebut specific evidence that was presented in an opposing party's written response testimony and shall not include any documentary evidence previously presented as part of the submitting party's direct testimony.

(2) *Witness statements.* In addition to the requirements of paragraph (b)(2) of this section, a reply witness statement must be limited to facts not previously included in that witness's prior statement, and must be limited to facts that contradict or rebut specific evidence that was presented in an opposing party's written response testimony.

(3) *Party statement.* A party statement in reply must be limited to rebutting or addressing an opposing party's written response testimony and may not include any discussion of the facts, the law, or damages that was included in that party's direct party statement. A reply party statement shall meet the

requirements set forth in § 220.5(b) of this subchapter and must be limited to seven pages.

(d) *Certification.* All written testimony submitted to the Board must include a certification by the party submitting such testimony that it is accurate and truthful.

(e) *Request for hearing.* Any party may include in a party statement a request for a hearing on the merits before the Board, consistent with § 222.16.

(f) *No additional filing.* Following filing of any written reply testimony, no further written testimony or evidence may be submitted to the Board, unless at the specific request of the Board or with the Board's leave, or as appropriate at a hearing on the merits ordered by the Board.

§ 222.16 Hearings.

(a) *Timing.* In any action, the Board may hold a hearing following submission of each party's written direct, response, and reply testimony if it determines that such a hearing is appropriate or advisable. The Board may decide to hold a hearing on its own initiative or after consideration of a request for a hearing from any party.

(b) *Virtual hearings.* All hearings shall be held virtually and may be recorded as deemed necessary by the Board.

(c) *Requesting a hearing.* A request for a hearing on the merits of a case may be included in a party statement, pursuant to § 222.15(e), but may also be submitted following the procedures set forth in § 220.5(a)(1) of this subchapter no later than 7 days after the date by which reply testimony may be submitted under § 222.15(a). The Board, in its sole discretion, shall choose whether to hold a hearing, and may elect to hold a hearing absent a request from a party.

(d) *Content of request.* Any request in a party statement for a hearing on the merits of a case shall consist of a short statement providing the reasons why the party believes the request should be granted.

(e) *Scheduling order.* When the Board determines that a hearing on the merits of a case is appropriate, it will issue an amended scheduling order setting forth the date of the hearing and deadlines for any additional evidence requested by the Board or for a pre-hearing conference, if applicable.

(f) *Close of evidence.* Following a hearing on the merits of a case, no additional written testimony or evidence may be submitted to the Board unless at the Board's specific request or with leave of the Board for good cause shown.

§ 222.17 Withdrawal of claims; dismissal.

(a) *General.* A party may request to withdraw its own claim or counterclaim by filing a written request with the Board seeking withdrawal, and therefore dismissal. Such written request shall consist of a brief statement seeking dismissal and shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(b) *Withdrawal before a response.* If the written request is received before a response to the claim or counterclaim is filed with the Board, the Board shall dismiss the claim or counterclaim without prejudice, unless all parties agree in a written stipulation filed with the Board that the claim or counterclaim shall be dismissed with prejudice.

(c) *Withdrawal after a response.* If the written request is received after a response to the claim or counterclaim is filed with the Board, the Board shall issue a *final determination* dismissing the claim or counterclaim with prejudice, unless the Board determines in the interests of justice that such dismissal shall be without prejudice or all parties agree in a written stipulation filed with the Board that the claim or counterclaim shall be dismissed without prejudice.

(d) *Effect of dismissal.* Dismissal of a claim or counterclaim under this section will not affect remaining claims or counterclaims in the proceeding.

§ 222.18 Settlement.

(a) *General.* The Board shall facilitate voluntary settlement between the parties of any claims or counterclaims. The appropriateness of a settlement conference, at a minimum, shall be raised by the Board at the pre-discovery and post-discovery conferences set forth in § 222.11(b).

(b) *Requesting a settlement conference—(1) Timing.* At any point in an *active proceeding*, some or all of the parties may jointly request a conference with an Officer to facilitate settlement discussions.

(2) *Form and content of request.* The request can be made orally at any Board conference or it can be made in writing. If made in writing, the request shall consist of a brief statement requesting a settlement conference and indicating which parties join in the request. Parties may also include a request to stay the proceedings while settlement discussions are ongoing. Granting a request for a stay shall be at the Board's discretion. Requests for a settlement conference and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(c) *Scheduling settlement conference.* If the request for a settlement

conference, and any request for a stay, is jointly made among the parties, or if no party files a response within seven days of the date of service of the request, the Board shall schedule a settlement conference with all parties subject to the request. If one or more parties files a response, upon consideration of the objections and whether any claims or counterclaims may be resolved with only the consenting parties in attendance, the Board may schedule a conference with some or all parties.

(d) *Settlement proceedings.* Three days prior to a settlement conference, each party participating in the conference shall submit a position statement to the presiding Officer by email and, when there is agreement among the parties, send such statement to the other participating parties outside of eCCB. The position statement shall not exceed five pages, and shall attach no more than 20 pages of exhibits, absent leave of the presiding Officer, although leave shall not be necessary should the page limit be exceeded due to an exhibit being a necessary agreement or contract. Settlement statements shall meet the requirements set forth in § 220.5(b) of this subchapter, but shall not be filed on eCCB. The statement must set forth:

(1) A brief overview of the facts and contentions;

(2) The relief sought, including the amount of damages, if any;

(3) Whether or to what extent the alleged wrongful conduct is currently taking place; and

(4) Any prior attempts at resolution, including any offers or counteroffers made to the other party.

(e) *Recusal of presiding Officer.* The Officer presiding over the settlement conference shall not participate in rendering a determination in the proceeding, unless the other Officers cannot reach a consensus as to the determination. The presiding Officer may review the record and attend any hearing that is held but shall not actively participate in the hearing or any substantive discussion among the Officers concerning the proceeding or the determination, except that such discussions may be allowed once it is known that the other Officers cannot reach a consensus as to the determination.

(f) *Stay of proceeding.* To provide the parties with an opportunity to pursue settlement and negotiate any resulting settlement agreement, the Board in its discretion may stay the proceeding for a period of 30 days concurrently with an order scheduling a settlement conference, at the time of or following the settlement conference, or at the

request of the parties. The parties may request an extension of the stay in good faith to facilitate ongoing settlement discussions. Requests to stay or extend a stay of the proceeding and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. If a settlement has not been reached at the time the stay, or any extension thereof, has expired, the Board shall issue an amended scheduling order to govern the remainder of the proceeding.

(g) *Settlement agreement.* If some or all parties reach a settlement, such parties may submit to the Board a joint request to dismiss some or all of the claims and counterclaims. The parties may include a request that the Board adopt some or all of the terms of the settlement in its *final determination*. Joint requests for dismissal shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(h) *Effect of settlement agreement.* Upon receipt of a joint request to dismiss claims due to settlement, the Board shall dismiss the claims or counterclaims contemplated by the agreement with prejudice, unless the parties have included in their request that the claims or counterclaims shall be dismissed without prejudice. If the parties have requested that the Board adopt some or all of the terms of the settlement in its *final determination*, the Board may issue a *final determination* incorporating such terms unless the Board finds them clearly unconscionable.

§ 222.19 Protective orders; personally identifiable information.

(a) *Standard protective order.* At the request of any party, the Board's standard protective order, as described in this section, shall govern all discovery material exchanged during the proceeding to protect against improper use or disclosure. Requests for a standard protective order shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(1) *Standard of use.* Discovery material received from another party may be used only in connection with the proceeding, and all copies must be returned or disposed of within 30 days of a determination or dismissal, or within 30 days of the exhaustion of the time for any review or appeal of the Board's *final determination*, whichever is later.

(2) *Confidentiality.* Discovery material may be designated as "confidential" only if the party reasonably and in good faith believes that it consists of:

(i) Bona fide confidential financial information previously not disclosed to the public;

(ii) Bona fide confidential and non-obvious business plans, product development information, or advertising or marketing plans previously not disclosed to the public;

(iii) Any information of a truly personal or intimate nature regarding any individual not known by the public; or

(iv) Any other category of information that the Board grants leave to designate as “confidential.”

(3) *Case-by-case basis.* Parties must make confidentiality determinations on a document-by-document basis and shall not designate as “confidential” all discovery material produced in bulk.

(4) *Submitting confidential information.* Confidential discovery materials, or references to or discussions of confidential discovery materials in other documents, may be submitted to the Board by either filing them under seal or redacting the confidential document. If filed under seal, the confidential document must be accompanied by a redacted copy that may be included in the public record.

