



**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Copyright Claims Board: Active  
Proceedings and Evidence**

**Docket No. 2021-8**

**COMMENTS OF THE COPYRIGHT ALLIANCE, APA, ASCRL, ASMP, THE  
AUTHORS GUILD, CREATIVEFUTURE, DMLA, GRAPHIC ARTISTS GUILD, IBPA,  
MAC, MCNA, NSAI, NPPA, NANPA, PPA, RECORDING ACADEMY, SAG-AFTRA,  
SCL, SGA, AND SONA<sup>1</sup>**

The organizations listed below appreciate the opportunity to submit reply comments in response to the notice of proposed rulemaking ([NPRM](#)) published in the Federal Register on December 8, 2021 by the U.S. Copyright Office, regarding procedures governing active proceedings before the Copyright Claims Board and post-determination procedures.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

American Photographic Artists (APA) is a leading national not-for-profit 501(c)(6) association run by, and for, professional photographers since 1981. Recognized for its

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<sup>1</sup> The organizations identified here are both members and non-members of the Copyright Alliance. It is not our normal practice to identify members separately, but we are doing it in response to the Notices of Inquiry (NOI) and Notices of Proposed Rulemakings (NPRM) related to implementation of the CASE Act solely because the Office “encourage[d] parties to file joint comments on issues of common agreement” in the March 26<sup>th</sup> NOI. Copyright Alternative in Small-Claims Enforcement Act Regulations, 86 Fed. Reg. 16156, 16158 (proposed Mar. 26, 2021). As we did with the NOI initial and reply comments, to comply with the Office’s request, we are filing jointly with members that otherwise would have filed their own separate (but virtually identical in substance) comments.

broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

The American Society for Collective Rights Licensing, Inc., is the nation's largest 501(c)(6) collective rights administration society serving over 16,000 illustrator and photographer members. ASCRL's goal is to maximize revenue for collectively administered rights and public lending rights and to distribute these funds in an equitable, cost effective, and efficient manner. ASCRL is a strong supporter of CASE Act provisions that enhance and help with the enforcement of the primary rights of illustrators and photographers, as well as strong secondary rights system for markets that illustrators and photographers find difficult or impossible to monetize due to the inefficiencies and costs of the licensing and enforcement systems.

American Society of Media Photographers, Inc. (ASMP) is a 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs and media. In its seventy-five-year-plus history, ASMP has been at the forefront of protecting the rights of visual creators and the craft of photography.

The Authors Guild is a national non-profit association of approximately 10,000 professional, published writers of all genres including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. Among our members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works that never reach the bestseller lists. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award. We have a long history of contributing to the ongoing interpretation and clarification of U.S. copyright law, and it is our pleasure to continue to serve that role submitting comments concerning implementation of the CASE Act to the Copyright Office.

CreativeFuture is a nonprofit coalition of more than 560 companies and organizations and more than 260,000 individuals – from film, television, music, book publishing, photography, and other creative industries. Its mission is to advocate for strong but appropriate copyright protections and to empower creatives to speak out against piracy and how it affects their ability to create and to make a living. To learn more, visit [www.creativefuture.org](http://www.creativefuture.org).

Digital Media Licensing Association (DMLA) (<https://www.digitalmedialicensing.org>) founded in 1951 is a not-for-profit trade association that represents the interests of entities in North America and internationally that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual to editorial and commercial users. As part of its mission DMLA has been advocating to protect copyright and to ensure fair licensing standards exist.

Graphic Artists Guild, Inc. has advocated on behalf of illustrators, graphic designers, and other graphic artists for fifty years. The Guild educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* raises industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

Founded in 1983 to support independent publishers nationwide, the Independent Book Publishers Association (IBPA) leads and serves the independent publishing community through advocacy, education, and tools for success. With over 4,100 members, IBPA is the largest publishing association in the U.S. Its vision is a world where every independent publisher has the access, knowledge, and tools needed to professionally engage in all aspects of an inclusive publishing industry. For more information, visit [ibpa-online.org](http://ibpa-online.org).

Music Artists Coalition (MAC) was formed because the music business is at a critical point in its history. Decisions are being made today in the United States and abroad which will impact music creators for decades. MAC believes music creators should be driving the strategy and conversation about the issues that shape their lives and that artists should have the opportunity to decide how to best protect the fate of their music and their other rights. Founding board members include Anderson .Paak, Dave Matthews, Don Henley, Maren Morris, Meghan Trainor, Shane McAnally, and Verdine White, among others. MAC has been engaging on key issues since its founding in August 2019 and played a key role in advocating for independent artists and their rights around California's AB5.

