



## Copyright Office

### 37 CFR Parts 201, 220, 222, 223, and 224

[Docket No. 2021-6]

#### Copyright Claims Board: Initiating of Proceedings and Related Procedures

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

**ACTION:** Final rule.

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**SUMMARY:** The U.S. Copyright Office is amending its regulations to establish procedures governing the initial stages of a Copyright Claims Board proceeding. The regulations provide requirements regarding filing a claim, the Board’s compliance review, service, notice of the claim, the respondent’s opt-out election, responses, and counterclaims.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020<sup>1</sup> directs the Copyright Office to establish the Copyright Claims Board (“CCB”), a voluntary forum for parties seeking resolution of certain copyright disputes that have a total monetary value of \$30,000 or less. The CCB is an alternative forum to federal court and is designed to be accessible to *pro se* individuals and individuals without much

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<sup>1</sup> Pub. L. 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

formal exposure to copyright.<sup>2</sup> The Office published a notification of inquiry (“NOI”) asking for public comments on the CCB’s operations and procedures.<sup>3</sup>

Following the NOI, the Office published a notice of proposed rulemaking (“NPRM”), proposing rules governing the initiation of proceedings before the CCB and related procedures.<sup>4</sup> These rules addressed filing a claim, the CCB’s review of the claim to ensure that it complies with the relevant statutory requirements and regulations (“compliance review”), service, notice of the claim, the respondent’s ability to opt out, the response, and counterclaims.<sup>5</sup>

The Office sought public input concerning its proposals for the initiation of proceedings and related procedures and received 186 responsive comments. The Office addresses these comments along with changes made to the proposed rule below.

## **II. Final Rule**

### **A. Fees**

#### **1. Fee for filing a claim**

The CASE Act provides that the sum total of any filing fees, including the fee to commence a proceeding, may not exceed the cost to file an action in federal district court (currently \$402<sup>6</sup>) but may not be less than \$100.<sup>7</sup> In the NPRM, the Office noted that the CASE Act’s Senate Report proposed “that the Office consider a two-tiered fee structure, with an initial fee assessed when the claim is filed and a second fee assessed after the

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<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).

<sup>3</sup> 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>.

<sup>4</sup> 86 FR 53897 (Sept. 29, 2021). Comments received in response to the September 29, 2021 NPRM are available at <https://www.regulations.gov/docket/COLC-2021-0004/comments>. References to these comments are by party name (abbreviated where appropriate), followed by “Initial NPRM Comments” or “Reply NPRM Comments,” as appropriate.

<sup>5</sup> 86 FR 53897.

<sup>6</sup> 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.*

<sup>7</sup> 17 U.S.C. 1510(c).

claim becomes active.”<sup>8</sup> At that time, the Office declined to institute a two-tiered fee system, under the theory that where a “claimant did not move on to the second tier, the total filing fees would not reach the statutory floor.”<sup>9</sup> Accordingly, a single filing fee of \$100 to commence a proceeding was proposed. However, the Office invited comments on the advisability of a two-tiered fee system and whether the Office has the authority to institute such a system under the CASE Act.

Commenters overwhelmingly supported a two-tiered fee system.<sup>10</sup> They offered many practical arguments, including that an upfront fee of \$100 may be cost-prohibitive for many claimants, especially when respondents subsequently opt out of the proceeding, and that a two-tiered system would increase participation by minimizing the loss to a claimant where a respondent opts out before a proceeding becomes active.<sup>11</sup> Commenters suggested setting the first fee in the range of \$10 to \$55, with many suggesting the first

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<sup>8</sup> 86 FR 53904 (citing S. Rep. No. 116-105, at 4 n.4).

<sup>9</sup> *Id.*

<sup>10</sup> *But cf.* Michael Bynum Initial NPRM Comments at 1 (not mentioning the two-tiered vs. single-tier choice, but stating that he was “comfortable” with a \$100 fee and that it was “reasonable”).

<sup>11</sup> *See, e.g.*, Copyright Alliance, ACT | App Ass’n, 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 Artists Coalition, Music Creators N. Am., 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.”) Initial NPRM Comments at 8–11; Am. Intell. Prop. L. Ass’n (“AIPLA”) Initial NPRM Comments at 3; The Authors Guild Reply NPRM Comments at 1–2; Mark Reback Initial NPRM Comments at 1; Jay Foster Initial NPRM Comments at 1.

fee should be around \$25.<sup>12</sup> Others did not take a position on a single fee or two-tiered approach, but suggested reducing the filing fee to less than \$100.<sup>13</sup>

Two comments, reflecting the views of multiple commenters, offered their analysis of the CASE Act permitting a two-tiered fee. As the Office noted in the NPRM, the CASE Act expressly refers to two separate “filing fees,” including the fee to commence a proceeding and the fee for the Register’s review.<sup>14</sup> While the Act does not state that these are the only fees that may be assessed, the Office interpreted 17 U.S.C. 1510(c) as dictating the “upper and lower limits to the filing fees it may assess,” and that the section requires a “statutory minimum” filing fee of \$100.<sup>15</sup> The Copyright Alliance et al. challenged the Office’s reading of 1510(c), stating that that provision is not “instructive of how much the Office must actually receive in fees each time a claimant commences a claim,” but instead is “instructing the Register on how to set the fee schedule in the regulations.”<sup>16</sup> AIPLA looked at the statutory text, which states that the total of all fees “including,” but not limited to, the fee for commencing a proceeding must equal at least \$100 to conclude that “[r]ather than a bottom limit on the initial filing fee, the Act sets a \$100 minimum on the ‘sum total of such filing fees[.]’”<sup>17</sup>

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<sup>12</sup> See, e.g., AIPLA Initial NPRM Comments at 3 (\$35–55); Authors Guild Reply NPRM Comments at 1–2 (\$25–35); Ryan Connors Initial NPRM Comments at 1 (\$25); Ricky Jackson Initial NPRM Comments at 1 (\$25); Sylvia Phipps Initial NPRM Comments at 1 (\$25); Anonymous Reply NPRM Comments at 3 (\$50); Sydney Krantz Initial NPRM Comments at 1 (\$25); Donna Barr Initial NPRM Comments at 1 (\$15); Ritterbin Photography Initial NPRM Comments at 1 (\$25); Lisa Shaftel Initial NPRM Comments at 5 (\$25); Suriya Ahmer Initial NPRM Comments at 1 (\$25); Mark Woodward Reply NPRM Comments at 1 (\$20–25); Hans Rupert Initial NPRM Comments at (\$10).

<sup>13</sup> See, e.g., John Long Initial NPRM Comments at 1; 9TH Eye in The Quad Productions Initial NPRM Comments at 1; c, z Initial NPRM Comments at 1; Cherry Wood Initial NPRM Comments at 1; Charlotte Cotton Initial NPRM Comments at 1; Dan Milham Initial NPRM Comments at 1; Gareth Hinds Initial NPRM Comments at 1; K Muldoon Initial NPRM Comments at 1; Bree McCool Photography Initial NPRM Comments at 1; Linda Langford Initial NPRM Comments at 1; Angela Jarman Initial NPRM Comments at 1.

<sup>14</sup> 86 FR 53904 (citing 17 U.S.C. 1506(e), (x)).

<sup>15</sup> *Id.*

<sup>16</sup> Copyright Alliance et al. Initial NPRM Comments at 9 (emphasis omitted).

<sup>17</sup> AIPLA Initial NPRM Comments at 3 (citing 17 U.S.C. 1510(c)).

Upon careful evaluation of the statute and the submitted comments, the Office is amending the proposed rule to include a two-tiered fee system, with a first payment of \$40 due upon filing and a second payment of \$60 due once a proceeding becomes active. Under the two-tiered approach adopted in this final rule, the “sum total” of all “filing fees” will be at least \$100 and no more than \$402, satisfying the requirements of section 1510(c).

In adopting a two-tiered fee, the Office is informed in part by the statutory analysis offered by AIPLA and the Copyright Alliance et al. as well as its own reading of the statute. The Office believes that the CASE Act does not establish a minimum initial fee to commence a proceeding, so long as the sum total of all filing fees set by the Office meets the statutory requirements, including that the total fees are not less than \$100. It is clear from the statute, and as noted in the NPRM,<sup>18</sup> that the \$100 minimum applies not to the fee that accompanies the filing of a claim, but rather to the “sum total” of whatever filing fees are prescribed in regulations established by the Register. Therefore, while under the statute, the combined total of all filing fees that may be assessed must be at least \$100, the statute does not require that each claimant pay \$100 at the outset before a proceeding becomes active.

Additionally, the Office agrees with commenters that a two-tiered fee system furthers the goals of the CCB, a factor the statute directs the Office to consider when setting filing fees.<sup>19</sup> As noted by the Copyright Alliance et al.,<sup>20</sup> the CASE Act’s Senate Report counsels that filing fees should not be set so high as to discourage potential claimants from using the CCB to resolve their disputes, knowing that when respondents exercise their right to opt out it will result in the claimants’ loss of the filing fees.<sup>21</sup> The

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<sup>18</sup> 86 FR 53904.

<sup>19</sup> 17 U.S.C. 1510(c).

<sup>20</sup> Copyright Alliance et al. Initial NPRM Comments at 10 (quoting S. Rep. No. 116-105, at 4).

<sup>21</sup> S. Rep. No. 116-105, at 4.

two-tiered fee system reduces the financial outlay to institute a proceeding. Requiring payment of a filing fee of \$100 when respondents may yet opt out could cause potential claimants to conclude that bringing a claim before the CCB is too great a financial risk. A chief objective of the CASE Act is to provide a forum that is “accessible especially for *pro se* parties and those with little prior formal exposure to copyright laws who cannot otherwise afford to have their claims and defenses heard in federal court.”<sup>22</sup> This fundamental goal is not served if the fee to commence a proceeding, which risks being lost if the respondent opts out, serves as too high a barrier to the filing of genuine claims.

The Office has set the amount of the first payment at \$40 and the second payment at \$60 for many reasons. First, a \$40/\$60 split keeps the overall fee at \$100, meaning that the published total filing fee will, by itself, fulfill the statutory requirement of having total filing fees be at least \$100. Second, Congress suggested that if a two-tiered system was created, “the initial filing fee itself should be smaller than the fee charged later when a proceeding becomes active.”<sup>23</sup> Third, in most cases that reach active proceeding status, much more of the work required by the CCB will occur after the proceeding becomes active, meaning that it makes sense to have the second fee higher than the first as opposed to a \$50/\$50 split. Fourth, while the Office received many comments asking for a two-tiered system, almost none of those commenters expressed any issue with the total of the two tiers equaling \$100.<sup>24</sup> Fifth, as expressed above, the \$40 fee fits squarely within the general range of prices suggested by commenters for the first payment. And, sixth, the first payment should not be so low that it does not have a deterrent effect on

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<sup>22</sup> H.R. Rep. No. 116-252, at 17.

<sup>23</sup> S. Rep. No. 116-105, at 4.

<sup>24</sup> *But see* The Authors Guild Reply NPRM Comments at 1–2.

purely frivolous claims, a concern expressed in the Office’s original study leading to the CASE Act (recommending a filing fee in order to “discourage spurious claims”).<sup>25</sup>

The Office notes that the \$40/\$60 split represents the Office’s best estimate of proper first and second payments given the information available. Should the Office determine after the benefit of experience that a different split makes sense (*e.g.*, if the current first payment amount does not appear to be sufficiently high to deter frivolous claims), it will engage in a new rulemaking process at that time.

Implementation of this fee system requires additional regulations concerning, for example, the timing of the second payment and the consequences of the failure to make that payment. These regulations are described in more detail below.

## **2. Fee for Counterclaims**

The Office did not include a fee for filing counterclaims in the proposed rule based on the lack of express statutory authorization for counterclaim fees and the fact that federal district courts do not charge fees for counterclaims, but it invited comments.<sup>26</sup> The Office received two comments on this issue. The Copyright Alliance et al. agreed that there should not be a filing fee for counterclaims since “the CCB is intended to be an affordable alternative to federal court” and federal courts do not charge a fee for bringing counterclaims.<sup>27</sup> AIPLA recommended instituting such a fee to defray the costs of the CCB checking counterclaims to make sure they are compliant with the rules and to deter the filing of frivolous counterclaims, noting that other administrative forums, including the Trademark Trial and Appeal Board, charge fees for counterclaims.<sup>28</sup> Upon

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<sup>25</sup> U.S. Copyright Office, *Copyright Small Claims* 122 & n.849 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> (“Copyright Small Claims”).

<sup>26</sup> 86 FR 53904.

<sup>27</sup> Copyright Alliance et al. Initial NPRM Comments at 11; Copyright Alliance et al. Reply NPRM Comments at 10–11.

<sup>28</sup> AIPLA Initial NPRM Comments at 3.

consideration of these comments, the Office has decided not to include a fee for filing counterclaims in the final rule.

### **A. Initiating a Claim**

The NPRM included proposed regulations on initiating claims before the CCB.<sup>29</sup> These regulations contemplated that claims would be submitted on a fillable form provided on the CCB's electronic filing system, called "eCCB." The claim form would include certain key information about the claim, such as the identity of the parties, the type of claim asserted, the harm experienced, and other relevant facts.<sup>30</sup> The Office received comments on the claim initiation process, discussed below. The Office also has endeavored to standardize the requirements for claims and counterclaims, where applicable.

#### **1. Pleading Requirements**

Commenters were split regarding whether they believed the pleading requirements for claims in the proposed rule were too burdensome or too lenient. In suggesting the rule was too lenient, New Media Rights questioned whether the pleading requirements were sufficient to place respondents on notice of the details of the claim,<sup>31</sup> and two commenters suggested that the Office include a mechanism for respondents to request additional information before deciding whether to opt out.<sup>32</sup> The Science Fiction and Fantasy Writers of America, Inc. ("SFWA"), suggested that the rule was too burdensome, and that the pleading requirements in the proposed rule were too complex and could deter claimants from filing claims, especially without the assistance of an attorney.<sup>33</sup>

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<sup>29</sup> 86 FR 53898.