(5) *Determination of confidentiality by the Board.* After notice and an opportunity for the designating party to respond, the Board in its discretion may remove a confidentiality designation from any material on its own initiative or upon consideration of a request from a party. Parties must attempt to resolve disputes over confidentiality designations before bringing such disputes to the Board. Requests to remove a confidentiality designation and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(b) *Custom protective orders.* Custom protective orders negotiated by the parties are disfavored. The parties may request that the Board enter a custom protective order that has been negotiated by the parties and that may provide for additional protections for highly sensitive materials. Such a request must be accompanied by a stipulation between the parties that explains the need for such a custom protective order and shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. The custom protective order must be attached as an exhibit to the request. The Board may in its discretion decide whether to grant the parties’ request for a custom protective order.

(c) *Personally identifiable information.* Regardless of whether discovery material has been designated as “confidential,” parties must redact

social security numbers, taxpayer identification numbers, birth dates, health information protected by law, the names of any individuals known to be minors, and financial account numbers from any public filings.

(d) *Violations of protective order.* Violations of a protective order may constitute *bad-faith conduct* pursuant to § 232.3 of this subchapter.

§ 222.20 Evidence.

(a) *Admissibility.* All evidence that is relevant and not unduly repetitious or privileged shall be admissible. Evidence which has authentication or credibility issues will have its weight discounted accordingly. The Board reserves the right to discount evidence or not admit evidence with serious credibility issues entirely, or to request clarification from a party.

(b) *Examination of witnesses.* All witnesses testifying at a hearing before the Board shall be required to take an oath or affirmation before testifying. At a hearing, any member of the Board may administer oaths and affirmations, ask questions of any witness, and each party shall have the opportunity to ask questions of each witness and the other parties. The Board shall manage the conduct of the hearing and may limit the number of witnesses or scope of questioning.

(c) *Exhibits in hearing—(1) Submission.* Unless they are specifically excluded by the Board’s own initiative or due to the Board’s ruling on an objection raised by a party, all documents submitted by the parties through their statements submitted under § 222.15 shall be deemed admitted and marked as exhibits in the same order as presented through the documentary evidence a party submitted with the party statement. To the extent additional documents are allowed by the Board at a hearing on the merits, such evidence may also be presented as exhibits to all parties and marked by the presenting party starting with the next number after the exhibits attached to the party’s document statement.

(2) *Summary exhibits.* The contents of voluminous documentary evidence which cannot be conveniently examined at the hearing may be presented in the form of a chart, summary, or calculation. Absent leave of the Board, evidence supporting the summary exhibit must have been produced to the other parties in discovery and admitted as exhibits, and the summary exhibit must be disclosed to the other parties in the proceeding at least seven days before the hearing.

(d) *New exhibits for use in cross-examination or redirect examination.* Exhibits not submitted as part of written testimony may not be used at a hearing without leave of the Board. Leave to use such exhibits may be requested before or during the hearing. Requests to use an exhibit not submitted as part of written testimony and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

PART 224—REVIEW OF CLAIMS BY OFFICERS AND ATTORNEYS

■ 11. The authority citation for part 224 continues to read as follows:

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

■ 12. Amend § 224.2 by revising paragraphs (b) and (c) to read as follows:

§ 224.2 Dismissal for unsuitability.

* * * * *

(b) *Dismissal by the Board for unsuitability.* (1) If, upon recommendation by a Copyright Claims Attorney as set forth in paragraph (a) of this section or at any other time in the proceeding upon the request of a party or on its own initiative, the Board determines that a claim or counterclaim should be dismissed for unsuitability under 17 U.S.C. 1506(f)(3), the Board shall issue an order stating its intention to dismiss the claim without prejudice.

(2) Within 30 days following issuance of an order under paragraph (b) of this section, the claimant or counterclaimant may request that the Board reconsider its determination of unsuitability. If the proceeding is active, the respondent or counterclaim respondent may file a response within 30 days following filing of the claimant’s request. A request or response made under this paragraph shall not exceed 7 pages and shall meet the requirements set forth in § 220.5(b) of this subchapter.

(3) Following the expiration of the time for the respondent or counterclaim respondent to submit a response, the Board shall render its final decision whether to dismiss the claim for unsuitability.

(c) *Request by a party to dismiss a claim or counterclaim for unsuitability.* At any time, any party who believes that a claim or counterclaim is unsuitable for determination by the Board may file a request that shall not exceed five pages providing the basis for such belief. An opposing party may file a response within 14 days setting forth the basis for such opposition to the request. A request or response made under this paragraph shall meet the requirements set forth in § 220.5(a)(2) of this subchapter.

■ 13. Part 225 is added to read as follows:

PART 225—DISCOVERY

Sec.

- 225.1 General practices.
- 225.2 Standard interrogatories.
- 225.3 Standard requests for the production of documents.
- 225.4 Additional discovery.
- 225.5 Disputes and sanctions.

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

§ 225.1 General practices.

(a) *Standard discovery practice.* Except as otherwise provided in this section, discovery in proceedings before the Copyright Claims Board (Board) shall be limited to the methods set forth in this part and shall use the standard forms provided on the Board's website. Discovery responses and documents shall be served on the other parties in accordance with § 222.5(e) of this subchapter and shall not be filed with the Board unless as part of written testimony or as needed in support of other filings.

(1) *Certifications.* All discovery material exchanged among the parties must include a certification by the party submitting such material.

(i) For responses to interrogatories or any requests for admission permitted by the Board, the certification shall affirm that the responses are accurate and truthful to the best of the submitting party's knowledge.

(ii) For the production of documents, the certification shall affirm that the produced documents are genuine and unaltered to the best of the producing party's knowledge.

(2) *Form of requests to Board.*

Requests to the Board related to discovery may be raised to the Board during a conference or by written request, as set forth in this section.

(3) *Reasonable investigation.* Parties shall make a reasonable investigation under the circumstances to adequately respond to discovery requests.

(b) *Timing of discovery.* The exchange of discovery material shall take place at the times and within the deadlines specified by the scheduling order. The Board may modify the discovery deadlines set forth in the scheduling order at the request of any party upon a showing of good cause or on its own initiative. Such requests may be made orally during a conference with the Board or by written request. Written requests for modification of a discovery deadline and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(c) *Conferences.* The Board shall hold a pre-discovery conference and a post-

discovery conference, as set forth in § 222.11(b) of this subchapter. The Board may hold additional conferences to manage discovery and resolve any disputes, at its own election or at the request of any party. Requests for a discovery conference not involving a dispute and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. Requests for a discovery conference involving a dispute and any responses thereto shall follow the procedures set forth in § 220.5(a)(2). Such conferences may be held by one or more Copyright Claims Officers. Conferences shall be held virtually.

(d) *Documents.* As used in this part, the term "document" shall refer to any tangible piece of information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form, whether in written or electronic form, an object, or otherwise. The Board shall read this definition broadly so that there is a comprehensive production of materials by each side needed to fairly decide matters before the Board, so long as that production can be easily accomplished by a layperson.

§ 225.2 Standard interrogatories.

(a) *General.* Parties in an *active proceeding* shall use the set of *standard interrogatories* provided on the Board's website. *Standard interrogatories* shall consist of information pertaining to:

(1) The identity of witnesses whom the parties plan to use in the proceeding, including contact information for the witnesses, if known, and a brief description of the subject matter on which they may testify;

(2) The identity of any other individuals who may have material information related to the claims or defenses, including contact information for the individuals, if known;

(3) Any agreement or other relationship between the parties relevant to the claim;

(4) Any harm suffered or damages sought; and

(5) Any materially responsive documents that the party is aware exist or once existed, but are not in the possession of that party.

(b) *For a party asserting infringement.* In addition to paragraph (a) of this section, the *standard interrogatories* for a party asserting an infringement claim or responding to a claim for non-

infringement shall consist of information pertaining to:

(1) The allegedly infringed work's copyright registration, to the extent such information differs from or adds to information provided in the claim;

(2) For works requiring copyright formalities, the extent the allegedly infringed work complied with such copyright formalities;

(3) The party's ownership of the copyright in the allegedly infringed work;

(4) Publication of the allegedly infringed work;

(5) The creation date and creation process for the allegedly infringed work, including whether the work is a joint or derivative work or was created through employment or subject to an agreement;

(6) Where the allegedly infringed work is a derivative work, the preexisting elements in the work, including ownership of those preexisting elements, and rights to use those preexisting elements;

(7) A description of how the party believes the alleged infringer gained access to the allegedly infringed work;

(8) The basis for the party's belief that the opposing party's activities constitute infringement of the allegedly infringed work;

(9) The discovery of the opposing party's alleged infringement by the party;

(10) A description of any harm suffered and, to the extent known, a calculation of the damages requested by the party as a result of the alleged infringement; and

(11) Any attempts by the party to cause the infringement to be ceased or mitigated prior to bringing the claim.

