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3-26-2021

## Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations

U.S. Copyright Office

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Dated: March 5, 2021.

**L.M. Dickey,**

*Rear Admiral, U.S. Coast Guard, Commander,  
Fifth Coast Guard District.*

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## LIBRARY OF CONGRESS

### U.S. Copyright Office

#### 37 CFR Chapter III

[Docket No. 2021-1]

#### Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations

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

**ACTION:** Notification of inquiry.

**SUMMARY:** The U.S. Copyright Office is issuing a notification of inquiry regarding its implementation of the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act. The CASE Act establishes the Copyright Claims Board (“CCB”), an alternative forum in which parties may voluntarily seek to resolve certain copyright infringement and other claims. The Office must establish regulations to govern the CCB and its procedures, including rules addressing service of notice and other documents, waiver of personal service, notifications that parties are opting out of participating in the forum, discovery, a mechanism for certain claims to be resolved by a single CCB Officer, review of CCB determinations by the Register of Copyrights, publication of records, certifications, and fees. The statute also allows the Office to adopt several optional regulations, including regulations addressing claimants’ permissible number of cases, eligible classes of works, the conduct of proceedings, and default determinations. The statute vests the Office with general authority to adopt regulations to carry out its provisions. To assist in promulgating these regulations, the Office seeks public comment regarding the subjects of inquiry discussed in this notification.

**DATES:** Initial written comments must be received no later than 11:59 p.m. Eastern Time on April 26, 2021. Written reply comments must be received no later than 11:59 p.m. Eastern Time on May 10, 2021.

**ADDRESSES:** For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted

electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office’s website at <https://www.copyright.gov/rulemaking/case-act-implementation/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** John R. Riley, Assistant General Counsel, by email at [jrill@copyright.gov](mailto:jril@copyright.gov), Brad A. Greenberg, Assistant General Counsel, by email at [brgr@copyright.gov](mailto:brgr@copyright.gov), or Rachel Counts, Paralegal, by email at [rcounts@copyright.gov](mailto:rcounts@copyright.gov). They can each be reached by telephone at 202-707-8350.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. The CASE Act and the Copyright Claims Board

On December 27, 2020, the President signed into law the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020.<sup>1</sup> The statute establishes the Copyright Claims Board (“CCB”), a voluntary tribunal in the Copyright Office (“Office”) comprised of three Copyright Claims Officers who have the authority to render determinations on certain copyright disputes that have a low economic value (“small copyright claims”). Congress created the CCB to address the significant challenges of litigating small copyright claims in federal court,<sup>2</sup> a problem analyzed in depth in the Office’s 2013 policy report, *Copyright Small Claims*.<sup>3</sup> This report included model legislation that Congress drew on in developing the statute, and Congress incorporated the Office’s report and supporting materials into the statute’s legislative history.<sup>4</sup>

Prior to the CCB beginning operations, jurisdiction to hear copyright infringement suits resides exclusively in federal courts.<sup>5</sup> The statute does not displace or limit the ability to bring copyright infringement claims in federal court. Instead, the law provides an alternative forum to decide small

copyright claims in a manner that is more accessible to *pro se* parties and other parties that otherwise could not afford to litigate their claims.<sup>6</sup>

The CCB has the authority to decide copyright infringement claims (asserted by copyright holders), claims seeking a declaration of noninfringement (asserted by users of copyrighted works or other accused infringers), and misrepresentation claims under 17 U.S.C. 512(f).<sup>7</sup> District courts can also refer parties to have their disputes decided by the CCB as part of their alternative dispute resolution programs.<sup>8</sup>

While the statute mandates the creation of the CCB, it does not change the underlying copyright law with respect to these disputes. The CCB will employ existing case law in making its determinations and, in the case of conflicting judicial copyright precedents that cannot be reconciled, the CCB “shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States,” or, if the action could have been brought in multiple jurisdictions, the jurisdiction that “has the most significant ties to the parties and conduct at issue.”<sup>9</sup> All CCB determinations are non-precedential.<sup>10</sup> The CCB may consult with the Register of Copyrights on general issues of law, although, similarly to the Copyright Royalty Board (“CRB”), it cannot do so regarding the facts of any pending matter or the application of law to those facts.<sup>11</sup>

Participation in the CCB is voluntary for all parties.<sup>12</sup> In establishing the CCB, Congress adopted a system whereby respondents must be notified of a claim asserted against them, and have the opportunity to opt out of participating in this alternative forum.<sup>13</sup> As with private arbitration models, participants may consent to participate in CCB proceedings, waiving their ability to have a dispute heard in federal court including any right to a jury trial.<sup>14</sup> As noted below, default determinations are able to be reviewed and set aside by an Article III judge, as an additional safeguard for defaulting respondents.<sup>15</sup>

<sup>6</sup> H.R. Rep. No. 116-252, at 17.

<sup>7</sup> 17 U.S.C. 1504(c)(1)-(3).

<sup>8</sup> *Id.* 1509(b); see 28 U.S.C. 651.

<sup>9</sup> 17 U.S.C. 1503(b), 1506(a)(2); H.R. Rep. No. 116-252, at 21-22, 25-26.

<sup>10</sup> H.R. Rep. No. 116-252, at 21-22, 33.

<sup>11</sup> 17 U.S.C. 1503(b)(2); see also *id.* 802(f)(1)(A)(i) (parallel CRB provision).

<sup>12</sup> See *id.* at 1503(a), 1504(a); H.R. Rep. No. 116-252, at 17, 21.

<sup>13</sup> 17 U.S.C. 1506(g)(1), (i).

<sup>14</sup> H.R. Rep. No. 116-252, at 21; *Small Claims Report* at 97-99.

<sup>15</sup> 17 U.S.C. 1508(c)(1)(C).

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

<sup>2</sup> See, e.g., H.R. Rep. No. 116-252, at 18-20 (2019). Note, the statute’s legislative history cited is for H.R. 2426, 116th Cong. (2019), the CASE Act of 2019, a bill largely identical to the CASE Act of 2020.

<sup>3</sup> U.S. Copyright Office, *Copyright Small Claims* (2013) <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> (“*Small Claims Report*”).

<sup>4</sup> H.R. Rep. No. 116-252, at 19.

<sup>5</sup> 17 U.S.C. 301(a); 28 U.S.C. 1338(a).

If a party fails to comply with a CCB-ordered award, the party seeking relief will need to seek a district court order to enforce it.<sup>16</sup>

The CCB can award multiple types of relief. First, the CCB can award monetary relief of up to \$30,000 per proceeding regardless of the number of works involved, exclusive of attorneys' fees and costs (discussed below).<sup>17</sup> This can include (1) actual damages and profits attributable to the infringement, or (2) statutory damages. When awarding statutory damages, the CCB must apply different monetary caps and availability criteria than those applied in federal court. Specifically, the CCB may award up to \$15,000 in statutory damages per work infringed for works registered within the Copyright Act's section 412 time limits,<sup>18</sup> and up to \$7,500 in statutory damages per work infringed for non-timely registered works (with a cap of \$15,000 per proceeding for non-timely registered works). Additionally, when assessing statutory damages, the CCB may not consider or make any finding that an infringement was willful, which typically increase statutory damages in federal court.<sup>19</sup>

The CCB can only award reasonable costs and attorneys' fees if doing so would be in the interests of justice.<sup>20</sup> Costs and attorneys' fees are not included in the monetary damages caps,<sup>21</sup> but instead have their own limitations. When a party engages in bad-faith conduct, the CCB can award reasonable costs and attorneys' fees up to \$5,000, or \$2,500 for *pro se* claimants.<sup>22</sup> Bad-faith conduct includes where "a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose or without a reasonable basis in law or fact."<sup>23</sup> Such bad-faith conduct could include failure to prosecute, including failure to meet one or more deadlines or requirements set forth in the CCB's schedule without justifiable cause.<sup>24</sup>

Second, while the CCB cannot issue injunctive relief, it can require that an infringing party cease or mitigate its infringing activity, but only in the event such party agrees and that agreement is reflected in the proceeding's record.<sup>25</sup>