<sup>30</sup> *Id.*

<sup>31</sup> New Media Rights Initial NPRM Comments at 4.

<sup>32</sup> Organization for Transformative Works ("OTW") Initial NPRM Comments at 8–9; New Media Rights Initial NPRM Comments at 4–5.

<sup>33</sup> SFWA Initial NPRM Comments at 2.



The Office intends the pleading requirements to represent a balance between claimants' and respondents' needs. The appropriate balance will ensure that a claim provides sufficient information to allow a respondent to make a meaningful assessment of whether to opt out or to proceed before the CCB, while not overly burdening the claimant. Though claimants are required to provide a fair amount of detail, the Office plans to make educational materials, such as the CCB Handbook, available to explain the pleading requirements while minimizing legal jargon. Furthermore, eCCB has been designed to provide guidance to claimants concerning what information they are required to provide via a fillable online form. Copyright Claims Attorneys will also be available to answer questions and provide guidance. If a Copyright Claims Attorney determines during the claim's compliance review that it does not provide sufficient information to place a respondent on notice, the CCB will order the claimant to provide more detail before allowing the claim to proceed. Additionally, the Office has included language in the final rule enabling parties to jointly request an extension of the opt-out period, as discussed below. Though the CCB ultimately must approve such requests, an extension may give the respondent additional time to approach the claimant during the opt-out period and request more information to determine whether to proceed or opt out.

Commenters noted that the proposed rule did not include a requirement that claimants seeking a declaration of noninfringement plead any facts alleging the existence of a dispute or controversy, as is required for declaratory judgments.<sup>34</sup> The Office has added this requirement to the final rule.

Additionally, two commenters suggested that the requirement that claimants describe and estimate the "monetary harm suffered"<sup>35</sup> was too limiting, since some

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<sup>34</sup> Copyright Alliance et al. Initial NPRM Comments at 13 (citing 28 U.S.C. 2201).

<sup>35</sup> 86 FR 53906.

claimants may seek statutory damages, profits, or no damages at all.<sup>36</sup> The final rule broadens this language, requiring that claimants describe the harm they have suffered due to the alleged activity and the relief they are seeking, which may include an estimate of such relief. Though the NPRM included this as a requirement for all three types of claims, the final rule only includes it as a requirement for infringement and misrepresentation claims, since damages are not available for noninfringement claims.

One commenter suggested that claimants be permitted to serve a settlement demand, akin to an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, along with the claim, so that a respondent would have a choice between opting out, responding and participating in the proceeding, or settling. The commenter believed that this could also increase participation in CCB proceedings since the respondent would be aware of the level of potential liability at the outset.<sup>37</sup> The Office is concerned that explicitly incorporating settlement demands such as these into the early stages of the process may encourage abusive use of the CCB, and that aggressive claimants would use such demands to intimidate respondents into a settlement or that high settlement demands would encourage respondents to opt out. Additionally, the Office believes that the revisions in the final rule requiring a claimant to describe the harm they have suffered and permitting them to include an estimate will better serve the goal of placing respondents on notice of the level of potential liability from the outset.

Further, commenters suggested that the requirement that the claimant identify the category of work that the claim pertains to may be confusing, especially for *pro se* claimants, and that this information is not necessary, since the Office can easily

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<sup>36</sup> Copyright Alliance et al. Initial NPRM Comments at 13–14; Motion Picture Ass’n, Recording Indus. Ass’n of Am. & Software and Info. Ass’n of Am. (“MPA, RIAA & SIIA”) Initial NPRM Comments at 9–10.

<sup>37</sup> James Doherty Initial NPRM Comments.

determine it from the work's application or registration.<sup>38</sup> The Office intends to provide guidance to claimants in its educational materials as well as within eCCB for determining the category of the work. Claimants who are unable to determine which category applies will be given an opportunity to describe the work in their own words instead. Though the Office may later be able to access this information in its records, identification of the category at this stage may provide helpful information to respondents in understanding the claim that is asserted. Indeed, New Media Rights believed the overall requirements for the claim, including the proposed rule's "standard for describing the nature of the work" to be "inadequate" for the respondent to understand the nature of the claim.<sup>39</sup> The Office believes that the final rule requires claims to include sufficient information for the respondent to be properly informed before making an opt-out election or when responding to the claim. The eCCB will give the claimant information as to how to select the category of the work or to describe it and provide the respondent with information and helpful context regarding the nature of the claim. If the work has already been registered, the claim will include the registration number, so that the respondent also has the ability to look up the work in the Office's registration database.

In response to commenters' observations that some of the technical pleading requirements may be too stringent, the Office made changes to ease the burden on claimants while keeping respondents' interests in mind. First, the Office has removed the requirement that a claim must include a caption.<sup>40</sup> Claimants still must identify all parties as part of the claim, but the proposed rule could be read to suggest that a claimant must separately provide a caption, which was not the Office's intention. Instead, eCCB will generate the caption from the information provided by the claimant. Second, the proposed

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<sup>38</sup> Copyright Alliance et al. Initial NPRM Comments at 12–13.

<sup>39</sup> New Media Rights Initial NPRM Comments at 4.

<sup>40</sup> 86 FR 53905.

rule required the claimant to identify an address for each respondent in every instance at the time the claim is filed.<sup>41</sup> Recognizing that determining a respondent's address may be challenging and time-consuming, the Office included a provision that enables claimants who are running up against the statute of limitations to file their claims without identifying the respondent's address. Such a claimant must certify that the statute of limitations is likely to expire within 30 days of the date the claim is filed and provide the basis for such belief. The claimant will, however, have to provide the respondent's address before the claim can continue further. Third, in recognition of the fact that claimants may not know the specific dates when the infringing activity began or ended, the final rule requires claimants to identify when the infringement began and, if applicable, ended, but only to the extent known.

## **2. Contact Information**

In the NPRM, claimants were required to provide their email addresses and telephone numbers as part of the initial notice. The exception to this was where the claimant was represented by legal counsel, in which case the counsel's contact information would appear instead.<sup>42</sup> The Office noted that making additional contact information for the claimant available to the respondent may facilitate communication, including with respect to settlement, but it may implicate other concerns as well, including some related to privacy.<sup>43</sup>

Commenters were split on this issue. The Copyright Alliance et al. agreed with the privacy concerns raised by the Office and believed that making contact information available to a respondent should be optional rather than mandatory.<sup>44</sup> Verizon did not think that the Office should be encouraging parties to communicate about settlement

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 53907.

<sup>43</sup> *Id.* at 53900.

<sup>44</sup> Copyright Alliance et al. Initial NPRM Comments at 15.

outside the CCB process.<sup>45</sup> AIPLA acknowledged the privacy concerns, but thought that the benefits of facilitating communication between the parties early on in the process outweighed any harm and noted that comparable forums require claimants to provide some form of contact information.<sup>46</sup>

The Office considered these comments and determined that claimants must provide a phone number, email address, and mailing address as part of the claim and initial notice, and respondents must provide a phone number, email address, and mailing address as part of the response. However, if a party is represented by counsel, that party's phone number and email address will be accessible to the CCB staff but will not be made available to the opposing party; the party's counsel's phone number and email address will be made available instead. The Office believes that making this contact information available will not only facilitate settlement, but will enable parties to communicate throughout the proceeding and exchange information through discovery. The final rule reflects these changes.

### **3. Bad-Faith Conduct at Claim Initiation Stage**

Several commenters requested that the Office adopt regulations to curb abusive use of the CCB.<sup>47</sup> These comments were submitted before the Office published its NPRM on active proceedings, which includes provisions designed to prevent and address bad-faith conduct and which should address many of the concerns raised.<sup>48</sup>

However, some commenters raised specific concerns about abuse at the claim initiation stage. For example, two commenters pointed out that the NPRM did not require

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<sup>45</sup> Verizon Initial NPRM Comments at 3.

<sup>46</sup> AIPLA Initial NPRM Comments at 1–2.

<sup>47</sup> Amazon Initial NPRM Comments at 3–4; Verizon Initial NPRM Comments at 1; Computer & Comm's Indus. Ass'n ("CCIA") Initial NPRM Comments at 2–3; OTW Initial NPRM Comments at 4–5.

<sup>48</sup> 86 FR 69890, 69893–94 (Dec. 8, 2021).

the copyright owner to certify the claim.<sup>49</sup> Instead, the proposed rule required the party submitting the claim, who may be another claimant or a claimant's authorized representative, to certify that the information in the claim is accurate and truthful.<sup>50</sup> The commenters suggested that copyright owners themselves be required to certify the claim.<sup>51</sup> The Office believes that requiring each copyright owner to submit a separate certification may be burdensome and unnecessarily complicate the CCB's streamlined electronic filing process, especially in instances where there are multiple claimants or where a claimant is represented by counsel or authorized representative. Instead, the Office modified the certification rule to require certifying parties to affirm that they have confirmed the accuracy of the information with the claimant or, in the case of one claimant certifying a claim, with its co-claimants.

#### **4. Other Comments**

Commenters made additional suggestions with respect to claim initiation, such as adding a reminder in the claim form to check the libraries and archives opt-out list prior to filing, and providing a space for claimants to challenge entities they believe to be improperly included on the list.<sup>52</sup> The Office agrees that claimants should check the libraries and archives opt-out list before filing a claim and that they may challenge an entity's inclusion on the list as part of their claim. The CCB may include reminders on its fillable claim forms. However, the Office believes that the more streamlined the claim form is, the more user-friendly it will be, and therefore will avoid requiring fields on the claim form that are targeted to less-than-common circumstances. The Office intends to include reminders to check the library and archives opt-out list where a claimant is filing a claim against a library or archives, or an employee thereof, in the CCB's educational

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<sup>49</sup> Amazon Initial NPRM Comments at 3–4; CCIA Initial NPRM Comments at 2–3.

<sup>50</sup> 86 FR 53906.

<sup>51</sup> Amazon Initial NPRM Comments at 3–4; CCIA Initial NPRM Comments at 2–3.

<sup>52</sup> Copyright Alliance et al. Initial NPRM Comments at 12.

materials, such as the CCB Handbook, along with instructions for how to challenge an entity's inclusion on the list.

Similarly, one comment suggested that the claim form remind claimants to check the designated service agent list.<sup>53</sup> The Office currently intends to include this as a requirement in eCCB's claim form so that the initial notice may be generated based on the information in the claim, but the Office does not believe that a revision to the regulatory language is necessary. The CCB's educational materials will also provide information to claimants concerning the designated service agent directory.

Amazon also included recommendations for additional eCCB functionality, such as including optimized search and filtering tools, in-docket searching, and a docket alert system.<sup>54</sup> The Office agrees with these recommendations and notes that eCCB will have some of these features. Though eCCB may not include every one of these features in the first instance due to time constraints, the Office will continue to explore ways to make eCCB as functional and user-friendly as possible.

Commenters noted that the NPRM requests a claimant asserting a misrepresentation claim to identify the sender and recipient of the takedown notice and suggested that the claim form make clear that the sender and recipient fields were not intended to identify the online service provider.<sup>55</sup> However, this appears to be a misreading of the NPRM. The Office intended for the claimant to identify the online service provider in these fields, as that is relevant information to describe the misrepresentation claim.

Commenters also addressed the proposed rule concerning additional matter that may accompany a claim. Some commenters believed that documentation in support of

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<sup>53</sup> *Id.*

<sup>54</sup> Amazon Initial NPRM Comments at 2–3.

<sup>55</sup> Copyright Alliance et al. Initial NPRM Comments at 14.

the claim should be required, noting that this would assist respondents in understanding the nature of the claim.<sup>56</sup> The Office appreciates these comments but has determined that additional matter in support of a claim at this stage should remain optional. This approach avoids imposing an unnecessary burden on some claimants, particularly where a claim relates to works that are large, unwieldy, or sensitive. Furthermore, as even infringement claims can be very different from each other, it would be difficult to accurately tell a claimant exactly what to attach at the claim stage without addressing many potential topics. If a claimant does not provide sufficient information to place the respondent on notice as to the nature of the claim, a Copyright Claims Attorney will request that the claimant provide additional detail as part of the CCB's compliance review process.

Additionally, the Organization for Transformative Works suggested that claims be required to prominently state whether the work at issue is registered, such as in boldface type or otherwise highlighted.<sup>57</sup> While the claim will state whether the work at issue has been registered, and the Office understands that the registration status of a work may be relevant to respondents in determining whether to opt out, the Office does not think that emphasizing this information in the way that is suggested will meaningfully benefit a respondent who may not understand the consequences of registration status. Indeed, highlighting the fact that a work has not been registered may cause a respondent who is not familiar with the registration requirements before the CCB to conclude that the claim is deficient in some way and that they need not take it seriously. Instead, the Office intends to explain the consequences of a work's registration status in the CCB's educational materials, so that potential respondents can weigh this factor in making an informed decision as to whether to opt out or not.

### **C. Review of the Claim by Copyright Claims Attorneys**

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<sup>56</sup> Fordham Initial NPRM Comments at 1–2; OTW Initial NPRM Comments at 7–9.

<sup>57</sup> OTW Initial NPRM Comments at 8.



## 1. Compliance Review

As noted in the NPRM, the statute describes the compliance review process in some detail and the Office proposed regulations to clarify the scope of the review.<sup>58</sup> The Office received several comments on the compliance review process.

Many commenters requested that Copyright Claims Attorneys check the libraries and archives opt-out list during the compliance review process to ensure that those entities that have opted out do not receive service documents from claimants.<sup>59</sup> Although claimants are encouraged to check this list before filing, Copyright Claims Attorneys will also review the library and archives opt-out list as part of their compliance review. The Office does not believe that this requires a regulatory change.

The Office also received a comment concerning the compliance review of *pro se* claims as compared to those of represented claimants. In the NPRM, the Office stated that “[t]he claimant will be asked to be as detailed as possible, but, as contemplated by Congress, the CCB will ‘construe liberally’ any information in the claim to satisfy regulatory requirements during claim review.”<sup>60</sup> The Organization for Transformative Works noted that “to construe liberally ‘any information’ goes beyond Congress’s intent” and that the legislative history cited in the NPRM only instructs that *pro se* claims are to be construed liberally. It argued that to construe all claims liberally “would violate long-standing procedural principles and provide an unwarranted, unfair advantage to claimants.”<sup>61</sup> The Office acknowledges that the legislative history discussing liberal construction of claims related to *pro se* claims<sup>62</sup> and agrees that only *pro se* claims will be

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<sup>58</sup> 86 FR 53899.