Music Creators North America (MCNA) (<http://www.musiccreatorsna.org/>) is an alliance of independent songwriter and composer organizations who advocate for the rights of, and educate on behalf of, North America's music creator community. In addition, MCNA works with sister alliances across every populated continent to further the interests of music creators throughout the world. Each MCNA member organization (including SGA, SCL,

The Alliance for Women Film Composers (AWFC), Music Answers (M.A.), The Screen Composers Guild of Canada (SCGC), and The Songwriters Association of Canada (SAC), is run exclusively by and for songwriters and composers. MCNA stands with over a half-million songwriters, composers and artists in Africa, Asia, Latin and South America and Europe through its membership in The International Council of Music Creators (CIAM), in advocating for the strongest possible protections of music creator rights everywhere in the world.

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 5,000 members and 100 chapters in the United States and abroad. The Nashville Songwriters Association International is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession.

Since its founding in 1946, the [National Press Photographers Association](#) (NPPA) has been the Voice of Visual Journalists. NPPA is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously advocates for and protects the constitutional and intellectual property rights of journalists as well as freedom of the press and speech in all its forms, especially as it relates to visual journalism. Its members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism community. NPPA's sister organization, the National Press Photographers Foundation (NPPF) supports NPPA's charitable and educational efforts.

Since its founding in 1994, the North American Nature Photography Association (NANPA) has been North America's preeminent national nature photography organization. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world and is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access for nature photographers.

Professional Photographers of America (PPA), the world's largest photographic trade association, represents over 30,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected.

As the only trade association in Washington representing all music creators, the Recording Academy represents the voices of performers, songwriters, producers, engineers, and all music professionals. Dedicated to ensuring the recording arts remain a thriving part of our shared cultural heritage, the Academy honors music's history while investing in its future, advocates on behalf of music creators, supports music people in times of need, and celebrates artistic excellence through the GRAMMY Awards — music's only peer-recognized accolade and highest achievement.

The Society of Composers & Lyricists (SCL) (<https://thescl.com/>), is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre). Established in 1945, SCL's membership has for 76 years been comprised of many of the world's most accomplished composers and lyricists in their respective audio-visual fields, today numbering over 1900.

The Songwriters Guild of America, Inc. (SGA) (<https://www.songwritersguild.com>), is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are formulated solely in the interests of its members. Established in 1931, SGA has for 90 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world on behalf of its approximately 4500 members.

Songwriters of North America (SONA), founded by songwriters Michelle Lewis and Kay Hanley with attorney Dina LaPolt in 2015, is a grassroots organization that advocates on behalf of songwriters' interests before legislative bodies, administrative agencies, and the courts. SONA seeks to ensure that songwriters are paid fairly and reliably for the works they create and played a vital role in securing passage of the Music Modernization Act, which updates the licensing system for musical works. SONA believes it is critical that songwriters and other

individual creators who can't afford federal court have a meaningful way to address infringing uses of their copyrighted works.

Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) is the world's largest labor union that represents working media and entertainment artists. In 2012, SAG-AFTRA was formed through the merger of two labor unions: Screen Actors Guild, Inc. (SAG) and the American Federation of Television and Radio Artists (AFTRA). SAG-AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure strong protections for media artists. SAG-AFTRA's membership includes more than 160,000 actors, journalists, DJs, recording artists, and other media professionals, many of whom are creators of their own content.

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## Priority Concerns

We appreciate the vast amount of work that the Copyright Office is undertaking to make sure that the CCB is up and running by June 2022. We understand the amount of work and time that goes into reviewing the various comments submitted in response to the initial Notice of Inquiry and drafting proposed regulations in response to the views expressed. In light of that, below is a list of our priority concerns and requests regarding the proposed rules. We have also attached an appendix of other concerns and requests that we think would benefit the CCB and be helpful to the Office in finalizing the regulations.

