



## U.S. Copyright Office

### 37 CFR Parts 201, 203, and 221

[Docket No. 2021-2]

#### Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations: Expedited Registration and FOIA

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

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding a new expedited registration option and a conforming amendment to the Office’s Freedom of Information Act regulations, under the Copyright Alternative in Small-Claims Enforcement Act. To qualify for this expedited registration option, the work(s) being registered must be the subject of a claim or counterclaim before the Copyright Claims Board. The Office invites public comments on this proposed rule.

**DATES:** Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** For reasons of governmental 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 <http://copyright.gov/rulemaking/case-act-implementation/expedited-registration>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** John R. Riley, Assistant General Counsel, by email at [jril@copyright.gov](mailto:jril@copyright.gov), Brad A. Greenberg, Assistant General Counsel, by email at [brgr@copyright.gov](mailto:brgr@copyright.gov). Each can be contacted by telephone at (202) 707-8350.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Expedited Registration.*

On December 27, 2020, the President signed into law the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020.<sup>1</sup> The CASE Act establishes the Copyright Claims Board (“CCB” or “Board”), a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value (“small copyright claims”).<sup>2</sup> The creation of the CCB does not displace or limit the ability to bring small copyright claims in federal court, but rather provides a more accessible alternative forum.<sup>3</sup> The CCB has authority to hear copyright infringement claims, claims seeking a declaration of noninfringement, and misrepresentation claims under section 512(f) of the Copyright Act, as amended by the Digital Millennium Copyright Act (“DMCA”).<sup>4</sup> Participation in the CCB is voluntary for all parties,<sup>5</sup> and all determinations

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<sup>1</sup> Public Law 116-260, sec. 212, 134 Stat. 1182, 2176 (2020).

<sup>2</sup> *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.

<sup>3</sup> H.R. Rep. No. 116-252, at 17; S. Rep. No. 116-105, at 2–3, 9.

<sup>4</sup> 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).

<sup>5</sup> *See id.* at 1504(a); H.R. Rep. No. 116-252, at 17, 21; S. Rep. No. 116-105, at 3, 11.

are non-precedential.<sup>6</sup> The Copyright Office (“Office”) is in the process of standing up the CCB and last month published a notification of inquiry regarding several rulemakings that the Office intends to promulgate and for which it invited public comments.<sup>7</sup>

Congress directed the CCB to begin operations by December 27, 2021, though the Register may, for good cause, extend that deadline by not more than 180 days.<sup>8</sup>

Congress created the CCB to address the challenges of litigating copyright cases in federal court, including the significant costs and time required. In doing so, it also considered the Copyright Act’s registration-related prerequisite to filing a federal lawsuit:<sup>9</sup> copyright owners of U.S. works cannot pursue infringement litigation until the Office has issued or refused a copyright registration, except in limited circumstances.<sup>10</sup> The registration requirement enables the Copyright Office to compile a public record of copyright claims that serves as a valuable resource for potential users of works, “gives courts the benefits of the Register’s expertise on issues of registrability, and serves judicial economy by narrowing the issues that must be litigated.”<sup>11</sup> The Supreme Court described the statutory registration requirement as “akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.”<sup>12</sup> Additionally, the Copyright Act states that in most instances, for a copyright owner to

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<sup>6</sup> H.R. Rep. No. 116-252, at 21–22, 33; S. Rep. No. 116-105, at 14.

<sup>7</sup> 86 FR 16156 (Mar. 26, 2021).

<sup>8</sup> Public Law 116–260, sec. 212(d), 134 Stat. at 2199.

<sup>9</sup> *Copyright Small Claims* 107–09.

<sup>10</sup> 17 U.S.C. 411(a) (“no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title” or “where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused”); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (holding that “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright”). Note that the registration requirement applies only to “any United States work” and not to foreign works. *See* 17 U.S.C. 411(a).

<sup>11</sup> Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 4, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (No. 08-103).