The CCB will be comprised of three Copyright Claims Officers and supported by at least two Copyright Claims Attorneys and additional support staff.<sup>26</sup> One Officer must have "substantial familiarity with copyright law and experience in the field of alternative dispute resolution."<sup>27</sup> The other two Officers must possess "substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims" and together must have "represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works."<sup>28</sup> These provisions are intended to ensure that the CCB is comprised of copyright experts, while "ensur[ing] a balanced system sensitive to both sides of infringement claims" and "undertak[ing] a holistic analysis of infringement claims with an eye toward the resourceful resolution of disputes."<sup>29</sup>

The Officers' duties include ensuring that claims, counterclaims, and defenses are properly asserted, managing CCB proceedings and issuing rulings, requesting production of information and relevant documents, conducting hearings and conferences, facilitating settlements, maintaining records, providing public information, and ultimately rendering determinations and awarding monetary relief.<sup>30</sup> Copyright Claims Attorneys will assist the Officers in the administration of their duties and assist the public with understanding the CCB's procedures and requirements.<sup>31</sup>

After a determination is rendered, the CCB may reconsider it for clear error of law or fact, and parties may subsequently seek review from the Register of Copyrights to determine whether the Board abused its discretion in denying reconsideration.<sup>32</sup> The CCB's determinations may also be reviewed by a district court "on limited but well-established grounds that parallel Section 10 of the Federal Arbitration Act"; that is, in the event of fraud,

corruption, misrepresentation, or misconduct, or if the CCB exceeded its authority or failed to render a final determination concerning the subject matter.<sup>33</sup> In addition, in the event of a default determination, a district court may vacate, modify, or correct the determination if it is established that the default or failure to prosecute was due to excusable neglect.<sup>34</sup>

Congress directed the CCB to begin operations by December 27, 2021; the Register of Copyrights may, for good cause, extend that deadline by not more than 180 days.<sup>35</sup> The Officers must be appointed by the Librarian of Congress, after consultation with the Register,<sup>36</sup> and the Office must hire other staff, promulgate necessary regulations, and establish related procedures, public materials, and forms. It must operationalize its administration of the various services provided by the CCB and other units of the Office, such as filings, payment administration, and mail processing. Because information technology development is centralized at the Library of Congress, the Library's Office of the Chief Information Officer ("OCIO") must also identify and deploy any necessary IT resources for the CCB, such as virtual hearing platforms and a case management system.

Congress vested the Office with broad regulatory authority to carry out the statute,<sup>37</sup> and specified that the Register shall "provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings instituted under this chapter, including by implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party."<sup>38</sup> Together, the statute and legislative history make clear that Congress intended for the Office to implement regulations in a manner that "further[s] the goals of the Copyright Claims Board"<sup>39</sup> and establishes an "efficient, effective, and voluntary" forum for parties to resolve their disputes.<sup>40</sup>

<sup>16</sup> H.R. Rep. No. 116–252, at 22 (citing *Stern v. Marshall*, 564 U.S. 462, 491 (2011)); 17 U.S.C. 1508(a).

<sup>17</sup> Further, when parties elect to use the CCB's streamlined provisions for "smaller claims," discussed below, total monetary damages are capped at \$5,000 total damages. 17 U.S.C. 1506(z).

<sup>18</sup> *Id.* at 1504(e)(1)(A)(ii)(I).

<sup>19</sup> *Id.* at 1504(e)(1)(A)(ii)(III).

<sup>20</sup> *Id.* at 1506(y)(2).

<sup>21</sup> *Id.* at 1504(e)(1)(D).

<sup>22</sup> *Id.* at 1506(y)(2). "In extraordinary circumstances," the CCB can award costs and attorneys' fees over these limits, but only "where a party has demonstrated a pattern or practice of bad faith conduct" and "in the interests of justice." *Id.* at 1506(y)(2)(B).

<sup>23</sup> *Id.* at 1506(y)(2).

<sup>24</sup> *Id.* at 1506(v)(2), (y)(2).

<sup>25</sup> *Id.* at 1504(e)(2)(A)(i), (e)(2)(B). This provision also applies to parties making knowing material misrepresentations under section 512(f). *Id.* at 1504(e)(2)(A)(ii).

<sup>26</sup> *Id.* at 1502(b).

<sup>27</sup> *Id.* at 1502(b)(3)(iii).

<sup>28</sup> *Id.* at 1502(b)(3)(ii).

<sup>29</sup> *Small Claims Report* at 100–101.

<sup>30</sup> 17 U.S.C. 1503(a), 1506.

<sup>31</sup> *Id.* at 1503(a).

<sup>32</sup> *Id.* at 1506(w), (x).

<sup>33</sup> 17 U.S.C. 1508(c); H.R. Rep. No. 116–252, at 22; see 9 U.S.C. 10(a) (under the Federal Arbitration Act, arbitral awards may be vacated for corruption, fraud, undue means, evident partiality, misconduct, or exceeding the powers delegated to the arbitrators).

<sup>34</sup> 17 U.S.C. 1506(c)(1).

<sup>35</sup> Public Law 116–260, sec. 212(d), 134 Stat. at 2199.

<sup>36</sup> 17 U.S.C. 1502(b)(1).

<sup>37</sup> *Id.* at 1510(a)(1).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1510(a)(2)(A).

<sup>40</sup> H.R. Rep. No. 116–252, at 23.

### B. Overview of the Rulemaking Process

To establish necessary and appropriate regulations to govern the CCB, the Office seeks public comment on the subjects discussed below. The Office is issuing this notification of inquiry as the first step in promulgating the regulations required by the statute. The Office plans to subsequently publish multiple notices of proposed rulemaking, each focusing on one or more of the regulatory categories discussed below. The Office has concluded that this approach will help to efficiently and thoughtfully conduct the relevant regulatory proceedings in light of the scope of the statute and the Office's available resources. To aid the Office's review, it is requested that if a submission responds to more than one of the below categories, it be divided into discrete sections with headings clearly indicating the category being discussed in each section. Comments addressing a single category should also have a heading that clearly indicates which category is being discussed. The Office also notes that it tentatively expects to produce a CCB practice guide, which will not be a substitute for existing statutes, regulations, or case law, but will provide parties, potential parties, and the public at large with basic information concerning the CCB and its procedures. The Office has already established a web page describing the CCB, which will be frequently updated as implementation work proceeds.<sup>41</sup>

The Office encourages parties to file joint comments on issues of common agreement.<sup>42</sup> The Office will also consider holding informal meetings to gather additional information on discrete issues prior to publishing notices of proposed rulemaking, establishing guidelines for *ex parte* communications. Relevant guidelines will be issued at <https://www.copyright.gov/rulemaking/case-act-implementation/>, and will be similar to those imposed in other Office proceedings.<sup>43</sup> Any such

<sup>41</sup> *Copyright Small Claims and the Copyright Claims Board*, <https://copyright.gov/about/small-claims> (last visited Mar. 21, 2021).

<sup>42</sup> See, e.g., NCTA—The Internet & Tele. Ass'n & Motion Picture Ass'n *Ex Parte* Letter (May 20, 2020), <https://www.copyright.gov/rulemaking/section111/ncta-mpa.pdf> (regarding regulations governing cable operators' reporting practices under 17 U.S.C. 111); Joint Comments of Nat'l Music Pubs.' Ass'n & Dig. Media Ass'n Submitted in Response to Copyright Royalty Board's November 5, 2018, Notification of Inquiry (Dec. 10, 2018) (regarding regulations relating to the MMA's enactment).

<sup>43</sup> See, e.g., 83 FR 65747, 65753–54 (Dec. 21, 2018) (identifying guidelines for *ex parte* communications in MLC and DLC designation

communications will be on the record to ensure the greatest possible transparency, and will supplement, not substitute for, the written record.

While all public comments are welcome, the Office encourages parties to provide specific proposed regulatory language for the Office to consider and for others to comment upon. Similarly, it would be helpful for commenters replying to proposed language to offer alternate language for consideration.

