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Copyright Office

37 CFR Parts 201, 220, 222, 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: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking to establish procedures governing active proceedings before the Copyright Claims Board and post-determination procedures. The proposed rule provides requirements regarding procedural practice, scheduling, conferences, discovery, written testimony, hearings, settlement, smaller claims, default and failure to prosecute, records, post-determination procedures, and conduct of parties. The Office intends to initiate a subsequent rulemaking regarding law student representation.

DATES: Initial written comments must be received no later than 11:59 p.m. Eastern Time on February 7, 2022. Written reply comments must be received no later than 11:59 p.m. Eastern Time on February 22, 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 website at *https://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 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

On December 27, 2020, the President signed into law the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The CASE Act directs the Copyright Office to establish the Copyright Claims Board (''CCB''), a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value (''small copyright claims'').[2] The CCB's creation does not displace or limit a party's ability to bring small copyright claims in federal court, but rather provides a streamlined and cost-effective alternative forum to decide those claims.[3] The CCB has authority to hear copyright infringement claims, claims seeking a declaration of non-infringement, and misrepresentation claims under section 512(f) of title 17.[4] Participation in the CCB is voluntary for all parties,[5] and all determinations are non-precedential.[6] Congress directed that the CCB begin operations by December 27, 2021, though the Register may, for good cause, extend that deadline by not more than 180 days.[7]

The CASE Act directs the Register of Copyrights to establish the regulations by which the CCB will conduct its proceedings, subject to the provisions of chapter 15 and relevant principles of law under title 17.[8] On March 26, 2021, the Copyright Office published a notification of inquiry (''NOI'') inviting public comment on various aspects of the CCB's operations, which the Office noted would be established through a series of rulemakings.[9] The Office has issued two previous notices [10] and one final rule [11] related to CCB procedures. In this notice, the Office proposes procedures related to conducting an active proceeding, post-determination review, smaller claims, and the conduct of parties. The Office will issue additional proposed rules related to CCB proceedings in one or more subsequent rulemakings.

II. Proposed Rule

A. Management of Parties

1. Joinder

The CASE Act provides that a claim or counterclaim shall be dismissed without prejudice if the CCB determines that it is unsuitable for determination due to a failure to join a necessary party.[12] The statute does not define or otherwise address procedures governing necessary parties. One comment proposed that the Office adopt Rules 19 and 20 of the Federal Rules of Civil Procedure (''FRCP''), which speak to joinder of parties, to CCB proceedings.[13] The Office has determined, however, that permitting joinder of third parties could significantly alter the nature of a proceeding and consequently could impact the notice provided to parties in some cases—for example, where a respondent declined to exercise its right to opt out based on its understanding of the parties and scope of the proceeding. Instead, the Office proposes that existing parties who believe that a necessary third party has not been joined should raise this issue with the CCB by filing a short letter setting forth the basis of such belief. After any other party already in the proceeding has an opportunity to file an opposing letter, the CCB will evaluate the alleged deficiency and, if it determines that a necessary party has not been joined, it will dismiss the proceeding without prejudice as unsuitable. The claimant may refile its claim with the necessary party included.

The proposed rule also provides that a necessary third party may file a request to intervene with the CCB. Each party must then file a response stating whether the party agrees that the proposed intervenor is a necessary party and provide the basis for that position. The CCB will evaluate the request and may hold a conference with all parties

[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, https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.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] H.R. Rep. No. 116–252, at 17; S. Rep. No. 116–105, at 2–3, 9.

[4] 17 U.S.C. 1504(c)(1)–(3). The CCB cannot issue injunctive relief, but can require that an infringing party cease or mitigate its infringing activity in the event such party agrees and the agreement is reflected in the proceeding's record. *Id.* at 1504(e)(2)(A)(i), (e)(2)(B). This provision also applies to parties making knowing material misrepresentations under section 512(f). *Id.* at 1504(e)(2)(A)(ii).

[5] *See id.* at 1504(a); H.R. Rep. No. 116–252, at 17, 21; S. Rep. No. 116–105, at 3, 11.

[6] H.R. Rep. No. 116–252, at 21–22, 33; S. Rep. No. 116–105, at 14.

[7] Public Law 116–260, sec. 212(d), 134 Stat. at 2199.

[8] 17 U.S.C. 1506(a)(1).

[9] 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.* References to these comments are by party name (abbreviated where appropriate), followed by ''Initial NOI Comments'' or ''Reply NOI Comments,'' as appropriate.

[10] 86 FR 53897 (Sept. 29, 2021); 86 FR 49273 (Sept. 2, 2021).

[11] 86 FR 46119 (Aug. 18, 2021).

[12] 17 U.S.C. 1506(f)(3).

[13] Am. Intell. Prop. L. Ass'n (''AIPLA'') Initial NOI Comments at 7.

and the third party requesting intervention. If the CCB determines that the intervening party is not a necessary party, it will deny the request and the proceeding will continue with the original parties. If the CCB determines that the intervening party is a necessary party, it will permit the intervening party to join the proceeding, as long as no other party opposes the intervention. A party opposing the intervention of a necessary party will not need to provide reasons for its opposition. If any party opposes the intervention, the proceeding will be dismissed without prejudice. The proposed rule thus permits a necessary party to be joined only if all parties agree.

The Office welcomes any comments as to whether the statute permits joinder of parties as outlined in the proposed rule and the appropriateness of the procedures proposed herein.

2. Dismissal

Under the statute, a claimant may elect to voluntarily dismiss a claim, respondent, or proceeding by written request at any time before a respondent files a response to the claim.[14] Similarly, a counterclaimant may elect to voluntarily dismiss a counterclaim by written request before the claimant files a response to the counterclaim.[15] Upon receipt of such a written request, the CCB shall dismiss the claim or counterclaim, as the case may be, without prejudice.[16]

The statute is not explicit as to whether a party may voluntarily withdraw a claim or counterclaim after a response to it has been filed. The Office's proposed rule addresses this scenario and provides that, if a written request to withdraw a claim or a counterclaim is received after the response has been filed, the CCB will dismiss the claim or counterclaim with prejudice, unless all parties have entered into a written stipulation that the claim or counterclaim will be dismissed without prejudice or unless the CCB determines the dismissal should be without prejudice in the interests of justice. This procedure provides a mechanism for a claimant or counterclaimant to unilaterally withdraw a claim after a response has been served, which furthers the statutory goal of providing a voluntary forum for the resolution of claims.[17] The proposed rule also protects the interests of a responding party, who has invested time and resources into the proceeding, and is in line with the FRCP.[18] The Office welcomes comments on the advisability of including a procedure for unilaterally withdrawing a claim or counterclaim after the response has been served and whether resulting dismissals should be with or without prejudice. To the extent commenters believe that such dismissals typically should be with prejudice, the Office invites comment on whether the CCB should be able to dismiss a case without prejudice if the circumstances show that such action is in the interests of justice.

The proposed rule also provides that a written request to withdraw a claim or counterclaim should include a brief statement signed by the party seeking dismissal. In addition, it provides that claims or counterclaims that are voluntarily withdrawn before a response is filed may be dismissed with prejudice if all parties agree in a written stipulation that is filed with the CCB. This option is intended to facilitate early settlement negotiations. Voluntary dismissal will not impact any other claims or counterclaims in the proceeding.

3. Default and Failure To Prosecute

i. Default Determinations

The CCB may enter a default determination in an active proceeding where the respondent ''has failed to appear or has ceased participating in the proceeding.'' [19] The statute empowers the Office to establish additional requirements that must be met before the CCB may issue a default determination.[20] The legislative history notes that the statute ''establishes a strong presumption against default judgments'' and provides greater protections against default than those available in federal court proceedings.[21] The Office accordingly believes it is important to have safeguards against defaults where possible, and to ensure that parties are given adequate notice before a default can be issued.

To obtain a default determination, the claimant must still ''submit relevant evidence and other information in support of the claimant's claim and any asserted damages,'' even where the respondent has failed to appear or has ceased participating.[22] The CCB then will evaluate the evidence, along with any other requested submissions, and determine whether the materials provided are sufficient to support a finding in the claimant's favor and, if so, any appropriate relief and damages.[23] If the CCB then determines that a default determination is appropriate, it must prepare the determination and provide a written notice to the respondent through all known addresses, including email addresses, and provide the respondent thirty days to file a submission in opposition to the default determination.[24] The CCB must consider a timely response from the respondent, ''and, after allowing the other parties to address such submissions, [shall] maintain, or amend its proposed determination as appropriate, and the resulting determination shall not be a default determination.'' [25] If the respondent fails to respond to the notice, the CCB ''shall proceed to issue the default determination,'' although the CCB may later vacate such determination ''in the interests of justice.'' [26] A federal court may also vacate the default determination ''if it is established that the default . . . was due to excusable neglect.'' [27]

The Office requested comments concerning ''any issues that should be considered relating to a respondent's default, including but not limited to regulations regarding proof of damages in default proceedings.'' [28] Some commenters urged the Office to adopt regulations designed to reduce the risk of the CCB becoming a ''default judgment mill.'' [29] Suggestions included regulations concerning the specific form of evidence a claimant must produce in support of a damages claim,[30] or a presumption against or even a prohibition on statutory damages awards in cases of default.[31] The Office is concerned, however, that regulations that increase the claimant's burden in proving damages or circumscribe the kinds of damages available in the case of a default beyond what is already provided in the statute could incentivize respondents to avoid engaging with CCB proceedings due to the perception that the claimant is not likely to be able to prove or to be awarded significant damages. This could increase, not reduce, the risk that the CCB would be perceived as a default

[14] 17 U.S.C. 1506(q)(1).

[15] *Id.* at 1506(q)(2).

[16] *Id.* at 1506(q)(1)–(2).

[17] H.R. Rep. No. 116–252, at 17.

[18] Fed. R. Civ. P. 41.

[19] 17 U.S.C. 1506(u).

[20] *Id.*

[21] H.R. Rep. No.116–252, at 24.

[22] 17 U.S.C. 1506(u)(1).

[23] *Id.*

[24] *Id.* at 1506(u)(2).

[25] *Id.* at 1506(u)(3).

[26] *Id.* at 1506(u)(4).

[27] *Id.* at 1508(c)(1)(C).

[28] 86 FR at 16162 (citing H.R. Rep. No. 116–252, at 24).

[29] Authors All. Initial NOI Comments at 7; Engine Initial NOI Comments at 8–9.

[30] AIPLA Initial NOI Comments at 7; Ben Vient Initial NOI Comments at 4.

[31] Engine Initial NOI Comments at 9; Univ. of Mich. Libr. Initial NOI Comments at 3.

judgment mill. The proposed rule accordingly does not include such provisions.

Commenters also urged the Office to adopt regulations ensuring that the claimant's submissions are carefully scrutinized, that service was effective,[32] and that the CCB considers any applicable defenses.[33] Others opposed a regulation allowing claimants to move for a default determination, rather than providing the CCB with exclusive authority to initiate default proceedings.[34] The Office appreciates these comments and has endeavored to establish a multistep process designed to make default less likely through the use of built-in safeguards encouraging respondents to engage in the process, while also considering the interests of claimants.

The Office, as allowed but not required under section 1506(u), has proposed a notice system with extra safeguards to avoid defaults where possible. Under the proposed rule, where there has been a missed deadline or requirement, the CCB, following a party's request or on its own initiative, may issue a notice, which will be delivered by mail and to known email addresses for the respondent or counterclaim respondent, explaining that failure to participate may result in the CCB entering a default determination against that party. This notice will explain the meaning and consequences of a default determination and provide the respondent with thirty days from the notice to cure the missed deadline or requirement. If the respondent has not re-engaged by curing the missed deadline or otherwise responding to the notice within fifteen days into the thirty-day window, the CCB will send a second notice to the respondent that re-attaches the first notice and reminds the respondent that it must cure the missed deadline or requirement by the thirty-day deadline.

If the respondent cures the missed deadline or requirement within the thirty-day window, the proceeding will resume and the CCB will issue a revised scheduling order, if necessary. If the respondent fails to cure the missed deadline but otherwise responds with an indication of an intent to re-engage in the proceeding, the CCB will consider the response and may either provide the respondent with additional time to cure the missed deadline, or may proceed with the default process, to avoid, for instance, a respondent continually taking extensions on deadlines without permission and only acting when defaults are issued. If the respondent fails to cure the missed deadline or requirement within the thirty-day window and does not otherwise request and receive additional time to cure the missed deadline, the CCB may proceed with the default process by requiring the claimant to submit evidence in support of a default determination. Such evidence shall take the form of the direct written testimony that the claimant ordinarily would put forward prior to a determination on the merits, and the CCB may request additional evidence that the claimant has within its possession. The CCB will then consider such evidence, taking into account any meritorious defenses that the respondent may have had, and determine whether the evidence is sufficient to support a finding in favor of the claimant. If so, the CCB will determine the appropriate relief and damages, if any, and prepare a proposed default determination that includes the CCB's finding in favor of the claimant, the damages awarded, if any, and the dismissal of any counterclaims asserted by the respondent. The CCB will provide written notice to the respondent of the default determination and its legal significance, and attach the proposed default determination and provide the respondent with thirty days from the notice to respond.

