

RIAA is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music legitimately produced and sold in the U.S. Their ability to protect the value of sound recordings through effective enforcement of copyrights is central to their economic success and all that they do.

SIIA is the principal U.S. trade association for the software and digital content industries. With over 600 member companies, SIIA is the largest association of software and content publishers in the country. Its members range from start-up firms to some of the largest and most recognizable corporations in the world. With members ranging from large multinational corporations to sole proprietorships, SIIA's members view the CASE Act as a potentially promising way to resolve copyright disputes.

Commenters and our members welcome the enactment of the CASE Act, and the establishment of a Copyright Claims Board ("CCB"), which will provide a voluntary forum, separate and distinct from the federal district courts, for the resolution of relatively low-dollar copyright disputes. This system holds out the promise of benefiting both claimants and respondents, who may choose in such cases to opt for the relatively informal procedures and monetary limits contemplated by the statute, over the extensive formality, process, and expense typical of federal litigation. The CASE Act addresses a real problem, and holds out the promise of providing a real solution.

Commenters' member companies are often parties to copyright cases in federal court, both as plaintiffs and defendants. It is reasonable to expect that they likewise may appear in CCB proceedings as claimants or respondents. Thus, they have a significant interest in ensuring that the

regulations implementing the CASE Act are fair, balanced, and provide a workable forum for the efficient resolution of small copyright disputes.

In crafting regulations to implement the CASE Act, it is understandable and appropriate for the Copyright Office to seek first and foremost to accommodate the interests of the individual creators and other small copyright owners, including *pro se* litigants, who are the legislation's primary intended beneficiaries. Thus Commenters fully support efforts to keep the small claims system simple, efficient, and easy to understand and navigate, including for non-attorneys. In so doing, however, the Office must also take care to safeguard the due process rights of *all* litigants, whether claimants or respondents, individuals or corporations, large entities or small, and represented by counsel or *pro se*. The success of the small claims system, as well as basic fairness, demands it.

Below, Commenters offer suggestions for crafting a system that properly balances the rights and interests of both claimants and defendants, of all types and sizes, and that we hope will result in a process that fulfills Congress's goal of providing redress for individual creators and other small copyright owners, while respecting the due process rights of all litigants.

II. TOPICS ADDRESSED BY THE NOTIFICATION OF INQUIRY

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

1. Content of Initial Notice

As described in the NOI, the purpose of the initial notice to be served on the respondent along with the claimant's claim is 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." 86 Fed. Reg. at 16,159. Commenters fully support having the initial notice

include a clear, direct, plain-English explanation of the process to respondents, including those not represented by counsel. Although explanatory language is less necessary for larger entities and represented litigants like Commenters' members, certain of our members represent smaller entities, and we agree that all those who may receive notices—even those who have never participated in or even heard of the CCB—should be able to understand that they have been sued in the equivalent of a lawsuit, and what they must do in response, and when.

With regard to the provision of educational information about the CCB, Commenters urge the Office to focus on informing participants about the CCB process itself, as distinct from copyright law in general, about which the Office's website already provides significant information.¹ Faced with a complicated challenge to stand up the CCB on a tight timeline, at the same time the Office is conducting numerous other important tasks, including the triennial rulemaking under Section 1201, it is not apparent that generating additional educational materials concerning general principles of copyright law should be a high priority at this time. It also may be challenging to develop and maintain summaries and interpretations of the law that are sufficiently detailed to be useful in litigation without recourse to primary sources, and that also reflect new legal developments, nuance in the law, and issues on which courts in various jurisdictions may differ.² As a general proposition, the quantity and level of detail of the Office's existing educational materials seem to strike a reasonable balance between these concerns.

¹ See, e.g., <https://copyright.gov/circs/>; <https://copyright.gov/help/faq>; <https://copyright.gov/fair-use/>.

² Geographic variations in the law could be a material issue, because the CASE Act requires the CCB to “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.” 17 U.S.C. §1506(a)(2).