<sup>59</sup> Copyright Alliance et al. Initial NPRM Comments at 24; LCA Initial NPRM Comments 1–2; Am. Ass’n of L. Libraries (“AALL”) Initial NPRM Comments at 1.

<sup>60</sup> 86 FR 53898 (citing H.R. Rep. No. 116–252 at 22).

<sup>61</sup> OTW Initial NPRM Comments at 11 (citing H.R. Rep. No. 116–252, at 22).

<sup>62</sup> H.R. Rep. No. 116–252, at 22.

construed liberally. Since the proposed regulatory text says nothing about liberal construction of pleadings, no change to the regulatory language is needed.

## **2. Dismissal for Unsuitability**

The Office received comments about whether secondary liability claims should be permitted before the CCB. Some commenters asserted that “secondary liability cases are generally too complicated for CCB resolution” and “should be categorically excluded.”<sup>63</sup> The Copyright Alliance et al. responded that “[s]ince the law specifically permits claims of infringement, it would be inappropriate for the Copyright Office to categorically exclude claims of secondary liability which as much constitute claims of infringement as do claims of direct liability.”<sup>64</sup> The Office agrees that it is not appropriate to categorically exclude claims of infringement based upon particular theories of liability, and there is nothing in the statute that supports such exclusions. While certain claims involving secondary liability may be unsuitable, the CCB will determine suitability on a case-by-case basis. One of the proponents of a categorical ban suggested, in the alternative, that the Office make clear in the CCB Handbook that secondary liability cases are generally too complicated for CCB resolution.<sup>65</sup> At this point, however, the Office does not believe it would be appropriate to make sweeping statements about any claim category’s suitability.

To provide additional clarity, the final rule adds specific procedures for a party to request dismissal of a claim or counterclaim for unsuitability. Similar to subject-matter jurisdiction issues in federal court, a party can submit a request, at any time, that the CCB find a claim unsuitable to be heard by the CCB, and the opposing party will have the

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<sup>63</sup> Amazon Initial Comments at 7; CCIA Initial Comments at 3.

<sup>64</sup> Copyright Alliance et al. Reply Comments at 11–12.

<sup>65</sup> Amazon Initial NPRM Comments at 7.

opportunity to respond. The CCB can also raise the issue of unsuitability at any point on its own.

#### **D. Initial and Second Notices**

The NPRM set forth procedures governing the initial notice of proceeding that a claimant must serve on a respondent along with the claim, as well as the second notice of proceeding that the CCB will issue to respondents who have not opted out.<sup>66</sup> Specifically, the proposed rule mandated that the initial notice describe the CCB, the nature of CCB proceedings, basic information about the claim(s) and claimant(s), the respondent's right to opt out, and the consequences of opting out or proceeding. In addition, the initial notice will explain how the respondent can find further information about copyright, the CCB, and how to access eCCB.<sup>67</sup> Similarly, the proposed rule instructed that the second notice would mirror the initial notice in substance and would be sent no later than 20 days after the claimant files proof of service or a completed waiver of service (unless the respondent already has opted out).<sup>68</sup>

Commenters emphasized the importance of avoiding overly technical or formal language in the notices,<sup>69</sup> and SFWA believed that the notices should do more to highlight the voluntary nature of the CCB and the respondent's ability to opt out.<sup>70</sup> Some commenters suggested including a list of commonly available defenses in the notice.<sup>71</sup> Other commenters were split on whether the notice should provide information on the differences between federal court litigation and CCB proceedings.<sup>72</sup> The Copyright

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<sup>66</sup> 86 FR 53899–53900, 53902.

<sup>67</sup> *Id.* at 53899–53900.

<sup>68</sup> *Id.* at 53902.

<sup>69</sup> SFWA Initial NPRM Comments at 2–3; Amazon Initial NPRM Comments at 4.

<sup>70</sup> SFWA Initial NPRM Comments at 2–3.

<sup>71</sup> AIPLA Initial NPRM Comments at 2.

<sup>72</sup> *Compare* Fordham Initial NPRM Comments at 2; OTW Initial NPRM Comments at 6–7 *with* Copyright Alliance et al. Reply NPRM Comments at 13–14.

Alliance et al. did not think that the notices should provide information on how to register for eCCB, under the theory that such information may distract the respondent during the opt-out period.<sup>73</sup> Two commenters suggested that the Office publish the language of the notices for public comment.<sup>74</sup>

The Office agrees that the notices should use clear and simple language while still appearing legitimate and having the authority of a governmental body. As reflected in both the NPRM and the final rule, the Office intends to have both notices describe the respondent's ability to opt out. However, the Office believes that the notices should take an impartial approach, and should neither encourage nor discourage opt-out elections. The Office also wishes to avoid including unnecessary detail in the notices, which may discourage some respondents from reading them in full. Instead, in addition to providing the key information needed, the notices will refer respondents to additional sources of information, where they can learn more about available defenses and the differences between federal court litigation and CCB proceedings, among other topics. The Office understands the value of public input concerning the language of the notices. Once the notices are public, the Office welcomes feedback from potential CCB participants.

The Copyright Alliance et al. suggested that the proposed rule be revised to make clear that the claim served with the initial notice must be the version that was found compliant by the Copyright Claims Attorney.<sup>75</sup> Similarly, the Organization for Transformative Works believed that the regulatory language may create the erroneous implication that a party other than the CCB may send the second notice,<sup>76</sup> while the Copyright Alliance et al. sought to clarify language in the preamble that incorrectly suggested that a respondent may file a response before the CCB serves the second

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<sup>73</sup> Copyright Alliance et al. Initial NPRM Comments at 16–17.

<sup>74</sup> OTW Initial NPRM Comments at 6–7; SFWA Initial NPRM Comments at 3.

<sup>75</sup> Copyright Alliance et al. Initial NPRM Comments at 17–18.

<sup>76</sup> OTW Initial NPRM Comments at 7.

notice.<sup>77</sup> The Office agrees with these comments, and has revised the final rule in line with these suggestions.

In response to suggestions that the Office do more to prevent abusive use of the CCB before a proceeding becomes active, the Office has included in the final rule a requirement that a claimant may not include with the service of the initial notice, claim, and related materials any additional substantive communications such as settlement demands, additional descriptions of the claim or the strength of the claim, or exhibits that were not filed as part of the claim. This rule is designed to prevent claimants from intimidating a respondent into participating in the proceeding or settling the claim, including by attempting to pass off their own materials as the CCB's. However, the rule should not prevent claimants and respondents from communicating during the opt-out period or engaging in good-faith settlement discussions. Such communications must occur separately from service of the initial notice, claim, and related materials to make clear to the respondent that they do not carry the CCB's imprimatur.

The Office also has standardized the information in both the initial notice and the second notice, where appropriate. Further, the proposed rule contemplated that the claimant would submit a completed initial notice form simultaneously with the claim form, which a Copyright Claims Attorney would review as part of compliance review and issue with an Office seal upon approval.<sup>78</sup> To make the process more streamlined and efficient, the CCB rather than the claimant will be responsible for creating the initial notice, which will be generated from the compliant claim. The final rule reflects this change. Similarly, the proposed rule's definition of "initial notice" erroneously suggested that initial notices would accompany counterclaims in addition to claims, as the

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<sup>77</sup> Copyright Alliance et al. Initial NPRM Comments at 18.

<sup>78</sup> 86 FR 53898.

Copyright Alliance et al. pointed out,<sup>79</sup> and the service provisions incorrectly suggested that counterclaims would be served like claims. These references to counterclaims have been removed in the final rule.

## **E. Service**

### **1. Reorganization of Proposed §§ 222.5 and 222.6**

In the NPRM, §§ 222.5 (“Service; designated service agents”) and 222.6 (“Waiver of service”) addressed service of the initial notice of proceedings and other documents in CCB proceedings, including a provision permitting corporations, partnerships, and other unincorporated associations to designate agents to receive service of the initial notice and claim. To permit such entities to designate agents in advance of the day the CCB opens its doors, the provision regarding designations of service agents and the Office’s directory of service agents has been broken out from this rulemaking and has already been published as a partial final rule.<sup>80</sup> The provision regarding designated service agents has been moved to § 222.6 (“Designated service agents”) and the provision regarding waiver of service has been moved into § 222.5, which has been renamed “Service; waiver of service; filing.” Section 222.5 has been reorganized and some of the text has been revised to restate with more clarity what was in the proposed rule.

One such clarification relates to designated service agents. Various commenters observed that, as required by the statute, when a corporation, partnership, or unincorporated association has designated a service agent, a claimant must serve the initial notice and claim upon that agent. They requested that the regulations clarify that this is the case.<sup>81</sup> The Office agrees with that interpretation of the statute,<sup>82</sup> and did not

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<sup>79</sup> Copyright Alliance et al. Initial NPRM Comments at 12.

<sup>80</sup> 87 FR 12861 (Mar. 8, 2022).

<sup>81</sup> *See, e.g.*, CCIA Initial NPRM Comments at 3; Copyright Alliance et al. Initial NPRM Comments at 19; MPA, RIAA & SIIA Initial NPRM Comments at 3–4.

<sup>82</sup> *See* 17 U.S.C. 1506(g)(5).

believe a regulatory provision was necessary in light of the statutory language, so such a provision was not in the NPRM. However, in light of the comments about possible confusion, § 222.5(b)(2)(ii) now provides that when an entity has designated a service agent, service of the initial notice and claim must be made on that service agent.

## **2. Service of Order Regarding Second Filing Fee and Electronic Filing Registration**

As discussed below, to accommodate a two-tiered filing fee system, the final rule includes a new provision for an order, after a proceeding has become active for all respondents, requiring the claimant to pay the second fee and requiring all parties who have not yet registered for eCCB to do so. Section 222.5 has been revised to address the service of that order. Service of that order upon each party will depend upon whether that party has already registered for eCCB. The CCB will serve the order through eCCB for those parties who are already registered users. For parties who have not yet registered for eCCB, the order will be served in the same manner as the second notice—*i.e.*, by mail and, if the CCB has an email address for the party, by email as well.

## **3. Revisions Regarding Filings and Service of Documents**

The final rule includes a few minor revisions, for purposes of efficiency and clarity, to the rules regarding service of documents subsequent to the service of the initial notice. The final rule also revises how an unrepresented individual can, in exceptional circumstances, use means other than eCCB for filings and the service of filings.

As a general rule, parties will need to use eCCB for all filings and, once a proceeding has become active, a filing on eCCB will constitute service on all registered eCCB users linked to a case. The NPRM provided that unrepresented parties could avoid eCCB by certifying that they were unable to use eCCB or that doing so would cause an undue hardship. The NPRM then presented several alternative means of service of filings and documents, subsequent to the service of the initial notice, in proceedings involving a party not using eCCB. Given how burdensome this would be on all parties, and to

maximize the number of parties using eCCB while still allowing for accessibility to CCB proceedings for those who are unable to use it, the final rule states that those unrepresented individuals who have exceptional circumstances preventing them from accessing eCCB should contact the CCB, so that alternate arrangements can be made. Determining the necessary modifications, if any, on a case-by-case basis will give the CCB the flexibility to formulate solutions based on the particular challenges of the parties.<sup>83</sup>

The NPRM would have required that service of the second notice, which is made by the CCB, be made by certified mail. The final rule has eliminated the requirement that the second notice be sent by certified mail, but it is likely that the Office will send such notices using some form of U.S. Postal Service tracking to confirm that they were actually delivered.

There was contradictory language in the NPRM regarding service of requests for discovery and discovery responses. On one hand, the NPRM provided that “discovery requests and responses must not be filed unless they are used in the proceeding, as needed, in relation to discovery disputes or submissions on the merits.”<sup>84</sup> On the other hand, it included “[a] discovery document required to be served on a party” among the documents that must be served “in the manner prescribed in paragraph (d)(3),” which stated that “[a] document is served under this paragraph by sending it to a registered user by filing it with [eCCB] or sending it by other electronic means.”<sup>85</sup> However, it was not the Office’s intent to require that discovery documents be filed with the CCB. The final

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<sup>83</sup> Copyright Office regulations take a similar approach with respect to the online filing requirement for group registrations of unpublished works. *See* 37 CFR 202.4(c)(10) (“In an exceptional case, the Copyright Office may waive the online filing requirement . . . or may grant special relief from the deposit requirement . . . subject to such conditions as the Associate Register and Director of the Office of Registration Policy and Practice may impose on the applicant.”).

<sup>84</sup> 86 FR 53909.

<sup>85</sup> *Id.* at 53908–09.



rule has been clarified to provide that, unless the parties agree to another method of service, discovery requests and responses shall be served on other parties by email if the format and size of the documents makes such service reasonably possible. When such service is not reasonably possible (*e.g.*, due to size or format issues), the parties should attempt to agree to other arrangements. In the absence of an agreement, such documents that cannot be served by email should be served by mail.

#### **4. Waiver of Personal Service**

The CASE Act permits a respondent to waive personal service of process—*i.e.*, to agree in writing that the claimant need not go through the formal procedures for service of the claim and initial notice. A claimant may send a request for a waiver of personal service, along with the initial notice and the other documents to be served with that notice, to the respondent by mail or other reasonable means. The respondent may return the signed waiver to the claimant, which constitutes acceptance and proof of service.<sup>86</sup>

Engine expressed concern that when sending requests for waivers of service to respondents, some claimants might use misleading or intimidating language, similar to concerns expressed by other commenters relating to service of the initial notice and claim. Engine suggested that each claimant be required to send to the CCB a copy of everything that was included in the waiver package that the claimant sends to a respondent.<sup>87</sup> Such a requirement would impose administrative burdens on the CCB staff and go well beyond requirements for cases in federal court. The Office believes that a more efficient solution would be to take the same approach that has been taken with respect to service, and the final rule provides that the request for waiver of personal service shall be prepared using a form prepared by the CCB and shall not be accompanied by any other substantive communications.