If the respondent responds to this default determination notice by providing evidence in opposition, the CCB will review the respondent's submissions and may request additional information, including written testimony. If the respondent indicates an intent to re-engage in the proceeding, but does not submit timely evidence, the CCB will have the discretion to either grant additional time to submit evidence or proceed with issuing the default determination. The claimant will have an opportunity to respond to any submissions from the respondent, and the CCB, in its discretion, may elect to hold a hearing. After considering any additional evidence or other information provided by the parties, the CCB will either maintain or amend its proposed determination. As the CCB will then have considered evidence from both parties, the resulting final determination will not be classified as a default determination. The effect of this classification is that the resulting final determination may not be challenged as a default determination in a federal district court pursuant to 17 U.S.C. 1508(c). The respondent may, however, seek reconsideration as outlined in 17 U.S.C. 1506(w) and the accompanying regulations in part 230 of title 37.

If the respondent fails to respond to the notice of pending default determination, the CCB will issue the determination as a final determination. The respondent may challenge the default determination in federal court within ninety days of its issuance or, provided that it has not yet initiated proceedings in federal court, may submit a request to the CCB that the default determination be vacated. The claimant will have an opportunity to respond to this request, and both parties will follow the general procedures for reconsideration requests with respect to their submissions. The CCB may then vacate the default determination if it finds that vacating the determination is in the interests of justice.

The statute does not speak to the disposition of a proceeding where the claimant's evidence is insufficient to support a finding in its favor. Under the proposed rule, if the CCB determines that the claimant's evidence is insufficient, it will dismiss the proceeding without prejudice. The Office believes that this approach is appropriate given that the claimant may have been unable to sufficiently gather supporting evidence through discovery due to the default of the respondent. A dismissal with prejudice thus could unfairly penalize a claimant and reward a defaulting respondent.

While the statute is generally designed to be lenient and to avoid defaults, in order to avoid abuse of the system, the proposed rule permits the CCB, in its discretion, to proceed with the default process without issuing the two notices described above, and to move forward with requiring the claimant to submit evidence in support of a default determination if a respondent misses a third deadline in a proceeding without good cause. This provision is aimed at encouraging timely participation and preventing respondents from repeatedly using the default provisions as a backdoor extension for deadlines. The Office appreciates any comments concerning whether such a provision is advisable, and whether there are any other

[32] Motion Picture Ass'n, Recording Indus. Ass'n of Am. & Software and Info. Ass'n of Am. (''MPA, RIAA & SIIA'') Initial NOI Comments at 16; Ryan Fountain Initial NOI Comments at 2.

[33] Engine Initial NOI Comments at 9.

[34] Copyright Alliance, Am. Photographic Artists, Am. Soc'y for Collective Rights Licensing, Am. Soc'y of Media Photographers, The Authors Guild, CreativeFuture, Digital Media Licensing Ass'n, Graphic Artists Guild, Indep. Book Pubs. Ass'n, Music Creators N. Am., Nat'l Music Council of the United States, Nat'l Press Photographers Ass'n, N. Am. Nature Photography Ass'n, Prof. Photographers of Am., Recording Academy, Screen Actors Guild-Am. Fed. of Television and Radio Artists, Soc'y of Composers & Lyricists, Songwriters Guild of Am. & Songwriters of N. Am. (''Copyright Alliance, et al.'') Reply NOI Comments at 16–17.

appropriate and effective methods for preventing abuse of the default process.

ii. Failure To Prosecute

The statute establishes a procedure whereby proceedings may be dismissed due to the failure of a claimant to complete service or to otherwise participate in the proceeding. Under the statute, the CCB will dismiss a respondent or an entire proceeding, as is applicable, without prejudice where a claimant does not complete service on one or more respondents within ninety days of the CCB approving the claim.[35] Once a proceeding becomes active, if a claimant (including a counterclaimant) fails to meet one or more deadlines or requirements set forth in the CCB's scheduling order without justifiable cause, the CCB may dismiss the claims after providing the claimant with written notice and a thirty-day period to respond and cure the missed deadline.[36] If the claimant does not comply, the CCB, after considering any response the claimant provides other than actually complying with the requirements of the missed deadline, may dismiss the claims.[37] As with default determinations, the CCB may subsequently vacate a dismissal ''in the interests of justice,'' [38] and a federal court may vacate the determination ''if it is established that the default or failure was due to excusable neglect.'' [39]

The Office solicited comments concerning regulations governing a claimant's failure to prosecute its claims. One commenter suggested that the regulations permit a respondent to move for dismissal for failure to prosecute,[40] while others opposed such a regulation.[41]

The proposed rule concerning a claimant's failure to complete service creates a distinction between necessary parties and non-necessary parties. If a claimant fails to timely serve a respondent whose participation is not necessary to adjudicate the claims against other parties, the CCB will dismiss that respondent from the proceeding without prejudice, and the proceeding will continue against any remaining respondents. On the other hand, if a claimant fails to timely serve a respondent who is a necessary party, the CCB will dismiss the proceeding without prejudice. If the claimant does not timely serve each and every respondent, the CCB will dismiss the proceeding without prejudice.

The proposed rule pertaining to a claimant's failure to prosecute generally mirrors the provisions regarding a respondent's default. Under the proposed rule, at the request of a party or on its own initiative, the CCB may issue a notice to the claimant, which will be delivered by mail and to all known email addresses for the claimant, that failure to prosecute may result in the CCB issuing a determination dismissing the claimant's claims. This notice will explain the legal effects of such a determination and provide the claimant with thirty days to cure the missed deadline or requirement. If the claimant has not re-engaged fifteen days into this thirty-day window, the CCB will send a second notice to the claimant that re-attaches the first notice and reminds the claimant that it must cure the missed deadline or requirement by the thirty-day deadline.

If the claimant cures the missed deadline or requirement within the thirty-day window, the proceeding will resume and the CCB will issue a revised scheduling order, if necessary. If the claimant fails to cure the missed deadline but otherwise responds with an indication of an intent to re-engage in the proceeding, the CCB will consider the response and may either provide the claimant with additional time to cure the missed deadline or requirement, or may proceed with issuing a determination dismissing the claims. If the claimant fails to cure the missed deadline or requirement within the thirty-day window and does not otherwise request and receive additional time to cure the missed deadline, the CCB will issue a determination dismissing the claims. Such a dismissal will be with prejudice and may include an award of attorneys' fees and costs, if appropriate. As with a default determination, the claimant may challenge the determination in federal court within ninety days of its issuance or, provided that it has not yet initiated proceedings in federal court, may submit a request to the CCB that the determination be vacated. The respondent will have an opportunity to respond to this request, and both parties will follow the general procedures for reconsideration requests with respect to their submissions. The CCB may then vacate the determination in the interests of justice.

The Office welcomes any comments concerning the proposed rules concerning a claimant's failure to proceed and specifically, whether they strike the proper balance between the rights and interests of a respondent and a claimant.

4. Conduct of Parties

The statute contains several provisions that are designed to deter and address improper conduct from parties in proceedings before the CCB. These include provisions authorizing the CCB to penalize bad-faith conduct by awarding costs and attorneys' fees, and to bar repeat bad-faith actors from initiating proceedings before the CCB for a period of twelve months.[42]

i. Bad-Faith Conduct

Under the statute, the CCB may award reasonable costs and attorneys' fees where it determines that ''a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, . . . unless inconsistent with the interests of justice.'' [43] Such an award is typically limited to $5,000, but where the party appeared *pro se,* the award may only include costs and is capped at $2,500.[44] The award may be increased beyond the statutory limit ''in extraordinary circumstances'' where there is a demonstrated ''pattern or practice of bad faith conduct.'' [45] The statute also authorizes the CCB to bar a party from initiating claims for a period of twelve months if it determines that the party engaged in certain bad-faith conduct more than once in a twelve-month period.[46] If it reaches such a determination, the CCB must also dismiss without prejudice any pending proceedings that were commenced by the bad-faith actor, except that dismissal of any active proceeding requires the written consent of the respondent.[47]

In response to the NOI, commenters suggested that the Office create a streamlined process or standardized forms to report bad-faith conduct [48] and publish a list of bad-faith actors who have been barred from using the CCB.[49] Commenters also recommended that the Office establish rules preventing copyright ''trolls'' from abusing the

[35] 17 U.S.C. 1506(v)(1).

[36] *Id.* at 1506(v)(2).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1508(c)(1)(C).

[40] Amazon Initial NOI Comments at 8.

[41] Copyright Alliance, et al. Reply NOI Comments at 16–17.

[42] 17 U.S.C. 1506(y)(2).

[43] *Id.*

[44] *Id.* at 1506(y)(2)(A).

[45] *Id.* at 1506(y)(2)(B).

[46] *Id.* at 1506(y)(3).

[47] *Id.*

[48] Amazon Reply NOI Comments at 4; Amazon Initial NOI Comments at 11–12; Copyright Alliance, et al. Initial NOI Comments at 42.

[49] Copyright Alliance, et al. Reply NOI Comments at 20; Comput. & Comms's Indus. Assoc. & internet Assoc. (''CCIA & IA'') Initial NOI Comments at 7–8.

CCB.[50] One commenter suggested that the regulations include a mechanism, similar to Anti-SLAPP motions,[51] whereby a respondent can make an early motion to dismiss a bad-faith claim.[52]

The proposed rule makes both parties and party representatives subject to various bad-faith conduct provisions. Under the proposed rule, the CCB will review, as part of its determination of an award of costs or attorneys' fees, whether a party or its representative engaged in bad-faith conduct. The Office has defined ''bad-faith conduct'' consistent with the statute, and the rule clarifies that such conduct may occur at any time during a proceeding. At any point prior to determination, the CCB may order a party or its representative to show cause why certain conduct does not constitute bad-faith conduct. The party or representative will have three days to file a response.

A party may also raise allegations of bad-faith conduct. To do so, the party must file a letter describing the alleged conduct, attaching any relevant exhibits, and seeking a conference. The accused party has seven days in which to file a response if it wishes. After reviewing the parties' submissions, the CCB must either make a finding that no bad-faith conduct occurred or schedule a conference to address the request. The CCB will consider the parties' letters, any arguments on the issue, and the accused party's behavior in other CCB proceedings in the preceding twelve months in determining whether to award attorneys' fees and costs. If the CCB determines that an award of attorneys' fees and costs is appropriate, the award will be included in the final determination and will be in accordance with the allowable amounts set forth in the statute.

The proposed rule also provides that a party or representative who engages in bad-faith conduct on more than one occasion within a twelve-month period will be barred from initiating claims before the CCB for a period of twelve months. The CCB must dismiss any pending proceedings brought by a party who engaged in repeated bad-faith conduct within the requisite time period. In its discretion, the CCB may also bar a representative from participating further in any claims pending before the CCB, after consideration of any hardship to parties represented by that person. If a representative is barred from further representing a party in a pending claim, the CCB will consider requests from that party asking the Board to provide additional time or a stay of the pending action to allow that party to find other representation. As with the proposed rule pertaining to bad-faith conduct within a proceeding, allegations of multiple instances of bad-faith conduct may be raised either by the CCB at any point during a proceeding through an order to show cause or by a party at any point after a proceeding has been initiated. A party may raise such allegations through a letter which describes the instances of bad-faith conduct, attaches relevant exhibits, and requests a conference. A respondent will not waive the ability to opt out of the proceeding if it raises allegations of bad-faith conduct with the CCB prior to the expiration of the period to opt out. The accused party will have an opportunity to respond, regardless of whether the allegations are raised by the CCB or another party.

After reviewing the parties' submissions, the CCB will either make a finding that no bad-faith conduct occurred or hold a conference to address the allegations. The CCB will consider the parties' letters, any arguments on the issue, and the accused party's behavior in other proceedings before the CCB. If an accused party has been subject to an award of attorneys' fees or costs by the CCB due to bad-faith conduct at any point in the prior twelve months, then that will be considered an additional instance of bad-faith conduct for purposes of establishing the bar on initiating claims. However, the CCB may also consider other evidence of bad-faith conduct by the accused party, even if such conduct ultimately did not result in a formal finding or an award of attorneys' fees or costs. For example, the CCB may consider instances in which the accused party filed claims that were found to be noncompliant, or bad-faith proceedings that were initiated by the accused party where the respondent opted out. If the CCB determines that the accused party has engaged in bad-faith conduct on more than one occasion in a twelve-month period, the CCB will issue a written determination that provides that the accused party will be barred from initiating claims before the CCB for twelve months and, where the bad-faith actor is a party and not a representative, that any pending proceedings commenced by the party be dismissed without prejudice, with the exception that the dismissal of active proceedings requires the written consent of the respondent in those proceedings.

The proposed rule does not provide for the publication of a list of bad-faith actors who have been barred from initiating proceedings, as some commenters suggested, because the Office believes that such a list would be unduly harsh, especially for non-attorneys. The CCB will, however, make certain records and findings related to bad-faith conduct public, so that parties are able to identify patterns of bad-faith conduct and bring them to its attention. The Copyright Claims Attorneys will be positioned to identify parties who, notwithstanding being barred from initiating proceedings, do so anyway in spite of a bar and will classify such proceedings as noncompliant. The Office welcomes any other comments concerning the proposed rules for bad-faith conduct, including whether there should be publication of a list of bad-faith actors.

ii. Attorney Conduct

The Office also requested comments regarding the adoption of regulations pertaining to the conduct of attorneys, such as whether to prohibit attorneys who have been suspended from practicing law from participating in CCB proceedings and whether to adopt rules addressing such issues as conduct and discipline, duties of candor, fraud prevention, and, if necessary, sanction, suspension, exclusion, or censure.[53] Commenters generally agreed on the advisability of such regulations. Some commenters suggested that the CCB should have the ability to bar or suspend attorneys who engage in bad-faith conduct,[54] and some suggested that the CCB should report such attorneys to their respective bar associations.[55] Several commenters agreed that disbarred, suspended, or sanctioned attorneys should not be permitted to practice before CCB.[56] Other suggestions were to have the CCB establish rules of professional conduct[57] as well as requirements that attorneys representing

[50] Elec. Frontier Found. (''EFF'') Initial NOI Comments at 3; John Boushka Initial NOI Comments at 1.