(c) *For a party asserting non-infringement.* In addition to the information in paragraph (a) of this section, the *standard interrogatories* for a party responding to an infringement claim or asserting a claim for non-infringement shall consist of information pertaining to:

(1) The party's ownership of the copyright in the allegedly infringing material;

(2) The dissemination history of the allegedly infringing material;

(3) The creation date and creation process for the allegedly infringing material, including whether any allegedly infringing work is a joint or derivative work or was created through employment or subject to an agreement;

(4) Where the allegedly infringing material is a derivative work, the preexisting elements in the work, including ownership of those preexisting elements, and rights to use those preexisting elements;

(5) Any information indicating that the party alleging infringement does not own a copyright in the allegedly infringed work;

(6) All defenses to infringement asserted by the party and a detailed basis for those defenses. Defenses listed in timely answers and timely updated answers to the *standard interrogatories* shall be considered by the Board and will not require an amendment of the response to an infringement claim or an amendment of a claim for non-infringement;

(7) The basis for any other reasons the party believes that its actions do not constitute infringement;

(8) Any continued use or dissemination of the allegedly infringing material; and

(9) For a party responding to infringement claims or counterclaims, the revenues and profits the party has received that are directly related to the sale or use of the allegedly infringing material, as well as the deductible expenses directly related to that sale or use, and any elements of profit for that sale or use that the party believes are attributable to factors other than the copyrighted work.

(d) *For a party asserting misrepresentation.* In addition to the information in paragraph (a) of this section, the *standard interrogatories* for a party asserting a claim of misrepresentation under 17 U.S.C. 512(f) shall consist of information pertaining to:

(1) The notification or counter notification that allegedly contained a misrepresentation;

(2) The identity of the internet service provider to which the notification or counter notification was sent;

(3) Identification and a description of any communications with the internet service provider, the parties, or others related to the notification or counter notification at issue;

(4) The basis for the party's belief that the notification or counter notification included a misrepresentation; and

(5) The harm, including a description and calculation of damages, caused by the alleged misrepresentation.

(e) *For a party responding to misrepresentation claims.* In addition to the information in paragraph (a) of this section, the *standard interrogatories* for a party responding to a claim of misrepresentation under 17 U.S.C. 512(f) shall consist of information pertaining to:

(1) All defenses asserted to the misrepresentation claim and the basis for those assertions. Defenses listed in timely answers and timely updated answers to the *standard interrogatories*

shall be considered by the Board and will not require an amendment of the response;

(2) The basis for any other reasons the party believes that its statement did not constitute a misrepresentation; and

(3) Identification and a description of any communications with the internet service provider, the parties, or others related to the notification or counter notification at issue.

(f) *Duty to update.* A party has an obligation to update its interrogatory responses and serve updated responses on the other parties as soon as practicable after the discovery of new or updated information.

§ 225.3 Standard requests for the production of documents.

(a) *General.* Parties in an *active proceeding* shall use the relevant set of *standard requests for the production of documents* provided on the Board's website. *Standard requests for the production of documents* shall include copies of:

(1) All documents the party is likely to use in support of its claims or defenses;

(2) All other documents of which the party is reasonably aware that conflict with the party's claims or defenses in the proceeding;

(3) All documents referred to in, or that were used in preparing, any of the party's responses to *standard interrogatories*; and

(b) *For a party asserting infringement.* In addition to the information in paragraph (a) of this section, the *standard requests for the production of documents* for a party asserting an infringement claim or responding to a claim for non-infringement shall include copies of:

(1) The work claimed to be infringed, its copyright registration, and all correspondence with the Copyright Office regarding that registration;

(2) The allegedly infringing material, if reasonably available;

(3) Where the allegedly infringed work is a derivative work, documents showing the preexisting works used and related to ownership of and rights to use those preexisting elements;

(4) Documents related to the allegedly infringing material, including communications about the allegedly infringing material;

(5) Documents showing or negating the ownership or rights of the party claiming infringement in the works at issue, including agreements showing the ownership or transfer or rights in the works;

(6) Documents sufficient to show the damages suffered by the party as a result of the alleged infringement; and

(7) Documents showing attempts by the party to cause the cessation or mitigation of infringement prior to bringing the claim.

(c) *For a party asserting non-infringement.* In addition to the information in paragraph (a) of this section, the *standard requests for the production of documents* for a party responding to an infringement claim or asserting a claim for non-infringement shall include copies of:

(1) The allegedly infringing material;

(2) Documents related to the allegedly infringed work, including communications regarding the allegedly infringed work;

(3) Documents related to the creation of the allegedly infringing material, including documents showing or negating rights to use the allegedly infringing material; and

(4) For a party responding to infringement claims or counterclaims, documents sufficient to show the revenues and profits the party has received directly related to the sale or use of the allegedly infringing material, as well as the deductible expenses directly related to that sale or use, and the elements of profit for that sale or use that the party believes are attributable to factors other than the copyrighted work.

(d) *For a party asserting misrepresentation.* In addition to the information in paragraph (a) of this section, the *standard requests for the production of documents* for a party asserting a claim of misrepresentation under 17 U.S.C. 512(f) shall include copies of:

(1) The notification or counter notification at issue;

(2) Communications with the internet service provider concerning the notification or counter notification at issue;

(3) Documents directly pertaining to the truth or falsity of any representations made in the notification or counter notification; and

(4) Documents sufficient to show the damages suffered by the party as a result of the alleged misrepresentation.

(e) *For party responding to misrepresentation claims.* In addition to the information in paragraph (a) of this section, the *standard requests for the production of documents* for a party responding to a claim of misrepresentation under 17 U.S.C. 512(f) shall include copies of:

(1) Communications with the internet service provider concerning the notification or counter notification at issue; and

(2) Documents directly pertaining to the truth or falsity of any

representations made in the notification or counter notification.

(f) *Document searches and productions*—(1) *General*. Each party shall have an obligation to conduct a reasonable search for any responsive documents of any files in its possession or under its control, including the files of any of the party's agents, employees, representatives, or others acting on the party's behalf who the party reasonably believes may have responsive documents.

(2) *Electronically stored information*. Documents responsive to the *standard requests for the production of documents*, or any additional requests permitted by the Board, including electronically stored information (ESI), including emails and computer files. A reasonable search under the circumstances shall include the ESI of the party and the party's agents, employees, representatives, or others acting on the party's behalf who the party reasonably believes may have responsive documents, except that—

(i) ESI searches need not exceed manual searches that are easily accomplished by a layperson; and

(ii) Parties need not conduct searches that would reasonably require the assistance of third parties, such as a document vendor that the party would have to hire to assist with or accomplish document collection or storage.

(3) *Voluminous productions*. Responses to document requests that include large amounts of irrelevant or duplicative material are prohibited and may constitute *bad-faith conduct*.

(4) *Duty to update*. A party has an obligation to preserve all material documents and to update its production of documents by providing to the other parties any documents it later finds responsive to the Board's *standard requests for the production of documents* or any other document requests allowed by the Board as soon as practicable after the discovery of such documents.

(g) *Privileged documents*. Confidential communications with external counsel or in-house counsel reflecting or seeking legal advice related to the merits of the proceeding shall be considered privileged and need not be produced or logged. Parties must seek leave of the Board to withhold additional documents as privileged by filing a request with the Board. Requests to withhold additional documents as privileged and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

§ 225.4 Additional discovery.

(a) *Requests for additional discovery*. Any party may request additional discovery within the deadlines set forth in the scheduling order.

(1) *Allowable discovery*. Except for the standard discovery provided in this part, any additional discovery requested must be narrowly tailored to the issues at hand, not covered by the standard discovery set forth in this part, highly likely to lead to the production of information relevant to the core issues of the matter, and not result in an undue burden on the party responding to the request.

(2) *Standard for additional discovery*. The Board will grant a request for additional discovery upon a showing of good cause. In considering a request for additional discovery, the Board shall balance the needs and circumstances of the case against the burden of additional discovery on any party, along with the amount in dispute and the overall goal of efficient resolution of the proceeding.

(3) *Consent from parties*. Prior to filing a request for additional discovery, the requesting party should make reasonable efforts to secure the consent of, or a compromise with, the other party regarding the proposed additional discovery request.

(4) *Form of request*. Requests for additional discovery and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter. Unless otherwise specified in this section, a request for additional discovery must—

(i) Specifically indicate the type of additional discovery requested and the information sought, including the specific requests themselves;

(ii) Set forth in detail the need for the request; and

(iii) Indicate whether the other parties consent or object to the request.