2. CCB Respondent Notifications (Second Notice)

Similar to the initial notice served by the claimant, the second notice sent by the Copyright Office is a vital step in informing the respondent that it has been sued, and what steps it must take in response. Again, Commenters defer to the sound judgment of the Office and representatives of individuals and smaller entities regarding the most effective language to convey such information, and the best method for delivery.

3. Service of Process and Designated Agents

While seemingly a mundane topic, service is actually one of the most important aspects of the CCB system: it is the means by which an entity is made subject to the jurisdiction of the CCB, and the consequences of default. While there are aspects of the CCB system that benefit from the application of less formal and strict rules than those in the Federal Rules of Civil Procedure, service must not be subject to such informality or relaxed standards.

Service comes *before* the respondent has agreed to participate in CCB and subject itself to the different rules of the CCB system. Just as in federal district court (or in fact any judicial or quasi-judicial system), it is imperative that the service requirements in CCB be robust, and that all respondents are served in a manner that ensures actual notice of the claim, so that it can decide whether or not to participate in the forum, and thus subject itself to its rules. Failure to impose and strictly enforce service requirements would violate the due process rights of respondents both big and small, and would result in unnecessary and costly litigation over relief from default.

The plain language of the statute reflects congressional intent that the rules for service be strictly followed. The CASE Act's statutory rules for service under the CCB, *see* 17 U.S.C. §1506(g), largely mirror Federal Rule of Civil Procedure 4. As the Office correctly notes in the

NOI, it “has regulatory authority to implement the statute, [but] it is constrained by the law Congress enacted; the Office can fill statutory gaps, but will not entertain proposals that conflict with the statute.” 86 Fed. Reg. at 16,158 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). Consistent with this principle, in implementing Sec. 1506(g), the Office must not relax the statute’s requirements, even as it seeks to make the overall system navigable for non-represented claimants. Courts in jurisdictions across the country hold that plaintiffs must be held to an exacting standard of “strict compliance” with service rules; “substantial compliance” typically doesn’t suffice. *See, e.g., Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir. 1991) (noting the “usual requirements of strict compliance with Rule 4”); *Whidbee v. Pierce Cty.*, 857 F.3d 1019, 1021 (9th Cir. 2017) (“Washington courts require strict compliance with the state’s service of process requirements.”)³; *see also Rutter Group Prac. Guide Fed. Civ. Proc. Before Trial Nat. Ed.*, Ch. 5-I, Challenging Defective Service (2020) (“In contrast to motions attacking the form of summons, challenges to the manner of service are interpreted strictly: A liberal construction of Rule 4 ‘cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had.’”) (quoting *Mid-Continent Wood Prods.*, 936 F.2d at 300).

As noted in the NOI, the statute provides that corporate entities “may elect to designate a service agent to receive notice of a claim against it before the [CCB] by complying with requirements that the Register of Copyrights shall establish by regulation,” and directs the

³ Federal Rule of Civil Procedure 4, as well as 17 U.S.C. §1506(g), explicitly incorporate state-law service requirements.

Register to “maintain a current directory of [such] service agents”⁴ and make it available on the internet. *See* 17 U.S.C. §1506(g)(5)(B). We wish to make two points about this provision.

First, the elective nature of participation in this directory suggests that it will inevitably be incomplete, *i.e.*, it will not contain all corporate entities claimants seek to serve. But if an entity elects to be listed in this directory, service upon the service agent it lists in the directory should be the exclusive means for serving that entity. Commenters note that virtually all corporations, including their members and their numerous subsidiaries and affiliates, already have registered agents for service of process, as required by state corporate laws.⁵ We therefore request that the regulations confirm that entities choosing to be listed in this elective directory may designate their existing registered agent for service of process (*e.g.*, CT Corporation) for these purposes as well. Moreover, as not all entities will participate in the elective directory, Commenters suggest that the page of the Office’s website describing the CCB process include a sub-page with links to the search pages of each of the state Secretary of State, Department of Corporations, or equivalent office,⁶ to facilitate and encourage service through this reliable and time-tested process, which generally avoids the complications and uncertainties of other forms of service.⁷

⁴ Given the statutory requirement that the directory be “current,” Commenters recommend that the Office send annual reminders to registrants to update their entries where necessary.

