



Copyright Office

37 CFR Parts 222, 224, 225, 233, 234, and 235

[Docket No. 2022–6]

Copyright Claims Board: District Court Referrals; Proof of Service Forms; Default Proceedings; Law Student Representation

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

ACTION: Interim rule; request for comments.

SUMMARY: The U.S. Copyright Office is amending its regulations governing the appearance of law student representatives before the Copyright Claims Board, district court referrals, proof of service forms, and default proceedings. The amendments allow the Copyright Claims Board to modify or suspend certain rules when a claim is referred by a district court and, in cases that are first filed before the Copyright Claims Board, accept alternative proof of service forms. The amendments also clarify the rules governing default proceedings and law student representation, and make certain technical corrections.

DATES: *Effective date:* The interim rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments due date: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of Government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the

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

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

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020¹ directed 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 district court and is designed to be accessible to *pro se* individuals and individuals without much formal exposure to copyright.² In early 2021, the Office published a notification of inquiry (“NOI”) asking for public comments on the CCB’s operations and procedures.³

Following the NOI, the Office published multiple notices of proposed rulemaking (“NPRMs”), including proposing rules governing the representation of parties before the CCB by law students⁴ and the conduct of proceedings before the CCB.⁵ After receiving and considering comments submitted by the public, the Office published final rules.⁶ On June 16, 2022, the CCB began receiving claims through its website dockets.ccb.gov.

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

² See, e.g., H.R. Rep. No. 116–252, at 18–20 (2019).

³ 86 FR 16156 (Mar. 26, 2021).

⁴ 86 FR 74394 (Dec. 30, 2021).

⁵ 86 FR 53897 (Sept. 29, 2021); 86 FR 69890 (Dec. 8, 2021).

⁶ 87 FR 20707 (Apr. 8, 2022) (law student representation final rule); 87 FR 12861 (Mar. 8, 2022) (initial proceedings partial final rule); 87 FR 16989 (Mar. 25, 2022) (initial proceedings final

II. Interim Rule and Request for Comments

After reviewing its regulations, the Office is clarifying the rules governing law student representation, adding a rule to address district court referrals, and amending the rules governing initiating proceedings and active proceedings, in particular those related to submitting a proof of service form and to default proceedings. The amendment also makes corrections for typographical errors and consistency.

Law Student Representation

In its law school representation rulemaking, the Office had proposed that qualified law students affiliated with a qualifying law school clinic could represent parties before the CCB.⁷ The proposed rule explained that the Office was “incorporat[ing] the requirements for law student representation provided by the law of the jurisdiction that certifies the student to practice in connection with a law school clinic.”⁸ This requirement was included in the final rule.⁹ Since the rule’s publication, the Office has become aware that some parties have interpreted the use of the word “certifies” to denote a formal law student certification process. The use of the word “certifies” was intended to mean “allows, authorizes, or permits” and did not necessarily contemplate a formal certification process (unless such a process is required by the law student’s jurisdiction for participation in a law school–connected clinic). Additionally, the Office understands that, in some jurisdictions, court or bar rules may govern law student representation rather than state law. The Office is revising its regulations to replace the word “certifies” with

rule); 87 FR 24056 (Apr. 22, 2022) (initial proceedings correction); 87 FR 30060 (May 17, 2022) (active proceedings final rule); 87 FR 36060 (June 15, 2022) (active proceedings correction).

⁷ 86 FR 74394, 74395.

⁸ *Id.*

⁹ In the final rule, law students affiliated with a *pro bono* legal services organization with a connection to the student’s law school were also permitted to represent parties before the CCB. 87 FR 20707, 20709–10.

“allow, authorize, or permit” to ensure that the definition of “applicable law” is broad enough to include court or bar rules and to fix an incorrect cross reference.

Finally, the Office is amending its regulations concerning law student representation to make clear that these regulations only apply to law students who formally appear in CCB proceedings. As the Office previously recognized, law students may provide legal assistance related to CCB proceedings in ways that do not rise to the level of a formal appearance. For example, a student may assist a party by evaluating the strength of the party’s claim or defense, drafting pleadings and other documents, advising a party about service of process, or explaining the CCB’s regulations or processes.¹⁰ Under the rules governing the CCB, such activities without more would not constitute an “appearance” before the CCB and, therefore, are not within the scope of the CCB’s regulations regarding law student appearances. However, the Office cautions that these activities may be subject to state or local laws, court rules, or bar rules, which might impose other requirements on such student activities. We continue to encourage law students to assist CCB parties in accordance with applicable law, regardless of the form that assistance takes.