Commenters are reminded that while the Office has regulatory authority to implement the statute, it is constrained by the law Congress enacted; the Office can fill statutory gaps, but will not entertain proposals that conflict with the statute.<sup>44</sup>

## II. Subjects of Inquiry

### A. Initiating CCB Proceedings, Notice, and Service of Notice and Claim

As the legislative history explains, the CCB is designed “to meet the Due Process Clause’s guarantee of fundamental fairness in a federal proceeding,”<sup>45</sup> including through mechanisms providing for service of notice and claims and waiver of service provisions modeled after the Federal Rules of Civil Procedure’s (“FRCP’s”) Rule 4.<sup>46</sup> In many cases, service of the notice may be the respondent’s introduction to the nature of the dispute and to the option to have the dispute resolved by the CCB. As discussed below, for a claim to become an active proceeding, it must go through multiple procedural safeguards, including an initial claim review by a CCB attorney and service of multiple notices to the respondent, with the corresponding opportunity to opt out of the proceedings.

The statute provides that a claim must first be reviewed by a CCB attorney for sufficiency under the statute and any

proceeding); 82 FR 49550, 49563 (Oct. 26, 2017) (identifying guidelines for *ex parte* communications in the Office’s “Section 1201” rulemaking); see also, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-designations/ex-parte-communications.html> (last visited Mar. 21, 2021) (*ex parte* guidelines for MLC and DLC designation rulemaking); *Ex Parte Communications*, <https://www.copyright.gov/1201/2018/ex-parte-communications.html> (last visited Mar. 21, 2021) (*ex parte* guidelines for Seventh Triennial Section 1201 Proceeding, 2018).

<sup>44</sup> See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984)).

<sup>45</sup> H.R. Rep. No. 116–252 at 22.

<sup>46</sup> *Id.* (providing additional mechanisms, such as the ability to participate in hearings virtually).

relevant regulations before the claim and notice of service is served upon a respondent.<sup>47</sup> If the claim is reviewed and found to be noncompliant, the CCB will send the claimant a notice of noncompliance and the claimant can amend the claim within thirty days of receiving the notice, without paying an additional fee.<sup>48</sup> If the claim remains noncompliant after the amended version is refiled, the claimant can amend it again within an additional thirty-day period after receiving the CCB’s second notice of noncompliance.<sup>49</sup> If the claimant does not file a compliant claim or misses either thirty-day refiling period, the claim will be dismissed without prejudice.<sup>50</sup> These rules equally apply to counterclaims.<sup>51</sup> Once approved by the CCB, the claim must be served on the respondent and proof of service must be filed within ninety days of such approval “using a standardized process and notice format established by the Register.”<sup>52</sup>

#### 1. Content of Initial Notice

To ensure that respondents are provided with proper notice of the claims asserted against them, along with information enabling a non-represented party to understand what the CCB is, and the process required to elect to participate or decline to do so, the statute details certain elements that must be included in the initial notice accompanying the claim. In addition, the Office is required to create a prescribed notice form and is vested with regulatory authority to specify further requirements to be included.

At a minimum, the served notice must meet several requirements prescribed by statute. The notice must be in a form that describes the CCB and the nature of a CCB proceeding.<sup>53</sup> In addition, the notice must include “a clear and prominent explanation of the respondent’s right to opt out of the proceeding and the rights the

<sup>47</sup> 17 U.S.C. 1506(f)(1); H.R. Rep. No. 116–252, at 22.

<sup>48</sup> 17 U.S.C. 1506(f)(1)(B).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1506(f)(2). Further, claims against online service providers for infringement via storage of, referral, or linking to infringing material that may be subject to 17 U.S.C. 512(b)–(d)’s limitations on liability must contain an additional claimant affirmation. The claimant must affirm that they previously notified the service provider of the claimed infringement and the service provider failed to remove or disable access to the material expeditiously, in accordance with the applicable section of 17 U.S.C. 512, or the claim will be dismissed without prejudice. *Id.* at 1506(f)(1)(C)(i).

<sup>52</sup> H.R. Rep. No. 116–252, at 31; 17 U.S.C. 1506(g).

<sup>53</sup> 17 U.S.C. 1506(g)(1).

respondent waives if it does not.”<sup>54</sup> In particular, it must include a prominent statement that by not opting out of a CCB proceeding within sixty days of receiving the notice, the respondent “loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States” and “waives the right to a jury trial regarding the dispute.”<sup>55</sup>

The Office now solicits comment regarding additional regulatory requirements to help ensure that the initial notice conveys a clear explanation of the CCB, deadlines associated with the pending claim, the ability and method for the respondent to opt out of the proceeding, and the benefits and consequences of participating or declining to do so. For example, FRCP 4, which prescribes the contents of a summons, requires a summons to name the court and parties, be addressed to the defendant, provide contact information for the plaintiff, state the time a defendant must appear, notify the defendant that failure to appear will result in a default judgment, and be signed by the clerk and bear the court’s seal.<sup>56</sup> The Office solicits comments regarding whether analogous requirements would be appropriate for a notice to a CCB respondent.

The Office notes that a variety of federal and state courts provide templates for summonses, which are succinct documents of two to three pages. For example, the Central District of California provides a fillable PDF that can be digitally signed by the process server; typical for federal court, it references the relevant rules of civil procedure but does not provide explanatory information.<sup>57</sup> Cook County, Illinois provides a similar form for state proceedings, but its form includes additional explanatory language as well as a list of hotlines to call for more information.<sup>58</sup> It begins:

You have been named a defendant in the complaint in this case, a copy of which is hereto attached. You are summoned and required to file your appearance, in the office of the clerk of this court, within 30 days after service of this summons, not counting the day of service. If you fail to do so, a judgment by default may be entered against you for the relief asked in the complaint. THERE WILL BE A FEE TO FILE YOUR APPEARANCE. To

file your written appearance/answer YOU DO NOT NEED TO COME TO THE COURTHOUSE.

Further tailored to *pro se* participants, the form for a small claims summons provided by the Superior Court of New Jersey small claims division, provides stark warnings to respondents and explains the small claims process.<sup>59</sup> It reads:

YOU ARE BEING SUED!  
IF YOU WANT THE COURT TO HEAR YOUR SIDE OF THIS CASE, YOU MUST APPEAR IN COURT. IF YOU DO NOT, THE COURT MAY RULE AGAINST YOU. READ ALL OF THIS PAGE AND THE NEXT PAGE FOR DETAILS.

In the attached complaint, the person suing you (who is called the plaintiff) briefly tells the court his or her version of the facts of the case and how much money he or she claims you owe. You are cautioned that if you do not come to court on the trial date to answer the complaint, you may lose the case automatically, and the court may give the plaintiff what the plaintiff is asking for, plus interest and court costs.

The summons is offered in Spanish as well as English.<sup>60</sup>

Because a CCB attorney must review the claim for sufficiency before a claimant is allowed to proceed with service upon the respondent, the Office is tentatively inclined to require the inclusion of a docket number assigned by the CCB on the notice as well as the claim. The docket number (or similar unique identifier) could be used by the respondent to access information regarding the proceeding, including how to opt out of a proceeding. The Office queries whether additional data beyond inclusion of the docket number (with ability to verify the proceeding on a CCB website or case management system) should be required to provide indicia that the notice relates to an official government proceeding.

In addition, because the CCB is designed to be accessible to participants who are not represented by attorneys, the Office is tentatively planning to require links to the Office’s public information about the CCB to be included on the notice.<sup>61</sup> The Office solicits comments on specific educational information that may be helpful to include, while being mindful that the notice must remain easy to understand and avoid overwhelming respondents. For example, should the notice provide information describing

copyright or copyright infringement, as well as potential defenses that may be available to a respondent, such as fair use?

The Office seeks comments on each specific field of information that claimants should be required to include in the notice. In addition, the Office is considering the content of the prescribed notice form, and welcomes public input. In responding, parties are encouraged to provide specific suggestions for language to be included on the form to describe the CCB and the decision facing the respondent, including by submitting sample notice forms if they desire.