### 1. Complexity of the Regulations

One of our most significant concerns with the proposed rules is their complexity. Our members have been advocates for a copyright small claims system for more than a decade, and the system envisioned by the copyright community and articulated by sponsors of the CASE Act has always been one that is intentionally designed to make the process navigable by pro se parties. Instead, the system is shaping up to be procedurally more complex than is necessary or required by the statute. One particular critique is that the system uses the federal rules as the starting point and relies too heavily on modeling after federal procedure. For example, the rules make reference to “cross-examination,” “redirect examination,” “impeachment” of witnesses, and application of the Federal Rules of Evidence by parties attempting to make arguments about admissibility of evidence. The proposed rules also adopt language from the federal system, like “requests for admissions” and “interrogatories” rather than plain, ordinary language that pro se parties would understand.

As the Office points out in the Small Claims Report, “The Federal Rules, while helpful in laying a comprehensive logistical framework for a wide range of lawsuits, can be difficult to navigate even for experienced litigators, much less pro se litigants.”<sup>2</sup> As drafted, the proposed rules lay out a comprehensive logistical framework that will be *extremely* difficult for pro se litigants to navigate.

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<sup>2</sup> U.S. Copyright Office, Copyright Small Claims, A Report of the Register of Copyrights at 12 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.



As the Office reviews and considers the comments filed in response to this NPRM, we strongly urge the Office to:

1. focus on ways to scale back on the requirements and reliance on mirroring the federal process as it drafts its final rules;
2. focus on consistency. For example, the proposed regulations contain a variety of inconsistent stipulations on page lengths and other formatting requirements for party submissions. With regard to page lengths, to make the process easier to understand and comply with, the Office should propose only three variations of page limits: 5 pages, 10 pages, and 15 pages. We suggest that any page limits currently proposed at 5 pages or less be changed to a 5-page limit, any page limits currently proposed between 6 and 10 pages be changed to a 10-page limit, and any page limits currently proposed between 11 and 15 pages be changed to a 15-page limit. With regard to submission formats, there should be a *single* requirement for formatting across *all* party submissions (i.e., font size, line spacing, etc.).<sup>3</sup> In addition, with regard to page limits, formatting requirements, and timelines for submissions, all these requirements should be laid out plainly in a document given to parties during the scheduling conference.
3. consider adopting the CASE Act implementing regulations on an interim basis at this stage, and holding off on issuing final rules until the CCB and interested parties get a sense for how the proposed regulations will work in practice (as we have stated in previous comments). Alternatively, if it is not possible to adopt interim regulations, after the CCB is up and running for a year, the Office should consider publishing another notice of inquiry (NOI) soliciting public comment on the efficacy of the existing rules.
4. create a handbook for parties that is *significantly* less complex than the regulations, easy to understand, and easy to follow. The proposed rules say that

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<sup>3</sup> Presently, some rules delve into great detail on formatting and others are silent or contain only one or two detailed requirements. For example rule 222.14(c)(3) (which governs party statements) calls for no more than 7 double-spaced pages, stipulates font size for the body of the text and footnotes, and dictates the size of the margins, while rule 222.11(d)(2) requires that requests for leave to amend be no more than 5 pages, but is silent on font size, line spacing, margins, etc.

the Office *may* issue a handbook, but we believe it is imperative that the Office does so. Pro se parties cannot be expected to navigate or understand the proposed rules as written, much less apply them. The Office should also create a set of webinars that users of the CCB can watch to understand the rules, regulations, and procedures;

5. limit the scope of discovery as explained in greater detail on page 13.

## **2. Limitation on Cases**

Section 233.2(a) proposes an annual limit of 10 cases *filed* per party. We *strongly* urge the Office to apply the limitation to *active* cases rather than all cases filed. Section 1504(g) of the Copyright Act permits the Office to establish a limit on the number of cases filed by a single claimant *in the interests of justice*. It is inconceivable how this proposal could be considered to be consistent with the interests of justice when it is intentionally designed to operate in a way that would prevent a claimant that has never had a single case heard by the Board from bringing additional cases for the remainder of the year. This is particularly troubling given that the primary goal in creating the CCB was to provide access to justice for parties who have been disenfranchised from the copyright system due to their inability to afford to enforce their rights in federal court. This proposal by the Copyright Office creates an arbitrary and undue obstacle for copyright owners seeking redress when their rights are infringed upon, and it has the potential to render the tribunal useless. This proposal also has the potential to increase parties' feelings of disenfranchisement by giving them such a bad first impression of the system that they decline to continue paying into the system—both via copyright registrations and via the small claims process. It is unclear why the Office believes that establishing a limitation on the number of cases *filed* instead of *active proceedings* is necessary to help the CCB Officers better manage their dockets or better guard against potential abuse. Because the system is voluntary and many respondents will opt out, the existing system will naturally serve to limit the number of cases on the Board's docket, and acts as a significant deterrent to abuse without the Office needing to impose an artificial restriction here.