District Court Referrals

The CASE Act provides that CCB proceedings “shall qualify as an alternative dispute resolution process under [28 U.S.C. 651] for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.”¹¹ The alternative dispute resolution (“ADR”) process referenced allows a district court to refer litigants appearing before it to one of several ADR procedures with the goal of resolving the

¹⁰ *Id.* at 20710 (“[T]he Office encourages the participation of law students in CCB proceedings more broadly. For example, under the supervision of a licensed attorney, a law student may assist with drafting a pleading or other document to be filed before the CCB. In addition, a licensed lawyer representing a party before the CCB may have a law student intern or clerk attend any part of the party’s proceeding.”).

¹¹ 17 U.S.C. 1509(b).

dispute prior to a trial. One of these ADR procedures, arbitration, involves a resolution of the parties' claims and defenses on the merits and accordingly requires the consent of both parties. Similarly, the CASE Act requires that a district court's referral of a dispute to the CCB for resolution occur only when both parties consent.¹²

The CASE Act created a tribunal for the resolution of certain copyright claims in a manner more efficient and less costly than in district court. The CCB's treatment of cases referred to it by district courts should be consistent with these goals. The Office understands the Act's referral provision to anticipate that such referrals would be resolved on the merits by the CCB, which would issue a final decision, subject to the CASE Act's provisions for reconsideration and review.¹³ Certain CASE Act provisions, *e.g.*, those governing service of the claim and opting out, are superfluous and inconsistent with a streamlined process in the referral context. If the CCB required Federal court litigants, who have already consented to a referral to the CCB, to comply with unnecessary procedural rules, the goals of the Act would be undermined.

Accordingly, while the Office believes that the CCB's procedural steps and regulations serve an important role, adhering to certain provisions would not always be in the parties' (or the CCB's) interests. For example, claims referred from district courts are likely to come to the CCB at different stages of litigation, including before, during, or after discovery or substantive motion practice, which may narrow or amend the issues in dispute. Moreover, it would be inefficient for parties to undertake discovery as set forth in CCB regulations if they previously had completed discovery during district court proceedings. Finally, it is unnecessary to engage in the opt-out process when both parties have consented to having their claims decided by the CCB. At the same time, other

¹² *Id.* (“A proceeding before the Copyright Claims Board under this chapter shall qualify as an alternative dispute resolution process under section 651 of title 28 for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.”)

¹³ *Id.*

provisions, such as those governing the CCB’s ability to set conferences as needed, the types of evidence that can be submitted at virtual hearings, records and publication, requests for reconsideration, the Register’s review, party conduct, law student representation, class action opt-out procedures, and dismissal for unsuitability seem equally appropriate for all claims before the CCB.

When a claim is referred to the CCB by a district court on consent of the parties pursuant to 17 U.S.C. 1509(b), the Office proposes that the parties to that case email the CCB as soon as possible (at asktheboard@ccb.gov) for further instructions on how to continue proceedings before the CCB, including on how to open a docket in eCCB outside of the standard process. The CCB will issue a scheduling order, schedule a conference with the parties, and use its discretion to adjust or suspend standard rules that would otherwise apply, subject to identified exceptions, in the interests of efficiently resolving the dispute.

Going forward, the Office does not propose requiring claimants to pay a fee under 37 CFR 201.3(g)(1) for claims referred from a district court. Further, claims referred by district courts will not be included when calculating the maximum number of proceedings a claimant, attorney, or law firm can bring before the CCB.¹⁴

Proof of service form, evidence in default determinations, and edits for consistency

In its initiating proceeding regulations, the Office required claimants to “file a completed proof of service form” to evidence that service of the claim on the respondent had been completed, and stated that such “proof of service form shall be located on the Board’s website.”¹⁵ The amendments proposed here will make clear that claimants may submit proof of service forms, by using either the form provided by the CCB or an alternative form that contains all of the information required in the CCB-provided form.

¹⁴ See 17 U.S.C. 1506(f)(3)(C), 1510(a)(1); 37 CFR 233.

¹⁵ 37 CFR 222.5(b)(3)(i).

Further, the proposed rule clarifies that evidence presented by the parties in a default proceeding is not limited to any materials exchanged in discovery, because a default proceeding may occur before discovery has concluded or even begun. Finally, the rule contains updated cross references and additional references to “counterclaims,” where earlier references only addressed “claims.”