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<sup>86</sup> 17 U.S.C. 1506(g)(6).

<sup>87</sup> See Engine Initial NPRM Comments at 3.

The final rule includes additional minor revisions regarding waivers of service. The NPRM had proposed that a waiver shall contain the respondent's email address and telephone number. However, consistent with revisions made to provisions governing the claim, the initial notice, and the response to the claim, the final rule provides when a respondent is represented, the waiver returned by a respondent should include the email address and telephone number not of the respondent, but rather of the respondent's counsel or authorized representative. Similarly, the final rule now provides that in cases where the respondent is represented, the waiver may be signed by the respondent's counsel or authorized representative.

In the NPRM, the Office proposed a rule that the proof of service must be filed within seven days of service, noting that the CCB will issue the second notice to the respondent no later than twenty days after receipt of a proof of service filed by the claimant.<sup>88</sup> The seven-day deadline was imposed so that the CCB would receive prompt notice that the initial notice had been served and could issue the second notice to the respondent within the following twenty days. Because one purpose of the second notice is to remind the respondent of its opt-out choice, it is vital that the second notice be served well before the expiration of the opt-out period, which is 60 days following service of the initial notice.<sup>89</sup>

The CASE Act provides only that proof of service of the initial notice must be filed not later than 90 days after the CCB notifies the claimant to proceed with service.<sup>90</sup> That provision continues to serve as an ultimate deadline for the filing of proof of service. However, to ensure that the second notice is delivered to the respondent well in advance of the expiration of the opt-out period, the CCB needs to receive the proof of service soon

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<sup>88</sup> 86 FR 53902, 53907.

<sup>89</sup> *See* 17 U.S.C. 1506(i).

<sup>90</sup> *Id.* at 1506(g).

after service takes place and well in advance of the opt-out date. Otherwise, the entire opt-out period could pass before the CCB is notified that service has been completed and the second notice would not meaningfully inform the respondent regarding its opt-out options. In the final rule, the Office has clarified that the seven-day deadline to advise the CCB regarding service on respondent applies to the filing of both proof of service and waiver of service, as applicable. As noted in the regulations, the consequence of a claimant failing to file its proof of service or waiver of service within the seven-day deadline is a possible extension of the respondent's opt-out deadline, depending on the circumstances.

## **5. Other Matters**

One comment urged that the Office provide claimants with clear, simple, plain-English instructions for effecting valid service, including a requirement that claimants search the online database of service agents and step-by-step instructions on how to serve such agents.<sup>91</sup> The Office intends to provide such information and instruction in other materials made available to the public, including the CCB Handbook.<sup>92</sup>

Other commenters expressed concern that the proposed rule for documents served electronically states, “service is complete upon filing or sending, respectively, but is not effective if the filer or sender learns that it did not reach the person to be served.”<sup>93</sup> The commenters observed that it is unclear what “learns” means and the uncertainty could enable intended recipients to make unsubstantiated claims that they did not receive documents that had been transmitted to them.<sup>94</sup> They proposed that the language be revised to include a proviso that the intended recipient must timely notify the sender that

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<sup>91</sup> MPA, RIAA & SIIA Initial NPRM Comments at 4.

<sup>92</sup> *See* 86 FR 69904 (proposed § 220.3).

<sup>93</sup> Copyright Alliance et al. Initial NPRM Comments at 19 (citing 86 FR 53908–09 (proposed § 222.5(d)(3)(ii))).

<sup>94</sup> *See id.*

the document was not received.<sup>95</sup> The Office notes that the language in question is taken almost verbatim from Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure.<sup>96</sup> The Federal Rule has no requirement that the intended recipient must notify the sender that the document was not received, and it is evident that unless a party was expecting to receive a particular document at a particular time, the intended recipient would have no way of knowing that the other party had attempted, but failed to accomplish, delivery of the document. The Office sees no reason to depart from the rule that has long worked for the federal courts.

The Office has extended the provision that service is not effective if the sender learns that it did not reach the party to be served to cover service by mail as well as email. There does not appear to be any basis for treating these methods separately because the purpose of the provision is to recognize that service is not effective when it was not completed. Further, if the sender of the material has actual notice that service was not completed, such as if it is returned from the U.S. Post Office because it was not delivered, the sender should have the same responsibility to make sure it is correctly served as with service by email.

Professor Eric Goldman acknowledged that the statutory provisions and proposed rule “incorporate[] existing service rules that apply to judicial proceedings,” but argued that the CCB should go further and “rigorously scrutinize service” and should “validate that the right defendant was identified and that service was made to that person.”<sup>97</sup> While implicitly acknowledging that this was not an issue created by or peculiar to the CCB

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<sup>95</sup> *See id.* at 19–20.

<sup>96</sup> Fed. R. Civ. P. 5(b)(2)(E) (“A paper is served under this rule by . . . sending it to a registered user by filing it with the court’s electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served.”).

<sup>97</sup> Eric Goldman Initial NPRM Comments at 1.

(Professor Goldman noted that “service rules can be gamed in non-CCB contexts”), he suggested that the CCB should “invest some resources in identifying—and punishing—service abuse.”<sup>98</sup> The Copyright Alliance et al. responded by noting that the possibility of misidentifying a defendant or a defendant’s address “is a possibility that also exists in federal court, and it is unreasonable to expect that the CCB could somehow ensure that the claimant does not misidentify the respondent or the respondent’s address.”<sup>99</sup> The Office agrees that the CCB cannot act as a guarantor that a claimant has served process on the correct respondent at the correct address, which is an issue that faces all tribunals regardless of size or jurisdiction. Moreover, the Office notes that the CCB has additional notices and safeguards against defaults that potentially reduce the effects of service abuse or mistake.

#### **F. Opt-Out Procedures**

The NPRM also set forth the procedures a respondent must follow to opt out of a proceeding. Under the proposed rule, a respondent may opt out by using either a paper or electronic form that requires provision of the docket number for the claim, a verification code, certain identifying information, and a signed affirmation.<sup>100</sup> The proposed rule required that each respondent independently fill out the opt-out form. It also specified that an opt-out would be effective against duplicate claims, but not unrelated claims between the same parties.<sup>101</sup>

Commenters emphasized the importance of making the opt-out process simple and accessible.<sup>102</sup> CCIA questioned whether it was necessary to require respondents using the electronic opt-out form to include a verification code when this code was not required

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<sup>98</sup> Eric Goldman Initial NPRM Comments at 1.

<sup>99</sup> Copyright Alliance et al. Reply NPRM Comments at 15.

<sup>100</sup> 86 FR 53902.

<sup>101</sup> *Id.* at 53902–03.

<sup>102</sup> Engine Initial NPRM Comments at 4; CCIA Initial NPRM Comments at 4–5.

for respondents using the paper form,<sup>103</sup> while others supported the use of the code as a security measure.<sup>104</sup> The Office believes that the verification code imposes a minimal burden while adding a necessary protective measure to ensure that only the respondent is able to opt out. The Office also agrees that electronic and paper opt-out forms should not be treated differently in this respect and has modified the rule to require the verification code, which will be provided along with the initial and second notices, for paper opt-out forms as well. The Office notes that eCCB is set up to make opting out easy, and its use is highly encouraged. Respondents will be able to find the appropriate claim on eCCB, identify themselves, and enter the opt-out code without needing to register. They will then be sent a confirmation for their records.

The NPRM requested comments on whether the rule should give respondents the ability to rescind an opt-out.<sup>105</sup> Commenters generally opposed such a provision, arguing that the Office lacked statutory authority to permit the rescission of opt-outs,<sup>106</sup> that claimants could use the availability of this mechanism to harass respondents,<sup>107</sup> that such a mechanism would impose an administrative burden on the CCB,<sup>108</sup> and that rescission may go against a claimant's wishes or raise constitutional concerns where a federal court's jurisdiction has been invoked.<sup>109</sup> Commenters suggested that if such a mechanism was introduced, the decision to rescind an opt-out should be accompanied by conditions,

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<sup>103</sup> CCIA Initial NPRM Comments at 4–5.

<sup>104</sup> Copyright Alliance et al. Reply NPRM Comments at 18.

<sup>105</sup> 86 FR 53903.

<sup>106</sup> Copyright Alliance et al. Initial NPRM Comments at 19–20.

<sup>107</sup> Verizon Initial NPRM Comments at 3.

<sup>108</sup> AIPLA Initial NPRM Comments at 2.

<sup>109</sup> *Id.*

such as a requiring the claimant's consent,<sup>110</sup> the reimbursement of the claimant's filing fee,<sup>111</sup> or other financial penalties.<sup>112</sup>

After consideration of these comments, the Office has decided not to allow the rescission of opt-outs by respondents, which would result in the unilateral reinitiation of a CCB proceeding. At the same time, the Office expects that there will be scenarios where, after opting out, respondents change their minds and determine that they would prefer to proceed before the CCB. In those circumstances, the respondent could contact the claimant with an offer to submit the parties' dispute to the CCB. The claimant would have a choice of whether to accept the offer. Accordingly, the Office is modifying the proposed rule to permit the same claim to be refiled following an opt-out where both parties have consented to the refiling.

In the NPRM, the Office proposed a rule intended to prevent a claimant from refiling a claim against a respondent who has already opted out with respect to that claim. Recognizing that such a rule should apply not only to verbatim repetitions of the previous claim but also to restatements of the same claim with different language, the Office proposed a rule that would protect a respondent who has opted out against a future claim "covering the same acts and the same theories of recovery."<sup>113</sup> Commenters raised concerns with the standard proposed in the NPRM. One comment suggested that the proposed rule adopted the wrong standard and that the correct standard is found in the statutory text relating to allowable counterclaims.<sup>114</sup> However, this rule is intended to address the repeated filing of a claim against a respondent that has previously opted out,

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<sup>110</sup> *Id.*

<sup>111</sup> Fordham Initial NPRM Comments at 3.

<sup>112</sup> Lisa Corson Initial NPRM Comments at 1.

<sup>113</sup> 86 FR 53902–03, 53912.

<sup>114</sup> MPA, RIAA & SIIA Initial NPRM Comments at 8–9 (citing 17 U.S.C. 1504(c)(4)(B)) (The comment suggested a rule focusing on whether the claim arises out of the same transaction or occurrence that is the subject matter of the original claim.).

not the scope of permissible counterclaims, which the statute limits to ensure that the CCB operates “efficiently and within the scope of its expertise.”<sup>115</sup> Another comment sought clarification as to how the rule would be applied in particular factual scenarios.<sup>116</sup> The Office understands that such examples may be helpful and expects to offer some in the Handbook. After considering the comments, the language in the final rule has been modified to make clear that the prohibition on refiled claims extends not only to identical or verbatim claims previously filed by the claimant from which the respondent has already opted out, but also to claims involving the same parties that cover the same acts and theories of recovery in substance, notwithstanding minor variations.

The Office received divided comments on whether and in what circumstances a respondent may seek an extension of the opt-out period. The Organization for Transformative Works suggested that respondents be permitted to extend the opt-out period when they need additional information to understand the nature of the claim or more time to seek the assistance of counsel,<sup>117</sup> while other commenters disagreed, arguing that this would result in delays in CCB proceedings, which are intended to be efficient.<sup>118</sup> The Office recognizes that there may be limited situations where a respondent needs more than 60 days to evaluate a more complex claim or to seek counsel, and the claimant may prefer that the opt-out period be extended rather than the respondent immediately opting out. The Office notes, however, that the statute gives the CCB the authority to extend the opt-out period in exceptional circumstances and upon written notice to the claimant when the extension is in the interests of justice.<sup>119</sup> The Office has made this explicit in the final rule and has included a provision stating that

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<sup>115</sup> See *Copyright Small Claims* at 105.

<sup>116</sup> SFWA Initial NPRM Comments at 3–4.

<sup>117</sup> OTW Initial NPRM Comments at 9, 11.

<sup>118</sup> Copyright Alliance et al. Reply NPRM Comments at 18–19.

<sup>119</sup> 17 U.S.C. 1506(i).



requests for an extension of the opt-out period may be made by the respondent individually or the parties jointly. The CCB Handbook will encourage respondents to seek the claimant's consent, as joint requests to extend the opt-out period can be more easily granted.

Commenters also urged the Office to consider publishing a list of respondents who have opted out, arguing that doing so would be helpful to potential claimants' decision-making process.<sup>120</sup> The Office is not creating such a list at this time, but will consider doing so in the future without the need for a regulation. The Office notes that this list would only be helpful if it includes a denominator representing the total number of claims filed against a particular respondent and not merely a numerator representing the number of times that the respondent has opted out. The Office further notes that eCCB will in any event contain information about claimants and respondents and will be public and searchable by parties.

Additionally, Verizon suggested that the rule make clear that the opt-outs of respondents who were not properly served be treated as effective.<sup>121</sup> The Office agrees and has included such a provision in the final rule.

The Office has also made additional procedural changes to streamline the opt-out process. First, the final rule permits a respondent's representative to complete the opt-out form, provided that they certify that they were directed and authorized by the respondent to do so. The Office has included this provision to enable represented respondents to opt out more easily, especially those who cannot themselves use eCCB but have an attorney who can. The Office does not believe there is a compelling reason to allow a party to be represented for other aspects of a CCB proceeding, but not the opt out, and this rule

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<sup>120</sup> Copyright Alliance et al. Initial NPRM Comments at 23; Amazon Initial NPRM Comments at 6.

<sup>121</sup> Verizon Initial NPRM Comments at 2.

makes sense for the same reasons that the CCB will allow authorized representatives for the claimant to prepare and certify the claim. Respondents will still have to provide their representatives with the proper opt-out code to enable the representative to opt out on their behalf. Second, the final rule requires a respondent to include certain contact information on opt-out forms so that the CCB may send the respondent or its representative confirmation of the opt-out. When opting out electronically, the respondent must include an email address. When opting out using a paper form, the respondent must provide either an email address or a mailing address. Third, the final rule makes clear that electronic opt-out forms must be submitted by 11:59 p.m. Eastern Time on the final day of the opt-out period, rather than at midnight.