Regardless of whether the Office agrees with our analysis above, the Office should allow for a greater number of micro claims (*i.e.*, what the NPRM refers to as “smaller claims”) to be

brought by claimants than would be permitted under the normal process (with the caveat that we would strongly oppose anything below 10 for the limitation on standard small claims). Since micro claims are adjudicated by just one Officer, and adhere to a more streamlined process (especially if our no-discovery rule is adopted (explained more fully below)), this would not overburden the Board and will incentivize claimants to designate claims as micro claims, where possible.

In addition, in our reading of the law, the Office lacks the authority to establish a limitation on the number of cases filed by attorneys. Section 1504(g) of the Copyright Act only permits the Office to establish a limit on the number of cases filed by the same *claimant* (instead of “party”), which is defined in the statute as the “real party in interest that commences a proceeding before the Copyright Claims Board.”<sup>4</sup> If, however, the Office disagrees with this interpretation of the law and insists on imposing such a limit, we note two additional problems with the 40 cases limit placed on private attorneys and law firms: (i) it is applied to all case when (as explained above) it should be applied only to *active* cases, and (ii) it fails to account for the variation in size from one firm to another (for example, an international law firm employing thousands of attorneys should be permitted to bring far more than 40 cases annually).

If the Office feels the need to impose an annual limit on the number of proceedings we *strongly* urge the Office to make that annual limit: (i) be reasonable, justifiable, and in the interests of justice; (ii) be based on the number of *active proceedings* before the CCB by the same claimant, and (iii) sunset after one or two years (unless it becomes clear sooner that the Board has excess capacity to take on more cases) so that the Office can re-evaluate the established limit. The limitation on the number of cases should also be included in the study the Office is required to conduct within three years of the Board’s first determination. In carrying out the study, the Office may want to consider tracking separate caseload data for each of the permissible claims—i.e., infringement, non-infringement, and 512(f) misrepresentation claims—as well as for micro claims in order to assess and make specific adjustments to those limitations if necessary.

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<sup>4</sup> 17 U.S.C. §1501(2)

### 3. Smaller Claims

As a general matter, we believe that the procedure for “smaller” claims (which we will refer to in these comments as “micro claims” for avoidance of confusion) should be significantly less complicated and burdensome on the parties than other cases brought before the CCB (“standard small claims”). This is particularly important given the complexity of the proposed regulations thus far. As we explained in previous comments, we *strongly* urge that determinations in micro claims proceedings be made solely “on the basis of the filing of the written direct statement by each party (or party group filing a joint petition), the response by any opposing party, and one optional reply by a party who has filed a written direct statement.” (See CRB regulations at 37 CFR 351.3) The default rule in micro claims proceedings should exclude discovery. Excluding discovery altogether, or allowing it only after a showing of good cause has been made, is not uncommon amongst small claims tribunals. Eliminating discovery would make the micro claims process much more attractive to claimants seeking damage awards of less than \$5,000 and to respondents who would be much more amenable to participating in the small claims process (and not opting out) if there was no discovery. An exception to the no-discovery rule should only be made upon a showing of good cause or where the CCB officers need to ask questions to complete the record and make a determination. Where an exception is made, discovery should be limited to only a few specific items that are relevant, probative, and likely to impact the outcome of the case.

The proposed regulations for micro claims give claimants no incentive to elect the micro claims process; instead, it would likely be in the claimant’s best interest to proceed under the framework for standard small claims where they have a potential for a greater award of damages and the expertise of *three* CCB officers instead of just one; since they would be opening themselves up to discovery either way and paying the same filing fee, they might as well leave open the possibility for receiving an award of more than \$5,000 rather than locking themselves into the lower cap on damages for micro claims. Likewise, requiring discovery in the micro claims process will deter potential respondents who would be amenable to participating in the small claims process but may opt out due to the discovery requirements.