## 2. CCB Respondent Notifications (Second Notice)

In addition to the initial notice sent by the claimant, the statute requires that the Register promulgate regulations “providing for a written notification to be sent by, or on behalf of, the Copyright Claims Board to notify the respondent of a pending proceeding.”<sup>62</sup> Similar to the initial notice, this notice must “include information concerning the respondent’s right to opt out of the proceeding, the consequences of opting out and not opting out, and a prominent statement that, by not opting out within 60 days after the date of service . . . the respondent loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States” and “waives the right to a jury trial regarding the dispute.”<sup>63</sup>

This notice supplements the initial notice served by the claimant and is intended to facilitate understanding of the official nature of the documents and proceeding, encourage a respondent to review the materials, and overall, increase the likelihood that a respondent engages with the asserted claim and knowingly elects to proceed or opt out of the CCB proceeding. The Office seeks public input on any issues that should be considered relating to the second notice, including but not limited to its content and how to ensure that recipients understand that it is an official Federal Government notification. The Office also invites suggestions regarding the format and procedure for sending the second notice, considering that Congress allows such notices to be sent “by, or on behalf of” the CCB. For example, should the Office create the notice and post it on the proceeding’s docket for the claimant to download and deliver to the respondent? Should the Office require it

<sup>54</sup> H.R. Rep. No. 116–252, at 22; 17 U.S.C. 1506(g)(1).

<sup>55</sup> 17 U.S.C. 1506(g)(1).

<sup>56</sup> Fed. R. Civ. P. 4(a)(1).

<sup>57</sup> Admin. Off. of the U.S. Cts., *Summons in a Civil Action* (June 2012) <https://www.uscourts.gov/sites/default/files/ao440.pdf> (form AO 440).

<sup>58</sup> Clerk for the Circuit Court of Cook County, *Summons* (Dec. 2020), [http://www.cookcountyclerkofcourt.org/Forms/pdf\\_files/CCG0001.pdf](http://www.cookcountyclerkofcourt.org/Forms/pdf_files/CCG0001.pdf) (form CCG 0001 A).

<sup>59</sup> New Jersey Courts, *Small Claims Summons and Return of Service* (Sept. 2018), [https://njcourts.gov/forms/10534\\_appendix\\_xi\\_a2.pdf](https://njcourts.gov/forms/10534_appendix_xi_a2.pdf).

<sup>60</sup> *Id.*

<sup>61</sup> Copyright Small Claims and the Copyright Claims Board, <https://copyright.gov/about/small-claims> (last visited Mar. 21, 2021).

<sup>62</sup> 17 U.S.C. 1506(h).

<sup>63</sup> *Id.* at 1506(h)(1).

to be delivered in hard copy or by email, and how should delivery be documented? Given the small dollar value nature of the claims, and similar standards for federal court, the Office is not inclined to require physical delivery by a method other than the U.S. Postal Service. Similarly, if the CCB itself is responsible for serving the second notice, rather than generating and providing the notice to the claimant who would make service on the CCB's "behalf," this would require additional Office operational resources.

### 3. Service of Process and Designated Agents

After a CCB attorney has reviewed a claim and found it suitable to proceed, a claimant must serve notice of the proceeding and a copy of the claim on the respondent either via personal service or pursuant to waiver of personal service.<sup>64</sup> Personal service may be effected by someone who is both "not a party to the proceeding and is older than 18 years of age"<sup>65</sup> and both service and waiver of service may only occur within the United States.<sup>66</sup> Proof of service must be filed with the CCB within ninety days after the CCB determines that the claim is suitable for resolution.<sup>67</sup> The statute includes separate rules of service for individuals and corporations, partnerships, and unincorporated associations, including those organizations using designated service agents. No claims can be brought "by or against a Federal or State governmental entity."<sup>68</sup>

Service on an individual<sup>69</sup> may be accomplished by using procedures analogous to those in the FRCP.<sup>70</sup> Service can be accomplished by "complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made."<sup>71</sup> Service can also be accomplished by "leaving a copy of the notice and claim at the individual's dwelling or usual place of abode with someone of suitable age and

discretion who resides there."<sup>72</sup> Finally, service on an individual can be accomplished by "delivering a copy of the notice and claim to an agent designated by the respondent to receive service of process or, if not so designated, an agent authorized by appointment or by law to receive service of process."<sup>73</sup>

Like individuals, corporations, partnerships, or unincorporated associations can be served "by complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made."<sup>74</sup> These organizations can also be served by delivering the notice and claim to "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process in an action brought in courts of general jurisdiction in the State where service is made."<sup>75</sup>

Under the statute, such corporations, partnerships, or unincorporated associations may elect to receive CCB claim notices via a designated service agent.<sup>76</sup> The Office is required to establish regulations governing this designated service agent option and to "maintain a current directory of service agents that is available to the public for inspection, including through the internet."<sup>77</sup> The Office may charge these organizations a fee to maintain the designated service agent directory.<sup>78</sup>

When commenting on aspects related to the CCB's service agent directory, parties may want to review the Office's existing designated agent directory for online service providers, created pursuant to the Digital Millennium Copyright Act ("DMCA").<sup>79</sup> Under the DMCA, the Office has promulgated regulations setting forth requirements for service providers to designate agents to receive notifications of claimed infringement,<sup>80</sup> and maintains a centralized online directory of those agents.<sup>81</sup> The directory allows the public to search by service provider and view both current and historical designated agent information, and is populated automatically with

information supplied by service providers through the Office's online system.<sup>82</sup> To designate an agent in that system, a service provider must supply its full legal name, physical street address, any alternate names used by the service provider, and the name, organization, physical mail address, telephone number, and email address of its designated agent. The registration process costs \$6 per designation and must be renewed every three years.

Commenters are encouraged to discuss whether and to what extent the Office should look to its DMCA designated agent regulations with respect to implementing the statute's service agent directory. The Office is interested in comments on whether and how a corporate parent should identify its progeny and how to make the database easy to update, search, and use. Further, and as noted in the section on fees below, the Office requests parties' comments on the appropriate fee to "cover the costs of maintaining the directory."<sup>83</sup>

The statute also allows a respondent to waive personal service by returning a signed form to the CCB. The claimant must provide this form to the respondent "by first class mail or by other reasonable means" and return of the form must be at no cost to the respondent.<sup>84</sup> The claimant's waiver request must be in writing, include a notice of the proceeding and a copy of the claim, state the date the request was sent, and provide the respondent thirty days to respond.<sup>85</sup> The personal service waiver does not constitute a waiver of the respondent's right to opt out of the proceeding.<sup>86</sup>

The Office may establish additional regulations governing commencing proceedings, personal service, and the personal service waiver request.<sup>87</sup> The statute requires the Office to enact regulations for service of any documents submitted or relied upon in a CCB proceeding, other than the notice of the proceeding and the copy of the claim.<sup>88</sup>

The Office seeks public input on any issues that should be considered relating to the CCB's service requirements, including but not limited to waiver and the service of documents

<sup>64</sup> *Id.* at 1506(g). The copy of the claim served must be the same as the claim that was filed with the CCB. *Id.* at 1506(g)(2).

<sup>65</sup> *Id.* at 1506(g)(3).

<sup>66</sup> *Id.* at 1506(g)(9); H.R. Rep. No. 116–252, at 32.

<sup>67</sup> 17 U.S.C. 1506(g).

<sup>68</sup> *Id.* at 1504(d)(3). The Office invites commenters to address whether the phrase "Federal or state Governmental entity" will be clearly understood by potential claimants.

<sup>69</sup> For a minor or an incompetent individual, service can only be effected by "complying with State law for serving a summons or like process on such an individual in an action brought in the courts of general jurisdiction of the State where service is made." 17 U.S.C. 1506(g)(4), (8).

<sup>70</sup> See Fed. R. Civ. P. 4(e).

<sup>71</sup> 17 U.S.C. 1506(g)(4)(A).

<sup>72</sup> *Id.* at 1506(g)(4)(C).

<sup>73</sup> *Id.* at 1506(g)(4)(D).

<sup>74</sup> *Id.* at 1506(g)(5)(A)(i).

<sup>75</sup> *Id.* at 1506(g)(5)(A)(ii). If the service agent is "one authorized by statute and the statute so requires," the claimant must also mail a copy of the notice and claim to the respondent. *Id.*

<sup>76</sup> *Id.* at 1506(g)(5)(B).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at 512(c)(2).

<sup>80</sup> 37 CFR 201.38.

<sup>81</sup> DMCA Designated Agent Directory, <https://copyright.gov/dmca-directory> (last visited Mar. 21, 2021).