#### **G. Order Regarding Second Filing Fee and Electronic Filing Registration**

As discussed above, the addition of a two-tiered fee system in the final rule required additional processes concerning payment of the second fee. Under the final rule, once a proceeding becomes active (*i.e.*, all respondents have been served and the time to opt-out for each respondent has expired without all of them opting out), the CCB will issue an order to all parties requiring that the claimant pay the second filing fee within 14 days and that any parties who have not yet registered for the eCCB do so (unless they are a *pro se* individual and have contacted the CCB and the CCB has determined that exceptional circumstances exist such that the party does not have to use eCCB) within 14 days. After the claimant pays the second filing fee and the 14-day period elapses, the CCB will issue a scheduling order. If any party has not yet registered for eCCB by that time, the CCB will serve that party with the scheduling order outside of eCCB, along with a notice reminding the party to register for eCCB or contact the CCB if they are unable to use it. The notice will also state that a failure to comply may ultimately result in a determination of the party's default or failure to prosecute. Under the final rule, if a claimant fails to submit the second payment within the 14-day period, the CCB will issue

a notice to that claimant, reminding them to submit the second payment within the next 14 days. If the claimant still fails to submit the second payment, the CCB will dismiss the proceeding without prejudice, unless doing so would not be in the interests of justice.

## **H. Response**

In the NPRM, the Office proposed procedures for the respondent to file a response to a claim.<sup>122</sup> As with the claim, responses generally must be filed using an electronic fillable form provided through eCCB.<sup>123</sup> In the response, the respondent will provide identifying information and details concerning the dispute, along with a certification that the information provided in the response is accurate and truthful to the best of the certifying party's knowledge.<sup>124</sup> Under the proposed rule, respondents to infringement claims were permitted to identify relevant defenses, and given the opportunity to attach documentation related to their response.<sup>125</sup> However, the proposed rule did not provide for identification of defenses to claims of misrepresentation or for declarations of noninfringement.

The Office requested comments concerning whether a list of common defenses should be provided to respondents and, if so, how such a list should be provided.<sup>126</sup> Commenters generally favored including a list of common defenses,<sup>127</sup> but they were divided on how and what details should be provided. Engine favored presenting defenses in the form of a checklist,<sup>128</sup> but others believed that this may encourage respondents to raise frivolous or baseless defenses and favored presenting relevant defenses in the form

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<sup>122</sup> 86 FR 53909.

<sup>123</sup> *Id.* at 53903.

<sup>124</sup> *Id.* at 53910.

<sup>125</sup> *Id.* at 53903.

<sup>126</sup> *Id.*

<sup>127</sup> Copyright Alliance et al. Initial NPRM Comments at 20–21; Engine Initial NPRM Comments at 4; MPA, RIAA & SIIA Initial NPRM Comments at 10; Fordham Initial Comments at 3–4. *But see* Lisa Corson Initial NPRM Comments at 1.

<sup>128</sup> Engine Initial NPRM Comments at 4.

of a list without additional detail.<sup>129</sup> Other commenters agreed that the Office should present a list of common defenses for each type of claim, but should make clear that the applicability of defenses will depend on the facts at issue.<sup>130</sup> Finally, two commenters agreed that the Office should provide a list of common defenses, but thought that each defense should be accompanied by a brief explanation along with links to resources.<sup>131</sup>

As a preliminary matter, the Office agrees that respondents for each type of claim—rather than only infringement claims—should be permitted an opportunity to present defenses beyond just disputing the claim, and it has revised the final rule accordingly. Additionally, the Office intends to include a list of common defenses in the response form. These defenses generally will take the form of a checklist, but respondents will be required to provide the basis for each defense they select as part of the response form. This will minimize the burden on respondents, who may not have much familiarity with the law, while discouraging the assertion of meritless defenses. The Office also intends to include additional information concerning common defenses as part of the CCB’s educational materials and to have links within eCCB so that respondents can easily access those materials.

Commenters also suggested that the response form alert respondents to the availability of pro bono assistance from legal clinics and how to contact them.<sup>132</sup> The Office intends to include references to pro bono assistance in the initial notice and throughout the CCB’s educational materials.

As discussed above, the final rule also requires a respondent to provide an address, phone number, email address, and, if represented by counsel or an authorized

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<sup>129</sup> Copyright Alliance et al. Initial NPRM Comments at 20–21; Copyright Alliance et al. Reply NPRM Comments at 15.

<sup>130</sup> MPA, RIAA & SIIA Initial NPRM Comments at 10.

<sup>131</sup> Fordham Initial NPRM Comments at 3–4; Anonymous Reply NPRM Comments at 4–5;

<sup>132</sup> Copyright Alliance et al. Initial NPRM Comments at 21.

representative, the address, phone number, and email address of the counsel or representative. Where a respondent is represented, the respondent's phone number and email address will not be made available to the opposing party, but only to CCB staff. Additionally, as is the case with the claim form, when the response is completed by someone other than the respondent, the final rule requires that the certifying party has confirmed the accuracy of the information with the respondent.

## **I. Counterclaims and Response to Counterclaims**

The CASE Act provides that a respondent in a CCB proceeding may assert certain related counterclaims against the claimant.<sup>133</sup> An allowable counterclaim must either “arise[] under section 106 or section 512(f) [of the Copyright Act] and out of the same transaction or occurrence that is the subject of a claim of infringement, . . . a claim of noninfringement, . . . or a claim of misrepresentation,”<sup>134</sup> or “arise[] under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement . . . if the agreement could affect the relief awarded to the claimant.”<sup>135</sup> Counterclaims must also fall within the same limits on damages that apply to claims.<sup>136</sup> Any asserted counterclaim is subject to the same compliance review applicable to an initial claim<sup>137</sup> and is subject to dismissal for unsuitability.<sup>138</sup>

### **1. No Opting Out of Counterclaims**

Though the CASE Act provides a detailed procedure for respondents to opt out of using the CCB to resolve claims,<sup>139</sup> it does not set forth a corresponding opt-out

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<sup>133</sup> 17 U.S.C. 1504(c).

<sup>134</sup> *Id.* at 1504(c)(4)(B)(i).

<sup>135</sup> *Id.* at 1504(c)(4)(B)(ii).

<sup>136</sup> *Id.* at 1504(c)(4)(A), 1504(e)(1).

<sup>137</sup> *Id.* at 1506(f)(2).

<sup>138</sup> *Id.* at 1506(f)(3).

<sup>139</sup> *Id.* at 1506(i).

procedure for counterclaims.<sup>140</sup> Under the statute, a claimant can elect to voluntarily dismiss a claim, respondent, or proceeding by written request at any time “before a respondent files a response to the claim,”<sup>141</sup> but once a response with any counterclaim is filed, the statute does not provide a means for the claimant to withdraw from, or opt out of, having the CCB decide the counterclaim.

In the NPRM, the Office invited comments on the issue, including whether allowing a claimant to opt out of having the CCB decide a counterclaim is permitted under the statute.<sup>142</sup> As the Office previously observed, “[a]s the claimant has already voluntarily submitted to, and in fact requested, the CCB to take up the general issue at hand, having an opt-out procedure for counterclaims potentially could constitute an inefficient use of time and resources.”<sup>143</sup> The Office also noted that, as the CASE Act permits only counterclaims that both arise from the same transaction or occurrence as a claim and that implicate copyright or an agreement affecting the relief to be awarded to the claimant, “there arguably should be no surprise when a counterclaim is asserted. For example, a claimant who brings an action before the CCB seeking a declaration of noninfringement of a work could reasonably expect a counterclaim for infringement of that same work.”<sup>144</sup>

Commenters were generally in agreement with the proposed rule. Several commenters opposed any provision that would allow claimants to opt out of counterclaims raised against them.<sup>145</sup> Some questioned the legality of such a provision.<sup>146</sup>

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<sup>140</sup> See 86 FR 53904.

<sup>141</sup> 17 U.S.C. 1506(q)(1).

<sup>142</sup> 86 FR 53904.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> AIPLA Initial NPRM Comments at 2; Copyright Alliance et al. Initial NPRM Comments at 21–22.

<sup>146</sup> AIPLA Initial NPRM Comments at 2; Copyright Alliance et al. Initial NPRM Comments at 21–22.

Commenters raised equitable concerns that “no party should be able to pursue a claim in CCB while simultaneously opting out of litigating a counterclaim against it”<sup>147</sup> and that once a claimant voluntarily elects to bring a claim, “they elect to either proceed before the CCB or not to; they do not get to pick and choose which eligible [counter]claims they would like to be subject to before the CCB.”<sup>148</sup>

Most of the comments that addressed the issue opined that, even if permissible, “an opt-out mechanism . . . for claimants who receive a counterclaim . . . would [not] be sound policy.”<sup>149</sup> One commenting party concurred that a claimant should not be entitled to opt out of a counterclaim “unless that original claimant drops its claim, thus resulting in dismissal of the entire CCB case.”<sup>150</sup>

Two commenters expressed the opposing view.<sup>151</sup> An authors’ organization commented that not allowing a claimant to opt-out of counterclaims would make “claimants unfairly bear[] the burden of paying the filing fee, initiating the process, and assuming the risk of being subjected to a counterclaim,” and give respondents “a distinct advantage by being able to force the case through the CCB process.”<sup>152</sup> Another anonymous commenter raised similar concerns that this would impose an unbalanced burden on claimants and that respondents may “attempt to find a way to abuse free counterclaims.”<sup>153</sup>

The Office agrees with the majority of comments that a claimant should not be entitled to opt out of a counterclaim. The NPRM expressed doubt that the CASE Act

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<sup>147</sup> MPA, RIAA & SIIA Initial NPRM Comments at 8.

<sup>148</sup> Copyright Alliance et al. Initial NPRM Comments at 22. This comment further suggested that the claim form should prominently inform claimants “that by bringing a claim before the CCB, they voluntarily consent to the process, including any counterclaims permitted[.]” *Id.*

<sup>149</sup> AIPLA Initial NPRM Comments at 2.

<sup>150</sup> MPA, RIAA & SIIA Initial NPRM Comments at 7.

<sup>151</sup> *See* Anonymous Reply NPRM Comments at 2; SFWA Initial NPRM Comments at 4.

<sup>152</sup> SFWA Initial NPRM Comments at 4.

<sup>153</sup> Anonymous Reply NPRM Comments at 2.

permits a counterclaim respondent to opt out, and no commenters made an argument that it does. Moreover, a respondent's right to opt out of a CCB claim is inherent in the voluntary nature of the forum, but a claimant before the CCB has already affirmatively opted in to the proceeding and could reasonably anticipate a respondent to file a counterclaim. Any claimant, knowing that the respondent may opt out of the proceeding or make a counterclaim, can assess those risks before filing the claim. But if a claimant facing a counterclaim could opt out of that counterclaim while maintaining their own claim, this would be unfair to respondents. The Office is persuaded that it would be inequitable and inefficient to permit a claimant to opt out of a counterclaim, even if such a regulation were permitted.

## **2. Other Provisions Related to Counterclaims**

The CASE Act does not specify when a counterclaim must be filed. Under the proposed rule, a counterclaim must be asserted at the same time the response is filed unless the CCB finds good cause for allowing a later counterclaim.<sup>154</sup> The only comments on this topic “agree[d] with this approach.”<sup>155</sup> The Office finds that this approach will enable “an efficient, orderly procedure that provides parties sufficient notice as to the issues involved in the proceeding.”<sup>156</sup>

The NPRM proposed that “the information required to assert a counterclaim should closely mirror the information required to assert a claim.”<sup>157</sup> However, commenters noted a discrepancy between those requirements—while claimants would have been required to state “[t]he facts leading the claimant to believe the work has been infringed,” counterclaimants would have been required to state “[t]he nature of the

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<sup>154</sup> 86 FR 53903.

<sup>155</sup> Copyright Alliance et al. Initial NPRM Comments at 21.

<sup>156</sup> 86 FR 53903.

<sup>157</sup> *Id.*



alleged infringement.”<sup>158</sup> The Copyright Alliance et al. suggested revising the latter provision to be consistent with the former.<sup>159</sup> The Office agrees and adopts the suggestion in the interest of consistency. The Office does not intend that the pleading standards and requirements for claimants and counterclaimants should differ, and accordingly, the Office has further revised the wording proposed in the NPRM regarding the content of counterclaims to conform it to the wording regarding the content of claims.

*J. Clarifying language and technical corrections.*

Commenters provided suggestions on clarifying language and correcting typographical errors in the NPRM. The Office has adjusted the final rule accordingly.<sup>160</sup>

**List of Subjects**

*37 CFR Part 201*

Copyright, General provisions.

*37 CFR Part 220*

Claims, Copyright, General.

*37 CFR Part 222*

Claims, Copyright.

*37 CFR Part 223*

Claims, Copyright.

*37 CFR Part 224*

Claims, Copyright.

**Final Regulations**

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<sup>158</sup> Copyright Alliance et al. Initial NPRM Comments at 21 (citing 86 FR 53903, 53910).

<sup>159</sup> *Id.*

<sup>160</sup> *See, e.g.,* Copyright Alliance et al. Initial NPRM Comments at 14–15, 17, 20–21; New Media Rights Initial NPRM Comments at 5–6; OTW Initial NPRM Comments at 11; SFWA Initial NPRM Comments at 2; Sergey Vernyuk Initial NPRM Comments at 1.

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

a. Revise the section heading;

b. Redesignate table 1 to paragraph (d) and table 1 to paragraph (e) as table 2 to paragraph (d) and table 3 to paragraph (e), respectively; and

c. Add paragraph (g).

The revision and addition 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) *Copyright Claims Board fees.* The Copyright Office has established the following fees for specific services related to the Copyright Claims Board:

**Table 4 to Paragraph (g)**

<b>Copyright Claims Board fees</b>	<b>Fees (\$)</b>
(1) Initiate a proceeding before the Copyright Claims Board.	
(i) First payment	40
(ii) Second payment	60
(2) [Reserved]	

## **Subchapter B—Copyright Claims Board and Procedures**

3. Under the authority of 17 U.S.C. 702, 1510, the heading for subchapter B is revised to read as set forth above.

4. Add part 220 to read as follows:

### **PART 220—GENERAL PROVISIONS**

Sec.