For pro se parties, even the “limited” discovery proposed in the NPRM for micro claims could be overly complex and burdensome (as well as invasive), and unnecessarily so; where the burden of discovery is necessary and congruent with the claim, the claimant can elect to bring

the claim under the procedures for standard small claims. In addition, section 1506(q) of the Copyright Act gives the claimant the ability to change its mind, dismiss the claim without prejudice, and refile the claim under the procedures for standard small claims if it decides that discovery is necessary. If the Office continues to disagree with our proposal, perhaps a rule could be added allowing parties to waive discovery in micro claims proceedings if all parties agree, or where the parties stipulate that they do not know of or have reason to believe that they have engaged in other unauthorized uses of the work at issue.

If implemented correctly, the micro claims process has the potential to create a *truly* streamlined and simplified process designed with pro se parties in mind, and to give the CCB the ability to hear more cases and manage its docket more efficiently. Incentivizing parties to use the micro claims process could also address concerns raised by opponents of the CASE Act that the limitation of damages is too high. However, that will be lost if there are not appropriate incentives for giving up the added flexibility that comes along with the process for standard small claims. The CASE Act provides the Office with significant discretion in drafting regulations for micro claims. We *strongly* urge the Office to eliminate discovery for micro claims.

#### **4. Default Determinations**

In section 227.3(a), the Office proposes that in instances of a respondent's default, "the Board shall consider whether the respondent has a meritorious defense." We *strongly* oppose this proposal and urge the Office to reverse course. As an initial point, nothing in section 1506(u) of the Copyright Act permits consideration of a defense that has not been properly raised by a respondent. Specifically, 1506(u)(1) requires that the claimant submit relevant evidence and that the Board "determine whether the materials so submitted are sufficient to support a finding in favor of the claimant under applicable law." Section 1506(u)(2) then requires that "[i]f the Copyright Claims Board makes an affirmative determination under paragraph (1), the Copyright Claims Board *shall* prepare a proposed default determination, and shall provide written notice to the respondent at all addresses" (emphasis added). In other words, if "the materials so *submitted* are sufficient to support a finding in favor of the claimant under applicable law" (emphasis added) the Board *must* enter the default judgment (unless the respondent responds to the notice of pending default within the allotted timeframe).

As we have stated in previous comments, affirmative defenses must be affirmatively raised and sufficiently pleaded.<sup>5</sup> This is true both for parties that participate throughout the proceeding as well as parties in default. A party in default that has failed to raise and sufficiently plead appropriate defenses along with the necessary facts to support those defenses should not be given the privilege of having defenses raised on their behalf. It is not the role of the CCB Officers to make arguments on behalf of parties that did not raise those arguments, whether those parties are active participants in the proceeding or are in default.

As it stands, under the Office’s proposal, a party would arguably be better off defaulting in order to have defenses invoked on their behalf by the CCB Officers than to even attempt to develop their own arguments or defend against the claims raised in the proceeding. We agree that a respondent’s default should not automatically result in a determination in favor of the claimant, and that, instead, the Board should weigh the merits of the claimant’s claim and supporting evidence; however, it would be entirely inappropriate for the Board—whose role is to act as an impartial adjudicator—to act on behalf of either party. Notably, the regulations do not provide for a mechanism by which the Board will invoke “meritorious” arguments that were not raised by a claimant in instances of a failure to prosecute (Part 228).

The CASE Act includes a number of safeguards to prevent respondents from defaulting—including the initial notice served by the claimant, a second notice to the respondent on behalf of the Board, and a notice of a pending default determination plus 30 days to intervene—in addition to an opportunity to challenge the default determination after the fact due to excusable neglect. To the extent that the proposal in 227.3(a) to consider meritorious defenses is intended to be a safeguard, the law already includes adequate safeguards that more appropriately address those concerns.

## **5. Limiting Scope of Discovery to Reduce Complexity**

In the narrative portion of the NPRM, the Office requests input on mechanisms to help limit the scope of document productions. We appreciate the Office’s concern here and suggest that the concern extend well beyond document production to the discovery process as a whole.

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<sup>5</sup> Cf. Fed. R. Civ. P. 8(b)(1)(A) (“In responding to a pleading, a party must...state in short and plain terms its defenses to each claim asserted against it.”); id. R. 8(c) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including...”).