[51] Anti-SLAPP statutes are laws designed to deter strategic lawsuits against public participation (''SLAPP''), that is, lawsuits that have the primary purpose of suppressing legitimate criticism or opposition. Such statutes set forth a special form of motion practice, referred to as an ''Anti-SLAPP motion,'' that permits the early dismissal of such lawsuits. *See, e.g., DC Comics* v. *Pac. Pictures Corp.,* 706 F.3d 1009, 1013 (9th Cir. 2013) (discussing California Anti-SLAPP statute).

[52] Gordon Fiermark Initial NOI Comments at 1.

[53] 86 FR 16164–65.

[54] CCIA & IA Initial NOI Comments at 7.

[55] *Id.;* MPA, RIAA & SIIA Initial NOI Comments at 21.

[56] Am. Bar Ass'n Intell. Prop. L. Sec. (''ABA–IPL'') Reply NOI Comments at 8–9; Google Initial NOI Comments at 2; Univ. of Mich. Libr. Initial NOI Comments at 7.

[57] Univ. of Mich. Libr. Initial NOI Comments at 7.

a party identify themselves; an attorney appearance include a representation that the attorney is a member of a bar in good standing; and an attorney who is aware of bad-faith behavior committed by another attorney inform the CCB.[58]

The proposed rule requires attorneys or other representatives to file a notice of appearance that consists of the name of the case, the attorney's bar number (where one exists) in a state in which the attorney has been admitted to practice, the case number, the person on whose behalf the appearance is made, and the attorney or representative's contact information, including email address and telephone number. Attorneys or other representatives must file a similar notice when withdrawing an appearance. Except for law student representatives, attorneys must be a member in good standing of a state, the District of Columbia, or a United States territory or commonwealth bar. Attorneys and representatives must file a statement under penalty of perjury that they are currently qualified and authorized to represent the party on whose behalf they have appeared.

As some comments suggested, the proposed rule prohibits attorneys or representatives who have been disbarred by any court from representing parties before the CCB. If an attorney in an active or pending proceeding is disbarred after a notice of appearance is made, the attorney must report the disbarment to the CCB and withdraw representation. The proposed rule does not prohibit disbarred attorneys or representatives from representing themselves *pro se* where they are a party in a proceeding.

The proposed rule also makes clear that attorneys and representatives who appear before the CCB have a duty of candor and impartiality toward the CCB and a duty of fairness towards opposing parties and counsel. The proposed rule does not establish independent rules of professional conduct. Instead, the CCB will look to the District of Columbia's rules of professional conduct and the rules in the jurisdiction in which the representative practices in determining whether an attorney or representative has breached these duties.

The proposed rule empowers the CCB to bar attorneys or representatives who violate any of these standards of conduct, or are otherwise found to be engaging in bad-faith conduct, from representing parties before the CCB for twelve months. The Office agrees with commenters that such a provision is advisable, and believes the Register has the authority under section 1506(a)(1) to prescribe regulations governing the conduct of attorneys in proceedings before the CCB. Such authority would seem to necessarily include the ability to temporarily bar attorneys from appearing before the CCB. Furthermore, the statute expressly authorizes a twelve-month bar for parties who engage in repeated bad-faith conduct,[59] and defines the term ''party'' to include ''the attorney of a party, as applicable.''[60] The Office invites comments concerning the CCB's authority to discipline or bar attorneys or representatives in this way and whether there are any other methods available to the CCB that should be considered.

5. Limitation on Cases

The statute provides the Office with the option of establishing regulations to limit the number of proceedings a party may bring each year ''in the interests of justice and the administration of the Copyright Claims Board.''[61] Congress explained that this power ''functions as both a docket management tool . . . and as protection against abusive conduct.''[62] In the NOI, the Office indicated its expectation that it would exercise this authority, subject to re-evaluation after the CCB is able to determine the size of its workload.[63]

The Office sought public comment relating to the initial limitation of the permitted number of proceedings a claimant may file each year.[64] Commenters were generally supportive of a limit on the number of claims a party may bring in a year, and suggested limits that ranged from two to four hundred cases.[65] A few commenters opposed a limit due to concerns that it would disproportionately disadvantage claimants who hold copyrights in many works[66] or that a strict limitation would run the risk of being arbitrary and capricious.[67] One commenter suggested a similar restriction be imposed on firms and agents, prohibiting them from representing more than one claim per client per year.[68] Other commenters suggested certain exemptions from the limitation, including for counterclaims,[69] for proceedings where a respondent ultimately opts out or that otherwise do not become active,[70] and for organizations acting on behalf of multiple rights holders.[71] One commenter suggested that the Office consider the financial situation of the claimant and the market price of the infringed work in determining the limit.[72]

Upon consideration of these comments, the Office has proposed a requirement that a party may file no more than ten proceedings in any twelve-month period. The Office believes this limit will help to ensure that the CCB is able to effectively manage its docket, particularly given that the Office has not proposed an upper limit on the total number of proceedings that may be pending before the CCB, as discussed further below. The Office also seeks to avoid the possibility that proceedings may be overwhelmed by just a few claimants. A private attorney or law firm may represent a claimant in no more than forty proceedings in any twelve-month period. A proceeding will count toward this limitation as soon as it is filed, regardless of how it is resolved (*e.g.,* even if it is found noncompliant or unsuitable, is voluntarily dismissed, or is dismissed due to a respondent's opt out). However, amendments to a claim or the filing of counterclaims will not count toward this limit. Any action taken for the sole purpose of avoiding this limitation will constitute bad-faith conduct under the proposed rule. At this time, the proposed rule does not limit the maximum number of total proceedings that may be filed before the CCB by all parties combined.

The proposed rule also provides the CCB with the ability to impose a temporary limitation on the number of proceedings that may be pending before it or the number of proceedings that a party or representative may have pending before the CCB in a twelve-month period. Such a limitation would remain in place for a period that may not exceed six months in the absence of a notice and comment rulemaking. This

[58] Copyright Alliance, et al. Initial NOI Comments at 42.

[59] 17 U.S.C. 1506(y).

[60] *Id.* at 1501(3)(B).

[61] *Id.* at 1504(g).

[62] H.R. Rep. No. 116–252, at 31.

[63] 86 FR 16164.

[64] *Id.*

[65] CCIA & IA Initial NOI Comments at 6 (10 cases); Copyright Alliance, et al. Initial NOI Comments at 41 (20 cases for first year, with discretion to permit more cases for good cause and in interests of justice); Davis Jr. & Luce Initial NOI Comments at 3 (two cases seeking damages over $2500); George LaBonty Initial NOI Comments at 1; Univ. of Mich. Initial NOI Comments at 6–7 (10–12 cases); Verizon Initial NOI Comments at 6–7 (four cases).

[66] MPA, RIAA & SIIA Initial NOI Comments at 19–20.

[67] Science Fiction and Fantasy Writers of Am. Reply NOI Comments at 6.

[68] Verizon Initial NOI Comments at 6–7.

[69] Copyright Alliance, et al. Initial NOI Comments at 41.

[70] *Id.* at 41–42; MPA, RIAA & SIIA Initial NOI Comments at 20.

[71] Copyright Alliance, et al. Initial NOI Comments at 41.

[72] Niskanen Center Initial NOI Comments at 5.

provision is intended to enable the CCB to react quickly in the event that it is inundated with more claims than it is able to handle. Claimants confronted with a potential statute of limitations issue because of the moratorium may file a claim accompanied by a declaration under penalty of perjury attesting that the statute of limitations will expire during the stay and setting forth facts in support of that conclusion. If the CCB determines that the statute of limitations likely will expire during the stay based on the facts set forth in the declaration, the CCB will hold the claim in abeyance and conduct its compliance review of the claim after the end of the moratorium.

The Office welcomes any 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.

B. Management of Proceedings

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

The statute includes a general prohibition on formal motion practice, subject to certain exceptions, but permits parties to make various ''requests.'' [73] The statute also sets forth the types of evidence that the CCB may consider in a proceeding—namely, relevant documentary and other nontestimonial evidence as well as relevant testimonial evidence submitted under penalty of perjury.[74] The statute does not otherwise speak to the applicability of the FRCP and the Federal Rules of Evidence (''FRE'').

The Office solicited comments regarding whether it should adopt any provisions of the FRCP in areas relevant to the CCB's operations, potentially with modifications to simplify them and make them more accessible.[75] The Office received several comments on this issue with wide-ranging recommendations on the applicability of the Federal Rules to CCB proceedings. Commenters suggested additional models to look to beyond the Federal Rules [76] and recommended specific provisions that they thought the CCB should adopt, such as those regarding initial status conferences [77] and mechanisms for summary dismissal of unsuitable claims.[78] Several commenters agreed that CCB proceedings should be more flexible and permissive than federal proceedings,[79] especially with respect to the admission of evidence.[80] Some commenters emphasized that the CCB should make use of standardized forms, as opposed to the more customized approach to submissions in federal court proceedings.[81]

The Office agrees with commenters that CCB proceedings should be more flexible and permissive than federal court proceedings. Similarly, and especially given the lack of need to worry about confusing a jury, and the desire not to force unsophisticated parties to learn the rules of evidence, the Board will be more flexible in accepting evidence than a strict adherence to the FRE would require.[82] Accordingly, the proposed rule makes clear that the CCB is not bound by the FRCP or the FRE and that citations by parties to the FRCP and FRE will only be considered to the extent they are persuasive.

2. Scheduling Order

The statute provides that the CCB will issue a scheduling order, which may be amended in the interests of justice, specifying the deadlines in a proceeding upon confirmation that it has become an active proceeding.[83] The CCB may also hold conferences to address case management or discovery issues.[84]

Under the proposed rule, the required scheduling order will include deadlines for the filing of the respondent's response to the claim (including any counterclaims); the date and time of a pre-discovery conference; deadlines for service upon other parties of responses to the CCB's standard interrogatories and standard production of document requests; other discovery deadlines; the deadline for requests for leave to seek additional discovery; the date of the close of discovery; the date and time of a post-discovery conference; and the deadline for the filing of written testimony. The proposed rule does not set forth specific timeframes for each of these deadlines so that the CCB has flexibility to assess the pace of proceedings and the need for docket management.

The proposed rule also provides that the CCB may hold additional conferences beyond the pre-discovery conference and the post-discovery conference on its own initiative or at the request of any party. All such conferences will be held virtually. The proposed rule also permits the CCB to amend the initial scheduling order as needed. The Office invites comments as to whether any other deadlines should be included in the initial scheduling order.

The proposed rule contemplates that one or more Officers will hold all conferences. The Office observes, however, that proceedings could be streamlined and made more efficient if Copyright Claims Attorneys are permitted to hold conferences that do not involve the resolution of a dispute and instead relate to logistical, scheduling, or other non-substantive matters. Accordingly, the Office solicits comments as to whether it has the authority to permit such conferences to be held by Copyright Claims Attorneys rather than Officers.

3. Amending Pleadings

While the statute does not speak to amended pleadings, the Office proposes a rule that would generally prohibit a claimant from making substantive changes without another review by the Copyright Claims Attorneys, or after the time for a respondent to opt out has expired.[85] Under the proposed rule, a claimant may freely amend its claim once as a matter of course before the claim is served by filing the proposed amendment for a compliance review.[86] If the compliance review by the Copyright Claims Attorney already has been completed at the time of the proposed amendment, it must be submitted for a new review by a Copyright Claims Attorney to ensure that the claim as modified is compliant.

A claimant seeking to amend a claim during the opt-out period may do so only with the CCB's leave. To seek such leave, the claimant must submit a short letter to the CCB that sets forth the reasons for the amendment. The CCB will freely grant leave to amend a claim if justice so requires, after considering whether the basis for the amendment should have been reasonably known to the claimant before the claim was served, along with any other relevant considerations. If the CCB grants leave for the amendment, it must still be submitted for a compliance review by a

[73] 17 U.S.C. 1506(m).

[74] *Id.* at 1506(o).

[75] 86 FR 16168.

[76] ACUS Initial NOI Comments at 1–3.

[77] AIPLA Initial NOI Comments at 6.

[78] LCA Reply NOI Comments at 4.

[79] AIPLA Initial NOI Comments at 8.

[80] *Id.;* Copyright Alliance, et al. Initial NOI Comments at 22.

[81] AIPLA Initial NOI Comments at 1; Copyright Alliance, et al. Initial NOI Comments at 21–22; Vient Initial NOI Comments at 4.

[82] The CASE Act provides that the Board CCB may consider various forms of evidence and that ''such evidence may be admitted without application of formal rules of evidence.'' 17 U.S.C. 1506(o).

[83] *Id.* at 1506(k).

[84] *Id.* at 1506(l).

[85] *See* Fed. R. Civ. Pro. 15.

[86] A detailed explanation of the compliance review can be found in the Office's notice of proposed rulemaking on initiation of CCB proceedings. *See* 86 FR 53898–99.