220.1 Definitions.

220.2 [Reserved]

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

#### **§220.1 Definitions.**

For purposes of this subchapter:

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

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

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

#### **§220.2 [Reserved]**

### **PART 222—PROCEEDINGS**

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

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

6. Add §§ 222.2 through 222.5 to read as follows:

Sec.

\* \* \* \* \*

222.2 Initiating a proceeding; the claim.

222.3 Initial notice.

222.4 Second notice.

222.5 Service; waiver of service; filing.

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**§222.2 Initiating a proceeding; the claim.**

(a) *Initiating a proceeding.* A claimant may initiate a proceeding before the Copyright Claims Board (Board) by submitting the following—

- (1) A completed claim form provided by the Board; and
- (2) The first payment of the filing fee set forth in 37 CFR 201.3(g).

(b) *Electronic filing requirement.* Except as provided otherwise in § 222.5(f), to submit the claim and the first payment of the filing fee, the claimant must be a registered user of the Board's electronic filing system (eCCB).

(c) *Contents of the claim.* The claim shall include:

- (1) Identification of the claim(s) asserted against the respondent(s), which shall consist of at least one of the following:
  - (i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;
  - (ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; or
  - (iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—
    - (A) A notification of claimed infringement; or
    - (B) A counter notification seeking to replace removed or disabled material;
- (2) The name(s) and mailing address(es) of the claimant(s);
- (3) For any claimant that is represented by legal counsel or an *authorized representative*, the name(s), mailing address(es), email address(es), and telephone number(s) of such claimant's legal counsel or *authorized representative*;

- (4) For any claimant that is not represented by legal counsel or an *authorized representative*, the email address and telephone number of such claimant;
- (5) The name(s) of the respondent(s);
- (6) The mailing address(es) of the respondent(s), unless the claimant(s) certifies that a respondent's address is unknown at the time to the claimant and that the claimant has a good-faith belief that the statute of limitations for the claim is likely to expire within 30 days from the date that the claim is submitted, and describes the basis for that good-faith belief;
- (7) For an infringement claim asserted under paragraph (c)(1)(i) of this section—
- (i) That the claimant is the legal or beneficial owner of rights in a work protected by copyright and, if there are any co-owners, their names;
  - (ii) The following information for each work at issue in the claim:
    - (A) The title of the work;
    - (B) The author(s) of the work;
    - (C) If a copyright registration has issued for the work, the registration number and effective date of registration;
    - (D) If an application for copyright registration has been submitted but a registration has not yet issued, the service request number (SR number) and application date; and
    - (E) The work of authorship category, as set forth in 17 U.S.C. 102, for each work at issue, or, if the claimant is unable to determine the applicable category, a brief description of the nature of the work; and
  - (iii) A description of the facts relating to the alleged infringement, including, to the extent known to the claimant:
    - (A) Which exclusive rights provided under 17 U.S.C. 106 are at issue;
    - (B) When the alleged infringement began;

- (C) The name(s) of all person(s) or organization(s) alleged to have participated in the infringing activity;
- (D) The facts leading the claimant to believe the work has been infringed;
- (E) Whether the alleged infringement has continued through the date the claim was filed, or, if it has not, when the alleged infringement ceased;
- (F) Where the alleged act(s) of infringement occurred (*e.g.*, a physical or online location); and
- (G) If the claim of infringement is asserted against an online service provider as defined in 17 U.S.C. 512(k)(1)(B) for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in 17 U.S.C. 512(b), (c), or (d), an affirmation that the claimant has previously notified the service provider of the claimed infringement in accordance with 17 U.S.C. 512(b)(2)(E), (c)(3), or (d)(3), as applicable, and that the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice;

(8) For a declaration of noninfringement claim asserted under paragraph (c)(1)(ii) of this section—

- (i) The name(s) of the person(s) or organization(s) asserting that the claimant has infringed a copyright;
- (ii) The following information for each work alleged to have been infringed, if that information is known to the claimant:
  - (A) The title;
  - (B) If a copyright registration has issued for the work, the registration number and effective date of registration;

(C) If an application for copyright has been submitted, but a registration has not yet issued, the service request number (SR number) and registration application date; and

(D) The work of authorship category, as set forth in 17 U.S.C. 102, or, if the claimant is unable to determine which category is applicable, a brief description of the nature of the work;

(iii) A brief description of the claimant's activity at issue in the claim, including, to the extent known to the claimant:

(A) Any exclusive rights provided under 17 U.S.C. 106 that may be implicated;

(B) When the activities at issue began and, if applicable, ended;

(C) Whether the activities at issue have continued through the date the claim was filed;

(D) The name(s) of all person(s) or organization(s) who participated in the allegedly infringing activity; and

(E) Where the activities at issue occurred (*e.g.*, a physical or online location);

(iv) A brief statement describing the reasons why the claimant believes that no infringement occurred, including any relevant history or agreements between the parties and whether claimant currently believes any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 are implicated; and

(v) A brief statement describing the reasons why the claimant believes that there is an actual controversy concerning the requested declaration;

(9) For a misrepresentation claim asserted under paragraph (c)(1)(iii) of this section—

(i) The sender of the notification of claimed infringement;

(ii) The recipient of the notification of claimed infringement;

(iii) The date the notification of claimed infringement was sent, if known;

(iv) A description of the notification;

(v) If a counter notification was sent in response to the notification—

(A) The sender of the counter notification;

(B) The recipient of the counter notification;

(C) The date the counter notification was sent, if known; and

(D) A description of the counter notification;

(vi) The words in the notification or counter notification that allegedly constituted a misrepresentation; and

(vii) An explanation of the alleged misrepresentation;

(10) For infringement claims and misrepresentation claims, a statement describing the harm suffered by the claimant(s) as a result of the alleged activity and the relief sought by the claimant(s). Such statement may, but is not required to, include an estimate of any monetary relief sought;

(11) Whether the claimant requests that the proceeding be conducted as a “smaller claim” under 17 U.S.C. 1506(z), and would accept a limitation on total damages of \$5,000 if the request is granted; and

(12) A certification under penalty of perjury by the claimant, the claimant’s legal counsel, or the claimant’s *authorized representative* that the information provided in the claim is accurate and truthful to the best of the certifying person’s knowledge and, if the certifying person is not the claimant, that the certifying person has confirmed the accuracy of the information with the claimant. The certification shall include the typed signature of the certifying person.

(d) *Additional matter.* The claimant may also include, as attachments to or files accompanying the claim, any material the claimant believes plays a significant role in setting forth the facts of the claim, such as:



- (1) A copy of the copyright registration certificate for a work that is the subject of the proceeding;
- (2) A copy of the copyrighted work alleged to be infringed. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows where the allegedly infringed work has been posted;
- (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows any allegedly infringing activity;
- (4) For a misrepresentation claim, a copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
- (5) For a misrepresentation claim, a copy of the counter notification that is alleged to contain the misrepresentation;
- (6) For a declaration of noninfringement claim, a copy of the demand letter(s) or other correspondence that created the dispute; and
- (7) Any other exhibits that play a significant role in setting forth the facts of the claim.

(e) *Additional information required during claim submission.* In connection with the submission of the claim the claimant shall also provide—

- (1) For any claimant that is represented by legal counsel or an *authorized representative*, the email address and telephone number of that claimant. Such information shall not be part of the claim; and
- (2) Any further information that the Board may determine should be provided.

(f) *Respondent address requirement for claim submission.* Any claim for which a respondent's mailing address has not been provided pursuant to paragraph (c)(6) of this section shall not be found compliant under 37 CFR 224.1 unless the claimant provides the address of the respondent to the Board within 60 days of the date the claim was filed

under paragraph (a) of this section. If the claimant does not provide a respondent address within that period of time, the Board may dismiss the claim without prejudice.

**§222.3 Initial notice.**

(a) *Content of initial notice.* The Board shall prepare an *initial notice* for the claimant(s) to serve on each respondent that shall—

- (1) Include on the first page a caption that provides the parties' names and includes the docket number assigned by the Board;
- (2) Be addressed to the respondent;
- (3) Provide the name(s) and mailing address(es) of the claimant(s);
- (4) For any claimant that is represented by legal counsel or an *authorized representative*, provide the name(s), mailing address(es), email address(es), and telephone number(s) of such legal counsel or *authorized representative*;
- (5) For any claimant that is not represented by legal counsel or an *authorized representative*, provide the email address and telephone number of that claimant;
- (6) Advise the respondent that a legal proceeding that could affect the respondent's legal rights has been commenced by the claimant(s) in the Board against the respondent;
- (7) Identify the nature of the claims asserted against the respondent, which shall consist of at least one of the following:
  - (i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;
  - (ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; and
  - (iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—
    - (A) A notification of claimed infringement; or
    - (B) A counter notification seeking to replace removed or disabled material;

- (8) Describe the Board, including that it is a three-member tribunal within the Copyright Office that has been established by law to resolve certain copyright disputes in which the total monetary recovery does not exceed \$30,000;
- (9) State that the respondent has the right to opt out of participating in the proceeding, and that the consequence of opting out is that the proceeding shall be dismissed without prejudice and the claimant shall have to determine whether to file a lawsuit in a Federal district court;
- (10) State that if the respondent does not opt out within 60 days from the day the respondent received the *initial notice*, the proceeding shall go forward and the respondent shall—
- (i) Lose the opportunity to have the dispute decided by the Federal court system, created under Article III of the Constitution of the United States; and
  - (ii) Waive the right to have a trial by jury regarding the dispute;
- (11) State that the notice is in regard to an official Government proceeding and provide information on how to access the docket of the proceeding in eCCB;
- (12) Provide information on how to become a registered user of eCCB;
- (13) State that parties may represent themselves in the proceeding, but note that a party may wish to consult with legal counsel or with a law school clinic, and provide reference to pro bono resources (*i.e.*, legal services provided without charge for those services) which may be available and are listed on the Board's website;
- (14) Indicate where other pertinent information concerning proceedings before the Board may be found on the Board's website;
- (15) Provide direction on how a respondent may opt out of the proceeding, either online or by mail; and
- (16) Include any additional information that the Board may determine should be included.

(b) *Service of initial notice.* Following notification from the Board pursuant to 17 U.S.C. 1506(f)(1)(A) to proceed with service of the claim, the claimant shall cause the *initial notice*, the claim, the opt-out notification form, and any other documents required by the direction of the Board to be served with the *initial notice* and the claim, upon each respondent as prescribed in § 222.5(b) and 17 U.S.C. 1506(g). The copy of the claim that is served shall be of the claim that was found to be compliant under 37 CFR 224.1, and is, at the time of service, available on eCCB. The *initial notice*, the claim, the opt-out notification form, and any other document required by the Board shall not be accompanied by any additional substantive communications or materials, including without limitation settlement demands, correspondence purporting to describe the claim or the strength of the claim, or exhibits not filed with the claim, when served by the claimant(s).

**§222.4 Second notice.**

(a) *Content of second notice.* The *second notice* to the respondent shall—

- (1) Include on the first page a caption that provides the parties' names and the docket number;
- (2) Be addressed to the respondent, using the address that appeared in the *initial notice* or an updated address, if an updated address was provided to the Board prior to service of the *second notice*;
- (3) Include the contact information for the claimant(s) and claimant's legal counsel or *authorized representative*, for any claimant represented by legal counsel or an *authorized representative*;
- (4) Advise the respondent that a proceeding that could affect the respondent's legal rights has been commenced by the claimant(s) in the Board against the respondent;
- (5) Identify the nature of the claims asserted against the respondent, which shall consist of at least one of the following:

- (i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;
- (ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; and
- (iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—
  - (A) A notification of claimed infringement; or
  - (B) A counter notification seeking to replace removed or disabled material;
- (6) Describe the Board, including that it is a three-member tribunal within the Copyright Office that has been established by law to resolve certain copyright disputes in which the total monetary recovery does not exceed \$30,000;
- (7) State that the respondent has the right to opt out of participating in the proceeding, and that the consequence of opting out is that the proceeding shall be dismissed and the claimant shall have to determine whether to file a lawsuit in a Federal district court;
- (8) State that if the respondent does not opt out within 60 days from the day the respondent received the *initial notice*, the consequences are that the proceeding shall go forward and the respondent shall—
  - (i) Lose the opportunity to have the dispute decided by the Federal court system, created under Article III of the Constitution of the United States; and
  - (ii) Waive the right to have a trial by jury regarding the dispute;
- (9) Provide information on how to access the docket of the proceeding in eCCB and how to become a registered user of that system;
- (10) State that the notice is in regard to an official Government proceeding and provide information on how to access the docket of the proceeding eCCB;
- (11) Provide information on how to become a registered user of eCCB;

- (12) State that parties may represent themselves in the proceeding, but note that a party may wish to consult with legal counsel or with a law school clinic, and provide reference to pro bono resources (*i.e.*, legal services provided without charge for those services) which may be available and are listed on the Board's website;
  - (13) Indicate where other pertinent information concerning proceedings before the Board may be found on the Board's website;
  - (14) Provide direction on how a respondent may opt out of the proceeding, either online or by mail;
  - (15) Be accompanied by the documents described in § 222.3(b); and
  - (16) Include any additional information or documents at the Board's direction.
- (b) *Timing of second notice.* The Board shall issue the *second notice* in the manner prescribed by § 222.5(d)(2) no later than 20 days after the claimant files proof of service or a completed waiver of service with the Board, unless the respondent has already submitted an opt-out notification pursuant to 37 CFR 223.1.

**§222.5 Service; waiver of service; filing.**

- (a) *In general.* Unless specified otherwise, all filings made by a party in CCB proceedings must be filed in eCCB. Except as provided elsewhere in this section, documents are served on a party who is a registered user of the eCCB and filed with the Board by submitting them to eCCB. Service is complete upon filing, but is not effective if the filer learns that it did not reach the person to be served.
- (b) *Service of initial notice, claim, and related documents—*(1) *Timing of service.* A claimant may proceed with service of a claim only after the claim is reviewed by a Copyright Claims Attorney and the claimant is notified that the claim is compliant under 37 CFR 224.1.