As we have stated in previous comments, to ensure that the process is accessible for pro se litigants and does not unduly encourage respondents to opt out, the discovery process should be limited by requiring that all discovery requests, including requests for production of documents, be: (i) narrowly targeted; (ii) highly likely to result in the production of evidence that is directly relevant to the claims and defenses; and (iii) serve the goal of efficient resolution of the case in light of the nature of the claims and defenses and the amount in dispute. A few examples (that we support) of ways the Office could achieve this include:

1. Limiting the scope of all areas of discovery to the particular set of facts and circumstances at issue in the case.<sup>6</sup>
2. Eliminating requests for admissions. Unlike interrogatories and document production, where the CCB will provide standard requests, the drafting of requests for admissions would be left entirely to the parties which will likely lead to unnecessary confusion. The burden and time spent trying to correct issues that occur would outweigh the benefits in most cases. To the extent that the Office reads 1506(n) of the Copyright Act as barring a complete elimination of requests for admissions, such requests could be made available only in extraordinary circumstances and upon the request of a party. Alternatively, if the Office feels strongly about the goal of requests for admissions, the Office could require a pre-trial statement listing out the facts that are not in dispute instead of requests for admissions.
3. Expressly prohibiting depositions. As stated in our previous comments, we agree with the Office's statement in the Small Claims Report that "depositions – which are typically conducted in person, can be intimidating for litigants, and require costly transcription services" and should not be a part of the small claims process.<sup>7</sup> We request that the Office make an affirmative statement that depositions will be excluded from CCB proceedings.

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<sup>6</sup> For example, a party should not be entitled to discovery related to past licensing fees assessed by a copyright owner.

<sup>7</sup> U.S. Copyright Office, Copyright Small Claims, A Report of the Register of Copyrights at 125 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

## Appendix

### 1. Management of Parties

#### a. Default Determinations

##### 227.1 Failure by respondent to appear or participate in proceeding

A technical correction should be made to rule 227.1(b)(2) to insert the word “within” immediately before “15 days.”

#### b. Claimant’s Failure to Prosecute

Unlike section 227.1, section 228.2 does not include a provision on “multiple missed deadlines.”

#### c. Bad-Faith Conduct

##### Definition

In some sections—including 233.2(b) and 225.4(f)(3)—the NPRM categorizes certain acts as per se “bad faith.” While we believe it is important for the NPRM to clearly define bad-faith conduct, the Board should always have discretion to make those determinations in light of all relevant context. For that reason, we encourage the Office to remove the references to “bad faith” in sections 233.2(b), 225.4(f)(3), and instead simply state that the behaviors described in those provisions are prohibited.

In addition, the definition of bad-faith conduct articulated in section 220.1(b) should make clear that “pursuit” of a claim, counterclaim, or defense includes all actions taken in support of that claim, counterclaim, or defense (e.g., bad-faith conduct occurring in the course of discovery, etc.). We suggest the following edit: Bad-faith conduct occurs when a party pursues a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact. **Under this definition, pursuit of a claim, counterclaim, or defense encompasses any actions taken in support of a claim, counterclaim, or defense before the CCB, including acts that ~~Such conduct~~ may occur at any point during a proceeding, including before a proceeding becomes an active proceeding.**



### **Public Record of Disciplinary Action**

Although the narrative portion of the NPRM states that the CCB will “make certain records and findings related to bad-faith conduct public, so that parties are able to identify patterns of bad-faith conduct and bring them to its attention,” the regulations do not clearly explain how these records will be kept, particularly in situations where there is no final determination (e.g., where bad-faith conduct occurs during the opt out period and the case never matures into an active proceeding, or where the proceeding is otherwise dismissed). It is unclear how, without a public list, parties would be able to identify patterns of bad-faith conduct. It would be unduly burdensome to expect parties, particularly pro se parties, to search through CCB records to piece this information together. Instead, this information should be recorded and made available in a manner that is easy for parties to access and decipher. This is not only important in instances where a party may want to make a case for patterns of bad-faith conduct, but also as a mechanism for alerting parties that an attorney they may be considering has a record of bad-faith conduct before the Board.

### **Due process for disciplinary action**

In addition, anyone accused of bad-faith conduct before the CCB should be notified of such accusation and given an opportunity to explain and defend their actions before a finding of bad-faith conduct is officially made and recorded. Although the regulations suggest that such an opportunity will be provided, it is unclear whether, as written, this opportunity would be provided in instances where the proceeding does not mature into an active case before the Board, or the case has otherwise been dismissed. Further, the regulations should clearly articulate what is necessary to constitute a showing of bad-faith conduct.