(b) *Requests for expert witnesses*. An expert witness may be used in a proceeding only with leave of the Board. The use of expert witnesses in proceedings before the Board is highly disfavored and requests shall be rarely granted.

(1) *Standard for permitting expert witnesses*. The Board shall grant a request by a party to introduce an expert witness only in exceptional circumstances and upon a showing that the case cannot fairly proceed without the use of the expert. In considering a request for an expert witness, the Board shall balance the needs and circumstances of the case, and whether the request is made by one party or jointly among the parties, against the burden that permitting the expert testimony would impose on any other

party, the costs to the opposing party of retaining a rebuttal witness, the amount in dispute, and the overall goal of efficient resolution of the proceeding. If the Board grants a request by a party to introduce an expert witness, an opposing party shall have the opportunity to introduce a rebuttal expert witness as a matter of course within an appropriate amount of time set by the Board. The Board will set a schedule for the service of the expert report and any rebuttal report and will adjust the dates in the existing scheduling order as needed.

(2) *Form of request*. Requests for an expert witness and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter. The request must specifically indicate the topics of the expert's proposed testimony, the name of the proposed expert, and the anticipated cost of retaining the expert, and must set forth the basis and justifications for the request, and indicate whether the other parties consent or object to the request.

(3) *Form of expert testimony*. Any expert testimony permitted by the Board shall be submitted along with the offering party's written direct or response testimony in the form of an expert statement. An expert statement must—

(i) Be sworn under penalty of perjury by the expert witness;

(ii) Be organized into numbered paragraphs;

(iii) Be detailed as to the substance of the expert's opinion and the basis and reasons therefor;

(iv) Disclose the facts or data considered by the expert witness in forming the expert witness's opinions;

(v) Describe the expert witness's qualifications, including a list of all publications authored and speaking engagements in the previous 10 years;

(vi) Include a list of all other cases in which the expert witness testified as an expert at trial or by deposition during the previous four years; and

(vii) Include a statement of the compensation to be paid for the study and testimony in the case.

(4) *Unauthorized expert testimony*. Any expert testimony that is introduced in any way without the Board's express permission shall be stricken by the Board and shall not be considered in the Board's determination.

(c) *Requests for admission*. Requests for admission may be served in a proceeding only with leave of the Board. Requests for admission are disfavored and requests to serve requests for admission may only be granted at the Board's discretion upon a showing of good cause. A request to serve requests

for admission, and any responses, shall follow the procedures set forth in paragraph (a) of this section.

(1) *Subject matter.* Requests for admission may pertain to:

(i) Facts, the application of law to fact, or opinions about either; and

(ii) The genuineness of any described documents, a copy of which must be attached to the request for admission.

(2) *Form of requests for admission.* Each matter must be separately stated in a request for admission in a numbered paragraph. Compound requests for admission shall not be permitted.

(3) *Responses to requests for admission.* A response to a request for admission must be served by the time specified by the Board. A matter admitted is conclusively established unless the Board, on request and for good cause shown, permits the admission to be withdrawn or amended. If a matter is not admitted, the answer must specifically deny it or state in detail why the responding party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter, and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. The responding party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable investigation and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(4) *Failure to respond.* A matter is not automatically admitted if a party fails to respond to a request for admission within the required timeframe. However, the Board may deem it admitted in the Board's discretion subject to the Board's power to apply adverse inferences to discovery violations under 17 U.S.C. 1506(n)(3) according to the procedures set forth in § 225.5.

(d) *Depositions.* Depositions shall not be permitted in proceedings before the Board.

§ 225.5 Disputes and sanctions.

(a) *Obligation to attempt resolution.* Parties shall attempt in good faith to resolve any discovery disputes without the involvement of the Board. A party must confer with an opposing party in an attempt to reach a resolution prior to raising any discovery dispute with the Board.

(b) *Request for conference to resolve dispute.* If an attempt to resolve a discovery dispute fails, the party seeking discovery may file a request for a conference with the Board. Requests

for conference to resolve a discovery dispute and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter. The request may attach communications related to the discovery dispute or documents specifically discussed in the request related to the inadequacy of the document production and shall:

(1) Describe the dispute;

(2) State that party's position with respect to the dispute;

(3) Explain the attempts made to resolve the dispute without the involvement of the Board; and

(4) Attach any inadequate interrogatory responses or inadequate request for admission responses.

(c) *Determination by Board.* Following receipt of the request and any response, the Board may schedule a conference to address the discovery dispute in its discretion. One or more Officers may participate in the conference. During or following the conference, or, if no conference is held, after the Board reviews the request and any responses, the Board shall issue an order resolving the discovery dispute and, in the event of a decision in favor of the aggrieved party, setting a deadline for compliance.

(d) *Failure to comply with order.* If a party fails to timely comply with the Board's discovery order, the party seeking discovery may send a notice to the noncompliant party giving the noncompliant party 10 days to comply. If the noncompliant party fails to comply within 10 days of receipt of the notice, the aggrieved party may file a request for sanctions with the Board.

(e) *Sanctions—(1) Form of request for sanctions.* A request for sanctions and any response thereto shall be uploaded to eCCB and shall meet the requirements set forth in § 220.5(a)(2) of this subchapter. A request for sanctions shall attach the relevant and allegedly inadequate discovery responses already provided by the opposing party, except for disputes pertaining to responses to document requests, and shall set forth the basis for the request.

(2) *Standard for granting request.* Following receipt of a request for sanctions and any response from the opposing party, the Board may hold a conference to address the request for sanctions. In the Board's sole discretion and upon good cause shown, sanctions may be imposed if the opposing party is found to be noncompliant with the Board's discovery order.

(3) *Relief.* Sanctions imposed for noncompliance with a discovery order of the Board may include an adverse inference with respect to the disputed facts directly related to the discovery in

question against the noncompliant party.

(4) *Implications for award of attorneys' fees and costs.* The Board may consider the assessment of discovery sanctions when considering the awarding of attorneys' fees and costs during a *final determination*.

■ 14. Part 226 is added to read as follows:

PART 226—SMALLER CLAIMS

Sec.

226.1 General.

226.2 Requesting a smaller claims proceeding.

226.3 Effect of counterclaims on a smaller claims proceeding.

226.4 Nature of a smaller claims proceeding.

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

§ 226.1 General.

When total monetary relief sought in a claim does not exceed \$5,000 (exclusive of attorneys' fees and costs), the claimant may choose to have the proceeding adjudicated under the procedures set forth in this part. The provisions of 37 CFR parts 220, 221, 223, 224, 227, 228, 229, 230, 231, 232, 233, and 234 and 37 CFR 222.1 through 222.10, 222.17, and 222.19 shall also apply to proceedings adjudicated under this part and no other procedures other than those set forth in this part shall apply, unless the Copyright Claims Board (Board) decides in its discretion that such application or non-application would not be in the interest of justice.

§ 226.2 Requesting a smaller claims proceeding.

A claimant may request consideration of a claim under the smaller claim procedures in this part at the time of filing a claim. The claimant may change its choice as to whether to have its claim considered under the smaller claim procedures at any time before service of the *initial notice*. If the claimant changes its choice, but the *initial notice* has already been issued, the claimant shall request reissuance of the *initial notice* indicating the updated choice. Once the claimant has served the *initial notice* on any respondent, the claimant may not amend its choice without consent of the other parties and leave of the Board.

§ 226.3 Effect of counterclaims on a smaller claims proceeding.

Where a claimant has chosen to proceed via a smaller claims proceeding, a respondent only may assert a counterclaim that seeks total monetary relief of \$5,000 or less (exclusive of attorneys' fees or costs).

Any permissible counterclaims asserted by a respondent shall be adjudicated under the procedures set forth in this part.

§ 226.4 Nature of a smaller claims proceeding.

(a) *Proceeding before a Copyright Claims Officer.* A smaller claims proceeding shall be heard by one Copyright Claims Officer (Officer). One of the three Officers shall hear smaller claims proceedings on a rotating basis at the Board's discretion.

(b) *Initial scheduling order.* Upon confirmation that a proceeding has become active and the claimant has paid the second payment of the filing fee set forth in 37 CFR 201.3(g), and after completion of the 14-day period specified in the Board's order pursuant to § 222.7 of this subchapter, the Board shall issue an initial scheduling order that shall include the dates or deadlines for filing of a response to the claim and any counterclaims by the respondent and an initial conference with the Officer presiding over the proceeding. The Board or presiding Officer may issue additional scheduling orders or amend the scheduling order at its own discretion or upon request of a party pursuant to § 222.11(d) of this subchapter.