<sup>12</sup> *Fourth Estate*, 139 S. Ct. at 887 (citation omitted).

qualify for an award of attorneys' fees or statutory damages, the infringed work(s) must have been registered within three months of publication or, if unpublished, before the act of infringement.<sup>13</sup>

In considering the challenges facing those involved in small copyright claims, the Office and Congress recognized both the continued value of copyright registration and the practical difficulties smaller-value copyright owners may have in registering their works. As the Office noted in its report, while copyright registration “helps to produce a valuable public record of American creativity as well as material information to parties in litigation,” at times it may also act as “a procedural hurdle for copyright claimants . . . who may not be aware of the repercussions of not registering in a timely manner.”<sup>14</sup> Congress echoed this sentiment, further noting that “many small claimants currently do not register their works because they do not expect to be able to enforce their rights in federal court.”<sup>15</sup>

The CASE Act addresses these dynamics by allowing a party to file an infringement claim with the CCB once “a completed application, a deposit, and the required fee for registration” have been delivered to the Office.<sup>16</sup> The legislative history characterizes this approach as taking “a more liberal attitude towards the commencement of a proceeding while registration of a work is in progress.”<sup>17</sup> Thus, unlike in federal court, a party does not need to obtain a registration prior to filing a claim before the CCB. But before the CCB renders a decision in any infringement dispute, the CASE Act mandates that the work at issue must be registered by the Office, and the other parties in

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<sup>13</sup> 17 U.S.C. 412.

<sup>14</sup> *Copyright Small Claims* at 16–17; see H.R. Rep. No. 116-252, at 25–26 (same).

<sup>15</sup> H.R. Rep. No. 116-252, at 26.

<sup>16</sup> 17 U.S.C. 1505(a)(1).

<sup>17</sup> H.R. Rep. No. 116-252, at 25.

the proceeding must have an opportunity to address the registration certificate.<sup>18</sup>

Recognizing that some infringement claims may involve works for which a registration application has been submitted, but for which the Office has not yet rendered a decision, Congress directed the CCB to hold such proceedings in abeyance.<sup>19</sup> If the Office refuses the registration, the CCB action will be dismissed without prejudice;<sup>20</sup> the CCB also may dismiss an action without prejudice if it has been held in abeyance for at least one year, upon providing thirty days written notice to the parties.<sup>21</sup> As Congress explained, “[t]his process is intended to strike a balance between still encouraging timely registration of works with the promise of a higher damages caps [in federal court] with the reality that smaller creators may have numerous understandable reasons for not routinely engaging in the registration process.”<sup>22</sup>

To ensure that the work at issue in a CCB proceeding is registered in a timely manner before the CCB issues a determination, the CASE Act directs the Office to “establish regulations allowing the Copyright Office to make a decision, on an expedited basis, to issue or deny copyright registration for an unregistered work that is at issue before the Board.”<sup>23</sup> The Office already has a process for expedited copyright registration, called “special handling,”<sup>24</sup> which is granted under specific circumstances: pending or prospective litigation; customs matters; or contract or publishing deadlines that necessitate the expedited issuance of a certificate.<sup>25</sup> As explained below, the Office is not proposing to use the existing special handling processes to institute the expedited

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<sup>18</sup> 17 U.S.C. 1505(b)(1).

<sup>19</sup> *Id.* at 1505(b)(2).

<sup>20</sup> *Id.* at 1505(b)(3); *see also Copyright Small Claims* at 108–109.

<sup>21</sup> 17 U.S.C. 1505(b)(2).

<sup>22</sup> H.R. Rep. No. 116-252, at 26.

<sup>23</sup> 17 U.S.C. 1505(d).

<sup>24</sup> 37 CFR 201.3(d)(7).

<sup>25</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 623.2 (3d ed. 2021).

registration mechanism for a CCB matter, although the processes will be somewhat similar. One difference will be the level of fees. The special handling fee is not insignificant for qualifying applicants and currently is set at \$800;<sup>26</sup> the Office has found this to be an inelastic fee, and the fees collected are used to help offset other registration services.<sup>27</sup> To help defer the costs of expedited registration before the CCB, the Office also needs to charge a fee, but the cost cannot be so high as to deter participation.<sup>28</sup> Accordingly, the expedited registration fee for a matter before the CCB will be considerably lower than fees for special handling under other circumstances.