Copyright Claims Attorney. If the Copyright Claims Attorney determines that the amended claim is compliant, the claimant must serve the amended claim on the respondent within fourteen days. Once the claimant serves the amended claim, the period for the respondent to opt out will begin anew, and it will have sixty days to determine whether to opt out of the proceeding.

If a party seeks to amend a pleading after the opt-out period has expired, it may only do so with the leave of the CCB. If the CCB grants such leave, the amendment still must be submitted for a compliance review. To make a request to amend a pleading after service, the party must submit a short letter to the CCB, and any opposing parties will be provided with an opportunity to object or to state that they do not object. The CCB will freely grant leave as justice so requires, after considering whether permitting amendment would prejudice any party or unduly delay the proceeding, and whether the party seeking amendment reasonably should have known of the basis for an amendment earlier. Responses to amended pleadings must be made within the later of the time remaining to respond to the original pleading or within twenty-one days of the CCB's issuance of notification that the amended pleading is compliant.

In proposing this approach, the Office seeks to ensure that the respondent knows the nature and scope of a claim before the opt-out period expires. In other words, the Office wishes to avoid scenarios where amendments substantially change the nature of the proceeding after the opt-out decision has been made. At the same time, the Office believes it is appropriate to permit certain amendments after service, especially where an obvious typographical error has been made. The Office seeks comments concerning these issues and the proper mechanisms for allowing amendments after service of a pleading while preserving the purpose of the opt-out provision.

4. Consolidation

The statute is silent concerning whether claims may be consolidated where they involve identical parties or identical facts and circumstances, or severed where they involve disparate claims. In line with the suggestion of one commenter,[87] the proposed rule provides that the CCB may consolidate active proceedings that involve the same parties or that arise out of the same facts and circumstances for purposes of conducting discovery, submitting evidence, or holding hearings, but not for purposes of CCB determinations and any damages award. Regarding severance, Copyright Claims Attorneys likely will, in the ordinary course, be able to identify during their review process instances where multiple claims involving disparate facts and circumstances have been asserted, and can require that the claimant separate out such disparate claims. The proposed rule also permits the CCB to sever proceedings with respect to some or all parties, claims, and issues where it becomes evident that a single proceeding includes distinct claims involving disparate facts and circumstances that would be inappropriate to resolve in a single proceeding.

Unlike the rule on consolidation, claims that have been severed will be treated together for purposes of damages, so that the cumulative amount of damages awarded in the severed proceedings cannot exceed the maximum damages under the statute for one proceeding. The CCB may dismiss one of the severed proceedings if it finds it to be unsuitable, while allowing the remaining proceeding or proceedings to continue.

The CCB may consolidate or sever proceedings either on its own or at the request of a party, provided that all affected parties receive reasonable notice and an opportunity to be heard. A party seeking consolidation or severance must submit a short letter to the CCB, setting forth the basis for the request, seeking a conference between the CCB and parties from each affected case, and, in the case of a consolidation, providing the docket numbers of each affected proceeding. Parties opposed to the consolidation or severance may file a response objecting to the request. The CCB will consider whether consolidation or severance is necessary and balance the necessity for such action with the timeliness of the request and any undue prejudice that may result.

The Office is interested in public comments concerning the advisability of these proposals. In particular, the Office seeks input as to whether the proposed rule that consolidated proceedings will remain separate for purposes of determinations and damages could be used to evade the statutory caps on damages awards in CCB proceedings, and whether, despite the proposed rule against a party taking actions to avoid case filing limitations, the proposed rule concerning severance could enable parties to evade the limitation on the number of proceedings filed by a single party if a party was able to make disparate claims against various respondents in a single claim filing, all of which should not have been filed together, and then attempt to treat all those claims as one filing even if later severed.

5. Settlement

The statute empowers Officers to facilitate the settlement between parties of claims and counterclaims.[88] It also permits some or all of the parties, at any point in an active proceeding, to request a settlement conference with an Officer. Parties may also jointly submit a settlement agreement, which may be adopted in the CCB's final determination.[89] Congress was clear that the statute ''reflects an intent to encourage compromise and settlement'' and is ''designed to promote compromise,'' as further reflected by the requirement that at least one of the Officers have experience with alternative dispute resolution.[90]

The proposed rule provides that the CCB will encourage voluntary settlement and will, at a minimum, discuss the appropriateness of holding a settlement conference as part of the pre-discovery and post-discovery conferences. At any point in an active proceeding, some or all parties may jointly request a settlement conference with an Officer either orally at a conference or in writing. If the request is made in writing, it must indicate which other parties, if any, join in the request. The party or parties may request a stay of the proceeding while settlement discussions are ongoing. Any opposing party may submit a response letter objecting to the settlement conference or the stay. Stays will be at the CCB's discretion. If no party objects, the CCB will schedule a settlement conference. If one or more party objects, the CCB may still schedule a conference with some or all of the parties, after considering the basis for the objection and whether any claims or counterclaims may be resolved if the CCB holds a conference with only the consenting parties in attendance.

Three days prior to the settlement conference, each participating party must submit a position statement by email to the Officer presiding over the settlement conference, which can be provided to the other parties by agreement, and may include a limited number of exhibits, to facilitate the settlement discussions. The CCB may

[87] Science Fiction and Fantasy Writers of Am. Initial NOI Comments at 6.

[88] 17 U.S.C. 1503(a)(1)(F).

[89] *Id.* at 1506(r).

[90] 17 U.S.C. 1502(b)(3)(iii); H.R. Rep. No. 116–252, at 24.

issue an order staying the proceedings for a period of up to thirty days at the time the conference is scheduled, during or following the conference, or at the request of the parties. Such a stay may be extended at the request of the parties, provided that they are participating in ongoing settlement discussions. If settlement discussions have not been successful at the time the stay (or an extension thereof) expires, the CCB will issue an amended scheduling order.

If settlement discussions are successful and some or all of the parties have reached a resolution, the parties may notify the CCB that they wish to dismiss some or all of the claims or counterclaims and may also include in their request for a dismissal that the CCB adopt some or all of the settlement terms in the final determination. The CCB will dismiss any claims or counterclaims covered by the settlement agreement with prejudice (unless the parties have agreed otherwise) and will adopt any requested settlement terms into the final determination, unless the CCB determines that they are clearly unconscionable.

The Office invites any comments concerning whether there are any other regulations that should be adopted to facilitate settlement between the parties. In particular, the Office seeks input on whether the CCB should be able to order a settlement conference where it sees possible benefit to holding a conference even where one or more parties object. The Office also seeks comment regarding the participation of Officers in settlement conferences. Under the statute, a determination must be reached by ''the majority of the Copyright Claims Board,'' [91] which suggests that an Officer who participates in a settlement conference must also participate in the determination. The Office notes that in the federal litigation system, there are varying approaches within the district courts [92] regarding who should preside over settlement conferences. Some allow district judges to preside over such conferences,[93] while others prefer the use of magistrate judges,[94] outside neutrals,[95] or some combination thereof.[96] The Office recognizes the possibility that a separation between the Officer who presides over a settlement conference and the Officers who serve as the ultimate decision-makers could further encourage participation in voluntary settlement negotiations, and seeks comments assessing the likelihood that parties will engage in settlement when the Officer who presides over the settlement conference will also be involved in the final determination. The Office is also interested in comment regarding any statutory authority for the recusal of the settlement conference Officer from a proceeding, only to terminate the recusal if the two remaining Officers fail to agree on a determination, and whether parties could stipulate to such a recusal and to abide by a decision issued by only the Officers not involved in settlement discussions.

6. Smaller Claims

The statute directs the Office to establish regulations concerning claims in which the total damages sought by the claimant do not exceed $5,000, exclusive of attorneys' fees and costs. These smaller claims are to be considered and determined by not fewer than one Officer. Such determinations will have the same effect as a determination issued by the full CCB.[97] The legislative history states that such proceedings should ''have the same procedural protections of any other claim before the Copyright Claims Board,'' other than that they may be heard by a single Officer.[98]

The Office solicited comments concerning procedures for such ''smaller claims,'' including regulations that would increase the efficiency of such proceedings while retaining the CCB's standard procedural protections.[99] Several commenters suggested that there be a strong presumption against discovery in smaller claims proceedings.[100] Other suggestions included that only Officers with substantial experience with copyright infringement claims be permitted to preside over smaller claims proceedings; [101] that respondents should receive the same protections available to defendants in federal litigation; [102] and that claimants should be required to indicate as part of the initial claim whether they are seeking $5,000 or less in damages.[103] The legislative history suggested that the Office could consider delaying rulemaking concerning smaller claims proceedings until it has an opportunity to evaluate its ordinary procedures and caseload in practice.[104] The Office has considered this suggestion and has decided to institute smaller claims procedures at the outset in order to provide an option of an increasingly streamlined process for claims of $5,000 or less. The Office believes that providing such a process will provide benefits in terms of efficiency and simplicity to parties and may enable the CCB to handle more claims than it otherwise could.

Under the proposed rule, a claimant may either request consideration under the smaller claims procedures at the time of filing or amend its request any time prior to service of the claim. When the claimant seeks to amend its choice after the compliance review but before service, the CCB must issue a new initial notice reflecting the change, so that the notice served on the respondent states that the proceeding will be conducted under the rules for smaller claims. However, once the claimant chooses the smaller claims procedures and completes service, that decision may not be reversed without the consent of the other parties and leave of the CCB.

Smaller claims proceedings will be heard by one Officer, who will be assigned on a rotating basis at the CCB's discretion. Discovery in smaller claims proceedings will be limited to the standard interrogatories, requests for admission, and the standard production of document requests provided by the CCB, as discussed further below. The presiding Officer shall not consider any requests for additional discovery, and expert testimony will be prohibited in smaller claims proceedings, since any benefits of additional discovery or expert testimony are unlikely to outweigh the costs and delays that they may cause. The assigned Officer will issue a determination based solely on the written testimony and without holding a hearing prior to issuing a determination.

The Office welcomes comments concerning the proposed rule for smaller claims and whether it strikes a proper balance between streamlining

[91] 17 U.S.C. 1506(t).

[92] Department of Justice, ''ADR in the Federal District Courts'' (Mar. 2016), *https://www.justice.gov/archives/olp/file/827536/download*.

[93] *See, e.g.,* D. Nev. L. Civ. R. 16.5; E.D. Mich. L. Civ. R. 16.3.

[94] *See, e.g.,* D. Ariz. L. Civ. R. 83.10; D. Colo. L. Civ. R. 16.6.

[95] *See, e.g.,* U.S. District Court for the Southern District of New York, ''Mediation Program Procedures,'' at 10 (July 2020); N.D. Ca. L. ADR R. 2–5.

[96] *See, e.g.,* E.D. Va. L. Civ. R. 83.6.

[97] 17 U.S.C. 1506(z).

[98] H.R. Rep. No. 116–252, at 17.

[99] 86 FR 16162–63.

[100] Copyright Alliance, et al. Reply NOI Comments at 17; AIPLA Initial NOI Comments at 7; Copyright Alliance, et al. Initial NOI Comments at 29; MPA, RIAA & SIAA Initial NOI Comments at 17.

[101] Copyright Alliance, et al. Initial NOI Comments at 29.

[102] Google Initial NOI Comments at 2.

[103] MPA, RIAA & SIAA Initial NOI Comments at 16–17.

[104] S. Rep. No. 116–105, at 8.

the process while providing the procedural protections available to other claims before the CCB.

7. Records and Publication

Under the statute, each final determination of the CCB will be made available on a publicly accessible website.[105] The Office is also directed to establish regulations related to the publication of other records and information concerning CCB determinations.[106] The Office previously indicated that it had requested the provision of an electronic filing and case management system from the Library of Congress' Office of the Chief Information Officer, which would provide capabilities comparable to existing case management systems operated by other courts and tribunals.[107] The Office sought comments concerning public access to CCB records and proceedings, as well as certification of records and determinations.[108] Several commenters agreed that access to determinations and other filings should be publicly available, but information provided during the course of discovery should not be made available.[109] Other commenters argued that there should be a presumption of public access to CCB filings,[110] and that access should be free.[111] A few commenters requested that the CCB make available statistics related to CCB proceedings.[112]

The Office recognizes that the CCB shares characteristics of both court and ADR proceedings.[113] Just as some litigants prefer arbitration in part because the records in such proceedings are not made available to the public, some claimants and respondents may prefer that access to their filings in CCB proceedings be limited. Such a feature might, in fact, play a role in some parties' determinations whether to file a claim with the CCB or whether to opt out of a CCB proceeding. Moreover, CCB determinations are not precedential, and therefore the public interest in such proceedings is arguably less compelling than it is in judicial proceedings.[114] The proposed rule seeks to balance public access with the confidentiality interests of the parties. It provides that the official written record of a CCB proceeding will consist of the parties' submissions and documents issued by the CCB. Members of the public may inspect the available official written record through the electronic filing system, with the exception of any materials that have been designated as confidential by the parties. The Office welcomes comment on whether there should be additional safeguards for parties to mutually agree to withdraw certain types of records from public view.