<sup>82</sup> From a user experience perspective, commenters may also wish to access the Office's searchable database of Pre-1972 Sound Recordings. *Schedules of Pre-1972 Sound Recordings*, <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html> (last visited Mar. 21, 2021).

<sup>83</sup> 17 U.S.C. 1506(g)(5)(B).

<sup>84</sup> *Id.* at 1506(g)(6).

<sup>85</sup> *Id.* at 1506(g)(6)(A)–(B).

<sup>86</sup> *Id.* at 1506(g)(7)(A).

<sup>87</sup> *Id.* at 1506(e), (g), (g)(6).

<sup>88</sup> *Id.* at 1506(j).

other than the initial notice and claim. To facilitate efficiency of communication with respect to claims brought by parties outside the United States, the Office inquires whether foreign claimants should be required to designate a domestic service agent and to provide such information to respondents.

### B. Opt-Out Provisions

Generally, respondents who do not wish to have a claim heard by the CCB can opt out of proceedings on a case-by-case basis. The statute includes two additional opt-out provisions: a blanket opt-out for libraries and archives who do not wish to participate in any CCB proceedings and a separate opt-out for parties who receive notice that they are class members in a pending class action involving the same transaction or occurrence as the CCB proceeding. The Office is directed to establish regulations to govern these opt-out actions.<sup>89</sup>

#### 1. Respondent's Opt-Out

As outlined above, after being properly served, respondents may opt out of a CCB proceeding by providing written notice to the CCB within sixty days of the date of service, although the CCB can extend that 60-day period in the interests of justice.<sup>90</sup> If a respondent does not opt out in a timely manner, the proceeding will become active and the respondent will be bound by the CCB's determination as provided for in section 1507(a).<sup>91</sup> If the respondent does opt out, the proceeding will be dismissed without prejudice.<sup>92</sup> The Office seeks public input on any issues that should be considered relating to the respondent's written opt-out notice, including the content of a notice and the methods that a respondent may use to execute that notice (e.g., paper or electronic).

In addition, the Office solicits comments regarding whether it should create a publicly accessible list of entities or individuals who have opted out of using the CCB in prior proceedings, as well as any other considerations relevant to whether the CCB should reflect a system to recognize entities or individuals that wish to consistently opt out of CCB proceedings. On the one hand, Congress did not establish a blanket opt-out for any entities other than libraries and archives, and in that case, it did so expressly by statute. This suggests that

the Office lacks authority to adopt other blanket opt-outs by regulation.<sup>93</sup> On the other hand, the Office understands that entities intending to consistently opt out may appreciate efficiency or at least a way to publicize their intentions, and that potential copyright owner claimants may also wish to avoid incurring filing fees as a result of serving claims upon entities who consistently opt out.

#### 2. Library and Archives Opt-Outs

The statute requires the Office to promulgate regulations for libraries and archives to "set forth procedures for preemptively opting out of proceedings before the Copyright Claims Board" and "compile and maintain a publicly available list of the libraries and archives that have successfully opted out."<sup>94</sup> For purposes of this provision, "the terms 'library' and 'archives' mean any library or archives, respectively, that qualifies for the limitations on exclusive rights under [17 U.S.C.] 108."<sup>95</sup> Office regulations cannot require a library or archives to pay a fee to opt out of a CCB proceeding or require renewal of the opt-out decision.<sup>96</sup>

The Office seeks public input on any issues that should be considered relating to the library and archives opt-out regulations, including whether a library or archive should be required to prove or certify its qualification for the limitations on exclusive rights under 17 U.S.C. 108, and thus for the blanket opt-out provision, and how to address circumstances where a library or archives ceases qualifying. In particular, given the prevalence of libraries and archives being located within larger entities, including but not limited to colleges and universities or municipalities, the Office invites suggestions addressing which entities, principals, or agents may opt out on behalf of a library or archive, as well as any associated certifications. The Office also seeks input related to transparency and functionality considerations with respect to its publication of the list of libraries and archives that have opted out. Finally, the Office is interested in whether it should include a regulatory provision that specifies that this opt out extends to employees operating in the course of their employment.

<sup>93</sup> See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); see also *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (describing "negative implications raised by disparate provisions").

<sup>94</sup> 17 U.S.C. 1506(aa)(2).

<sup>95</sup> *Id.* at 1506(aa)(4).

<sup>96</sup> *Id.* at 1506(aa)(3).

#### 3. Class Action Opt-Outs

Any party to an active proceeding before the CCB who receives notice of a pending class action arising out of the same transaction or occurrence as the proceeding before the CCB, in which the party is a class member, shall either seek to dismiss the CCB proceeding or opt out of the class action proceeding, "in accordance with regulations established by the Register of Copyrights."<sup>97</sup> The Office seeks public input on any issues that should be considered relating to regulations governing dismissal or opt-outs related to class action proceedings, including specific proposed regulatory language.

#### C. Additional CCB Practice and Procedures

The Office also requests comment on specific practice and procedural issues: Discovery, defaults, certifications for the various filings made by participants, and procedures for "smaller claims." As noted, the statute provides the Office with broad flexibility to regulate CCB proceedings.<sup>98</sup> In this regard, the Office heeds Congress's observation that "[w]hile principles of federal procedure are relevant to the CASE Act, the Act is not intended to simply mimic federal practice" and that the Office should "tak[e] advantage of the grant of regulatory authority to create rules and procedures most appropriate to create an efficient dispute resolution forum that also affords due process protections."<sup>99</sup> In addition to those specific areas, the Office welcomes comment on other CCB practices and procedures.

##### 1. Discovery

The statute allows for limited discovery in CCB proceedings. Discovery may include "the production of relevant information and documents, written interrogatories, and written requests for admission," as established by Office regulations.<sup>100</sup> If a party makes a request for additional, limited discovery and has demonstrated good cause for that request, the CCB "may approve additional relevant discovery, on a limited basis, in particular matters, and may request specific information and documents from participants in the proceeding and voluntary submissions from nonparticipants, consistent with the interests of justice."<sup>101</sup> If a party does not "timely provide discovery materials in response to a proper request

<sup>97</sup> *Id.* at 1507(b)(2).

<sup>98</sup> *Id.* at 1506(a)(1), 1510(a)(1).

<sup>99</sup> H.R. Rep. No. 116-252, at 23.

<sup>100</sup> 17 U.S.C. 1506(n).

<sup>101</sup> *Id.* at 1506(n)(1).

<sup>89</sup> *Id.* at 1506(aa)(1), 1507(b)(2)(A).

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

for materials that could be relevant to [disputed] facts” after being provided notice and an opportunity to respond and upon good cause shown, the CCB may “apply an adverse inference with respect to disputed facts” against that party.<sup>102</sup>

Congress limited discovery in CCB proceedings to “ensure that the proceedings are streamlined and efficient.”<sup>103</sup> As described by the Office’s *Copyright Small Claims* report, discovery in the federal courts is the “primary reason for the length of federal court litigation” and is associated with “often substantial costs and potential for abuse by exploitative litigants.”<sup>104</sup> While some discovery may often be necessary in a CCB proceeding, the Office is mindful that additional discovery could compromise the value and efficiency gained by using the CCB, in lieu of using the federal courts. The Office further notes that some state small claims systems adopt presumptions against any discovery at all.<sup>105</sup>

The Office seeks public input on any issues that should be considered relating to discovery in CCB proceedings, including but not limited to a limit on the number of interrogatories and requests for admission allowed without leave, what constitutes “good cause” to request additional information, standards for determining when information is confidential, and which provisions of FRCP Rule 26 should or should not be imported or adapted into the CCB’s regulations. For example, are there circumstances where a Rule 26(f) conference is appropriate, and if so, should the Office require the use of a specific template that sets out proposed deadlines and allows parties to fill in blanks? In cases where discovery extends to production of electronically stored information (“ESI”), should the CCB create rules specifically relating to ESI? In responding, commenters are encouraged to direct the Office to any practices or model rules of specific jurisdictions, and describe how their functioning may be worth emulating or avoiding.