⁵ Major corporations typically use firms such as CT Corporation to act as their registered agents. *See* <https://www.wolterskluwer.com/en/solutions/ct-corporation/registered-agent-services-solutions>.

⁶ *See, e.g.*, California (<https://businesssearch.sos.ca.gov/>); Delaware (<https://icis.corp.delaware.gov/ecorp/entitysearch/namesearch.aspx>); New York (https://www.dos.ny.gov/corps/bus_entity_search.html).

⁷ *See* Fed. R. Civ. P. 4(h)(1)(B) (authorizing service of process on registered agents).

Second, we urge the Office to make clear that if a person or entity does elect to participate in this directory, it may voluntarily designate a person to receive CCB-related process that is *not* listed as a registered agent with a Secretary of State or similar authority. As is the case with the DMCA, some of Commenters' members may receive large numbers of these notices, and the efficiency of the proceedings would be improved by directing CCB claims to one designated place in a large organization, rather than through the entity designated for authorized service for all purposes.

B. Opt-Out Provisions

1. Respondent's Opt-Out

The Office should make the process by which a respondent may exercise its statutory right to opt out⁸ of a CCB proceeding as simple as possible. Ideally, the respondent should be able to log on to an online CCB system similar to eCRB or PACER, easily navigate to an "Opt Out" page, click the "Opt Out" box and then "Submit," without any further obligations. The Office's system should then auto-generate an opt-out notice, which it automatically emails to both the claimant and respondent. Both the initial notice served by the claimant and the second notice sent by the CCB should contain a pre-printed page clearly and conspicuously informing the respondent of its right to opt out, and instructions about how to exercise it, including the URL for the web page at which it may do so (or analogous instructions to effect the opt-out via the online case-management system). Under such a system, there should be no need for the respondent to draft an opt-out notice or to fill out any elaborate form.

⁸ See 17 U.S.C. §1506(i).

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

Commenters take no position on the process by which an entity may claim status as a “library” or “archive” for purposes of a blanket opt-out under the CCB. *See* 17 U.S.C. §1506(aa). However, the regulations must make clear that an entity’s status as a library or archive for the purposes of opting out under CCB does not constitute a determination of that entity’s status, and may not be cited as such, in any other context, including in any federal court litigation in which that entity is a party.

3. **Class Action Opt-Outs**

While Section 1506(q)(3) permits an opt-out by any party that receives notice of a class action arising out of the same transaction or occurrence, apparently at any point during a CCB proceeding, it should be recognized that any opt-out once a proceeding has progressed beyond the initial stages risks wasting effort and expense by the litigants and the CCB, and the amount of wasted effort and expense increases with the passage of time. Thus, a party with knowledge of a class action should not be permitted to commence a CCB proceeding involving the same transaction or occurrence and then opt out later. Similarly, a party learning of a class action during the pendency of a proceeding and wishing to exercise a class-action opt-out should be required to do so promptly after learning of the class action and not, for example, be allowed to continue imposing costs of CCB litigation on the CCB and that party’s adversary, only to opt out at a later stage of the case.

C. Additional CCB Practice and Procedures

1. Discovery

As the NOI correctly notes, “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.’” 86 Fed. Reg. 16,162 (citing U.S. Copyright Office, *Copyright*

Small Claims (2013) at 13). For this reason, it is crucial to the success of the CCB that discovery be carefully cabined.⁹ Indeed, whether discovery is appropriately limited will be among the most important factors that both claimants and respondents will consider in deciding whether to participate in CCB proceedings. Absent appropriate limits on discovery, parties, and especially respondents, will likely take their chances in federal court, where they are afforded additional due process protections.