The proposed rule also addresses other issues related to public access to CCB proceedings and documents. The CCB may, in its discretion, make a transcript of a hearing using available technology or a court reporter. The Office anticipates that, in general, the CCB will use standard speech to text transcript technology that is available with the CCB's videoconferencing system. At the request of a party, the CCB may designate an official reporter to record and/or transcribe a hearing. The requesting party or parties will be responsible for paying the reporter for the cost of the official transcript directly. The Office welcomes comment regarding whether such informal raw transcripts, which may contain various errors, should be added to the official record. Attendance at CCB hearings will be limited to the parties and their representatives, except with leave of the CCB. Requests for leave to attend a CCB hearing must be made in writing. To certify a CCB record, the Office proposes to utilize preexisting services through its Records Research and Certification Section.

C. Discovery

The statute allows limited discovery in CCB proceedings. Discovery may include ''the production of relevant information and documents, written interrogatories, and written requests for admission,'' as established by Office regulations.[115] The CCB has the discretion to approve, upon a showing of good cause, requests for additional relevant discovery on a limited basis.[116] The CCB also may request specific information and documents from parties, consistent with the interests of justice.[117] In addition, the CCB may issue a protective order to protect confidential materials at the request of a party and for good cause.[118] The CCB is empowered to apply an adverse inference concerning disputed facts against a party who fails to timely provide relevant discovery materials in response to a proper request, after providing that party with notice and an opportunity to respond.[119]

Congress provided for limited discovery in CCB proceedings to ''ensure that the proceedings are streamlined and efficient.''[120] As explained in the Office's *Copyright Small Claims* report, discovery in federal courts is the ''primary reason for the length of federal court litigation'' and is associated with ''often substantial costs and potential for abuse by exploitative litigants.''[121] Consistent with this goal, the Office proposes a period of limited discovery involving the use of standard CCB-issued interrogatories and standard CCB-issued document requests, and allowing parties to serve limited requests for admission. Requests for additional discovery may be granted for good cause shown. While the CCB may consider requests for expert witnesses, such requests will be disfavored.

[105] 17 U.S.C. 1506(t)(3).

[106] *Id.*

[107] 86 FR 16163.

[108] *Id.*

[109] ABA–IPL Reply NOI Comments at 7; Copyright Alliance, et al. Initial NOI Comments at 38; MPA, RIAA & SIIA Initial NOI Comments at 19.

[110] EFF Initial NOI Comments at 4; Univ. of Mich. Initial NOI Comments at 5.

[111] Internet Archive Initial NOI Comments at 3.

[112] Engine Initial NOI Comments at 9; Univ. of Mich. Initial NOI Comments at 5.

[113] *See* 17 U.S.C. 1502(b)(9) (providing that the CCB is housed in the Copyright Office); *id.* at 1509(b) (providing that a CCB proceeding qualifies as an alternative dispute resolution process for purposes of referral by district courts).

[114] *See, e.g.,* 5 U.S.C. 574 (requiring communications provided to a neutral during federal alternative dispute resolution be held confidential unless one of four statutory exceptions apply).

[115] 17 U.S.C. 1506(n).

[116] *Id.*

[117] *Id.* at 1506(n)(1).

[118] *Id.* at 1506(n)(2).

[119] *Id.* at 1506(n)(3).

[120] 86 FR 16162.

[121] *Copyright Small Claims* at 13.

1. Protective Orders

The Office solicited comments related to the issuance of protective orders and the CCB's handling of confidential information, including whether the CCB should adopt a standard model protective order.[122] Commenters overwhelmingly endorsed the idea of a standard protective order established at the initiation of discovery, similar to the procedures used by the Trademark Trial and Appeal Board (''TTAB'').[123] Some commenters argued that an ''Attorneys' Eyes Only'' level of confidentiality would be inappropriate, as many parties likely will be proceeding *pro se.*[124] Others, however, believed that such a designation for commercially sensitive information would be advisable.[125]

The Office agrees with the suggestion of providing a standard protective order to be issued at the request of any party. Under the proposed rule, once requested by any party, this order will govern all discovery material exchanged over the course of the proceeding, and will provide that discovery material received from another party may only be used in connection with the proceeding and must be returned or disposed of at the conclusion of the proceeding. The parties may negotiate customized protective orders that include additional protections for highly sensitive materials. Customized protective orders must be approved by the CCB, and a request for deviation from the standard protective order must explain the need for such deviation.

The standard protective order will provide a single tier of confidentiality. To promote public access and minimize the number of sealed filings, the proposed rule prohibits the bulk marking of documents as ''confidential'' and mandates that confidentiality designations be made on a document-by-document basis.

Confidential discovery materials, or any discussions thereof, may be submitted to the CCB in redacted form or filed under seal. If a document is filed under seal as part of written testimony, a redacted version of the document must be included in the public record. The proposed rule also requires the redaction of certain personally identifiable information from public filings, regardless of whether the discovery material has been marked confidential.

2. Interrogatories

Commenters favored a limit on the number of interrogatories permitted.[126] One comment suggested that the CCB promulgate a standard set of interrogatories tailored to particular categories of claims, with the option to add a limited number of additional questions of each party's choosing.[127] Another comment suggested that parties be permitted to propound additional interrogatories beyond an initial limited number upon a showing of good cause.[128]

The Office has reviewed these suggestions and proposes that, absent leave, interrogatories in CCB proceedings be limited to a standard set that is provided by the CCB through the its website. These standard interrogatories will, in all cases, solicit information related to witnesses, individuals with knowledge of the claims and defenses, relevant agreements between the parties, damages, and a description of relevant documents. The CCB will also promulgate standard interrogatories specifically tailored to the type of claims at issue. For example, a party asserting an infringement claim or responding to a non-infringement claim will respond to standard interrogatories that solicit information pertaining to the allegedly infringed work's copyright registration, ownership, publication history, and creation, along with the basis of the party's belief that the opposing party's activities constitute infringement, the discovery of the alleged infringement, and any attempts to cause the infringement to be ceased or mitigated. A party responding to an infringement claim or asserting a non-infringement claim will respond to standard interrogatories that solicit information pertaining to the ownership, publication history, and creation of the allegedly infringing work, along with information pertaining to the party's defenses, any continued use of the allegedly infringing work, and any revenues or profits directly attributable to the allegedly infringing work.

A party asserting a misrepresentation claim under 17 U.S.C. 512(f) will respond to standard interrogatories that solicit information pertaining to the notification or counter notification, the identity of and any relevant communications with the internet service provider in question or with others, the basis for the party's belief that the notification or counter notification contained a misrepresentation, and any harm caused by the alleged misrepresentation. A party responding to a 512(f) misrepresentation claim will respond to standard interrogatories that solicit information pertaining to the basis for its defenses and any relevant communications with the internet service provider in question or with others.

Under the proposed rule, parties have an obligation to update their interrogatory responses, and serve these updated responses on the other parties, as soon as possible following the discovery of relevant new or updated information.

The Office welcomes any comments concerning the standard interrogatories set forth in the proposed rule and is specifically interested in any comments concerning any other categories of information the standard interrogatories should cover.

3. Requests for Admission

Commenters favored similar limits on the number of requests for admission that may be served in CCB proceedings.[129] Under the proposed rule, parties may serve requests for admission on each other party concerning the facts, the application of law to facts, opinions about either, or the genuineness of documents. The Office proposes that the content of requests for admission be left to the discretion of parties rather than making use of standard forms. Requests for admission must be separately stated in numbered paragraphs, and responses are due thirty days after service. Matters admitted will be treated as conclusively established, unless the CCB permits an admission to be withdrawn or amended on request and for good cause shown. If a matter is not admitted, a party must specifically deny it or state in detail why the party cannot admit or deny it. Any denial must fairly respond to the substance of the request, and an answer may specify that part of the request is admitted and then state what is denied. A party may assert lack of knowledge or information in response to a request, but

[122] 86 FR 16162.

[123] ABA–IPL Reply NOI Comments at 6; Spotify Reply NOI Comments at 3; AIPLA Initial NOI Comments at 7; Amazon Initial NOI Comments at 7–8; Copyright Alliance, et al. Initial NOI Comments at 27; MPA, RIAA, SIIA Initial NOI Comments at 14–15.

[124] Copyright Alliance, et al. Reply NOI Comments at 16; MPA, RIAA & SIIA Initial NOI Comments at 14–15.

[125] Spotify Reply NOI Comments at 3; Amazon Reply NOI Comments at 6.

[126] Copyright Alliance, et al. Initial NOI Comments at 23; Amazon Initial NOI Comments at 6–7; MPA, RIAA & SIAA Initial NOI Comments at 12.

[127] Copyright Alliance, et al. Initial NOI Comments at 23.

[128] MPA, RIAA & SIAA Initial NOI Comments at 12.

[129] *Id.;* Amazon Initial NOI Comments at 6–7; CCIA & IA Initial NOI Comments at 4–5.

only with a representation that the party made a reasonable inquiry in attempting to answer the request, but that the information it knows or can readily obtain is insufficient to enable it to admit or deny the information in the request.

While this rule is modeled after the FRCP,[130] the Office proposes a few important modifications. First, the number of requests for admissions without leave of the CCB is limited to ten, and the rule makes explicit that compound requests are barred. In addition, in contrast to the FRCP, if a party fails to timely respond to a request for admission, the matter asserted is not automatically admitted. However, the CCB in its discretion may deem it admitted pursuant to its power to apply adverse inferences with respect to discovery violations under 17 U.S.C. 1506(n)(3).

The Office welcomes public input into this proposed provision, specifically whether there should be any further limitations on the subject matter of the requests for admission and whether the proposed rule strikes the proper balance in adapting the FRCP for *pro se* parties.

4. Production of Documents

Several commenters suggested that the regulations pertaining to the production of documents be drafted so to avoid the production of large amounts of electronically stored information (''ESI''),[131] as this is a common feature of federal court litigation that significantly increases the costs and burdens on the parties during discovery. These commenters suggested that the regulations make clear that ESI productions must be limited to what is available through searches that a layperson can reasonably handle and should not require the retention of a discovery vendor.[132] One comment also suggested that the regulations prohibit ''document dumps'' of large amounts of irrelevant or duplicative materials.[133]

The Office agrees with these suggestions. Under the proposed rule, the CCB will provide standard document production requests that will be available on its website. As with the standard interrogatories, these document requests will always involve certain common categories—such as documents the party is likely to use in support of its claims or defenses, documents the party is aware of which conflict with its claims or defenses, and documents related to damages—as well as document requests specific to the type of claim at issue. A party asserting infringement or responding to a non-infringement claim will be required to produce a copy of the allegedly infringed work and allegedly infringing material (if applicable and available to the claimant), agreements related to the works at issue, ownership of the allegedly infringed work, pertinent documents where the allegedly infringed work is a derivative work, documents related to the allegedly infringing work, and documents relating to attempts to cause the alleged infringement to be ceased or mitigated. A party responding to an infringement claim or asserting a non-infringement claim will be required to produce a copy of the allegedly infringing material, agreements related to the works at issue, documents related to the creation of the allegedly infringing material, documents pertaining to the allegedly infringed material, and documents relating to any revenues and profits directly attributable to the allegedly infringing material. With respect to section 512(f) misrepresentation claims, parties will be required to produce a copy of the notification or counter notification at issue, communications with the relevant internet service provider or others related to the notification or counter notification, and documents pertaining to the truth or falsity of any representations made in the notification or counter notification.

In responding to document requests, each party must conduct a reasonable search for responsive documents within its possession or under its control, including in the files of its agents, employees, representatives, or others acting on its behalf. Responsive documents may include ESI. In line with commenters' suggestions, however, a reasonable search of ESI shall not exceed manual searches that are easily accomplished by a layperson and need not include searches that require the assistance of third parties, such as a document vendor. Responses to document requests that include large amounts of irrelevant or duplicative material will constitute bad-faith conduct. Under the proposed rule, a party has an obligation to disclose the existence of any responsive materials that are no longer in its possession and explain why they are no longer in its possession. A party also has an obligation to supplement its production as soon as practicable if it later finds responsive documents.

The Office solicits comments as to this proposed rule. The Office is specifically interested in any comments related to whether the proposed rule will sufficiently limit the scope and size of document productions in CCB proceedings. The Office welcomes any suggestions pertaining to mechanisms for further limiting the scope of productions, as well as any other categories of relevant documents that should be included in the standard document production requests.

5. Disputes and Sanctions

The proposed rule requires parties to attempt to resolve discovery disputes in good faith without involving the CCB, a principle found in the FRCP.[134] Parties must meet and confer, at least through a phone call, to attempt to reach a resolution prior to raising a discovery dispute with the CCB. If such an attempt fails, a party seeking discovery may file a short letter describing the dispute and seeking a conference with the CCB, and an opposing party will have an opportunity to file a response prior to the conference. The CCB may then hold a conference and issue an order resolving the dispute either during or following the conference and, if applicable, set a deadline for compliance.

If the party fails to timely comply, the party seeking discovery may send a notice to the allegedly noncompliant party that provides an additional ten days to comply. If the allegedly noncompliant party still fails to comply, the party seeking discovery may request that the CCB impose sanctions. This request may be no longer than ten pages, plus supporting documents, and the opposing party will have an opportunity to file a response. The CCB may hold a conference to address the request for sanctions and will impose sanctions in its sole discretion and upon good cause shown where the opposing party is found to be noncompliant with the CCB's discovery order. The sanctions imposed by the CCB may include an adverse inference against the noncompliant party regarding the facts directly related to the disputed discovery. The proposed rule provides that the CCB may also consider imposing sanctions when awarding attorneys' fees and costs during a final determination.

The Office is interested in comments concerning whether this proposed rule strikes the proper balance between the interests and rights of the respective

[130] Fed. R. Civ. Pro. 36.