(c) *Initial conference—(1) In general.* An initial conference will take the place of the pre-discovery conference held in non-smaller claims proceedings. During the initial conference, the presiding Officer shall explain the steps of the proceeding, and the parties shall discuss the nature of the claims and any counterclaims and defenses as well as the possibility of settlement with the presiding Officer. While the presiding Officer in a smaller claims proceeding may discuss settlement with the parties, if a separate settlement conference is held, that settlement conference shall be held before an Officer who is not the presiding Officer.

(2) *Discovery.* During the initial conference, the presiding Officer shall discuss with the parties whether additional documents and information beyond any materials attached to the claim and response are necessary to reach a determination. Any order requiring documents or information to be produced shall be narrowly tailored to the merits of the proceeding and highly likely to lead to the production of information relevant to the core issues of the matter and not result in an undue burden on any party. If the presiding Officer determines that such documents and information are necessary, the presiding Officer shall order the parties to serve such

documents and information on each other and set the date for such service to be accomplished.

(d) *Merits conference—(1) Timing of merits conference.* During or following the initial conference, the presiding Officer shall schedule a conference to further discuss the merits of the case.

(2) *Submission of materials before merits conference.* No later than 14 days before the merits conference, each party—

(i) Shall file with the presiding Officer evidence it wishes to be considered for the presiding Officer to decide the case as well as any evidence requested by the presiding Officer. All such evidence must have been served on the other parties to the proceeding before such filing, unless the evidence was received from the other side;

(ii) May submit a written statement that set forth its positions as to the claims, defenses, and any counterclaims, along with any damages sought and the types of damages sought. Such written statement shall follow the procedures set forth in § 220.5(b) of this subchapter and shall be limited to seven pages. No written responses shall be permitted; and

(iii) May submit witness statements that comply with § 222.15(b)(2) of this subchapter. No later than seven days before the merits conference, an opposing party may request that the witness whose statement was submitted appear at the merits conference so that the party may ask the witness questions relating the witness's testimony. The failure of a witness to appear in response to such a request shall not preclude the presiding Officer from accepting the statement, but the presiding Officer may take the inability to question the witness into account when considering the weight of the witness's testimony.

(3) *Failure to submit evidence.* If a party fails to submit evidence in accordance with the presiding Officer's request, or submits evidence that was not served on the other parties or provided by the other side, the presiding Officer may discuss such failure with the parties during the merits conference or may schedule a separate conference to discuss the missing evidence with the parties. The presiding Officer shall determine an appropriate remedy, if any, for the failure to submit evidence in accordance with the presiding Officer's request, including but not limited to drawing an adverse inference with respect to disputed facts, pursuant to 17 U.S.C. 1506(n)(3), if it would be in the interests of justice.

(4) *Conduct of merits conference.*

During the merits conference, each party shall have an opportunity to address the materials submitted by any other party and to present their position on the claims, defenses, and any counterclaims, along with any damages sought, if any, to the presiding Officer. The presiding Officer may also ask questions to any party or any witness.

(e) *Proposed findings of fact.*

Following the merits conference, the presiding Officer shall prepare proposed findings of fact and shall serve the proposed findings of fact on each party. The proposed findings of fact shall include any adverse inference that the presiding Officer is considering applying due to a failure to submit evidence pursuant to paragraph (d)(3) of this section. Within 21 days from the date the proposed findings of fact are served—

(1) *Response to proposed findings of fact.* Any party may submit a written response to the proposed written findings of fact, including any adverse inferences identified by the presiding Officer. Such written response shall follow the procedures set forth in § 220.5(b) and be limited to five pages. Such written responses may not reference or attach any evidence that was not previously filed, unless the presiding Officer grants leave to do so. If the presiding Officer grants leave to reference or attach additional evidence, the other parties shall be provided an opportunity to respond to the new evidence in writing or during a conference;

(2) *Statement as to damages.* To the extent the claimant or counterclaimant has not already made an election as to whether it is seeking actual damages or statutory damages, a claimant or counterclaimant seeking damages shall file a statement, which may be included in its response to the proposed findings of fact, as to whether the party is seeking statutory damages or actual damages and any profits. This election may be changed at any time up until a final determination; and

(3) *Statement as to voluntary agreement to stop or mitigate unlawful activities.* A respondent or counterclaim respondent may inform the presiding Officer, at any time up to and including the merits conference, that if found liable on a claim or counterclaim, it would voluntarily agree to an order to cease or mitigate the unlawful activity. Such an election may be considered in appropriate cases by the presiding Officer in determining an amount of damages, if any, pursuant to 17 U.S.C. 1504. Such information will not be considered by the presiding Officer in

any way in making its determination as to liability, and shall be considered only as to damages.

(f) *Final determinations.* (1) After considering the information and arguments provided by the parties during the merits conferences and any other conferences ordered by the presiding Officer, along with any submissions filed by the parties, the presiding Officer shall issue a *final determination*.

(2) If, as described in § 227.1 of this subchapter, a respondent fails to appear or participate in a proceeding brought under the procedures set forth in this part, the presiding Officer shall transfer the proceedings to proceed under the rules governing default proceedings under part 227 of this subchapter, which may result in a *default determination* or dismissal of the claim. If proceedings continue under the rules governing default proceedings under part 227, any *default determination* must be issued by no fewer than two Officers. If the respondent cures a missed deadline or requirement, as described under § 227.1(c) of this subchapter, the proceeding shall resume under the procedures set forth in this part and the presiding Officer shall issue a revised scheduling order, if necessary.

(g) *Additional conferences.* In its discretion or upon the request of any party, the presiding Officer may hold additional conferences, including to manage the conduct of the proceeding, address disputes between the parties, settlement and engage in further discussion of the claims, counterclaims, or defenses and supporting evidence. Requests for a conference and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(h) *No expert testimony.* Parties may not submit expert testimony for consideration. Any expert testimony submitted shall be disregarded by the assigned Officer.

■ 15. Part 227 is added to read as follows:

PART 227—DEFAULT

Sec.

- 227.1 Failure by respondent or counterclaim respondent to appear or participate in proceeding.
- 227.2 Submission of evidence by claimant or counterclaimant in support of default determination.
- 227.3 Notice of proposed default determination.
- 227.4 Opportunity for respondent or counterclaim respondent to submit evidence.
- 227.5 Issuance of determination.

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

§ 227.1 Failure by respondent or counterclaim respondent to appear or participate in proceeding.

(a) *Notice of missed deadline or requirement.* If a respondent or counterclaim respondent fails to file a response or fails, without justifiable cause, to meet any filing deadline or other requirement set forth in the scheduling order or other order, upon notice of a party or by its own initiative, the Copyright Claims Board (Board) may issue a notice to the respondent or counterclaim respondent following the missed deadline or requirement. Requests to issue a notice regarding a missed deadline or requirement and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(b) *Contents of default notice—(1) First default notice.* A notice issued under this section shall inform the respondent or counterclaim respondent that failure to participate in the proceeding may result in the Board entering a *default determination* against the respondent or counterclaim respondent, including dismissal of any counterclaims asserted by the defaulting respondent, and shall explain the legal effects of a *default determination*. The notice shall provide the respondent or counterclaim respondent with 30 days from the date of the notice to cure the missed deadline or requirement. The notice shall be issued to the respondent or counterclaim respondent through eCCB, as well as by mail and all known email addresses.

(2) *Second default notice.* If the respondent or counterclaim respondent has failed to respond within 15 days after the first notice of the pendency of the *default determination*, the Board shall send a second notice to the respondent or counterclaim respondent according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the respondent or counterclaim respondent that it must cure the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to notice.* If the respondent or counterclaim respondent cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary. If the respondent or counterclaim respondent fails to timely cure but submits a response that indicates an intent to re-engage with the proceeding pursuant to the procedures set forth in

§ 220.5(a)(1) of this subchapter, the Board shall consider the response and either provide the respondent or counterclaim respondent with additional time to meet the deadline or proceed with the *default determination* process. If the respondent or counterclaim respondent fails to cure the missed deadline or requirement within the time specified by the notice and does not otherwise respond to the notice, the Board shall require the claimant or counterclaimant to submit evidence in support of a *default determination*, as set forth in § 227.2.

(d) *Multiple missed deadlines.* A respondent or counterclaim respondent may cure a missed deadline according to the procedure set forth in this section at least twice without default being issued. If the respondent or counterclaim respondent misses a third deadline in the scheduling order without good cause, the Board may, in its discretion, proceed directly to requiring submission of evidence to proceed with a *default determination* as set forth in § 227.2.

§ 227.2 Submission of evidence by claimant or counterclaimant in support of default determination.

(a) *General.* If a respondent or counterclaim respondent fails to appear or ceases to participate in the proceeding and the Board elects to proceed to a *default determination*, the Board shall require the claimant or counterclaimant to submit written direct testimony, as set forth in § 222.15(b) of this subchapter.