## 2. Protective Orders

Any documents or testimony that contain confidential information can be subject to a protective order issued by

the CCB, upon the request of a party and for good cause shown.<sup>106</sup> In considering issues related to discovery, commenters are encouraged to address to the CCB’s handling of confidential information (including the redacting of such information) and the issuance of protective orders. For example, should the CCB adopt a default model protective order that the parties can enter into, with appropriate adaptations as needed? In addressing this topic, commenters may wish to review the Copyright Royalty Board’s confidentiality and redaction regulations and recent protective orders,<sup>107</sup> or provide the Office with model rules from jurisdictions that may prove useful.

## 3. Respondent’s Default and Claimant’s Failure To Prosecute

Where a proceeding becomes “active,” *i.e.*, the respondent has not timely opted out of the CCB process, and the respondent “has failed to appear or has ceased participating in the proceeding,” the CCB may enter a default determination.<sup>108</sup> To obtain a default determination, the claimant must “submit relevant evidence and other information in support of the claimant’s claim and any asserted damages.”<sup>109</sup> The CCB must then evaluate this evidence, including any other requested submissions, and determine if those materials are sufficient to support a finding in the claimant’s favor and, if so, any appropriate relief and damages.<sup>110</sup>

If the CCB determines that a default judgment is proper, it must prepare a default determination and provide a written notice to all the respondent’s addresses reflected in the CCB’s proceeding records, including email addresses, giving the respondent thirty days to submit an opposition to the proposed default determination.<sup>111</sup> If the respondent timely responds to the CCB’s notice, the CCB must consider the response when issuing its determination, which is then not

considered a “default.”<sup>112</sup> If the respondent does not respond to the notice, the CCB “shall proceed to issue the default determination as a final determination,” although the CCB “may, in the interests of justice, vacate the default determination.”<sup>113</sup> A federal court can also vacate the default determination “if it is established that the default . . . was due to excusable neglect.”<sup>114</sup>

As Congress made clear, the statute “establishes a strong presumption against default judgments” and provides greater protections against default than in the federal courts.<sup>115</sup> The statute also gives the Office the authority to supplement the statutory default rules by establishing additional requirements that must be met before the CCB can enter a default determination.<sup>116</sup> The Office seeks public input on any issues that should be considered relating to a respondent’s default, including but not limited to regulations regarding proof of damages in a default proceeding.<sup>117</sup>

The statute also contains rules regarding a claimant’s failure to complete service and failure to prosecute. If a claimant does not complete service on a respondent within ninety days of the CCB approving the claim, the CCB will dismiss the proceeding without prejudice.<sup>118</sup> After a proceeding becomes active, if a claimant fails to meet one or more deadlines or requirements set forth in the CCB’s schedule without justifiable cause, the CCB may dismiss the claimant’s claims.<sup>119</sup> The CCB must first provide the claimant written notice that it has missed a deadline and a thirty-day period to respond to the notice, and must consider the claimant’s response, if any, before dismissing the claims.<sup>120</sup> As noted above, failure to prosecute can constitute bad-faith conduct, potentially subjecting the claimant to pay the respondent’s costs and attorneys’ fees.<sup>121</sup>

## 4. Smaller Claims

The Office is required to promulgate regulations for a single CCB Officer to hear and resolve “smaller claims,” *i.e.*, claims involving \$5,000 or less (exclusive of any attorneys’ fees and

<sup>102</sup> *Id.* at 1506(n)(3).

<sup>103</sup> H.R. Rep. No. 116–252, at 17.

<sup>104</sup> *Small Claims Report* at 13.

<sup>105</sup> *See, e.g.*, Commonwealth of Massachusetts, Trial Court of the Commonwealth, *Small Claims Standards* sec. 5:02, (Nov. 2001), <https://www.mass.gov/doc/small-claims-standards/download> (“Discovery is not routinely available”).

<sup>106</sup> 17 U.S.C. 1506(n)(2).

<sup>107</sup> *See, e.g.*, 37 CFR 303.5(k) (rules governing exclusion or redaction of personally identifiable information); Protective Order, *Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Performances (Web V)*, No. 19–CRB–0005–WR (2021–2025) (June 24, 2019), <https://app.crb.gov/document/download/4012>.

<sup>108</sup> 17 U.S.C. 1506(u) (The respondent’s failure to appear or participate “can be demonstrated by the respondent’s failure, without justifiable cause, to meet 1 or more deadlines or requirements set forth in the [CCB’s proceeding] schedule.”).

<sup>109</sup> *Id.* at 1506(u)(1).

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

<sup>111</sup> *Id.* at 1506(u)(2).

<sup>112</sup> *Id.* at 1506(u)(3).

<sup>113</sup> *Id.* at 1506(u)(4).

<sup>114</sup> *Id.* at 1508(c)(1)(C).

<sup>115</sup> H.R. Rep. No. 116–252, at 24.

<sup>116</sup> 17 U.S.C. 1506(u)(1).

<sup>117</sup> *See* H.R. Rep. No. 116–252, at 24–25.

<sup>118</sup> 17 U.S.C. 1506(v)(1).

<sup>119</sup> *Id.* at 1506(v)(2).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1506(v)(2), (y)(2).

costs).<sup>122</sup> Congress expects that these smaller claim proceedings will “otherwise have the procedural protections of any other claim before the Copyright Claims Board,”<sup>123</sup> and that a determination issued under the smaller claims provisions will “have the same effect as a determination issued by the entire Copyright Claims Board.”<sup>124</sup> The Office seeks public input on any issues that should be considered relating to smaller claims proceedings, including but not limited to any regulations that will increase the efficiency of the single-Officer proceeding while retaining the CCB’s standard procedural protections.

##### 5. Other Rules of Practice and Procedure; Evidentiary Rules

While the discussion above identifies a number of filings and procedures related to the operation of the CCB from initiation of claims through the Board’s rendering of determinations, it is not comprehensive. The Office solicits suggestions, including specific proposals, regarding other procedural rules that would be helpful to the CCB’s goal of establishing an efficient dispute resolution forum while respecting due process protections.<sup>125</sup> Because the CCB is designed to be simpler and less formal than federal courts, the Office encourages plain language suggestions and urges commenters to consider what rules are necessary to codify by regulation and in what areas it is advisable for CCB Officers to retain discretion and flexibility.

In particular, the Office solicits comment regarding whether to propose adopting additional provisions of the FRCP on areas germane to the CCB’s operations, with potential modifications to simplify them and make them more accessible. For example, commenters may consider addressing rules such as: Serving and filing pleadings and other papers (Rule 5); privacy protections for filings made with the court (Rule 5.2); computing and extending time for motion papers (Rule 6); pleadings allowed (Rule 7); disclosure statement (Rule 7.1); general and special rules of pleadings (Rule 8); form of pleadings (Rule 10); signing pleadings, motions, and other papers; representations to the Court, sanctions (Rule 11); defenses and objections (Rule 12); counterclaim and crossclaim (Rule 13); amended and supplemental pleadings (Rule 15); and

scheduling and management (Rule 16).<sup>126</sup>

Beyond the Federal Rules, commenters are strongly encouraged to consider whether other rules or adjudicatory bodies may offer useful models. Most notably, various state court systems operate small claims courts, which may contain helpful language or approaches for the CCB to model.<sup>127</sup> Federal courts, too, often have model rules for their districts, including rules tailored to *pro se* representations. Comparable agency tribunals may also offer useful analogues. For example, the Copyright Royalty Board’s regulations are codified at 37 CFR parts 350 through 355. Several Office regulations also address related issues such as certifications<sup>128</sup> and attestations,<sup>129</sup> confidentiality,<sup>130</sup> waiver, service of process upon the Office, and production of information by the Office.<sup>131</sup> In addition, the U.S. Patent and Trademark Office has promulgated rules governing procedures and practices with respect to operation of the Trademark Trial and Appeals Board as well as the Patent Trial and Appeals Board.<sup>132</sup>

Like other small claims tribunals, CCB proceedings are not subject to formal rules of evidence.<sup>133</sup> The CCB can consider relevant documentary and other nontestimonial evidence as well as relevant testimonial evidence.<sup>134</sup> The testimonial evidence must be submitted under penalty of perjury and is normally limited to parties’ and non-expert witnesses’ statements.<sup>135</sup> In exceptional cases, the CCB may permit

expert witness testimony for good cause.<sup>136</sup> In addition to rules of procedure, the Office encourages parties to comment upon issues relevant to evidentiary rules.<sup>137</sup>

In responding, the Office invites commenters to propose specific regulatory language so that this notification may crystallize areas of agreement and disagreement among the commenting parties.