[131] Copyright Alliance, et al. Initial NOI Comments at 25–26; MPA, RIAA & SIIA Initial NOI Comments at 13–14.

[132] Copyright Alliance, et al. Initial NOI Comments at 25–26; MPA, RIAA & SIIA Initial NOI Comments at 13–14.

[133] Copyright Alliance, et al. Initial NOI Comments at 26.

[134] Fed. R. Civ. Pro. 37.

parties. The Office is also interested in comments concerning whether it has the authority to issue any monetary sanctions specifically related to a discovery dispute.

D. Evidence

The statute sets out specific categories of evidence that the CCB may consider in making a determination: Documentary and other nontestimonial evidence, sworn written testimony, and oral testimony taken at a hearing.[135] In exceptional cases, expert witness testimony or other types of testimony may be permitted for good cause shown.[136] Testimony may be admitted without application of formal rules of evidence.[137] The Office solicited comment regarding applicable standards for evidence and received comments suggesting that the CCB look to outside sources for establishing evidence standards, such as immigration courts [138] and the Copyright Royalty Board (''CRB'').[139]

The proposed rule for evidentiary standards is modeled after the CRB's rule,[140] as applicable. The Office proposes adopting the general standard of accepting all evidence that is relevant and not unduly repetitious or privileged, as well as the CRB's standards for testimony and objections at hearings. In addition, the proposed rule clarifies the role of FRE 401 and 403, and reserves the CCB's right to discount or exclude evidence with serious credibility issues. It also establishes that only documentary evidence submitted during the written testimony phase may be introduced at a hearing, except evidence required during cross-examination or redirect examination. The Office has not incorporated the CRB's provision requiring that physical copies of evidentiary materials be provided to all parties, due to the online nature of CCB proceedings.[141] Similarly, due to the nature of CCB proceedings, the Office also does not incorporate the CRB's standards regarding the introduction of studies and analyses.

The proposed rule further provides that testifying witnesses at hearings must take an oath or affirmation prior to their testimony. Parties may conduct direct examination, cross-examination, and redirect examination, but the CCB may limit the number of witnesses who testify or the scope of the questioning. Parties will be entitled to raise objections to evidence during the hearing, and the Board will consider those objections if based on valid reasoning, even if not based on the technical rules of evidence.

E. Written Testimony

The CCB is barred from instituting formal motion practice except that it ''may request or permit parties to make submissions addressing relevant questions of fact or law, or other matters, including matters raised *sua sponte* by the Officers, and offer responses thereto.'' [142] The CCB is further allowed to hear various ''requests'' from the parties.[143] As part of its broad flexibility to regulate CCB proceedings,[144] the Office proposes a process of written testimony at the close of discovery that establishes the legal and factual basis for the dispute. The Office intends that this process may establish the entire record for the CCB's consideration and that hearings will be held at the CCB's discretion and as set forth below.

A claimant or counterclaimant begins the process by submitting written direct testimony in support of its claim or counterclaim. Any party subsequently responding to that claim shall file written response testimony thirty days following service of the direct testimony. Finally, the original claimant or counterclaimant may, but is not required to, file written reply testimony fourteen days following service.

Direct and responsive testimony comprises documentary evidence, witness statements, and party statements. Documentary evidence consists of non-testimonial evidence sponsored by a witness with knowledge of its contents and authenticity, unless the document was produced by an opposing party. Such evidence must have been served on the opposing parties, and accompanied by a numbered document list that briefly describes each document included. Witness statements consist of sworn written testimony, from non-expert witnesses unless leave for experts has been granted, testifying to factual information based on the witness's personal knowledge, and sponsoring certain documents in the document list. A party statement is a brief statement of no more than twelve double-spaced pages that sets forth a party's position as to key facts, the law, and damages. For a claimant, such damages information includes whether it is seeking statutory or actual damages and any profits of an alleged infringer. For a respondent, such information includes whether it would voluntarily agree to an order stopping it from engaging in activities found unlawful; [145] such an agreement may be taken into account by the CCB in determining damages. Both elections may be changed prior to a final determination, and a respondent's agreement to an injunction will not be considered in any way when reviewing liability. Reply testimony may only include new documentary evidence and witness statements to the extent that they are required to contradict or rebut evidence presented by the opposing party in its response.

F. Hearings

In the course of a proceeding, the CCB may conduct hearings.[146] Hearings on the merits may be held as long as there are no fewer than two Officers to ''receive oral presentations on issues of fact or law from parties and witnesses to a proceeding.'' [147] These hearings, whenever possible, are to be carried out online or by phone, ''except that, in cases in which physical or other nontestimonial evidence material to a proceeding cannot be furnished to the Copyright Claims Board through available telecommunications facilities, the [Board] may make alternative arrangements . . . that do not prejudice any other party to the proceeding.'' [148] The hearing must be noted in the record and transcribed.

The Office proposes that a hearing not be required at the close of written testimony, but may be held at the CCB's discretion, and may be convened on the CCB's own initiative or upon a request from any party for a hearing. A party need not give detailed reasons for its request for a hearing, but the request must be included in a party statement submitted during the written testimony phase. Once the hearing has been conducted, no additional testimony or evidence may be submitted, except as set forth in post-determination proceedings.

The Office understands that while alternative arrangements may be made for the submission of material physical or nontestimonial evidence that cannot be furnished virtually, the statute appears to require virtual hearings.[149] However, the Office is interested in providing a mechanism for in-person

[135] 17 U.S.C. 1506(o).

[136] *Id.*

[137] *Id.* at 1506(o)(2).

[138] AIPLA Initial NOI Comments at 8.

[139] Copyright Alliance, et al. Initial NOI Comments at 22.

[140] 37 CFR 351.10.

[141] *Id.* at § 351.10(d).

[142] 17 U.S.C. 1506(m)(2).

[143] *Id.* at 1506(m)(1).

[144] *Id.* at 1506(a)(1), 1510(a)(1).

[145] *Id.* at 1504(e)(2).

[146] *Id.* at 1503(a)(1)(E).

[147] *Id.* at 1506(p).

[148] *Id.* at 1506(c)(2).

[149] *Id.*

hearings in the circumstance where such a hearing is requested by all parties and all parties can attend. The Office welcomes comments regarding this provision and whether the statute can be read to allow in-person hearings when requested by all parties and where all parties can attend.

G. Post-Determination Proceedings

After a determination is rendered, the CCB may reconsider it for clear error of law or fact upon request of a party.[150] If reconsideration is denied, the Register of Copyrights may review the CCB's decision upon request of a party to determine whether there was an abuse of discretion in denying reconsideration.[151] The Office requested comment on both post-determination proceedings, and proposes regulations as further set forth below.

1. Request for Reconsideration

The CCB's determinations are subject to reconsideration or amendment by the CCB itself, if a party submits a written request within thirty days of the final determination.[152] After providing other parties an opportunity to address the request for reconsideration, the CCB shall either deny the request or issue an amended final determination.[153] The request should not merely repeat previous arguments made before the CCB, and the CCB will not accept new evidence unless a party demonstrates through clear and convincing evidence that the evidence was not available in the exercise of reasonable diligence prior to the submission of written testimony. After the requesting party sets forth the purported error that it believes was material to the outcome or a technical mistake, the non-requesting party has the opportunity to respond or otherwise oppose the points made. The Office proposes that responses to requests for reconsideration be filed within twenty-one days after service of a request for reconsideration, and that each party's brief may be no more than twelve double-spaced pages. The Office has not included a provision for a reply to the response by the requesting party before the CCB renders a decision, as the statute contemplates only ''an opportunity [for other parties] to address [the] request.'' [154]

2. Register's Review

Where the CCB denies a party's request for reconsideration of a final determination in whole or in part, that party can request that the Register review the determination. Such review ''shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination.'' [155] A request must be accompanied by ''a reasonable filing fee,'' to be established by regulation.[156] After other parties have had an opportunity to address the reconsideration request, the Register must either ''deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination.'' [157] The Office sought public input on any issues relating to the Register's review, including regulatory standards for the substance of a request, a reasonable filing fee, and post-review procedures.[158]

Under the proposed rule, a party may request the Register's review within 30 days of a denial of a request for reconsideration. The request must identify what the requesting party believes to be the CCB's abuse of discretion in denying the request for reconsideration and must be accompanied by a filing fee. The Office proposes that responses be filed within twenty-one days after service of a request for Register's review, following procedures similar to those set forth above with regard to a request for reconsideration filed with the CCB. Only evidence that was previously submitted to the CCB as part of written testimony, at a hearing, or in response to a specific request for evidence from the CCB may be submitted as part of the Register's review process.

The statute provides ''[i]f the Copyright Claims Board denies a party a request for reconsideration of a final determination, . . . that party may . . . request review.'' [159] This provision is silent as to the non-requesting party's ability to request the Register's review if it loses the reconsideration request. That seems to suggest that only a party who has unsuccessfully requested reconsideration by the CCB may seek Register review, but not the non-requesting party, even where the request was successful and the determination is amended. Accordingly, the Office has not included a provision for the non-moving party to request review of an amended final determination. The Office invites comment on this issue, as well as the appropriateness of allowing the party which did not seek reconsideration, but which now finds itself on the losing end of the matter, to seek reconsideration of an amended final determination (*i.e.,* reconsideration of the reconsideration) without relitigating issues the CCB has already considered.

Finally, the Office proposes a $300 fee to request the Register's review. In setting this fee, the Office finds that the fee applicable to a second request for reconsideration of a denial of registration provides a useful analogue. When the Registration Program refuses to register a work, the applicant has two opportunities to request reconsideration. The first request is considered within the Registration Program. Second requests are considered by the Register or her designee, the General Counsel, and a third senior member of the Office.[160] The fee for a second reconsideration is $700,[161] though the actual cost for providing the service is $4,471.[162] The Office anticipates that the Register's review of a CCB determination will operate in a similar manner and will necessarily involve the time and expertise of the Register and senior staff. Setting the fee at $300 reasonably reflects the narrower scope of review under this procedure as compared to registration requests for reconsideration and, in combination with the proposed filing fee for initiating a claim,[163] complies with the statutory ceiling of $402.[164]

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 220

Claims, Copyright, General.

37 CFR Part 222

Claims, Copyright.

[150] *Id.* at 1506(w).

[151] *Id.* at 1506(w), (x).

[152] *Id.* at 1506(w).

[153] *Id.*

[154] *Id.* at 1506(x).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] 86 FR 16164.

[159] 17 U.S.C. 1506(x).

[160] *See generally* U.S. Copyright Office, *Compendium of U.S. Copyright Practices,* ch. 1700 (3d ed. 2021).

[161] 37 CFR 201.3(d)(4)(ii).

[162] Booz Allen Hamilton, *2017 Fee Study Report* 2, 26 (2017), *https://www.copyright.gov/rulemaking/feestudy2018/fee_study_report.pdf.*

[163] *See* 86 FR 53905 (proposed 37 CFR 201.3(g)(1)).

[164] 17 U.S.C. 1501(c) (setting the sum total of filing fees as no less than $100 and no more than the cost of filing an action in a district court of the United States). The statutory fee for filing suit in a federal district court is $350, 28 U.S.C. 1914(a), and an additional fee of $52 is charged as an administrative fee by the Judicial Conference of the United States. *Id.*

37 CFR Part 225

Claims, Copyright.

37 CFR Part 226

Claims, Copyright.

37 CFR Part 227

Claims, Copyright.

37 CFR Part 228

Claims, Copyright.

37 CFR Part 229

Claims, Copyright.

37 CFR Part 230

Claims, Copyright.

37 CFR Part 231

Claims, Copyright.

37 CFR Part 232

Claims, Copyright.

37 CFR Part 233

Claims, Copyright.

Proposed Regulations

For the reasons stated in the preamble, the U.S. Copyright Office proposes to further amend chapter II, subchapters A and B, of title 37 Code of Federal Regulations, as proposed to be amended at 86 FR 53897 (September 29, 2021), as follows:

Subchapter A—Copyright Office and Procedures

PART 201—GENERAL PROVISIONS

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

Authority: 17 U.S.C. 702.

Section 201.10 also issued under 17 U.S.C. 304.

■ 2. In § 201.3, revise the first column heading in table 4 to paragraph (g) and 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 Register	300

Subchapter B—Copyright Claims Board and Procedures

■ 3. Revise part 220 to read as follows:

PART 220—GENERAL PROVISIONS

Sec.

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

§ 220.1 Definitions.

For purposes of this subchapter:

(a) A claim becomes an *active proceeding* when 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.

(b) *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 may occur at any point during a proceeding, including before a proceeding becomes an *active proceeding.*

(c) A *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.

(d) A *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.

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

(f) An *initial notice* means the notice of a proceeding that accompanies a claim or counterclaim in a Copyright Claims Board proceeding as described in 17 U.S.C. 1506(g).

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

(h) *Standard production of document requests* 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 Handbook.

The Copyright Claims Board may issue a handbook explaining the Board's practices and procedures. The handbook may be viewed, downloaded, 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 electronic filing system by 11:59 p.m. Eastern Time on the date of the deadline or dispatched by the date of the deadline.

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 part. Parties may cite to the Federal Rules of Civil Procedure or the Federal Rules of Evidence (''FRE'') as persuasive authority. The Board may

consider arguments referencing the Federal Rules of Civil Procedure or FRE, but is not bound by the Federal Rules of Civil Procedure or FRE, and will only consider them to the extent that they are persuasive in the context of this subchapter.