#### *B. Freedom of Information Act.*

The CASE Act limits the materials related to a CCB proceeding that must be disclosed under the Freedom of Information Act (“FOIA”).<sup>29</sup> The Office is otherwise subject to FOIA, which, subject to certain conditions and exceptions, requires agencies to make their records available to the public either proactively or in response to a request.<sup>30</sup> The CASE Act limits the CCB documents, materials, and other records that must be disclosed under FOIA to “determinations, records, and information” that are published on the Office’s website and that relate to a CCB final determination.<sup>31</sup>

## **II. Proposed Rule**

Having carefully considered the above issues and its own administrative and operational constraints in administering the registration system, the Office now issues a proposed rule amending its regulations regarding expedited registration for claimants

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<sup>26</sup> 37 CFR 201.3(d)(7)(i).

<sup>27</sup> 83 FR 24054, 24060 (May 24, 2018).

<sup>28</sup> We note that the CASE Act states that the costs of filing a CCB action “may not exceed the cost of filing an action in a district court of the United States, and shall be fixed in amounts that further the goals of the Copyright Claims Board.” 17 U.S.C. 1510(c).

<sup>29</sup> *Id.* at 1506(t)(4).

<sup>30</sup> *See* 5 U.S.C. 552.

<sup>31</sup> 17 U.S.C. 1506(t)(4).

engaged in CCB proceedings, as well as a conforming amendment for disclosures under FOIA. The Office invites public comment on any aspects of the amended rules.

*A. Small Claims Expedited Registration*

The Office proposes establishing regulations for small claims expedited registration consistent with the statute. First, before a claim or counterclaim may be asserted before the CCB, the copyright owner must have either been issued a registration certificate for the work(s) at issue or submitted a completed registration application, deposit, and the required registration fee to the Office. The CCB cannot hear a claim or counterclaim related to a work for which the registration has been rejected.

Second, the claimant or counterclaimant must submit its application for small claims expedited registration by making a request and paying the fee as directed by the CCB. An important difference between the small claims expedited registration process and the Office's general special handling procedures is that requests for small claims expedition will be made to the CCB, and not through the electronic registration system (currently known as "eCO"). Specifically, the claimant or counterclaimant who has a pending copyright application must indicate that the registration is pending and place the service request ("SR") number issued by the Copyright Office's Office of Registration Policy and Practice<sup>32</sup> ("RPP") on its claim or counterclaim notice. That SR number can be used to identify the work pending in RPP's registration application queue. If small claims expedited registration request is granted, as discussed further below, RPP will be notified and will use the SR number to move the application up in the queue. If the proceeding cannot move forward because a registration certificate for the work has not been issued, the CCB will hold the proceedings in abeyance until a decision is made on the application.

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<sup>32</sup> The Office of Registration Policy and Practice "administers the U.S. copyright registration system and advises the Register of Copyrights on questions of registration policy and related regulations and interpretations of copyright law." 37 CFR 203.3(e).

Third, a claimant or counterclaimant may only request small claims expedited registration after it has submitted a completed registration application and the respondent has either opted in or has not timely opted out. This will also ensure that registration applicants do not invoke the CCB to receive special handling treatment at a discounted rate when not genuinely intending to pursue their claim through the CCB.

Fourth, the fee for small claims expedited registration must be timely made for the required amount. The small claims expedited registration fee supplements, and does not substitute for, the registration application fee; it is intended to partially offset the costs for the Office of accelerating the examination of works before the CCB. The CASE Act sets a statutory minimum filing fee for a proceeding of \$100; the statutory maximum, which includes the initial filing fee, may not exceed filing fees in federal district court, which currently are set at \$402.<sup>33</sup> Accordingly, the special handling fee of \$800 would on its own exceed the maximum fee set by Congress, which would run counter to the Act's aims to keep the CCB accessible for smaller economic actors. On the other hand, a *de minimis* fee may not be appropriate either, as expedited registration will impose real costs on the Office that would otherwise need to be offset through appropriations. To keep the CCB accessible while helping to offset some of the anticipated increased costs of small claims expedited registration, the Office has determined that a \$50 fee is reasonable. The Office thus proposes that applicants seeking small claims expedited registration pay a \$50 fee for each claim; this fee supplements the relevant application fees for the type of application at issue. In line with its overall approach to fee-setting, the Office intends to periodically reassess the reasonableness of the fee once additional data about the operation of this service becomes available.