(b) *Additional evidence.* Following submission of the claimant's or counterclaimant's written testimony in support of a *default determination*, the Board shall consider the claimant's or counterclaimant's submissions and may request any additional evidence from the claimant or counterclaimant within the claimant's or counterclaimant's possession.

§ 227.3 Notice of proposed default determination.

(a) *Consideration of evidence.* Following submission of evidence by the claimant or counterclaimant, as set forth in § 227.2, the Board shall review such evidence and shall determine whether it is sufficient to support a finding in favor of the claimant or counterclaimant under applicable law. As part of its review, the Board shall consider whether the respondent or counterclaim respondent has a meritorious defense. If the Board finds the evidence sufficient to support a finding in favor of the claimant or counterclaimant, it shall determine the

appropriate relief and damages, if any, to be awarded.

(1) If the Board determines that the evidence is sufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed *default determination*.

(2) If the Board determines that the evidence is insufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed determination dismissing the proceeding without prejudice and shall provide written notice of such proposed determination to the claimant or counterclaimant. The claimant or counterclaimant may submit a response to the proposed determination within 30 days of the date of the notice of proposed determination. Such response shall follow the procedures set forth in § 220.5(b) of this subchapter and be limited to seven pages. After considering any response from the claimant or counterclaimant, the Board shall either maintain its proposed determination and dismiss the proceeding without prejudice or determine that the evidence is sufficient to support a finding in favor of the claimant or counterclaimant and prepare a proposed *default determination*.

(b) *Proposed default determination.* The proposed *default determination* shall include a finding in favor of the claimant or counterclaimant and the damages awarded, if any. The proposed *default determination* shall also include dismissal of any counterclaims asserted by the defaulting respondent.

(c) *Notice to respondent or counterclaim respondent.* The Board shall provide written notice to the respondent or counterclaim respondent of the pendency of the *default determination* and the legal significance of the *default determination*, including any liability for damages, if applicable, as set forth in 17 U.S.C. 1506(u)(2). The notice shall be accompanied by the proposed *default determination* and shall provide the respondent or counterclaim respondent 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed *default determination*.

§ 227.4 Opportunity for respondent or counterclaim respondent to submit evidence.

(a) *Response to notice by respondent or counterclaim respondent.* The respondent or counterclaim respondent may submit in writing any evidence or information in opposition to the

proposed *default determination* within 30 days of the issuance of the proposed *default determination* absent an extension of that time by the Board. The form of that response shall follow the procedures for written response testimony under § 222.15(b) of this subchapter. If the respondent or counterclaim respondent fails to timely submit evidence but submits a response that indicates an intent to submit evidence in opposition to the proposed *default determination*, the Board shall consider the response and either provide the respondent or counterclaim respondent with additional time to submit evidence or proceed with issuing the *default determination*.

(b) *Response to respondent's or counterclaim respondent's submissions.* If the respondent or counterclaim respondent provides any evidence or other information in response to the notice of the pending *default determination*, the other parties to the proceeding shall be provided an opportunity to address such a submission by following the procedures for written reply testimony under § 222.15(c) of this subchapter within 21 days of the respondent's submission.

(c) *Hearings.* The Board may hold a hearing related to *default determinations* at its discretion.

§ 227.5 Issuance of determination.

(a) *Determination after respondent or counterclaim respondent submits evidence.* If the respondent or counterclaim respondent provides evidence or information as set forth in § 227.4, the Board shall consider all submissions, including any responses to the respondent's or counterclaim respondent's submission. The Board then shall maintain or amend its proposed *default determination*. The resulting determination shall not be a *default determination* and instead shall be a *final determination*. The respondent or counterclaim respondent may not challenge such determination under 17 U.S.C. 1508(c)(1)(C) and may only request reconsideration pursuant to 17 U.S.C. 1506(w) and the procedures set forth in part 230 of this subchapter.

(b) *Determination after respondent or counterclaim respondent fails to respond to notice.* If the respondent or counterclaim respondent fails to respond to the notice of pending *default determination*, the Board shall issue the proposed *default determination* as a *final determination*. The respondent or counterclaim respondent may only challenge such determination to the extent permitted under 17 U.S.C. 1508(c) or the procedures set forth in paragraph (c) of this section.

(c) *Vacating a default determination.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the respondent or counterclaim respondent may request in writing that the *default determination* be vacated and provide the reasons why the decision should be vacated. A request to vacate the *default determination* must be filed within 30 days of the determination, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b) of this subchapter; and a response to that request must be filed within 30 days of the request to vacate, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b). The Board may vacate the *default determination* in the interests of justice.

■ 16. Part 228 is added to read as follows:

PART 228—CLAIMANT'S FAILURE TO PROCEED

Sec.

228.1 Claimant or counterclaimant's failure to complete service.

228.2 Claimant or counterclaimant's failure to prosecute.

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

§ 228.1 Claimant or counterclaimant's failure to complete service.

(a) *Failure to serve a respondent who is not a necessary party.* If a claimant fails to timely complete service on a respondent who is not a necessary party, pursuant to § 222.14 of this subchapter, the Copyright Claims Board (Board) shall dismiss that respondent from the proceeding without prejudice. The proceeding shall continue against any remaining respondents.

(b) *Failure to serve a respondent who is a necessary party.* If a claimant fails to timely complete service on a respondent who is a necessary party, pursuant to § 222.14 of this subchapter, the Board shall dismiss the proceeding without prejudice.

(c) *Complete failure to serve respondents.* For a claim to proceed, a claimant must complete service on at least one respondent. If a claimant does not timely file any proof of service, the Board shall dismiss the proceeding without prejudice.

§ 228.2 Claimant or counterclaimant's failure to prosecute.

(a) *General.* If a claimant or counterclaimant fails to proceed in an *active proceeding* without justifiable cause, as demonstrated by a failure to meet any filing deadline or requirement set forth in the scheduling order or other order, upon request of a party or on its own initiative, the Board shall issue a notice following the missed deadline or

requirement. Requests to issue a notice regarding a missed deadline or requirement and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(b) *Contents of failure to prosecute notice.* (1) A notice issued under paragraph (a) of this section shall inform the claimant or counterclaimant that failure to proceed in the proceeding may result in the Board issuing a determination dismissing the claimant's or counterclaimant's claims, including an award of attorneys' fees and costs where appropriate, and shall explain the legal effects of such a determination. The notice shall provide the claimant or counterclaimant with 30 days, beginning on the date of the notice, to respond to the notice and meet the missed deadline or requirement. The notice shall be issued to the claimant or counterclaimant by mail and all known email addresses.

(2) If the claimant or counterclaimant has failed to respond 15 days after the notice of the failure to proceed, the Board shall send a second notice to the claimant or counterclaimant according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the claimant or counterclaimant that it must respond and meet the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to failure to prosecute notice.* (1) If the claimant or counterclaimant cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary.

(2) If the claimant or counterclaimant fails to cure the missed deadline or requirement within the time specified by the notice but submits a response that indicates an intent to re-engage with the proceeding pursuant to the procedures set forth in § 220.5(a)(1) of this subchapter, the Board shall consider the response and either provide the claimant or counterclaimant with additional time to cure the missed deadline or requirement or issue a determination dismissing the claims or counterclaims.

(3) If the claimant or counterclaimant fails to cure the missed deadline or requirement within the time specified by the notice and does not otherwise respond to the notice, the Board shall issue a determination dismissing the claims or counterclaims.

(d) *Determination dismissing claims or counterclaims.* A determination dismissing the claims or counterclaims for failure to proceed in the *active proceeding* shall be with prejudice and

shall include an award of attorneys' fees and costs pursuant to § 232.3 of this subchapter, if appropriate. The claimant or counterclaimant may only challenge such determination to the extent permitted under 17 U.S.C. 1508 or the procedures set forth in paragraph (e) of this section.

(e) *Vacating a determination dismissing claims or counterclaims.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the claimant or counterclaimant may request in writing that the determination be vacated and provide the reasons supporting the request. A request to vacate the determination must be filed within 30 days of the determination, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b) of this subchapter; and a response to that request must be filed within 30 days of the request to vacate, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b). The Board may vacate the determination of dismissal in the interests of justice.

(f) *Multiple missed deadlines.* A claimant or counterclaimant may cure a missed deadline according to the procedure set forth in this section at least twice without dismissal for failure to prosecute. If the claimant or counterclaimant misses a third deadline in the scheduling order without good cause, the Board may, in its discretion, proceed directly to issuing a determination dismissing the claims or counterclaims for failure to proceed under paragraph (d) of this section.

■ 17. Part 229 is added to read as follows:

PART 229—RECORDS AND PUBLICATION

Sec.