(2) *Service methods.* (i) Service of the *initial notice*, the claim, and other documents required by this part or the Board to be served with the *initial notice* and claim shall be made as provided under 17 U.S.C. 1506(g), as supplemented by this section.

(ii) If a corporation, partnership, or unincorporated association has designated a service agent under 17 U.S.C. 1506(g)(5)(B) and § 222.6, service must be made by certified mail or by any other method that the entity specifies in its designation under § 222.6 that it will accept.

(3) *Filing of proof of service.* (i) No later than the earlier of seven calendar days after service of the *initial notice* and all accompanying documents under paragraph (b) of this section and 90 days after receiving notification of compliance, a claimant shall file a completed proof of service form through eCCB. The proof of service form shall be located on the Board's website.

(ii) The claimant's failure to comply with the filing deadline in paragraph (b)(3)(i) of this section may constitute exceptional circumstances justifying an extension of the 60-day period in which a respondent may deliver an opt-out notification to the Board under 17 U.S.C. 1506(i).

(c) *Waiver of personal service—(1) Delivery of request for waiver of service.* A claimant may request that a respondent waive personal service as provided by 17 U.S.C.

1506(g)(6) by delivering, via first class mail, the following to the respondent:

- (i) A completed waiver of personal service form provided on the Board's website;
- (ii) The documents described in § 222.3, including the *initial notice* and the claim;  
and
- (iii) An envelope, with postage prepaid and addressed to the claimant requesting the waiver or, for a claimant represented by legal counsel or an *authorized representative*, to that claimant's legal counsel or *authorized representative*.

(2) *Content of waiver of service request.* The request for waiver of service shall be prepared using a form provided by the Board that shall—

- (i) Bear the name of the Board;
- (ii) Include on the first page and waiver page the caption identifying the parties and the docket number;
- (iii) Be addressed to the respondent;
- (iv) Contain the date of the request;
- (v) Notify the respondent that a legal proceeding has been commenced by the claimant(s) before the Board against the respondent;
- (vi) Advise that the form is not a summons or official notice from the Board;
- (vii) Request that respondent waive formal service of summons by signing the enclosed waiver;
- (viii) State that a waiver of personal service shall not constitute a waiver of the right to opt out of the proceeding;
- (ix) Describe the effect of agreeing or declining to waive service;
- (x) Include a waiver of personal service form provided by the Board, containing a clear statement that waiving service does not affect the respondent's ability to opt out of the proceeding and that, if signed and returned by the respondent, will include—
  - (A) An affirmation that the respondent is waiving service;
  - (B) An affirmation that the respondent understands that the respondent may opt out of the proceeding within 60 days of receiving the request;
  - (C) The name and mailing address of the respondent;
  - (D) For a respondent that is represented by legal counsel or an *authorized representative*, the name(s), mailing address(es), email address(es), and telephone number(s) of such legal counsel or *authorized representative*;



(E) For a respondent that is not represented by legal counsel or an *authorized representative*, the email address and telephone number of that respondent; and

(F) The typed, printed, or handwritten signature of the respondent or, if the respondent is represented by legal counsel or an *authorized representative*, the typed, printed, or handwritten signature of the respondent's legal counsel or *authorized representative*. If the signature is handwritten, it shall be accompanied by a typed or printed name; and

(xi) Not be accompanied by any other substantive communications.

(3) *Completing waiver of service*. The respondent may complete waiver of service by returning the signed waiver form in the postage prepaid envelope to claimant by mail or, if the claimant also provides an email address to which the waiver of personal service form may be returned, by means of an email to which a copy of the signed form is attached. Waiving service does not affect a respondent's ability to opt out of a proceeding.

(4) *Timing of completing waiver*. The respondent has 30 days from the date on which the request was sent to return the waiver form.

(5) *Filing of waiver*. Where the respondent has completed the waiver form, the claimant must submit the completed waiver form to the Board no later than the earlier of seven calendar days after the date the claimant received the signed waiver form from the respondent or 90 days after receiving notification of compliance.

(d) *Service by the Copyright Claims Board*—(1) *In general*. Except as otherwise provided in this paragraph (d), the Board shall serve one copy of all orders, notices, decisions, rulings on motions, and similar documents issued by the Board upon each party through eCCB.

(2) *Service of second notice.* (i) The Board shall serve the *second notice* required under 17 U.S.C. 1506(h) and § 222.4, along with the documents described in § 222.3(b), by sending them by mail to the respondent at the address provided—

(A) In the designated service agent directory, if the respondent is a corporation, partnership, or unincorporated association that has designated a service agent; and, if not,

(B) By the claimant in the claim or, in a subsequent communication correcting the address.

(ii) The Board shall also serve the *second notice* by email if an email address for the respondent has been provided in the designated service agent directory or by the claimant.

(3) *Service of order regarding second filing fee and electronic filing registration on claimants.* The Board shall serve the orders set forth in § 222.7—

(i) On any respondents that have not registered for eCCB in the manner set forth in paragraph (d)(2) of this section; and

(ii) On any claimants that have not registered for eCCB by sending such documents—

(A) By mail at the address provided for the claimant in the claim and by email at the email address provided for the claimant in the claim; or

(B) If the claimant is represented by legal counsel or an *authorized representative*, by mail at the address provided for such counsel or *authorized representative* in the claim and by email at the email address provided for such legal counsel or *authorized representative* in the claim.

(e) *Service of discovery requests, responses, and responsive documents*—(1) *Service of discovery requests, responses, and responsive documents.* Except as provided in paragraph (f) of this section, unless the parties agree in writing to other arrangements,

discovery requests and responses shall be served by email and documents or other evidence responsive to discovery requests shall be served by email where the size and format of the documents or evidence make such service reasonably possible. If such documents or other evidence cannot reasonably be served by email, the parties shall confer and agree to other arrangements. Should the parties be unable to agree to other arrangements, such documents or other evidence shall be served by mail. Service is complete upon sending, but service is not effective if the sender learns that it did not reach the party to be served.

(i) If a party is represented by legal counsel or an *authorized representative*, service under this paragraph must be made on the legal counsel or *authorized representative* at that legal counsel's or *authorized representative's* email address, or mailing address provided in the claim, response, or notice of appearance, unless the Board orders service on the party.

(ii) If a party is not represented, service under this paragraph (e)(1) must be made on the party at the email address or mailing address provided by that party in the claim or response.

(2) *Filing generally prohibited.* Unless the Board orders otherwise, discovery requests and responses should not be filed with the Board unless a party relies on the request or response as part of another filing in the proceeding.

(f) *Waiver of electronic filing and service requirements.* In exceptional circumstances, an individual not represented by legal counsel or an *authorized representative* may request that the Board waive the electronic filing and service requirements set forth in this subchapter. Whether such a waiver is granted is at the Board's discretion. If a waiver is granted, the Board shall instruct the parties as to the filing and service requirements for that proceeding based on consideration of the circumstances of the proceeding and the parties.

7. Add §§ 222.7 through 222.10 to read as follows:

Sec.

\* \* \* \* \*

222.7 Order regarding second filing fee and electronic filing registration.

222.8 Response.

222.9 Counterclaim.

222.10 Response to counterclaim.

**§222.7 Order regarding second filing fee and electronic filing registration.**

(a) *Issuance of order.* Once a proceeding has become active with respect to all respondents who have been served and have not opted out within the 60-day period set forth in 17 U.S.C. 1506(i), the Board shall issue an order to all parties in the proceeding providing that within 14 days of the order—

(1) The claimant must submit the second payment of the filing fee set forth in 37 CFR 201.3(g) through eCCB; and

(2) All claimant(s) and respondent(s) must register for eCCB unless they have been granted a waiver pursuant to § 222.5(f).

(b) *Receipt of second payment from claimant—(1) Confirmation of active proceeding.*

Upon receipt of the second payment of the filing fee set forth in 37 CFR 201.3(g) and after completion of the 14-day period specified in the Board's order, the Board shall issue a scheduling order through eCCB.

(2) *Notice to respondent.* If any claimant or respondent has not registered for eCCB, the scheduling order shall be accompanied by a notice to those parties that unless they have been granted a waiver pursuant to § 222.5(f), they must register for eCCB and that a failure to do so within a time set by the Board may result in

default or failure to prosecute. Such scheduling order and notice shall be served on the respondent according to the procedures set forth in § 222.5(d)(2).

(c) *Failure of claimant to submit second payment.* If the claimant(s) fails to submit the second payment of the filing fee set forth in 37 CFR 201.3(g) within 14 days from the date of the Board's order, the Board shall issue another notice to the claimant(s), which shall provide that the proceeding shall be dismissed without prejudice unless the claimant(s) submits the second payment of the filing fee within 14 days. If the claimant(s) fails to submit the second payment of the filing fee within 14 days of the issuance of that notice, the Board shall dismiss the proceeding without prejudice, unless the Board finds that the proceeding should not be dismissed in the interests of justice.

#### **§222.8 Response.**

(a) *Filing a response.* Following receipt of the scheduling order in an active proceeding, each respondent shall file a response through eCCB using the response form provided by the Board. Except for respondents who are represented by the same legal counsel or *authorized representative*, each respondent shall submit a separate response.

(b) *Content of response.* The response shall include—

(1) The name and mailing address of the respondent(s) and, for any respondents represented by legal counsel or an *authorized representative*, of such respondent's legal counsel or *authorized representative*;

(2) The phone number and email address of—

(i) The respondent, if the respondent is not represented by legal counsel or an *authorized representative*; or

(ii) The legal counsel or other *authorized representative* for the respondent, if the respondent is represented by legal counsel or an *authorized representative*;

(3) A short statement, if applicable, disputing any facts asserted in the claim;

- (4) For infringement claims brought under 17 U.S.C. 1504(c)(1), a statement describing in detail the dispute regarding the alleged infringement, including reasons why the respondent contends that it has not infringed the claimant's copyright, and any additional defenses, including whether any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 are implicated;
- (5) For declaration of noninfringement claims brought under 17 U.S.C. 1504(c)(2), a statement describing in detail the dispute regarding the alleged infringement, including reasons why the respondent contends that its copyright has been infringed by claimant, and any additional defenses the respondent may have to the claim;
- (6) For misrepresentation claims brought under 17 U.S.C. 1504(c)(3), a statement describing in detail the dispute regarding the alleged misrepresentation, including an explanation of why the respondent believes the identified words do not constitute misrepresentation, and any additional defenses the respondent may have to the claim;
- (7) Any counterclaims pursuant to § 222.9; and
- (8) A certification under penalty of perjury by the respondent or the respondent's legal counsel or *authorized representative* that the information provided in the response is accurate and truthful to the best of the certifying person's knowledge and, if the certifying person is not the respondent, that the certifying person has confirmed the accuracy of the information with the respondent. The certification shall include the typed signature of the certifying person.
- (c) *Additional matter.* The respondent may also include, as attachments to or files that accompany the response, any material the respondent believes plays a significant role in setting forth the facts of the claim, such as:
- (1) A copy of the copyright registration certificate for a work that is the subject of the proceeding;

- (2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows where the allegedly infringed work has been posted;
  - (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows any allegedly infringing activity;
  - (4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
  - (5) A copy of the counter notification that is alleged to contain the misrepresentation; and
  - (6) Any other exhibits that play a significant role in setting forth the facts of the response.
- (d) *Additional information required during response submission.* In connection with the submission of the response the respondent shall also provide—
- (1) For any respondent that is represented by legal counsel or an *authorized representative*, the email address and telephone number of that respondent. Such information shall not be part of the response; and
  - (2) Any further information that the Board may determine should be provided.
- (e) *Timing of response.* The respondent has 30 days from the issuance of the scheduling order to submit a response. If the respondent waived personal service, the respondent will have an additional 30 days to submit the response.
- (f) *Failure to file response.* A failure to file a response within the required timeframe may constitute a default under 17 U.S.C. 1506(u).

## **§222.9 Counterclaim.**

- (a) *Asserting a counterclaim.* Any party can assert a counterclaim falling under the jurisdiction of the Board that also—

- (1) Arises out of the same transaction or occurrence as the initial claim; or
- (2) Arises under an agreement pertaining to the same transaction or occurrence that is subject to an initial claim of infringement, if the agreement could affect the relief awarded to the claimant.

(b) *Electronic filing requirement.* A party may submit a counterclaim through eCCB using the counterclaim form provided by the Board.