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<sup>33</sup> See 28 U.S.C. 1914(a)–(b), note (2020) (District Court Miscellaneous Fee Schedule); see also Admin. Off. of the U.S. Courts, *District Court Miscellaneous Fee Schedule* (Dec. 2020), <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.



Fifth, the request for small claims expedited registration must be granted before RPP is notified of the request. The bases for denying a request are failure to pay the required fee or determination that the request would be unduly burdensome. If the request is granted, RPP will ordinarily make a decision on the application within ten business days of receiving the request. If RPP requires additional correspondence with the applicant, this may extend the review timeline.

Sixth, the Office will continue to examine all copyright registration applications under the same standards, regardless of whether the application is reviewed under small claims expedited registration, special handling, or the general registration process. Whether a work is eligible for copyright registration is established by the Copyright Act and the Office's regulations, and the CASE Act does nothing to change that.<sup>34</sup>

The Office proposes to establish this process as an interim rule. The CCB is a first-of-its-kind tribunal, and the Office recognizes that as it begins to hear cases there may be a need to adjust some processes. An interim rule will help maintain flexibility to make necessary modifications in response to new evidence or unforeseen issues. The learned experiences of the CCB and the parties that come before it may lead the Office to revise this rule to better fulfill Congress's intent for expedited registration under the CASE Act. This proposed rule is intended to establish procedures for small claims expedited registration that will facilitate access to the CCB while guarding against improper requests. The Office invites public comment on these proposed changes.

#### B. *Freedom of Information Act*

The Office also proposes a technical edit to the Office's FOIA regulations to reflect the CASE Act's statutory reference to FOIA. The edit will add language stating that CCB determinations published on the Office's website and related records and

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<sup>34</sup> See 17 U.S.C. 102; *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); 37 CFR 202.1.

information published on that website may be disclosed under FOIA. All other materials related to CCB proceedings are exempt from disclosure under FOIA.<sup>35</sup> The Office invites public comment on the proposed conforming amendment.

### **List of Subjects**

#### **37 CFR Part 201**

Copyright, General provisions.

#### **37 CFR Part 203**

Freedom of information.

#### **37 CFR Part 221**

Claims, Copyright, Registration.

### **Proposed Regulations**

For reasons stated in the preamble, the Copyright Office proposes to amend 37 CFR chapter II as follows:

#### **PART 201—GENERAL PROVISIONS**

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

**Authority:** 17 U.S.C. 702.

2. Amend §201.3 by:

a. Redesignating paragraphs (d)(8) through (17) as paragraphs (d)(9) through (18), respectively.

b. Adding new paragraph (d)(8).

The addition reads as follows:

**§201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.**

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<sup>35</sup> 17 U.S.C. 1506(t)(4).

(d) \* \* \*

**Table 1 to Paragraph (d)**

<b>Special services</b>	<b>Fees (\$)</b>
* * * * *	* *
(8) Small claims expedited registration fee for each claim.	\$50
* * * * *	* *

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**PART 203—FREEDOM OF INFORMATION ACT: POLICIES AND PROCEDURES**

3. The authority citation for part 203 continues to read as follows:

**Authority:** 5 U.S.C. 552.

4. Amend §203.1 by adding a sentence at the end of the section to read as follows:

**§203.1 General.**

\* \* \* \* \* All information relating to proceedings of the Copyright Claims Board under chapter 15 of the Copyright Act is exempt from disclosure under FOIA, except for Copyright Claims Board determinations published on the Copyright Office website and related records and information published on that website.