- 229.1 Access to records and proceedings.
- 229.2 Record certification.

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

§ 229.1 Access to records and proceedings.

(a) *Official written record.*

Submissions by parties to a proceeding and documents issued by the Copyright Claims Board (Board) shall constitute the official written record.

(b) *Access to record.* Any member of the public may inspect the official written record through eCCB, except any materials that have been marked confidential pursuant to § 222.19 of this subchapter.

(c) *Attendance at hearing.* Attendance at a Board hearing, including virtual hearings, is limited to the parties to the proceeding, including any legal counsel

or *authorized representatives*, and any witnesses, except with leave of the Board. The Board may order that a witness be excluded from a hearing except when a question is directed to the witness. A request for attendance may be made in writing. Requests for a third-party non-witness to attend a hearing and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(d) *Hearing transcript.* The Board may cause a transcript of a hearing to be made by using an official reporter or any technology that is available to the Board. At the request of any party, the Board may designate an official reporter to attend and transcribe a hearing or to prepare a transcript from a recording of a hearing. Requests to designate an official reporter and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. The requesting party or parties shall pay the reporter directly for the cost of creating an official transcript.

§ 229.2 Record certification.

Upon a written request to the Records Research and Certification Section of the U.S. Copyright Office pursuant to 37 CFR 201.2(1), and payment of the appropriate fee pursuant to 37 CFR 201.3, the Board will certify the official record of a proceeding.

■ 18. Part 230 is added to read as follows:

PART 230—REQUESTS FOR RECONSIDERATION

Sec.

- 230.1 General.
- 230.2 Request for reconsideration.
- 230.3 Response to request.
- 230.4 No new evidence.
- 230.5 Determination.

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

§ 230.1 General.

This part prescribes rules pertaining to procedures for reconsideration of a *final determination* issued by the Copyright Claims Board (Board). A party may request reconsideration according to the procedures in this part if the party identifies a clear error of law or fact material to the outcome or a technical mistake.

§ 230.2 Request for reconsideration.

Upon receiving a *final determination* from the Board, any party may request that the Board reconsider its determination. Such a request must be filed within 30 days of the determination, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b) of this subchapter. The request must identify a clear error

of law or fact that was material to the outcome or a technical mistake. The request shall not merely repeat any oral or written argument made to the Board as part of the proceeding but shall be specific as to the purported error or technical mistake that is the subject of the request. For the purposes of this section, the term *final determination* shall include an amended *final determination*.

§ 230.3 Response to request.

A party opposing a request for a reconsideration may file a response to the request within 30 days of the date of service of the request. Such response shall be no more than 12 pages and shall meet the requirements set forth in § 220.5(b) of this subchapter.

§ 230.4 No new evidence.

Evidence that was not previously submitted to the Board as part of written testimony or at a hearing or in response to a specific request for evidence from the Board shall not be submitted as part of a request for reconsideration or a response to a request, except where the party demonstrates, through clear and convincing evidence, that the evidence was not available to that party in the exercise of reasonable diligence prior to the submission of written testimony or prior to the hearing.

§ 230.5 Determination.

After the filing of response papers or after the time for a party opposing the request for reconsideration to file a response has elapsed, the Board shall consider the request and any response and shall either deny the request for reconsideration or issue an amended *final determination*. The Board will base its decision on the party's written submissions.

■ 19. Part 231 is added to read as follows:

PART 231—REGISTER'S REVIEW

Sec.

231.1 General.

231.2 Request for Register's review.

231.3 Response to request for Register's review.

231.4 No new evidence.

231.5 Standard of review.

231.6 Determination.

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

§ 231.1 General.

This part prescribes rules pertaining to procedures for review by the Register of Copyrights of a *final determination* by the Copyright Claims Board (Board). A party whose request for reconsideration has been denied under § 230.5 of this subchapter may seek

review of the *final determination* by the Register of Copyrights not later than 30 days after a request for reconsideration has been denied in whole or in part.

§ 231.2 Request for Register's review.

A party may not file for review of the Board's *final determination* by the Register of Copyrights unless it has first filed, and had denied, a request for reconsideration. Where the Board has denied a request for reconsideration, the party who requested reconsideration may request review of the *final determination* by the Register of Copyrights. Such a request must be filed within 30 days of the denial of a request for reconsideration, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b) of this subchapter. The request must include the reasons the party believes there was an abuse of discretion in denying the request for reconsideration. The request must be accompanied by the filing fee set forth in 37 CFR 201.3(g)(3).

§ 231.3 Response to request for Register's review.

A party opposing the request for review may file a response to the request for review within 30 days of the date of service of the request. Such response shall be no more than 12 pages and shall meet the requirements set forth in § 220.5(b) of this subchapter. The request must include the reasons the party believes there was no abuse of discretion in denying the request for reconsideration. No reply filings shall be permitted.

§ 231.4 No new evidence.

Evidence that was not previously submitted to the Board as part of written testimony or at a hearing or in response to a specific request for evidence from the Board shall not be submitted as part of a request for review or a response to a request for review.

§ 231.5 Standard of review.

The Register's review shall be limited to consideration of whether the Board abused its discretion in denying reconsideration of the determination.

§ 231.6 Determination.

After the filing of response papers or after the time for a party opposing the request for review to file a response has elapsed, the Register shall consider the request and any response and shall either deny the request for review or remand the proceeding to the Board for reconsideration of issues specified in the remand and for issuance of an amended *final determination*. The

Register will base such a decision on the party's written submissions.

■ 20. Part 232 is added to read as follows:

PART 232—PARTY CONDUCT

Sec.

232.1 General.

232.2 Representations to the Board.

232.3 Bad-faith conduct.

232.4 Bar on initiating and participating in claims.

232.5 Legal counsel and authorized representative conduct.

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

§ 232.1 General.

(a) For purposes of this part, a *participant* includes all parties, including any legal counsel or other *authorized representatives* participating in CCB proceedings.

(b) All *participants* shall act with the utmost respect for others and shall behave ethically and truthfully in connection with all submissions and appearances before the Copyright Claims Board (Board).

§ 232.2 Representations to the Board.

By submitting materials or advocating positions before the Board, a *participant* certifies that to the best of the *participant's* knowledge, information, and belief, formed after a reasonable inquiry under the circumstances:

(a) It is not being presented for any improper purpose;

(b) Any legal contentions are made in good faith based on the *participant's* reasonable understanding of existing law;

(c) Any factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) Any denials of factual contentions have evidentiary support or, if specifically so identified, are reasonably based on belief or a lack of information.

§ 232.3 Bad-faith conduct.

(a) *General*. The Board shall award costs and attorneys' fees as part of a determination where it is established that a *participant* engaged in *bad-faith conduct*, unless such an award would be inconsistent with the interests of justice.

(b) *Allegations of bad-faith conduct—*
(1) *On the Board's initiative*. On its own, and prior to a *final determination*, the Board may order a *participant* to show cause why certain conduct does not constitute *bad-faith conduct*. Within 14 days, the *participant* accused of *bad-faith conduct* shall file a response to this

order, which shall follow the procedures set forth in § 220.5(a)(2).

(2) *On a party's initiative.* A party that in good faith believes that a *participant* has engaged in *bad-faith conduct*, may file a request for a conference with the Board, describing the alleged *bad-faith conduct* and attaching any relevant exhibits. Requests for a conference concerning allegations of *bad-faith conduct* and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(c) *Establishing bad-faith conduct.* After the response of an accused *participant* has been filed under paragraph (b) of this section, or the time to file such a response has passed, the Board shall either make a determination that no *bad-faith conduct* occurred or schedule a conference concerning the allegations.

(d) *Determining the award.* A determination as to any award of attorneys' fees and costs due to *bad-faith conduct* shall be made as part of the *final determination*. In determining whether to award attorneys' fees and costs due to *bad-faith conduct*, and the amount of any such award, the Board shall consider the requests and responses submitted, any arguments on the issue, and the accused *participant's* behavior in other Board proceedings. Such an award shall be limited to an amount of not more than \$5,000, unless—

(1) The adversely affected party appeared *pro se* in the proceeding, in which case the award shall be limited to costs in an amount of not more than \$2,500; or

(2) Extraordinary circumstances are present, such as a demonstrated pattern or practice of *bad-faith conduct*, in which case the Board may award costs and attorneys' fees in excess of the limitations in this section.

§ 232.4 Bar on initiating and participating in claims.

(a) *General.* A *participant* that has been found to have engaged in *bad-faith conduct* on more than one occasion within a 12-month period shall be subject to the penalties set forth in paragraph (d) of this section.