To the maximum extent possible, the exchange of information and documents in a CCB case should be accomplished through the use of CCB-provided form questionnaires, form discovery requests, and mandatory disclosures that parties should be required to fill out or respond to early in the case.¹⁰ (As discussed *infra* Sec. II.C.5., the claimant should be required to provide such information well in advance of the respondent's opt-out deadline, as the information will likely impact respondent's decision to opt out or not.) Such forms should require the parties to disclose such information as:

- Full name of individual or entity and complete contact information, including for counsel (where applicable)
- The title and registration number (if available) for the work on which the claimant is suing (or, where the registration has not yet been issued, the service request ("SR") number issued by the Copyright Office's Office of Registration Policy and Practice and the date of the application)

⁹ Commenters note that, in their experience, discovery in Copyright Royalty Board proceedings, which often involve disputes worth millions or even billions of dollars, tends to be quite broad-ranging, and discovery disputes frequent and expensive to litigate. Thus we do not view CRB as a useful model for CCB.

¹⁰ For an example of such a standard form questionnaire, *see* California Judicial Council Form DISC-010, which is used in Limited Civil Cases, a category of cases that fall between "small claims" (with an upper limit of \$10,000) and "unlimited" civil cases. As the form notes, the monetary limit in Limited Civil Cases is \$25,000, not far from the limit in the CCB. The form is available at: <https://www.courts.ca.gov/documents/disc010.pdf>.

- Information sufficient to identify and/or locate a copy of the work on which the claimant is suing, and, where practicable (*e.g.*, in the case of a photograph), a reproduction of the work
- Information and documents sufficient to establish the claimant as owner or exclusive licensee of the right(s) under which it is making its claim
- In the case of a claim under 17 U.S.C. §512(f), a copy of the relevant DMCA notice and any counter-notice or related correspondence involving the service provider or others
- The statutorily required “statement of material facts in support of the claim.” 17 U.S.C. §1506(e). This should include, at least:
 - The date(s) of the alleged infringement, and
 - The circumstances of the alleged infringement, including where it is claimed to have occurred
- A description of the documents the party believes are relevant to the claims or defenses, and the production of such documents, including any contracts or agreements relevant to the claims or defenses, and any prior correspondence between the parties, or involving third parties, about the transaction or occurrence at issue (as with all documents containing confidential material, subject to an appropriate protective order)
- The amount of damages the claimant is seeking, and a short statement explaining how the amount of damages was calculated, as well as any documents (*e.g.*, previous similar licenses) that support the calculation
- The identity and contact information for witnesses who have knowledge of relevant information, a description of the witness’s relevant knowledge and what the party expects

him or her to testify to, and, where available, statements by such witnesses describing their relevant knowledge.

Commenters believe that in the vast majority of CCB cases, the information and documents provided in response to such a questionnaire should be sufficient for fair resolution of the claims, without the need for further discovery, including “custom” document requests, interrogatories, or requests for admission that are commonplace in regular litigation.¹¹ Requiring the claimant to provide such information up front will also facilitate early settlement.

In those relatively rare cases where a party reasonably believes that the questionnaire/mandatory disclosures did not result in information or documents necessary to fairly resolve the case, the regulations should limit discovery to interrogatories, requests for admission, and document requests that are: 1) narrowly targeted to further elucidate the responses to the mandatory questionnaire; 2) highly likely to result in the production of evidence that is directly relevant to the claims or defenses; and 3) serve the goal of efficient resolution of the case in light of the nature of the claims and defenses and the amount in dispute.

Interrogatories in the CCB should be limited to five per party, as should requests for admission.¹² If a party believes more are necessary, it should be required to seek leave from the CCB to propound them, and the request should be granted only upon a showing of good cause. *See* 17 U.S.C. §1506(n)(1). While Commenters do not recommend a specific numerical limit on requests for production of documents, such requests should be subject to the exacting standards

¹¹ Given that “[t]he Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages,” 17 U.S.C. §1504(e)(1)(A)(ii)(III), inquiry into the respondent’s state of mind will not be relevant in CCB proceedings, further reducing the need for extensive discovery.