Conclusion

The Office finds good cause to issue these regulations as final interim rules, with an immediate effective date.¹⁶ We believe that notice and public comment are unnecessary for certain insignificant changes, including typographical errors, updated cross references, and clarifications. Although the rules governing district court referrals, proof of service forms, default proceedings, and law student representation could benefit from public comment, notice and public comment in advance of this rule’s publication is impracticable, as the CCB has already begun operations and started accepting claims. For example, the CCB must have rules in place for district court referrals, as one such referral has already been made to the CCB. Accordingly, the Office is publishing this rule as final without first issuing a notice of proposed rulemaking, but seeks public comment regarding the subjects of this interim rule for any future amendments deemed appropriate.

List of Subjects in 37 CFR Parts 222, 224, 225, 233, 234, and 235

Claims, Copyright.

Interim Regulations

For the reasons stated in the preamble, the U.S. Copyright Office amends 37 CFR parts 222, 224, 225, 233, 234, and 235 as follows:

PART 222—PROCEEDINGS

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

¹⁶ 5 U.S.C. 553(b)(B), (d)(3).

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

2. Amend § 222.5 by revising the last sentence of paragraph (b)(3)(i) to read as follows:

§ 222.5 Service; waiver of service; filing.

* * * * *

(b) * * *

(3) * * *

(i) * * * A claimant shall submit a completed proof of service document, using either the proof of service form available on the Board’s website or a substantively similar proof of service document that provides all of the information required by the Board’s form.

* * * * *

3. Amend § 222.9 as follows:

a. Revise paragraphs (c)(2)(i) through (iii);

b. Add paragraph (c)(2)(iv);

c. Revise paragraphs (c)(3)(iii)(E) and (G);

d. Revise paragraphs (c)(4)(iii) introductory text, (c)(4)(iii)(C), (c)(6), (d) introductory text, and (d)(5);

e. Redesignate paragraph (d)(6) as paragraph (d)(7); and

f. Add new paragraph (d)(6).

The revisions and additions read as follows:

§ 222.9 Counterclaim.

* * * * *

(c) * * *

(2) * * *

(i) A counterclaim for infringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(ii) A counterclaim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under 17 U.S.C. 106;

(iii) A counterclaim 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; or

(iv) A counterclaim that arises under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement brought under 17 U.S.C. 1504(c)(1), if the agreement could affect the relief awarded to the claimant;

(3) * * *

(iii) * * *

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

* * * * *

(G) If the infringement counterclaim 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) * * *

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

* * * * *

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

* * * * *

(6) For infringement counterclaims, misrepresentation counterclaims, and counterclaims arising under an agreement as provided in paragraph (a)(2), a statement describing the harm suffered by the counterclaimant(s) as a result of the alleged activity and the relief sought by the counterclaimant(s). Such statement may, but is not required to, include an estimate of any monetary relief sought;

* * * * *

(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 counterclaim, such as:

* * * * *

(5) A copy of the counter notification that is alleged to contain the misrepresentation;

(6) A copy of any agreements related to the counterclaim, including any amendments or revisions; and

* * * * *

4. Amend § 222.10 as follows:

- a. Revise paragraphs (b)(3) through (5) and (c)(5);
- b. Redesignate paragraph (c)(6) as paragraph (c)(7); and
- c. Add new paragraph (c)(6).

The revisions and addition are as follows:

§ 222.10 Response to counterclaim.

* * * * *

(b) * * *

(3) For infringement counterclaims, as set forth in 37 CFR 222.9(c)(2)(i), 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 declaration of noninfringement counterclaims, as set forth in 37 CFR 222.9(c)(2)(ii), a statement describing in detail the dispute regarding the alleged infringement, including any defenses as well as reasons why the counterclaim respondent believes there is infringement of copyright;

(5) For misrepresentation counterclaims, as set forth in 37 CFR 222.9(c)(2)(iii), a statement describing in detail the dispute regarding the alleged misrepresentation, including any defenses as well as an explanation of why the counterclaim respondent believes the identified words do not constitute misrepresentation; and

* * * * *

(c) * * *

(5) A copy of the counter notification that is alleged to contain the misrepresentation;

(6) A copy of any agreements related to the counterclaim, including any amendments or revisions; and

* * * * *

5. Amend § 222.15 by revising paragraph (b)(1)(ii) to read as follows

§ 222.15 Written testimony on the merits.

* * * * *

(b) * * *

(1) * * *

(ii) Except when testimony is submitted pursuant to § 227.2 or § 227.4 of this subchapter, direct or response documentary evidence shall only include documents that were served on opposing parties pursuant to the scheduling order, absent leave from the Board, which shall be granted only for good cause.

* * * * *

PART 224—REVIEW OF CLAIMS BY OFFICERS AND ATTORNEYS

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

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

7. Amend § 224.2 by revising the first sentence of paragraph (c) to read as follows:

§ 224.2 Dismissal for unsuitability.