(b) *Allegations of multiple instances of bad-faith conduct—*(1) *On the Board's initiative.* On its own, and at any point during a proceeding, the Board may order a *participant* to show cause why certain conduct engaged in on more than one occasion within a 12-month period does not constitute a pattern of *bad-faith conduct*. Within 14 days, such *participant* shall file a response to this order, which shall

follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(2) *On a party's initiative.* A party that in good faith believes that a *participant* has engaged in *bad-faith conduct* before the Board on more than one occasion within a 12-month period, may file a request for a conference with the Board at any point after a proceeding has been initiated. Such a request shall describe the alleged instances of *bad-faith conduct*, include the CCB case numbers for any other instances of *bad-faith conduct* if known, and attach any relevant exhibits. Such a request filed by a respondent before the time to opt out of the proceeding has expired shall not operate as a waiver of that respondent's right to opt out of the proceeding. Requests for a conference concerning allegations of a pattern of *bad-faith conduct* and any responses thereto shall follow the procedures set forth in § 220.5(a)(2) of this subchapter.

(c) *Establishing a pattern of bad-faith conduct.* After an accused *participant's* response has been filed under paragraph (b) of this section, or the time to file such a response has passed, the Board shall either make a determination that the *participant* has not engaged in *bad-faith conduct* before the Board on more than one occasion within a 12-month period, or shall schedule a conference concerning the allegations. An award of attorneys' fees or costs against an accused party, pursuant to § 232.3, within the prior 12 months shall establish an instance of *bad-faith conduct* within the requisite time period. The Board may consider other evidence of *bad-faith conduct* by the accused *participant* that did not result in an award of attorneys' fees or costs pursuant to § 232.3, including but not limited to, claims that did not proceed because they were reviewed by a Copyright Claims Attorney and found to be noncompliant or where proceedings were initiated but the respondent opted out.

(d) *Penalties.* In determining whether to bar a *participant* from initiating claims or a legal counsel or *authorized representative* from participating on a party's behalf, the Board shall consider the requests and responses submitted by the parties, any arguments on the issue, and the accused *participant's* behavior in other Board proceedings. The Board shall issue its determination in writing. If the Board determines that the accused *participant* has engaged in *bad-faith conduct* on more than one occasion within a 12-month period, such determination shall include:

(1) A provision that the accused *participant* be barred from initiating a claim, or in the case of a legal counsel

or *authorized representative*, barred from participating on a party's behalf, before the Board for a period of 12 months beginning on the date on which the Board makes such a finding;

(2) In the case of a pattern of *bad-faith conduct* by a party, dismissal without prejudice of any proceeding commenced by that claimant or respondent or by the legal counsel or *authorized representative* on behalf of a party that is still pending before the Board at the time the finding is made, except that an *active proceeding* shall be dismissed only if the respondent to that proceeding provides written consent to the dismissal; and

(3) In the case of a pattern of *bad-faith conduct* by a legal counsel or *authorized representative*, a provision that the representative be barred from representing any party before the Board for a period of 12 months beginning on the date on which the Board makes such a finding. In deciding whether the legal counsel or *authorized representative* shall be barred from representing other parties in already pending proceedings, the Board may take into account the hardship to the parties represented by the sanctioned representative. If a legal counsel or *authorized representative* is barred from further representing a party in a pending claim, the Board will consider requests from that party asking the Board to amend the scheduling order or issue a stay of the pending action to allow that party to find other representation. Whether to amend the scheduling order or issue a stay shall be at the Board's discretion.

§ 232.5 Legal counsel and authorized representative conduct.

(a) *Notices of appearance.* If a party elects to be represented by legal counsel or other *authorized representative* in a proceeding, such legal counsel or *authorized representative*, other than the legal counsel or *authorized representative* who filed the claim on the claimant's behalf, must file a request to link their eCCB user account to the case and to the party or parties in that case whom they represent. The legal counsel or *authorized representative* must make sure that their eCCB user account accurately contains the legal counsel's bar number in a State in which the legal counsel has been admitted to practice (if applicable), and the legal counsel or *authorized representative's* mailing address, email address, and telephone number. If a legal counsel or *authorized representative* wishes to withdraw its representation, the legal counsel or *authorized representative* must file a Request to Withdraw Representation.

(b) *Bar admissions.* A legal counsel must be a member in good standing of the bar of the highest court of a State, the District of Columbia, or any territory or commonwealth of the United States. A law student representative must qualify under regulations governing law student representation of a party set forth in part 234 of this subchapter. The legal counsel or *authorized representative* must file with the Board a written statement under penalty of perjury that the legal counsel or *authorized representative* is currently qualified and is authorized to represent the party on whose behalf the legal counsel or *authorized representative* appears.

(c) *Disbarred legal counsel.* Any legal counsel who has been disbarred by any Federal court, a court of any State, the District of Columbia, or any territory or commonwealth of the United States shall not be allowed to represent a party before the Board. If a legal counsel in any proceeding active or pending before the Board is disbarred, the legal counsel must report the disbarment to the Board and withdraw representation from any proceeding.

(d) *Duties toward the Board and the parties.* A legal counsel or *authorized representative* has a duty of candor and impartiality toward the Board, and a duty of fairness toward opposing parties. In assessing whether a legal counsel has breached its duties, the Board shall consider the rules of professional conduct of the District of Columbia and the State in which the legal counsel practices.

(e) *Penalties for violation.* Any legal counsel or *authorized representative* found to be in violation of any of the rules of conduct as set forth in this section, or who is otherwise found to be behaving unethically or inappropriately before the Board, may be barred from representing parties in proceedings before the Board for a period of twelve months.

■ 21. Part 233 is added to read as follows:

PART 233—LIMITATION ON PROCEEDINGS

Sec.

233.1 General.

233.2 Limitation on proceedings.

233.3 Temporary limitations on proceedings.

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

§ 233.1 General.

This part prescribes rules pertaining to the management of the Copyright Claims Board's (Board's) docket and prevention of abuse of the Board's proceedings.

§ 233.2 Limitation on proceedings.

(a) *Maximum number of proceedings.* The number of Copyright Claims Board proceedings that may be filed by a claimant and the number of proceedings a solo practitioner or law firm may file on behalf of claimants in any 12-month period shall be limited in accordance with this section. A proceeding shall count toward the numerical limitation as soon as it is filed, regardless of how the proceeding is resolved, whether it is found to be noncompliant under § 224.1 or unsuitable under § 224.2 of this subchapter, voluntarily dismissed, or fails to become active due to a respondent's opt-out. Neither amendments to a claim, nor counterclaims filed in response to a claim shall count as additional claims in determining whether the limit has been reached. The following limitations shall apply:

(1) A claimant, including a corporate claimant's parents, subsidiaries, and affiliates, shall file no more than 30 proceedings in any 12-month period.

(2) A sole practitioner shall file no more than 40 CCB proceedings on behalf of claimants in any 12-month period.

(3) A law firm shall file no more than 80 CCB proceedings on behalf of claimants in any 12-month period.

(b) *Circumvention of limit.* If a claimant files a claim in excess of the limitation set forth in paragraph (a)(1) of this section, such claim shall be dismissed without prejudice. If a sole practitioner or legal counsel associated with a law firm files a claim in excess of the limitation set forth in paragraph (a)(2) or (3) of this section, the legal counsel or law firm at issue shall be ordered to withdraw from the

proceeding and the Board may stay the proceeding for 60 days, which may be extended for good cause shown, for the claimant to retain new legal counsel. It may be considered *bad-faith conduct* under § 232.3 for a party to take any action for the sole purpose of avoiding the limitation on the number of proceedings that may be filed as set forth in this section.

(c) *Law students, law clinics, and pro bono legal services.* The limitations in this section do not apply to law students or a law clinic or *pro bono* legal services organization with a connection to the participating law student's law school.

§ 233.3 Temporary limitations on proceedings.

(a) *Moratorium on new claims.* If the Board has determined that the number of pending cases before it has overwhelmed the capacity of the Board, the Board may impose a temporary stay on the filing of claims. The Board shall publish an announcement of that determination on its website, stating the effective date of the stay, and the duration of the stay, not to exceed six months.

(b) *Exception to moratorium.* If a claimant's statute of limitations under 17 U.S.C. 1504(b) is about to expire during the stay issued under paragraph (a) of this section, the claimant may file a claim on or before the statutory deadline accompanied by a declaration under penalty of perjury stating that the statute of limitations will expire during the stay and setting forth facts in support of that conclusion. If the Board determines that the statute of limitations likely will expire during the stay based on the facts set forth in the declaration, the Board shall hold the claim in abeyance and conduct a compliance review following the end of the stay.

Dated: May 9, 2022.

Shira Perlmuter,

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

Approved by:

Carla D. Hayden,

Librarian of Congress.

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