¹² Federal Rule of Civil Procedure 33 permits 25 interrogatories, while Rule 36 places no numerical limits on requests for admission.

proposed above. And if one or both parties believe it would be helpful, they should be able to request a conference with the CCB early in the case to obtain guidance on the proper scope of discovery. *Id.* §1506(l).

Depositions are not specifically authorized by the statute, and the burden and expense associated with the process (including the usual necessity of a court reporter in addition to counsel’s time in preparing witnesses and defending the deposition) makes them particularly ill-suited for the small-claims context. Commenters therefore recommend that the regulations bar depositions.

As the NOI notes, the subject of discovery of electronically stored information (“ESI”) raises particular concerns. While much relevant information today is stored electronically, “the oft-vast scope of data and the sometimes astronomical costs of processing and storage associated with a request for production make ESI a double-edged sword.”¹³ A 2012 study found that the median cost for producing ESI in the cases it reviewed was **\$1.8 million**.¹⁴ Given the potential for these “astronomical” expenses, discovery of ESI must be significantly limited in the CCB process. Accordingly, the CCB regulations should make clear that parties are not required to conduct searches for, or produce, large volumes of ESI, including of the type and volume that would require the retention of an ESI discovery vendor. Rather, no searching of ESI should be required beyond that which could be performed “manually” by a reasonably competent lay computer user (*e.g.*, using the “search” functionality of standard, commercially available email

¹³ See *Make Timely Objections to the Cost of ESI Discovery*, American Bar Ass’n, (June 30, 2019), available at <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/make-timely-objections-to-the-cost-of-esi-discovery/> .

¹⁴ See *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, The Rand Institute for Civil Justice, at 17 (2012), available at https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf .

programs like Outlook or Gmail, or other locations where relevant information is likely to be stored, such as file folders in the Windows or Mac environment).

Permitting motion practice over discovery disputes in CCB cases would inevitably cause litigation expenses to dwarf the amount in dispute, and would result in respondents routinely opting out of the system. Therefore, the regulations should specifically bar the motions to compel and motions for a protective order that are common in federal litigation, other than as permitted under Section 1506(n)(2), regarding confidential information. Rather, as anticipated by the statute, the parties, in their ultimate submissions urging the CCB to rule in their favor on the merits, may note their opponent's alleged failure to respond appropriately to discovery requests, and argue to the CCB that it should "apply an adverse inference with respect to disputed facts against a party who has failed to timely provide discovery materials in response to a proper request for materials that could be relevant to such facts." *Id.* §1506(n)(3). Of course, as Section 1506(n)(3) requires, the responding party must have "notice and an opportunity to respond" to such arguments.

In the event a party believes that resolution of a discovery dispute requires intervention from the CCB itself, an informal teleconference pursuant to Section 1506(m)(1) should suffice. Such proceedings "may not include any formal motion practice," *id.* §1506(m); rather, participants should make their arguments orally.

2. Protective Orders

The statute provides that the CCB "may issue a protective order to limit the disclosure of documents or testimony that contain confidential information." *Id.* §1506(n)(2). Commenters agree with the Office that it would be helpful for the CCB to adopt a "default model protective order that the parties can enter into, with appropriate adaptations as needed." 86 Fed. Reg. at

16,162. The Trademark Trial and Appeal Board Standard Protective Order¹⁵ provides a useful starting point, though we note that a “For Attorneys’ Eyes Only” category of confidential information is likely inappropriate for a process where many litigants will proceed *pro se*. Simplicity and ease of compliance is key. Providing such a form order would significantly reduce the expense associated with drafting and negotiating such protective orders, and of potentially enlisting the CCB itself to resolve disputes over their scope. A conference to determine the proper scope of the protective order and to explain to unrepresented parties the procedures and importance of compliance may be appropriate. *See* 17 U.S.C. §1506(l), (n)(2).