(c) *Content of counterclaim.* The counterclaim shall include—

- (1) The name of the party or parties against whom the counterclaim is asserted;
- (2) An identification of the counterclaim, which shall consist of at least one of the following:
  - (i) A claim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;
  - (ii) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106; or
  - (iii) A claim under 17 U.S.C. 512(f) for misrepresentation in connection with—
    - (A) A notification of claimed infringement; or
    - (B) A counter notification seeking to replace removed or disabled material;
- (3) For an infringement counterclaim asserted under paragraph (c)(2)(i) of this section—
  - (i) That the counterclaimant is the legal or beneficial owner of rights in a work protected by copyright and, if there are any co-owners, their names;
  - (ii) The following information for each work at issue in the counterclaim:
    - (A) The title of the work;
    - (B) The author(s) of the work;
    - (C) If a copyright registration has issued for the work, the registration number and effective date of registration;



(D) If an application for copyright has been submitted but a registration has not yet issued, the service request number (SR number) and registration application date; and

(E) The work of authorship category, as set forth in 17 U.S.C. 102, for each work at issue, or, if the counterclaimant is unable to determine the applicable category, a brief description of the nature of the work;

(iii) A description of the facts relating to the alleged infringement, including, to the extent known to the counterclaimant:

(A) Which exclusive rights provided under 17 U.S.C. 106 are at issue;

(B) When the alleged infringement began;

(C) The name(s) of all person(s) or organization(s) alleged to have participated in the infringing activity;

(D) The facts leading the counterclaimant to believe the work has been infringed;

(E) Whether the alleged infringement has continued through the date the claim was filed, or, if it has not, when the alleged infringement ceased;

(F) Where the alleged act(s) of infringement occurred; and

(G) If the claim of infringement is asserted against an online service provider as defined in 17 U.S.C. 512(k)(1)(B) for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in 17 U.S.C. 512(b), (c), or (d), an affirmation that the counterclaimant has previously notified the service provider of the claimed infringement in accordance with 17 U.S.C. 512(b)(2)(E), (c)(3), or (d)(3), as applicable, and that the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice;

(4) For a declaration of noninfringement counterclaim asserted under paragraph

(c)(2)(ii) of this section—

(i) The name(s) of the person(s) or organization(s) asserting that the counterclaimant has infringed a copyright;

(ii) The following information for each work alleged to have been infringed, if that information is known to the counterclaimant:

(A) The title;

(B) If a copyright registration has issued for the work, the registration number and effective date of registration;

(C) If an application for copyright has been submitted, but a registration has not yet issued, the service request number (SR number) and registration application date; and

(D) The work of authorship category, as set forth in 17 U.S.C. 102, or, if the counterclaimant is unable to determine which category is applicable, a brief description of the nature of the work;

(iii) A brief description of the activity at issue in the claim, including, to the extent known to the counterclaimant:

(A) Any exclusive rights provided under 17 U.S.C. 106 that may be implicated;

(B) When the activities at issue began and, if applicable, ended;

(C) Whether the activities at issue have continued through the date the claim was filed;

(D) The name(s) of all person(s) or organization(s) who participated in the allegedly infringing activity; and

(E) Where the activities at issue occurred;

(iv) A brief statement describing the reasons why the counterclaimant believes that no infringement occurred, including any relevant history or agreements between the parties and whether counterclaimant currently believes any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 are implicated; and

(v) A brief statement describing the reasons why the counterclaimant believes that there is an actual controversy concerning the requested declaration;

(5) For a misrepresentation counterclaim asserted under paragraph (c)(2)(iii) of this section—

(i) The sender of the notification of claimed infringement;

(ii) The recipient of the notification of claimed infringement;

(iii) The date the notification of claimed infringement was sent, if known;

(iv) A description of the notification;

(v) If a counter notification was sent in response to the notification—

(A) The sender of the counter notification;

(B) The recipient of the counter notification;

(C) The date the counter notification was sent, if known; and

(D) A description of the counter notification;

(vi) The words in the notification or counter notification that allegedly constituted a misrepresentation; and

(vii) An explanation of the alleged misrepresentation;

(6) For infringement claims and misrepresentation claims, a statement describing the harm suffered by the claimant(s) as a result of the alleged activity and the relief sought by the claimant(s). Such statement may, but is not required to, include an estimate of any monetary relief sought;

- (7) A statement describing the relationship between the initial claim and the counterclaim; and
- (8) A certification under penalty of perjury by the counterclaimant or the counterclaimant's legal counsel or *authorized representative* that the information provided in the counterclaim is accurate and truthful to the best of the certifying person's knowledge and, if the certifying person is not the counterclaimant, that the certifying person has confirmed the accuracy of the information with the counterclaimant. The certification shall include the typed signature of the certifying person.
- (d) *Additional matter.* The counterclaimant may also include, as attachments to or files that accompany the counterclaim, any material the counterclaimant believes plays a significant role in setting forth the facts of the claim, such as:
- (1) A copy of the copyright registration certificate for a work that is the subject of the proceeding;
  - (2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows where the allegedly infringed work has been posted;
  - (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows any allegedly infringing activity;
  - (4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
  - (5) A copy of the counter notification that is alleged to contain the misrepresentation;
- and
- (6) Any other exhibits that play a significant role in setting forth the facts of the counterclaim.

(e) *Timing of counterclaim.* A counterclaim must be served and filed with the respondent's response unless the Board, for good cause, permits a counterclaim to be asserted at a subsequent time.

**§222.10 Response to counterclaim.**

(a) *Filing a response to a counterclaim.* Within 30 days following the Board's issuance of notification that a counterclaim is compliant under 37 CFR 224.1, a claimant against whom a counterclaim has been asserted (counterclaim respondent) shall file a response to the counterclaim through eCCB using the response form provided by the Board.

(b) *Content of response to a counterclaim.* The response to a counterclaim shall include—

- (1) The name, mailing address, phone number, and email address of each counterclaim respondent filing the response;
- (2) A short statement, if applicable, disputing any facts asserted in the counterclaim;
- (3) For counterclaims brought under 17 U.S.C. 1504(c)(1), a statement describing in detail the dispute regarding the alleged infringement, including any defenses as well as any reason why the counterclaim respondent believes there was no infringement of copyright, including any exceptions and limitations as set forth in 17 U.S.C. 107 through 122 that are implicated;
- (4) For counterclaims brought under 17 U.S.C. 1504(c)(2), a statement describing in detail the dispute regarding the alleged infringement, including reasons why the counterclaim respondent believes there is infringement of copyright;
- (5) For counterclaims brought under 17 U.S.C. 1504(c)(3), a statement describing in detail the dispute regarding the alleged misrepresentation and an explanation of why the counterclaim respondent believes the identified words do not constitute misrepresentation; and

(6) A certification under penalty of perjury by the claimant, the claimant's legal counsel, or the claimant's *authorized representative* that the information provided in the response to the counterclaim is accurate and truthful to the best of the certifying person's knowledge and, if the certifying person is not the counterclaim respondent, that the certifying person has confirmed the accuracy of the information with the counterclaim respondent. The certification shall include the typed signature of the certifying person.

(c) *Additional matter.* The counterclaim respondent may also include, as attachments to or files that accompany the counterclaim response, any material the counterclaim respondent believes play a significant role in setting forth the facts of the claim, such as:

- (1) A copy of the copyright registration certificate for a work that is the subject of the proceeding;
- (2) A copy of the allegedly infringed work. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows where the allegedly infringed work has been posted;
- (3) A copy of the allegedly infringing material. This copy may also be accompanied by additional information, such as a hyperlink or screenshot, that shows any allegedly infringing activity;
- (4) A copy of the notification of claimed infringement that is alleged to contain the misrepresentation;
- (5) A copy of the counter notification that is alleged to contain the misrepresentation; and
- (6) Any other exhibits that play a significant role in setting forth the facts of the counterclaim response.

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

## **PART 223—OPT-OUT PROVISIONS**

8. The authority citation for part 223 continues to read as follows:

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

9. Add § 223.1 to read as follows:

### **§223.1 Respondent's opt-out.**

(a) *Effect of opt-out on particular proceeding.* A respondent may opt out of a proceeding before the Copyright Claims Board (Board) pursuant to 17 U.S.C. 1506(i) following the procedures set forth in this section. A respondent's opt-out shall result in the dismissal of the claim without prejudice.

(b) *Content of opt-out notification.* The respondent's opt-out notification shall include—

- (1) The docket number assigned by the Board and contained in either the *initial notice* served by the claimant or the *second notice*;
- (2) The respondent's name;
- (3) The respondent's mailing address;
- (4) An affirmation that the respondent shall not appear before the Board with respect to the claim served by the claimant;
- (5) A certification under penalty of perjury that the individual completing the notification is the respondent identified in the claim served by the claimant or is the legal counsel or *authorized representative* of the respondent identified in the claim and has been directed and authorized by the respondent to opt out of the particular proceeding; and

(6) The typed, printed, or handwritten signature of the respondent or its legal counsel or *authorized representative*, and, if the signature is handwritten, a typed or printed name.

(c) *Process of opting out.* Upon being served with a notice and claim, a respondent may complete the opt-out process by—

(1) Completing and submitting the Board’s online opt-out notification form available through the Board’s electronic filing system (eCCB) as identified in the *initial notice* and *second notice* and providing an email address for confirmation; or

(2) Completing and submitting the paper opt-out notification form included with the *initial notice* and *second notice*, providing a mailing address or email address to receive confirmation, and delivering it to the Board, either by—

(i) First-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) A third party commercial carrier, that guarantees delivery no later than two days from the day of deposit with the service.

(3) An online or paper opt-out notification is not complete unless the confirmation code, provided with both the *initial notice* and *second notice*, is included in the submission.

(d) *Effect of improper service.* If a respondent is improperly served under 37 CFR 222.5 and completes the opt-out process described in paragraph (c) of this section, a respondent’s timely opt-out will still be effective and result in the dismissal of the claim without prejudice.

(e) *Timing of opt out.* The respondent has 60 days from the date of service or waiver of service to provide notice of its opt-out election. When the last day of that period falls on a weekend or a Federal holiday, the ending date shall be extended to the next Federal work day.



- (1) When opting out via the online form under paragraph (c)(1) of this section, the respondent's opt-out notification must be submitted by 11:59 p.m. Eastern Time on the last day of the opt-out period.
- (2) When opting out under paragraph (c)(2) of this section, the respondent's opt-out notification must be postmarked, dispatched by a commercial carrier, courier, or messenger, or hand-delivered to the Office no later than the 60-day deadline.
- (f) *Extension of opt-out period.* The Board may extend the 60-day period to opt out in exceptional circumstances and in the interests of justice and upon written notice to the claimant. Either a respondent individually or the parties jointly may contact the Board through a Copyright Claims Attorney to request an extension of the opt-out period.
- (g) *Multiple respondents.* In claims involving multiple respondents, each respondent who elects to opt out must separately complete the opt-out process.
- (h) *Confirmation of opt-out.* When a respondent has completed the opt-out process, the Board shall notify all parties to the proceeding.
- (i) *Effect of opt out on refiled claims.* If the claimant attempts to refile a claim against the same respondent(s), covering in substance the same acts and the same theories of recovery after the respondent's initial opt-out notification, the Board shall apply the prior opt-out election and dismiss the claim unless the claimant can demonstrate that the respondent affirmatively has agreed to resubmission of the parties' dispute to the Board for resolution.
- (j) *Effect of opt-out on unrelated claims.* The respondent's opt-out for a particular claim shall not be construed as an opt-out for claims involving different acts or different theories of recovery.

10. Add part 224 to read as follows:

**PART 224—REVIEW OF CLAIMS BY OFFICERS AND ATTORNEYS**

Sec.

224.1 Compliance review.

224.2 Dismissal for unsuitability.

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

**§224.1 Compliance review.**

(a) *Compliance review by Copyright Claims Attorney.* Upon the filing of a claim or counterclaim with the Copyright Claims Board (Board), a Copyright Claims Attorney shall review the claim for compliance with 17 U.S.C. chapter 15 and this subchapter, as provided in this section.

(b) *Substance of compliance review.* The Copyright Claims Attorney shall review the claim or counterclaim for compliance with all legal and formal requirements for a claim or counterclaim before the Board, including:

- (1) The provisions set forth under this subchapter;
- (2) The requirements set forth in 17 U.S.C. 1504(c), (d), and (e)(1); and
- (3) Whether the allegations in the claim or the counterclaim clearly do not state a claim upon which relief can be granted.

(c) *Issuing finding.* Upon completing a compliance review, the Copyright Claims Attorney shall notify the party that submitted the document in accordance with 37 CFR 222.5 and 17 U.S.C. 1506(f) by—

- (1) Informing the claimant or counterclaimant that the claim or counterclaim has been found to comply with the applicable statutory and regulatory requirements and instructing the claimant to proceed with service under 37 CFR 222.5 and 17 U.S.C. 1506(g); or
- (2) Informing the claimant or counterclaimant that the claim or counterclaim, respectively, does not comply with the applicable statutory and regulatory requirements and identifying the noncompliant issue(s) according to the procedure set forth in 17 U.S.C. 1506(f).

(d) *Dismissal without prejudice.* If the original claim and an amended claim were previously reviewed by the Copyright Claims Attorney and were found not to comply with the applicable statutory and regulatory requirements, and if the Copyright Claims Attorney concludes, following the submission of a second amended claim, that the claim still does not comply with the applicable statutory and regulatory requirements, the claim shall be referred to a Copyright Claims Officer who shall confirm whether the second amended claim complies with the applicable statutory and regulatory requirements. If the Copyright Claims Officer concurs with the conclusion of the Copyright Claims Attorney, the proceeding shall be dismissed without prejudice.

(e) *Clearance is not endorsement.* The finding that a claim or counterclaim complies with the applicable statutory and regulatory requirements does not constitute a determination as to the validity of the allegations asserted or other statements made in the claim or counterclaim.

(f) *No factual investigations.* For the purpose of the compliance review, the Copyright Claims Attorney shall accept the facts stated in the claim or counterclaim materials, unless they are clearly contradicted by information provided elsewhere in the materials or in the Board's records. The Copyright Claims Attorney shall not conduct an investigation or make findings of fact; however, the Copyright Claims Attorney may take administrative notice of facts or matters that are well known to the general public, and may use that knowledge during review of the claim or counterclaim.

#### **§224.2 Dismissal for unsuitability.**

(a) *Review by Copyright Claims Attorney.* During the compliance review under § 224.1, the Copyright Claims Attorney shall review the claim or counterclaim for unsuitability on grounds set forth in 17 U.S.C. 1506(f)(3). If the Copyright Claims Attorney concludes that the claim should be dismissed for unsuitability, the Copyright Claims Attorney shall

recommend to the Board that the Board dismiss the claim and shall set forth the basis for that conclusion.

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

(2) Within 30 days following issuance of an order under paragraph (b) of this section, the claimant or counterclaimant may request that the Board reconsider its determination. The respondent or counterclaim respondent may file a response within 30 days following service of the claimant's request.

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

*(c) Request by a party to dismiss a claim or counterclaim for unsuitability.* At any time, any party who believes that a claim or counterclaim is unsuitable for determination by the Board may file a request providing the basis for such belief. An opposing party may file a response within 14 days of the date of service of the request, setting forth the basis for such opposition to the request. There will be no reply papers related to a request to dismiss for unsuitability unless ordered by the Board in its discretion.

**Dated:** March 16, 2022.

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**Shira Perlmutter,**

*Register of Copyrights and*

*Director of the U.S. Copyright Office.*

Approved by:

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**Carla D. Hayden,**

*Librarian of Congress.*

**[BILLING CODE 1410-30-P]**

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