5. Add subchapter B, consisting of part 221, to read as follows:

**SUBCHAPTER B—COPYRIGHT CLAIMS BOARD, LIBRARY OF CONGRESS**

**PART 221—REGISTRATION**

**Sec.**

221.1 Registration requirement.

221.2 Small claims expedited registration.

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

**§221.1 Registration requirement.**

(a) A claim or counterclaim alleging infringement of an exclusive right in a copyrighted work may not be asserted before the Copyright Claims Board unless the legal or beneficial owner of the copyright has first delivered a completed application, a deposit, and the required fee for registration of the copyright to the Copyright Office and a registration certificate has either been issued or has not been refused.

(b) For a work that has not yet been registered, a claimant or counterclaimant who has a pending application to register the work must indicate on its claim or counterclaim notice that the work is pending registration and must include the work's service request (SR) number that was assigned to the copyright registration claim. If the proceeding cannot continue because of a pending registration, the Copyright Claims Board shall hold proceedings in abeyance until the claimant or counterclaimant provides the Copyright Claims Board with the certificate of registration or the registration number on the certificate of registration or certificate preview. The proceeding shall be dismissed without prejudice if the Copyright Claims Board is notified that the registration application was rejected. If the proceeding has been held in abeyance for more than one year, the Copyright Claims Board may dismiss the claim or counterclaim without prejudice after providing thirty days written notice.

#### **§221.2 Small claims expedited registration.**

(a) *Eligibility.* A claimant or counterclaimant alleging infringement of an exclusive right in a copyrighted work before the Copyright Claims Board is eligible to expedite a copyright registration application under this section. This process shall be known as small claims expedited registration.

(b) *Initiating small claims expedited registration.* The small claims expedited registration process can only be initiated after the claimant or counterclaimant has both completed an application for copyright registration and the respondent has opted in or not timely opted out. To initiate the small claims expedited registration process, the qualifying claimant or

counterclaimant must make a request and pay the required fee as directed by the Copyright Claims Board. Parties should request small claims expedited registration once the respondent has opted in or not timely opted out. Parties must not attempt to initiate small claims expedited registration by using the Copyright Office's electronic registration system (eCO).

(c) *Fee--(1) Amount.* The small claims expedited registration fee for each claim must be made for the appropriate amount, as prescribed in §201.3(c) of this chapter. The fee for small claims expedited registration is intended to accelerate the registration process for a qualifying Copyright Claims Board claimant or counterclaimant that already has a pending registration application; it is in addition to, and does not offset, the fee for copyright registration.

(2) *Method of payment.* (i) The fee for small claims expedited registration must be submitted electronically to the Copyright Claims Board and not through the Copyright Office's electronic registration system (eCO).

(ii) A claimant or counterclaimant shall follow instructions on the Copyright Office website to make electronic payments with credit or debit cards, or directly from their bank accounts by means of automated clearing house (ACH) debit transactions. Applicants may not use a deposit account to make payments for small claims expedited registration.

(3) *No refunds.* The small claims expedited registration fee is not refundable, unless the small claims expedited registration request is denied under paragraph (d) of this section.

(d) *Denied requests.* If the applicant failed to pay the required fee or if the Copyright Office determines that expedited registration under this section would be unduly

burdensome, the Office will notify the applicant that the request has been denied and that the copyright registration claim will be examined on a regular basis.

(e) *Granted requests.* If the request for expedited registration under this section is granted, the Office will make every attempt to examine the application or the document within ten business days after notice of the request is delivered by the Copyright Claims Board to the Copyright Office's Office of Registration Policy and Practice, although the Copyright Office cannot guarantee that all applications or all documents will be registered or recorded within that timeframe.

(f) *Identical registration standards.* The Copyright Office will apply the same practices and procedures set out in the part when examining a copyright registration claim, regardless of whether the applicant asks for small claims expedited registration.

**Dated:** April 20, 2021.

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**Regan A. Smith,**

*General Counsel and*

*Associate Register of Copyrights.*

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