Given the broad range of legal experience of the parties and counsel likely to appear before it, the CCB regulations and form of protective order should be clear about how compliance with the order can be enforced. Commenters suggest that any party who willfully breaches a duty to maintain the confidentiality of information protected by a CCB protective order should be barred from participating in CCB proceedings for a period of at least 12 months. The CCB should also be permitted to order additional relief, such as evidentiary or monetary sanctions, within the proceeding itself, for either willful or negligent violation of confidentiality orders, depending on the particular facts and circumstances.

3. Respondent’s Default and Claimant’s Failure to Prosecute

Default is authorized by Section 1506(u) of the statute, and is appropriate in situations where the respondent has been properly served and yet fails to participate in the proceedings. But, as the House Judiciary Committee report makes clear, “The Act establishes a strong presumption against default judgments.” H.R. Rep. No. 116-252, at 24. This principle should apply to both process and substance. As to process, the statute specifies that default may only

¹⁵ https://www.uspto.gov/sites/default/files/documents/Standard%20Protective%20Order_02052020.pdf

occur once “a proceeding has been deemed an active proceeding,” 17 U.S.C. §1506(u), *i.e.*, “[i]f proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the [CCB] within th[e] 60-day period.” *Id.* §1506(i). The regulations should specify that, in determining whether service has been effectively made, the CCB should review not only the face of the proof of service, but, to the extent practicable, the facts and circumstances surrounding the purported service, to ensure that the claimant has strictly complied with the service requirements. *See supra* Sec. II.A.3 (discussing need for strict compliance in service). Obviously, it would be fundamentally unfair to enter default against a respondent that has not been properly served, and thus made aware of the need to either opt out or participate in the proceedings.

Regarding substance, the statute itself appropriately directs the CCB to scrutinize the claimant’s claim, and, based upon “upon review of such evidence [submitted by the claimant]... determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law and, if so, the appropriate relief and damages, if any, to be awarded.” *Id.* §1506(u)(1). We do suggest that the regulations regarding default implement the House Judiciary Committee’s direction that the CCB “carefully scrutinize” not only the claimant’s claim and supporting evidence, but also “consider applicable affirmative defenses such as fair use, where warranted by the circumstances of the case.” H.R. Rep. No. 116-52, at 25.

4. Smaller Claims

The statute directs the Register to establish regulations for the adjudication of “smaller claims,” *i.e.*, those “in which total damages sought do not exceed \$5,000 (exclusive of attorneys’ fees and costs).” 17 U.S.C. §1506(z). Claimants should be required to indicate in their initial claim whether they are seeking \$5,000 or less in damages. If so, their case will be designated a

“smaller claim,” and be subject to the specific rules governing that category of cases. And once a case has been designated a smaller claim, that designation must remain in place for the duration of the case. It would be fundamentally unfair to permit a case to move from “smaller claim” to “regular” status mid-litigation, as the respondent will have made its decision not to opt out in reliance on the “smaller claim” designation.

For such smaller claims, responses to the questionnaire/mandatory disclosures described *supra* Sec. II.C.1. should suffice; no other discovery should be permitted. Indeed, permitting discovery in such cases would result in litigation expenses, including attorneys’ fees, quickly overwhelming the amount in dispute. Such a rule not permitting traditional discovery would be consistent with the practice in true state “small claims” courts like those in California, where claims brought by individuals are limited to \$10,000 and by corporations to \$5,000. *See* Cal. Civ. Proc. Code §116.310(b) (“The pretrial discovery procedures described in Section 2019.010 are not permitted in small claims actions.”); *id.* §§116.220-116.221 (establishing monetary limits on claims).