##### D. Public Access to Records and Proceedings; Certifications; Case Management System Considerations

The CCB will make its final determinations available on a publicly accessible website.<sup>138</sup> The CCB is also required to certify official records of its proceedings, including for review and confirmation of CCB determinations by a district court.<sup>139</sup> Additionally, the Office must establish regulations regarding publication of other CCB determination records and information, “including the redaction of records to protect confidential information that is the subject of a protective order.”<sup>140</sup>

To maintain and publish the CCB’s records, the Office has requested that the OCIO provide the CCB with an electronic filing and case management system. The Office intends for this system to provide capabilities comparable to existing case management systems, such as, those operated in existing small claims courts, the Copyright Royalty Board’s eCRB platform, or the federal courts’ case management/electronic case files system, called PACER.<sup>141</sup> The system would provide a mechanism to publish CCB orders and determinations and other information, as well as written submissions to the CCB, including claims and responses, on a public-facing website.

In addition to specifically soliciting information regarding issuance of protective orders noticed above, the Office seeks public input on other issues relating to the CCB’s provision of access to records and proceedings to the general public, as well as certification of records and determinations.

##### E. Register’s Review of CCB’s Denial of Reconsideration

The CCB’s determinations are subject to reconsideration or amendment by the CCB itself, if a party submits a written

<sup>126</sup> Fed. R. Civ. P. 5, 5.2, 6, 7, 7.1, 8, 10–13, 15, 16.

<sup>127</sup> See, e.g., Superior Court Rules—Small Claims (DC 2017) <http://www.dccourts.gov/sites/default/files/2017-05/Superior%20Court%20Rules%20of%20Procedure%20for%20the%20Small%20Claims%20and%20Conciliation%20Branch.pdf>; see also DC Small Claims and Conciliation Branch Handbook, [http://www.dccourts.gov/sites/default/files/matters-docs/Small\\_Claims\\_Handbook\\_Revised\\_May\\_2015.pdf](http://www.dccourts.gov/sites/default/files/matters-docs/Small_Claims_Handbook_Revised_May_2015.pdf).

<sup>128</sup> See, e.g., 37 CFR 201.4(c)(4)–(5) (recording-related certifications), 210.10(j) (section 115 cumulative statements of account certification), 210.27(i) (section 115 monthly reports of usage certification for blanket licensees), 210.29(g) (Mechanical Licensing Collective’s section 115 royalty statement certification).

<sup>129</sup> See, e.g., *id.* at §§ 201.4(d)(4) (redaction of personal identifying information), 201.17(e)(14) (statements of account submitted by cable systems), 201.38(c)(2) (DMCA designated agent attestation).

<sup>130</sup> *Id.* at § 210.34.

<sup>131</sup> *Id.* at part 205.

<sup>132</sup> See *id.* at parts 2, 7, 11, 42.

<sup>133</sup> 17 U.S.C. 1506(o); *Small Claims Report* at 126; see e.g., District of Columbia Courts, *Small Claims Mediation 2* (Sept. 2017), <https://www.dccourts.gov/sites/default/files/Small%20Claims%20Mediation%2009-17.pdf> (the DC small claims mediation program is expressly not subject to the Federal Rules of Evidence). Cf. Fed. R. Evid. (2020).

<sup>134</sup> 17 U.S.C. 1506(o).

<sup>135</sup> *Id.* at 1506(o)(2).

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Fed. R. Evid. (2020).

<sup>138</sup> 17 U.S.C. 1506(t)(3).

<sup>139</sup> *Id.* at 1503(a)(1)(I); 1508(b).

<sup>140</sup> *Id.* at 1506(t)(3).

<sup>141</sup> See eCRB, <https://app.crb.gov/>; Public Access to Court Electronic Records, <https://pacer.uscourts.gov/>.

<sup>122</sup> *Id.* at 1506(z).

<sup>123</sup> H.R. Rep. No. 116–252, at 17.

<sup>124</sup> 17 U.S.C. 1506(z).

<sup>125</sup> See H.R. Rep. No. 116–252, at 23.

request within thirty days of the final determination.<sup>142</sup> Where the CCB denies a party's request for reconsideration of a final determination, that party can request that the Register review the determination. Such review "shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination."<sup>143</sup> A request must be accompanied by "a reasonable filing fee," to be established by regulation.<sup>144</sup> After other parties have had an opportunity to address the reconsideration request, the Register must either "deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination."<sup>145</sup> The Office seeks public input on any issues relating to the Register's review, including any potential regulatory provisions addressing the substance of the request, *e.g.*, inclusion of the reasons the party believes the CCB abused its discretion, post-review procedures, and the amount of a reasonable filing fee.

#### F. Fees

The statute requires the Office to establish multiple fees associated with CCB proceedings. These include fees to commence a CCB proceeding,<sup>146</sup> whether before the full CCB or a single Officer, fees to initiate the Register's review of the CCB's denial of reconsideration,<sup>147</sup> and fees to "cover the costs" associated with maintaining the service agent directory.<sup>148</sup>

As noted above, there shall be no fee imposed upon libraries or archives filing a blanket opt-out of proceedings with the CCB.<sup>149</sup> The statute further states that "[t]he sum total of . . . filing fees" must be "not less than \$100, may not exceed the cost of filing an action in a district court of the United States" (currently \$400), and "shall be fixed in amounts that further the goals of the Copyright Claims Board."<sup>150</sup> The Office tentatively interprets these monetary limits as referring to the collective costs associated with fees paid by claimants to initiate proceedings, given the provision's comparison to costs of filing an action in district court. For example, the Office does not believe a fee

associated with an entity filing a notice of service agent needs to fall under this cap, since it would be paid by a different entity than a claimant and would not be associated with a particular proceeding.

The statute's fee-setting provisions augment the general fee-setting authority provided to the Office in section 708 of the Copyright Act, which authorizes the Register to fix fees for certain services, including CCB services, based on the cost of providing them.<sup>151</sup> The Office has previously interpreted this requirement to permit it to "use fee revenue from some services to offset losses from others for which the fees are kept low to encourage the public to take advantage of the service."<sup>152</sup> As with most of its services, the Office intends to intake fees for the CCB via *pay.gov*.

The Office seeks public input on any issues that should be considered relating to CCB fees, including with respect to the amounts for specific fees. It is also interested in comments evaluating whether fees to commence a proceeding should be staggered to require an initial fee and an additional fee once the proceeding is active (*i.e.*, obligating claimants with proceedings that are likely to proceed to a determination to bear greater costs than claimants where respondents opt out), whether fees for consideration and determination by a single CCB Officer should be lower than fees for standard CCB proceedings, or any other related topics.

#### G. Permissible Number of Cases

The Office has the power to limit "the permitted number of proceedings each year by the same claimant . . . in the interests of justice and the administration of the Copyright Claims Board."<sup>153</sup> As described by Congress, this power "functions as both a docket management tool . . . and as protection against abusive conduct."<sup>154</sup> The Office expects the CCB to exercise this power, and notes the likelihood that any initial limitation may be revisited after the CCB has established its workflows and can better evaluate its expected workload. The Office seeks public input on any issues that should be considered relating to the initial limitation of the permitted number of proceedings each

year by the same claimant in CCB proceedings, including whether the limitation should be based on a claimant's filings or active claims, other small claims tribunals' experiences with comparable limitations,<sup>155</sup> and how such a limitation may best be designed to prevent abusive conduct while preserving access for good-faith claimants.