■ 6. Add §§ 222.10 through 222.19 to read as follows:

* * * * *

Sec.

* * * * *

§ 222.10 Scheduling order.

(a) *Timing.* Upon confirmation that a proceeding becomes an active proceeding, the Board shall issue an initial scheduling order.

(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 requests for admission;

(5) Service of documents in response to standard production of document requests;

(6) Requests for leave to seek additional discovery;

(7) Close of discovery;

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

(9) Filing of each party's written testimony and responses, pursuant to § 222.14.

(c) *Conferences.* In addition to those identified in paragraph (b) of this section, the Board may hold additional conferences to manage the proceedings and resolve disputes, at its own election or at the request of any party. Conferences may be held by one or more Officers and 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 37 CFR 224.1(c)(1), 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 the Board's electronic filing system;

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

(4) As necessary to facilitate settlement pursuant to § 222.17; or

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

§ 222.11 Amending pleadings.

(a) *Amendments before service.* A party may freely amend its pleading once as a matter of course prior to service of its claim or counterclaim. Any claim or counterclaim that is amended shall be submitted for a compliance review by a Copyright Claims Attorney.

(b) *Amendments during the opt-out period.* A claimant seeking to amend a claim during the opt-out period may do so only with leave of the Board.

(1) *Requests for leave to amend.* To request the Board's leave, the claimant must submit a letter to the Board, no longer than five pages in length, setting forth the reasons why an amended claim is appropriate. In determining whether to grant leave to amend a pleading, the Board shall freely grant leave if justice so requires after considering whether the basis for the amendment reasonably should have been known to the claimant before the claim was served or during the time period specified in paragraph (a) of this section, along with any other relevant considerations.

(2) *Compliance review of amended claims.* If the Board grants leave to amend a claim, any amendment shall be submitted by the claimant for a compliance review by a Copyright Claims Attorney.

(3) *Time for service of the amended claim.* The claimant shall serve the amended claim on the respondent within 14 days after a Copyright Claims Attorney finds it to be compliant.

(4) *Extension of the opt-out period.* The respondent shall have 60 days from service of the amended claim to opt out of the proceeding pursuant to 37 CFR 223.1.

(c) *Non-infringement claims or defenses or misrepresentation claims.* A party asserting non-infringement or defending against a claim of infringement or misrepresentation may amend its pleading after service of its initial responses to standard interrogatories, where the party disclosed additional defenses beyond those set forth in the initial pleading. Such amendment shall be as a matter of right.

(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.

(1) *Time to respond.* Unless the Board orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 21 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 short letter to the Board, no longer than five pages in length, setting forth the reasons why an amended pleading is appropriate. Any other party may file a response, no longer than five pages in length, within 14 days of the date of service of the request for leave to amend, stating its views concerning the request. No reply letters shall be permitted unless the Board grants leave.

(3) *Standard for granting leave to amend.* In determining whether to grant leave to amend a pleading, the Board shall freely 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.

§ 222.12 Consolidation or severance.

(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) *Severance.* If a single proceeding includes distinct claims involving disparate facts and circumstances that would be difficult, time-consuming, or otherwise inappropriate to resolve in a single proceeding, the Board may sever

the proceedings with respect to some or all parties, claims, and issues. Severed proceedings shall be treated as one proceeding for purposes of statutory damages. The Board may in its discretion dismiss one of the severed proceedings as unsuitable for resolution under these regulations without dismissing other severed proceedings.

(c) *Timing.* The Board may consolidate or sever 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.

(d) *Procedure.* The party seeking consolidation or severance must submit a short letter to the Board, no longer than five pages in length, setting forth the reasons for the request, requesting a conference with the Board and the parties from each affected case, and, in the case of a request for consolidation, providing the Board with the docket numbers for each affected proceeding. Parties opposing consolidation or severance may file a response letter, no longer than five pages in length, within 14 days of the date of service of the request for consolidation or severance, objecting to the request. No reply letters shall be permitted, unless the Board grants leave for a reply.

(e) *Standard for granting request.* In determining whether to grant a request to consolidate or sever, the Board shall consider whether consolidation or severance is necessary and balance that need with the timeliness of the request and whether any undue prejudice has resulted from the delay in making the request.

§ 222.13 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 may file a letter, no longer than three pages in length, notifying the Board of the failure to join the necessary party and providing the basis for such belief. An opposing party may file a response, no longer than three pages in length, within 14 days of the date of service of the letter, in opposition. If the Board determines that a necessary party has not been joined, it shall dismiss the proceeding without prejudice.

(c) *Intervention of a necessary party.* At any time, a necessary third party seeking to intervene may file a letter, no longer than three pages in length, setting forth the reasons for the request and requesting a conference with the Board. Within 14 days of the date of service request, each party to the proceeding shall file a letter, no longer than three pages in length, indicating whether it agrees that the intervening party is a necessary party, and the basis thereof, or whether it opposes the intervention. After evaluating the parties' letters, 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.

§ 222.14 Written testimony on the merits.

(a) *Timing.* At 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 30 days following the date of service of written direct testimony. Any party who asserted a claim or counterclaim may file written reply testimony within 14 days following the date of service of written response testimony.

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

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

(ii) Each document must be sponsored by a witness with knowledge of its contents and authenticity, unless the document statement states that the document was produced by an opposing party during discovery; and

(iii) 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;

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

(iv) Reference any documents included in the document statement that are sponsored by the witness, with a brief statement as to the basis for the witness's knowledge of the document's authenticity.

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

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

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

(iii) Shall have a title page with the case's caption and the title of the document (*e.g.,* Party Statement of Respondent John Doe);

(iv) Shall be limited to 12 double-spaced pages, not including the title page or any signatures or certificates of service, in 12-point font or larger for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page;

(v) For a claimant or counterclaimant seeking damages, shall include a statement 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 final determination by the Board; and

(vi) 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 stopping it from engaging in the activities found unlawful in the future as specified in 17 U.S.C. 1504(e)(2). 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, and such election may be changed at any time up until final determination by the Board. The statement shall take the following form: ''[Claim/Counterclaim] respondent agrees that if it is found liable, it agrees to an order that it will stop the activity found to be unlawful.'' 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. The reply witness's statement must refer to any documents the reply witness is sponsoring in the same manner as set forth in paragraph (b)(2) of this section.

(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 is subject to the same formatting rules set forth in paragraph (b)(3) of this section except that it must be limited to 7 double-spaced pages, not including the title page or any signatures or certificates of service, in 12-point font or larger for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page.

(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 § 222.15.

(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 as appropriate at a hearing on the merits ordered by the Board.

§ 222.15 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 must be included in a party statement, pursuant to § 222.14(e). 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 to the following effect: ''[Party name] requests a hearing pursuant to 37 CFR 222.14(e).'' The statement should include 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.

§ 222.16 Withdrawal of claims; dismissal.

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 be signed by the party seeking the dismissal.

(a) *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.

(b) *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.

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

§ 222.17 Settlement.

(a) *General.* The Board shall encourage voluntary settlement between the parties of any claims or counterclaims. The appropriateness of a settlement conference, at a minimum, shall be raised at the pre-discovery and post-discovery conferences set forth in § 222.10(b).

(b) *Requesting 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 letter requesting a settlement conference and indicating which parties join in the request. The parties may also include in such letter a request to stay the proceedings while settlement discussions are ongoing. Granting a request for a stay shall be at the Board's discretion.

(3) *Response to request.* Any party that objects to the request for a settlement conference, or joins in the request for a settlement conference but not a request for a stay of proceedings, may file a response with the Board within seven days of the date of service of the request seeking a settlement conference. Such response shall consist of a brief letter indicating that the party objects to a settlement conference, or a stay of proceedings, and stating the basis for that objection.

(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, serve such statement on the other participating parties outside of the electronic filing system. The position statement shall be in letter form, shall not exceed five pages, including any salutations and signatures, 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. 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) *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. 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.

(f) *Settlement agreement.* If some or all parties reach a settlement, such parties may submit to the Board a letter that they jointly wish 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.

(g) *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.

§ 222.18 Protective orders.

(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.

(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 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.* The Board may in its discretion remove a confidentiality designation from any material on its own initiative or upon consideration of a request from a party. Parties are expected to attempt to resolve disputes over confidentiality designations before bringing such disputes to the Board.

(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. 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.

§ 222.19 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. The Board may apply FRE 401 and 403 in weighing evidence, but the Board is not bound by the FRE. Parties may cite to the FRE as persuasive authority when making an argument about the credibility, weight, or admissibility of a piece of evidence.

(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, parties may conduct direct examination (substantively limited to the testimony of the witness in the written statements and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination or submitted through witness statements); and redirect examination (limited to matters raised on cross-examination). The Board 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 properly sponsored documents submitted by the parties through their statements submitted under § 222.14 shall be deemed admitted and marked as exhibits in the same order as presented through the party's document 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) *Separation of irrelevant portions.* In any large documents, relevant and material matter in an exhibit must be plainly marked to distinguish it from immaterial or irrelevant material.

(3) *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.

(d) *Objections.* Parties are entitled to raise objections to evidence during the course of the hearing and to raise an objection that an opposing party has not furnished non-privileged underlying documents.

(e) *New exhibits for use in cross-examination or redirect examination.* 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.

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

PART 225—DISCOVERY

Sec.

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

§ 225.1 General practices.

This part prescribes rules pertaining to procedures for discovery conducted in proceedings before the Copyright Claims Board (''Board'').

(a) *Standard discovery practice.* Except as otherwise provided in this section, discovery in proceedings before the 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, but 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 or submitted to the Board must include a certification by the party submitting such material that it is accurate and truthful.

(2) *Form of requests to Board.* Requests to the Board related to discovery may be raised to the Board during a conference or by letter, as set forth in this section.

(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 through its own initiative. Such requests may be made orally during a conference with the Board or by letter. Any letter requests shall be limited to two pages and shall set forth the original date of the deadline and the requested extension, provide the basis for the scheduling modification, indicate whether the other parties consent or object to the modification, and whether any other dates in the scheduling order will be affected by the modification. Any party that objects to the requested scheduling modification may file a response letter within three days of the date of service of the letter request, which shall be limited to two pages and set forth the basis for the objection.

(c) *Conferences.* The Board shall hold a pre-discovery conference and a post-discovery conference, as set forth in 37 CFR 222.10. The Board may hold additional conferences to manage discovery and resolve any disputes, at its own election or at the request of any party. Conferences may be held by one or more Copyright Claims Officers (''Officers''), with the exception of post-discovery conferences and any conferences to decide a dispute, both of which shall be held by one or more Officers. Conferences shall be held virtually.

(d) *Request 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 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.* A request for additional discovery must be made by letter, no more than three pages, not including the additional requests themselves—

(i) Specifically indicating the means of additional discovery requested and the information sought;

(ii) Setting forth the basis and justifications for the request;

(iii) Indicating whether the other parties consent or object to the request; and

(iv) Attaching a copy of the additional discovery requests.

(5) *Response to request.* Within seven days of the date of service of a letter requesting additional discovery, any party that opposes the request may file a response letter of no more than three pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(e) *Request 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.* A request for an expert witness must be made by letter, no more than five pages, at the time set forth for requests for additional discovery in the scheduling order. The letter 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 response.* Within seven days of the date of service of a request for leave to offer an expert witness, any party that opposes the request may file a response letter of no more than five pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(4) *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.

(5) *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.

(f) *Definitions.* 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 is 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 and nature of witnesses whom the parties plan to use in the proceeding, including contact information for the witnesses, if known;

(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 damages sought; and

(5) A description of documents relevant to the claims and defenses.

(b) *For a party asserting infringement.* In addition to the witness, damages, and document description information in 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) The allegedly infringed work's compliance with any relevant copyright formalities;

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

(4) Publication history for 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 the alleged infringer's access to the allegedly infringed work, if known;

(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 and calculation of the damages suffered 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 publication 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;

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

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

(9) For a party responding to infringement claims or counterclaims, 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 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) 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;

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

(3) 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 Requests for admission.

(a) *General.* Parties in an active proceeding may serve a maximum of 10 requests for admission on each other party relating to:

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

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

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

(c) *Responses to requests for admission.* A response to a request for admission must be served within 30 days from the date of service of a request for admission. 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 inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(d) *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).

§ 225.4 Standard production of document requests.

(a) *General.* Parties in an active proceeding shall use the relevant set of standard production of document requests provided on the Board's website. Standard production of document requests 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;

(3) All documents related to damages; and

(4) All documents referred to in, or that were used in preparing, any of the party's responses to standard interrogatories.

(b) *For a party asserting infringement.* In addition to the information in paragraph (a) of this section, the standard production of document requests 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) Agreements related to ownership of or rights in the works at issue;

(6) Documents related to the party's ownership of the copyright in the allegedly infringed work;

(7) Documents relating to the damages suffered by the party as a result of the alleged infringement; and

(8) Documents related to 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 production of document requests 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 or rights regarding the allegedly infringing material;

(4) Agreements related to ownership of or rights in the works at issue; and

(5) For a party responding to infringement claims or counterclaims, documents related to 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 attributable to factors other than the copyrighted work.

(d) *For party asserting misrepresentation.* In addition to the information in paragraph (a) of this section, the standard production of document requests 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; and

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

(e) *For party responding to misrepresentation claims.* In addition to the information in paragraph (a) of this section, the standard production of document requests 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 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.