5. Other Rules of Practice and Procedure; Evidentiary Rules

The statute specifies that, to initiate a proceeding, the “claim” (*i.e.*, the equivalent of a complaint) must include, *inter alia*, “a statement of material facts in support of the claim.” 17 U.S.C. §1506(e)(1). Commenters believe that, in addition to the statutorily required claim, the claimant should be required to serve on the respondent, within 14 days after service of the initial claim, the standardized questionnaire/form discovery/mandatory disclosures described *supra* Sec. II.C.1., which would provide information to enable the respondent to better evaluate whether the CCB or federal court is the appropriate forum for resolution of the dispute (and to facilitate early settlement). For example, if the information provided in response to the

questionnaire suggests that the case is simple and straightforward, with only a few relevant documents, the respondent may well decide to participate in CCB. If, however, the information appears to indicate that proving the claims or establishing defenses is likely to require extensive discovery, the respondent is more likely to opt out. It is much better for both respondents *and claimants* to be able to make this determination early in the process.

After the close of discovery, CCB should establish a process by which the parties present their cases for ultimate resolution by the panel. While acknowledging that the process will be less formal than that in federal court, especially in cases involving *pro se* litigants, Commenters envision a procedure whereby the parties would submit briefs roughly akin to summary judgment or trial briefs to the CCB, attaching as exhibits the evidence upon which they rely (subject to appropriate redaction or sealing of confidential material). The party on which the burden of proof rests (the claimant) would file first, followed by the respondent, with an optional reply by the claimant. Due process would require that a party only cite evidence that it had disclosed to the opposing party via the form questionnaire or other discovery. After reviewing these submissions from the parties, the CCB could render its decision at that point, or conduct a hearing before issuing its judgment.

D. Public Access to Records and Proceedings; Certifications; Case

Management System Considerations

Commenters support making the dockets and materials filed in CCB cases, including orders of the CCB itself, accessible to the public. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (“the courts of this country recognize a general right to inspect and copy public records and documents”); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (“The first amendment guarantees the press and the public a general right of access to court

proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed.”); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (noting the “strong presumption in favor of access to court records”).

However, raw discovery materials exchanged between the parties but not filed with the CCB, should not be public. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (right of access to court documents does not extend to fruits of pre-trial civil discovery; protective orders prohibiting dissemination of such material “do[] not offend the First Amendment”). Where a party seeks to submit material obtained via discovery to the CCB in support of its claims, it may do so, but subject to appropriate redaction or sealing of confidential material as set forth in the protective order entered into in the case. *See* 86 Fed. Reg. at 16,163.

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

Consistent with Section 1507, which states that final determinations in CCB proceedings are non-precedential, we urge the Office to clarify that the Register’s decisions arising from CCB proceedings are likewise non-precedential.

F. Fees

The statute prescribes a fee range of \$100 up to the amount for filing an action in federal district court (currently \$402).¹⁶ Any amount within this range seems reasonable and appropriate.

G. Permissible Number of Cases

While sympathetic to the desire to ensure equitable access to the limited resources of the CCB and to managing the workload of CCB—especially in its early stages—Commenters remain unconvinced that imposing a strict numerical limit on the number of cases a claimant may bring is necessary at the outset. In the absence of any real-world experience with the CCB, no one

¹⁶ 17 U.S.C. § 1510(c); NOI, 86 Fed. Reg. at 16,164.

knows how many cases will be filed, how many respondents will opt out, or how much work those cases will require of the Copyright Claims Officers and Copyright Claims Attorneys. Further, numerical limits would disproportionately disadvantage individuals and entities, like Commenters' members, as well as individuals like photographers and graphic artists, who own rights in large numbers of copyrighted works—including many of the most popular and sought-after works available. Limiting these potential claimants' ability to bring small claims before the CCB would neither "prevent abusive conduct" nor work to "preserv[e] access for good-faith claimants," which are the Office's stated reasons for considering such limits.¹⁷