#### H. Conduct of Parties and Attorneys

The statute has several provisions to preemptively deter frivolous, vexatious, or otherwise improper conduct, including the claim filing fee,<sup>156</sup> the ability for the Office to limit the number of claims an entity can bring each year,<sup>157</sup> the total monetary recovery limitation,<sup>158</sup> and the provision that a notice of a claim may be sent only after being reviewed by the CCB for statutory and regulatory compliance.<sup>159</sup> The statute also requires the Office to establish regulations requiring parties to certify that statements made in CCB proceedings are accurate and truthful.<sup>160</sup> Further, the statute contains provisions to address bad-faith conduct, including by awarding costs and attorneys' fees and barring repeat offenders from initiating claims before the CCB for twelve months.<sup>161</sup> These provisions demonstrate that Congress went to great lengths to address potential problems concerning bad-faith claimants. The Office is committed to thoughtful implementation of these provisions to deter both bad-faith conduct and misuse of CCB proceedings by those who have a genuine misunderstanding of the law.<sup>162</sup> The Office seeks public input on any issues that should be considered relating to parties' certification requirements and bad-faith conduct, including how the CCB can verify that filings do not contain fraudulent information, procedures for reporting bad-faith conduct, and whether the Office should prohibit attorneys who have been suspended from the practice of law from participating in CCB proceedings. For example, the U.S. Patent and Trademark

<sup>155</sup> See, *e.g.*, Cal. Civ. Proc. Code 116.231; Mich. Comp. Laws 600.8407(2).

<sup>156</sup> 17 U.S.C. 1510(c).

<sup>157</sup> *Id.* at 1504(g).

<sup>158</sup> *Id.* at 1504(e)(1)(D).

<sup>159</sup> *Id.* at 1506(f)(1).

<sup>160</sup> *Id.* at 1506(e)(2), (y)(1).

<sup>161</sup> *Id.* at 1506(y)(2); see also *id.* at 1510(a)(1) (directing the Office to establish regulation "implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party").

<sup>162</sup> The Office is also committed to providing clear, accessible guidance to the public about the CCB's rules and procedures, outside of its regulations.

<sup>142</sup> 17 U.S.C. 1506(w).

<sup>143</sup> *Id.* at 1506(x).

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

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1506(e)(3).

<sup>147</sup> *Id.* at 1506(x).

<sup>148</sup> *Id.* at 1506(g)(5)(B).

<sup>149</sup> *Id.* at 1506(aa)(3).

<sup>150</sup> *Id.* at 1510(c); see H.R. Rep. No. 116–252, at 28 n.1.

<sup>151</sup> 17 U.S.C. 708(a). Section 708 contains other requirements for setting certain fees, such as a requirement to conduct a fee study for Congress or limitations on fees for filing statements of account in connection with certain statutory licenses that do not appear to apply to CCB fees.

<sup>152</sup> *Copyright Office Fees, Notice of Proposed Rulemaking*, 83 FR 24054, 24055 (May 24, 2018).

<sup>153</sup> 17 U.S.C. 1504(g).

<sup>154</sup> H.R. Rep. No. 116–252, at 31.

Office has adopted various rules with respect to the operation of the Patent Trial and Appeals Board and the Trademark Trial and Appeals Board, as well as for attorneys and entities prosecuting applications before the agency. Those rules address various issues, such as conduct and discipline, duties of candor, fraud prevention, and, if necessary, sanction, suspension, exclusion or censure.<sup>163</sup> Commenters are encouraged to suggest other models (including any adopted by state small claims courts), as well as to offer regulatory language tailored to the CCB specifically.

### I. Other Subjects

While this notification outlines a variety of issues relevant to implementation of the CCB, the Office welcomes input on any issues not specifically identified that commenters believe are appropriate and within the Office's regulatory authority. Commenters should be aware that apart from this notification, the Office intends to separately publish a proposed rule regarding a process to expedite a registration decision for an unregistered work at issue before the CCB,<sup>164</sup> as well as a conforming technical edit to the Office's FOIA regulations.<sup>165</sup>

In some cases, the Office may defer exercising its regulatory authority until a later date. For example, the Office has the authority to limit claims regarding particular classes of works (e.g., musical works, audiovisual works, architectural works, etc.) that the CCB can hear.<sup>166</sup> While the Office welcomes any suggestions regarding this authority now, it may delay exercising it until a later date, including potentially after the CCB is operational.

<sup>163</sup> See, e.g., 35 U.S.C. 32 (authorizing the Patent and Trademark Office Director to "suspend or exclude . . . from further practice . . . any person, agent or attorney shown to be in competent or disreputable"); 37 CFR 11.19(b) (grounds for disciplining or disqualifying practitioners); see also 37 CFR 1.56, 1.97 and 1.98, 41.128, 42.11 and 42.12; U.S. Patent and Trademark Office, *Scam Prevention*, <https://www.uspto.gov/patents/basics/using-legal-services/scam-prevention> (including general information to the public and a link to a publically available complaint form).

<sup>164</sup> 17 U.S.C. 1505(d). Before the CCB renders a determination in any infringement dispute, the work at issue must be registered by the Office and the other parties in the proceeding must have an opportunity to address the registration certificate. But the statute allows a party to file a claim with the CCB before the Office has issued a registration, as long as "a completed application, a deposit, and the required fee for registration" have been delivered to the Office. *Id.* at 1505(a)(1).

<sup>165</sup> *Id.* at 1504(t)(4).

<sup>166</sup> *Id.* at 1504(c).

Dated: March 23, 2021.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

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**BILLING CODE 1410-30-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 38

#### RIN 2900-AR00

### Veterans Legacy Grants Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes regulations to establish the Veterans Legacy Grants Program (VLGP). VA would establish grant application procedures and evaluative criteria for determining whether to issue funding to eligible entities to conduct cemetery research and produce VLGP educational materials. Educational materials would relate the histories of Veterans interred in national, State, or Tribal Veterans' cemeteries and would promote community engagement with those histories.

**DATES:** Comments must be received on or before May 25, 2021.

**ADDRESSES:** Comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov) or mailed to: Director, Legislative and Regulatory Service (42E), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Comments should indicate that they are submitted in response to "RIN 2900-AR00—Veterans Legacy Grants Program." Comments received will be available at [regulations.gov](http://regulations.gov) for public viewing, inspection, or copies.

**FOR FURTHER INFORMATION CONTACT:** Bryce Carpenter, Educational Outreach Programs Officer, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-5362. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** In Public Law 116-107, sec. 1 (Jan. 17, 2020) (codified at 38 U.S.C. 2400 note), Congress authorized VA to establish a grant program to conduct cemetery research and produce educational materials for the VLGP. VA proposes to add new 38 CFR 38.710 through 38.785 to implement this new grant authority.

The mission of the National Cemetery Administration (NCA) is to honor

Veterans and their eligible family members with final resting places and lasting tributes, thus ensuring that "No Veteran Ever Dies." In 2016, the Veterans Legacy Program (VLP) was established to support NCA's mission to ensure "No Veteran Ever Dies" through contract awards to educational entities to conduct cemetery research and produce educational tools for the public to utilize and learn about the histories of Veterans interred in VA national cemeteries, as well as VA grant-funded State and Tribal Veterans' cemeteries. By engaging educators, students, researchers, and the public, VLP enabled NCA to share the stories of those who served and build an understanding and appreciation of the reasons national cemeteries are considered national shrines. Through contract awards from 2016 to 2020, VLP funded research for 19 projects, which produced more than 573 Veteran biographies, 17 documentary films about Veterans, and 6 Veterans' cemetery walking tours. Additionally, under VLP contracts issued to date, VLP will have engaged almost 9,000 kindergarten through high school students, more than 200 undergraduate students, nearly 40 graduate students, more than 50 scholars, and more than 300 teachers.

As the VLP program grew, VA sought authority to award grants to entities rather than request contract proposals from educational institutions to carry out this mission-critical function. Public Law 116-107, sec. 1 (codified at 38 U.S.C. 2400 note), enacted in early 2020, authorizes VA to make such grants. Under that authority, this proposed rule would establish regulations to govern VA's funding of VLP projects through more effective and efficient grant awards that would be administered by the VLGP. The proposed regulations address the purpose and use of grant funds and set out the general process for awarding a grant, as well as criteria for evaluating grant applications, priorities related to the award of a grant, and other general requirements and guidance for administering the VLGP.

Section 38.710 sets forth the purpose of the VLGP, which is to fund projects for research related to national, State, or Tribal Veterans' cemeteries, to present such research through site hosting and other digital technologies, and to produce educational materials that teach about the history of Veterans interred in those cemeteries. Grants may also fund projects that promote community engagement with the histories of Veterans interred in those locations.