(2) *Electronically stored information.* Documents responsive to the standard requests, or any additional requests permitted by the Board, may include 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, except that—

(i) ESI searches shall 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 shall constitute bad-faith conduct.

(4) *Responsive documents no longer in possession of party.* A party shall disclose any materially responsive documents that the party is aware exist or once existed, but are no longer in the possession of that party, and shall explain why the documents are no longer in the possession of the party, including the circumstances surrounding any destruction of documents.

(5) *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 or any other document requests allowed by the Board as soon as practicable after the discovery of such documents.

§ 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, at least through a phone call, 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 by letter, no more than three pages not including the attachments referred to in this paragraph (b), for a conference with the Board. The letter request shall:

(1) Describe the dispute;

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

(3) Include a statement that the request is made following an attempted resolution call between the parties along with the date of such call, or explain why a call was not possible; and

(4) Attach the relevant discovery responses already provided by the opposing party, except for disputes pertaining to production of document requests, which shall attach a list of documents produced in response to the requests.

(c) *Response to request for conference.* Within seven days of the date of service of the letter request, an opposing party may submit a response to a request for a conference by letter, no more than three pages, not including any attachments, which states the opposing party's position with respect to the dispute. No reply letters shall be permitted, unless the Board grants leave for a reply.

(d) *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, 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.

(e) *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.

(f) *Sanctions*—(1) *Form of request for sanctions.* A request for sanctions shall be no more than 10 double-spaced pages, not including the attachments referred to in this paragraph (f)(1), in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page and shall attach the relevant discovery responses already provided by the opposing party, except for disputes pertaining to production of document requests, which shall attach a list of documents produced in response to the requests.

(2) *Form of response to request for sanctions.* Within 14 days of the date of service of the request for sanctions, the opposing party may file a response to the request. The response shall be no more than 10 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. No reply papers will be accepted absent leave of the Board.

(3) *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.

(4) *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.

(5) *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.

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

PART 226—SMALLER CLAIMS

Sec.

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 claim may be adjudicated under the procedures set forth in this part.

§ 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 also amend its filing at any time prior to service of the claim to modify its selection concerning smaller claim procedures. If the initial notice has already been issued, the claimant shall request reissuance of the initial notice with the smaller claim proceeding notice. Once the claimant chooses whether to proceed via a smaller claims proceeding or via the standard proceeding in 37 CFR parts 222 and 225, it may not amend its choice without consent of the other parties and leave of the Board.

§ 226.3 Nature of a smaller claims proceeding.

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

(b) *Limited discovery.* Discovery between the parties is limited to the standard discovery set forth in 37 CFR 225.2 through 225.4. Parties may not submit additional discovery requests, and the assigned Officer will not consider such requests.

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

(d) *Determination on written testimony.* The Officer will issue a determination based on the written testimony submitted pursuant to 37 CFR 222.14. No hearing will be held prior to a determination.

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

PART 227—DEFAULT

Sec.

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

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

(a) *General.* For purposes of this section, the term ''respondent'' shall include counterclaim respondents. If a 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 following the missed deadline or requirement.

(b) *Contents of notice*—(1) *First notice.* A notice issued under this section shall inform the respondent that failure to participate in the proceeding may result in the Board entering a default determination against the respondent, including dismissal of any counterclaims asserted by the respondent, and shall explain the legal effects of a default determination. The notice shall provide the 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 by mail and all known email addresses.

(2) *Second notice.* If the respondent has failed to respond 15 days after the notice of the pendency of the default determination, the Board shall send a second notice to the 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 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 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 fails to timely cure but submits a response that indicates an intent to re-engage with the proceeding, the Board shall consider the response and either provide the respondent with additional time to meet the deadline or proceed with the default determination process. If the 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 to submit evidence in support of a default determination, as set forth in § 227.2.

(d) *Multiple missed deadlines.* A respondent may cure a missed deadline according to the procedure set forth in this section twice without default being issued. If the 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 in support of default determination.

(a) *General.* If a 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 to submit written direct testimony, as set forth in § 227.1.

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

§ 227.3 Notice of proposed default determination.

(a) *Consideration of evidence.* Following submission of evidence by the claimant, 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 under applicable law. As part of its review, the Board shall consider whether the respondent has a meritorious defense. If the Board finds the evidence sufficient to support a finding in favor of the claimant, 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, 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, the Board shall dismiss the proceeding without prejudice.

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

(c) *Notice to respondent.* The Board shall provide written notice to the 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 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 to submit evidence.

(a) *Response to notice by respondent.* The respondent may submit in writing any evidence or information in opposition to the proposed default determination. The Board shall consider the submission and may request that the respondent submit additional information, including in the form of written response testimony, as set forth in 37 CFR 222.14, by a deadline set by the Board. If the respondent fails to timely submit evidence but submits a response that indicates an intent to re-engage with the proceeding, the Board shall consider the response and either provide the respondent with additional

time to submit evidence or proceed with issuing the default determination.

(b) *Response to respondent's submissions.* If the 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 submissions by a deadline set by the Board.

(c) *Hearings.* The Board may hold a hearing at its discretion.

§ 227.5 Issuance of determination.

(a) *Determination after respondent submits evidence.* If the respondent provides evidence or information as set forth in § 227.4, the Board shall consider all submissions. 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 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 fails to respond to notice.* If the 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 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 may request in writing that the default determination be vacated and provide the reasons why the decision should be vacated. The respondent and claimant shall follow the general procedures for a request for reconsideration as set forth in part 230 of this subchapter. The Board may vacate the default determination in the interests of justice.

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

PART 228—CLAIMANT'S FAILURE TO PROCEED

Sec.

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 37 CFR 222.13, 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 37 CFR 222.13, 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.

(b) *Contents of notice.* (1) A notice issued under paragraph (a) of this section shall inform the claimant that failure to proceed in the proceeding may result in the Board issuing a determination dismissing the claimant'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 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 by mail and all known email addresses.

(2) If the claimant has failed to respond 15 days after the notice of the failure to proceed, the Board shall send a second notice to the claimant 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 that it must respond and meet the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to notice.* (1) If the claimant 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 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, the Board shall consider the response and either provide the claimant with additional time to cure the missed deadline or requirement or issue a determination dismissing the claimant's claims.

(3) If the claimant 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 claimant's claims.

(d) *Determination dismissing claims.* A determination dismissing the claimant's claims for failure to proceed in the active proceeding shall be with prejudice and shall include an award of attorneys' fees and costs pursuant to 37 CFR 232.3, if appropriate. The claimant may only challenge such determination to the extent permitted under 17 U.S.C. 1508(c) or the procedures set forth in paragraph (e) of this section.

(e) *Vacating a determination dismissing claims.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the claimant may request in writing that the determination be vacated and provide the reasons supporting the request. The claimant and respondent shall follow the general procedures for a request for reconsideration as set forth in part 230 of this subchapter. The Board may vacate the determination of dismissal in the interests of justice.

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

PART 229—RECORDS AND PUBLICATION

Sec.

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 the electronic filing system, except any materials that have been marked confidential pursuant to 37 CFR 222.18.

(c) *Attendance at hearing.* Attendance at a Board hearing, including virtual hearings, is limited to the parties to the proceeding and their representatives, except with leave of the Board. A request for attendance may be made in writing.

(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. 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, and payment of the appropriate fee pursuant to 37 CFR 201.3, the Board will certify the official record of a proceeding.

■ 12. 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. A party may also request reconsideration to vacate a default determination.

§ 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 and shall be no more than 12 doubled-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. 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.

§ 230.3 Response to request.

A party opposing a request for a reconsideration may file a response to the request within 21 days of the date of service of the request. Such response shall be no more than 12 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. No reply shall be filed by the party seeking reconsideration absent leave of the Board.

§ 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.

■ 13. 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.
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 37 CFR 230.5 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 and shall be no more than 15 doubled-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. 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).

§ 231.3 Response to request.

A party opposing the request for review may file a response to the request for review within 21 days of the date of service of the request. Such response shall be no more than 15 double-spaced pages in 12-point font or larger, for both body text and footnotes, with at least one-inch margins on the top, bottom, left, and right of each page. 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.

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

PART 232—CONDUCT OF PARTIES

Sec.
232.1 General.
232.2 Representations to the Board.
232.3 Bad-faith conduct.
232.4 Bar on initiating claims.
232.5 Attorney and representative conduct.

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

§ 232.1 General.

All parties and any attorneys or other representatives 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 party, including any attorneys representing a party, certifies that to the best of the party'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 party'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 party or its representative 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 party or its representative to show cause why certain conduct does not constitute bad-faith conduct. Within seven days, the party or representative accused of bad-faith conduct shall file a letter response to this order, which shall be not more than three pages.

(2) *On a party's initiative.* A party that in good faith believes that another party or its representative has engaged in bad-faith conduct, may file a letter describing the alleged bad-faith conduct, attaching any relevant exhibits, and requesting a conference with the Board. Within seven days of the date of service of the letter, the accused party or representative may file a response to this letter. Any letters described within this paragraph (b)(2) shall be no longer than three pages. No reply letters shall be permitted, unless the Board grants leave for a reply.

(c) *Establishing bad-faith conduct.* After an accused party's or representative's response letter has been filed under paragraph (b) of this section, or the time to file such a letter 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.* 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 letters submitted by the parties, any arguments on the issue, and the accused party's or representative's behavior in other proceedings. Any award of attorneys' fees or costs shall be included in the final determination. 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 claims.

(a) *General.* A party or a party representative 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 party or its representative to show cause why certain conduct engaged in on more than one occasion within a 12-month period does not constitute bad-faith conduct. Within seven days, such accused party or representative shall file a letter response to this order, which shall be not more than three pages in length.

(2) *On a party's initiative.* A party that in good faith believes that another party or its representative to the proceeding has engaged in bad-faith conduct before the Board on more than one occasion within a 12-month period, may file a letter with the Board at any point after a proceeding has been initiated. Such letter shall describe the alleged instances of bad-faith conduct, include the case numbers for any other instances of bad-faith conduct if known, attach any relevant exhibits, and request a conference with the Board. Such a letter 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. Within seven days of the date of service of the letter, the accused party or representative may file a response to this letter. Any letters described within this section shall be not more than three pages in length. No reply letters shall be permitted unless the Board grants leave.

(c) *Establishing bad-faith conduct.* After an accused party's or representative's response letter has been filed under paragraph (b) of this section, the Board shall either make a determination that the party or representative 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 the accused party or its representative, 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 party or representative that did not result in an award of attorneys' fees or costs pursuant to § 232.3, including but not limited to claims that 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 party from initiating claims or a representative from initiating claims on a party's behalf, the Board shall consider the letters submitted by the parties, any arguments on the issue, and the accused party's or representative's behavior in other proceedings. The Board shall issue its determination in writing. If the Board determines that the accused party or representative 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 party be barred from initiating a claim, or in the case of a representative, barred from initiating claims for parties, 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 bad-faith conduct by a party, dismissal without prejudice of any proceeding commenced by that party or by the representative on behalf of a party that is still pending before the Board at the time the finding is made, except that active proceedings shall be dismissed only if the respondent provides written consent to the dismissal; and

(3) In the case of a 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 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 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 issue amend the scheduling order or issue a stay shall be at the Board's discretion.

§ 232.5 Attorney and representative conduct.

(a) *Notices of appearance.* If a party elects to be represented by an attorney or other representative in a proceeding, such attorney or representative must file a notice of appearance that provides the name of the case, the representative's bar number in a State in which the representative has been admitted to practice (if applicable), the case number (if assigned), the person on whose behalf the appearance is made, and the representative's mailing address, email address, and telephone number. Similar notice must also be given for any withdrawal of appearance.

(b) *Bar admissions.* An attorney 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 ([to be proposed at 37 CFR part 234]). An attorney or representative must file with the Board a written statement under penalty of perjury that the attorney or representative is currently qualified and is authorized to represent the party on whose behalf the attorney or representative appears.

(c) *Disbarred attorneys.* Any attorney or representative 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 an attorney in any proceeding active or pending before the Board is disbarred after a notice of appearance has been made, the attorney must report the disbarment to the Board and withdraw representation from any proceeding.

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

(e) *Penalties for violation.* Any attorney or 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.

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

PART 233—LIMITATION ON CASES

Sec.
233.1 General.
233.2 Limitation on proceedings.
233.3 Temporary limitations.

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 filed by a party.* A party, including a corporate party's parents, subsidiaries, and affiliates, shall file no more than 10 Copyright Claims Board proceedings in any 12-month period. A private attorney or law firm shall represent a claimant in no more than 40 Copyright Claims Board proceedings in any 12-month period. A proceeding shall count toward this limitation as soon as it is filed, regardless of how the proceeding is resolved, whether it is found to be noncompliant or unsuitable, voluntarily dismissed, or fails to become active due to a respondent's opt-out. Amendments to a claim and counterclaims filed in response to a claim shall not count toward this limit.

(b) *Circumvention of limit.* It shall be considered bad-faith conduct under 37 CFR 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) *Maximum total number of proceedings before the Board.* There shall not be a maximum total number of proceedings that may be filed before the Board.

§ 233.3 Temporary limitations.

(a) *Moratorium on new claims.* When 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 or on the number of claims that may be filed by a party or representative. 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 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: November 24, 2021.

Kevin R. Amer,

Acting General Counsel and Associate Register of Copyrights.

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