To be clear, Commenters wholeheartedly agree that vexatious litigants should be prevented from abusing the small claims system, and that the statute's protections against bad-faith conduct should be strictly enforced. However, the number of filings a claimant makes is not necessarily indicative of vexatiousness. Commenters thus believe that enforcing the bad faith provisions in Section 1506(y) and elsewhere in the statute,¹⁸ and monitoring developments as the CCB encounters real-world conditions, is the better way to proceed at this time. To the extent permitted by Section 1504(g), the regulations should empower the Register to delegate to the CCB the ability to manage its caseload, including by imposing filing limits, as developments warrant. In the event the Office is nonetheless inclined to impose an annual numerical limit on claims at the outset, Commenters suggest that cases where the respondent opts out should not count against a claimant's limit. And the CCB should have the discretion to allow exceptions to any numerical limit on a case-by-case basis for good cause and in the interests of justice.

¹⁷ NOI, 86 Fed. Reg. at 16,164.

¹⁸ See 17 U.S.C. § 1506(y)(2) (permitting awards of costs and fees to adversely affected participant in cases of bad faith conduct); *id.* §1506(y)(3) (permitting CCB to bar bad-faith litigants from initiating claims for up to 12 months); *see also id.* §1504(e)(3).

H. Conduct of Parties and Attorneys

Commenters take seriously the need to deter bad-faith conduct and misuse of CCB proceedings. As the NOI notes, Congress “went to great lengths” to include statutory provisions designed to achieve this goal.¹⁹ Commenters here respond to several of the specific issues related to the conduct of parties and attorneys on which the NOI seeks comment.

First, it is not apparent to Commenters that the CCB needs to develop its own broad-ranging system of discipline. With regard to attorneys and other licensed professionals who appear before the CCB, there already exist well-developed standards of conduct and disciplinary procedures on which the CCB can rely. For example, if an attorney made false statements to the CCB, the attorney would violate ethical standards applicable to attorneys generally and be subject to discipline.²⁰ Likewise, if a disbarred or currently-suspended attorney sought to represent a client before the CCB, that attorney would be engaged in the unauthorized practice of law. That would be grounds for further discipline in jurisdictions in which the attorney was licensed. *See* ABA Model Rule of Prof'l Conduct 5.5. In some jurisdictions, a disbarred or currently-suspended attorney may even face criminal liability for representing a client in the CCB. *See, e.g.*, Md. Bus. Occ. & Prof. Code §§10-601, 10-606; Va. Code Ann. §54.1-3904. Rather than adopting new procedures modeled after the Patent and Trademark Office or any other tribunal, the Office should strongly consider making referrals to state bars and similar licensing bodies to utilize existing mechanisms for ensuring that those representing clients in the CCB behave ethically and appropriately.

¹⁹ NOI, 86 Fed. Reg. at 16,164.

²⁰ *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 3.3 (candor toward the tribunal), 8.4 (misconduct).

With regard to unrepresented litigants, the various protections embedded in the statute itself may be sufficient to address bad-faith conduct. The statute gives the CCB authority to award fees and costs as a sanction against bad-faith litigants and to bar repeat offenders from using the tribunal for up to a year.²¹ It also includes provisions capable of deterring unrepresented parties who may in good faith misunderstand the law (in addition to bad-faith litigants); these include provisions requiring screening of claims for regulatory and statutory compliance before they are served on an opposing party,²² as well as the authority to set a filing fee amount of no less than \$100.²³ In extreme instances in which harsher responses are warranted—for instance, where a party has made material misstatements despite its sworn certification that statements made in CCB proceedings are accurate and truthful²⁴—laws against perjury could provide additional recourse.²⁵

Commenters and their members thank and commend the Office for its work toward implementing the CASE Act. We look forward to providing further input and working with the Copyright Office going forward.

²¹ 17 U.S.C. §1506(y).

²² *Id.* §1506(y)(3).

²³ *Id.* §1510(c).

²⁴ *Id.* at §1506(y)(1).

²⁵ *See, e.g.*, 18 U.S.C. §1621 (making perjury punishable by fine and/or imprisonment of up to five years); *see also id.* §1623 (discussing perjury in any proceeding before or ancillary to any court in the United States).

Respectfully submitted,



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