* * * * *

(c) 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. * * *

PART 225—DISCOVERY

8. The authority citation for part 225 continues to read as follows:

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

9. Amend § 225.2 by revising paragraphs (a)(2) and (3), (b) introductory text, (b)(1) and (11), (c) introductory text, (c)(6), (d) introductory text, (e) introductory text, and (e)(1) to read as follows:

§ 225.2 Standard interrogatories.

(a) * * *

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

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

* * * * *

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

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

* * * * *

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

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

* * * * *

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

* * * * *

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

* * * * *

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

(1) All defenses asserted to the misrepresentation claim or counterclaim and the basis for those assertions. Defenses listed in timely answers and timely updated answers to the *standard interrogatories* shall be considered by the Board and will not require an amendment of the response;

* * * * *

10. Amend § 225.3 by revising paragraphs (a)(1) through (3), (b) introductory text, (b)(7), (c) introductory text, (d) introductory text, and (e) introductory text to read as follows:

§ 225.3 Standard requests for the production of documents.

(a) * * *

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

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

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

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

* * * * *

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

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

* * * * *

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

* * * * *

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

* * * * *

PART 233—LIMITATION ON PROCEEDINGS

11. The authority citation for part 233 continues to read as follows:

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

12. Amend § 233.2 by adding paragraph (d) to read as follows:

§ 233.2 Limitation on proceedings.

* * * * *

(d) *District court referrals.* In calculating the number of proceedings that have been filed by a claimant, sole practitioner, legal counsel, or a law firm under this section, claims referred by district courts will not be considered.

PART 234—LAW STUDENT REPRESENTATIVES

13. The authority citation for part 234 continues to read as follows:

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

14. Amend § 234.1 by revising paragraphs (a)(1), (c), and (f) to read as follows:

§ 234.1 Law student representatives.

(a) * * *

(1) *State law compliance.* Any law student who is affiliated with a law school clinic or a *pro bono* legal services organization with a connection to the student's law school is qualified under applicable laws governing representation by law students of parties in legal proceedings, and meets the other requirements of this section may appear before the Copyright Claims Board (Board). Applicable laws are the laws, court rules, or bar rules of the jurisdiction that allow, authorize, or permit the student to practice law in conjunction with a law school clinic or *pro bono* legal services organization with a connection to the student's law school.

* * * * *

(c) *Attorney supervision.* A law student who appears on behalf of a party in a proceeding before the Board shall be supervised by an attorney who is qualified under applicable state law governing representation by law students, as specified in paragraph (a) of this section. In supervising the law student, the attorney shall adhere to any rules regarding participant conduct.

* * * * *

(f) *Notice of appearance.* In any proceeding in which a law student appears on behalf of a party, a notice of appearance shall be filed identifying the law student representative, the supervising attorney, and the law school clinic or pro bono legal organization with which they are affiliated, unless already identified in the party's claim, counterclaim, or response.

* * * * *

15. Part 235, consisting of § 235.1, is added to read as follows:

PART 235—DISTRICT COURT REFERRALS

Authority: 17 U.S.C. 702, 1509(b), 1510.

§ 235.1 District court referrals.

(a) *General.* This section governs circumstances where a district court has referred a proceeding to the Board under 17 U.S.C. 1509(b) and 28 U.S.C. 651, as well as the Copyright Claims Board's (Board's) authority to suspend or amend certain regulations under this chapter after such a referral.

(b) *Amending or suspending procedural rules.* (1) When a district court has referred a proceeding to the Board, the Board may suspend or amend rules governing its proceedings in the interests of justice, fairness, and efficiency, except as identified in paragraph (b)(2) of this section.

(2) The Board may not suspend or amend the rules governing the following parts and sections: 37 CFR parts 227 through 232 and 234, 37 CFR 220.1 through 220.4, 37 CFR 222.1, 37 CFR 223.3, or 37 CFR 224.2.

(c) *Requirement to contact the Board.* When a district court has referred a proceeding to the Board, the parties to that case should email the Board (at asktheboard@ccb.gov) as soon as possible for further instructions. The Board will issue the parties instructions on how to continue proceedings before the Board, including how

to open a docket in eCCB without following the standard process to file a claim and pay a fee.

(d) *Fees.* When a district court has referred a proceeding to the Board, a claimant is not required to pay the Board a fee to initiate a claim under 37 CFR 201.3(g)(1).

Dated: December 2, 2022.

Shira Perlmutter,

Register of Copyrights and

Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[BILLING CODE 1410-30-P]

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