### **Disciplinary action against attorneys**

The narrative portion of the NPRM invites comment on whether it would be appropriate to temporarily bar attorneys who have been found to have acted in bad faith in proceedings before the CCB from participating in future proceedings. Not only is it appropriate, in defining a “party” to include attorney representatives, the CASE Act requires that the CCB discipline offending attorneys in this way. This is an important mechanism for protecting claimants and

respondents from attorneys whose previous history of bad-faith conduct might put them in jeopardy.

In addition, different and inconsistent language is used throughout the proposed regulations to refer to parties and attorneys. For example, in some instances, the phrase “all parties and attorneys” is used, and in others “party, including any attorneys” is used. Although subtle, these inconsistent uses could imply different meanings for the term “party” throughout the regulations.

#### **232.4(a) General**

The rule should make clear, for example by adding “before the CCB” immediately following “on more than one occasion,” that the relevant conduct is limited to actions before the CCB.

#### **232.4(d) Penalties**

Since an attorney could presumably be brought on board after the claim is initiated, we suggest the following edit: “In determining whether to bar a party from initiating claims or a representative from ~~initiating claims participating~~ on a party’s behalf...”

#### **d. Limitation on Cases**

In section 233.2(b), the Office states that it will be considered bad faith “for a party to take any action for the sole purpose of avoiding the limitation on the number of proceedings that may be filed as set forth in this section.” We encourage the Office to clarify what it has in mind with regard to an action “for the sole purpose of avoiding the limitation.”

### **2. Management of Proceedings**

#### **a. Scheduling Order**

In the narrative portion of the NPRM, the Office solicits input about allowing conferences “that do not involve the resolution of a dispute and instead relate to logistical, scheduling, or other non-substantive matters” to be held by Copyright Claims Attorneys instead of Officers. We believe that there should be a presumption that those conferences will be held by Officers, however Copyright Claims Attorneys should be permitted to hold those conferences if deemed necessary to ensure that proceedings are “streamlined.”

### **b. Amending Pleadings**

In section 222.11(a), it is unclear what the Office means by “freely” amend. The Office should clarify the language in 222.11(a). Perhaps the Office means to say that the party may amend the pleading on their own volition, as distinct from amendments required by the Copyright Claims Attorneys for compliance, once prior to service. However, if that is the intent, it is not clear.

### **c. Consolidation**

Section 222.12(b) should be amended to clarify that any dismissal that might occur would be without prejudice.

### **d. Settlement**

The Office requests input regarding whether an Officer who participates in a settlement conference must also participate in the determination. Section 1506(b)(1) of the Copyright Act requires that the Board issue its determinations “independently on the basis of the records in the proceedings before it.” Since an Officer who presides over a settlement conference will be privy to information beyond what exists in the record (which runs the risk of improperly influencing that Officer), that Officer’s “vote” with regard to the final determination should be excluded from the final determination unless a third vote is needed where the two remaining Officers fail to agree on a determination. Since the third Officer’s vote may be necessary where an agreement cannot otherwise be made, that Officer should be permitted to review the record and sit in on hearings, etc., but should not be permitted to actively participate in the discussions in any manner that might influence the independence of the remaining two Officers.

### **e. Protective Orders**

Section 222.18(a)(1) requires that copies of discovery material received from another party “must be returned or disposed of within 30 days of a determination or dismissal, or within 30 days of the exhaustion of the time for any review or appeal of the Board’s final determination, whichever is later.” This requirement should apply regardless of the confidentiality status of the material, and the party in possession of the material should be required to certify that the material has been returned or disposed of within the allotted timeframe.

Section 222.18(a)(5) permits the Board to unilaterally “remove a confidentiality designation from any material on its own initiative or upon consideration of a request from a party.” We urge that the CCB provide the affected party the opportunity to object to such a change in designation before making that decision.

### **226.1 General**

Section 226.1 of the proposed regulations states that “[w]hen total monetary relief sought in a claim does not exceed \$5,000 (exclusive of attorneys’ fees and costs), the claim may be adjudicated under the procedures set forth in this part.” While this seems to suggest that relief sought for counterclaims cannot interfere with a claimant’s decision to pursue a micro claim, we believe this should be made clear. For example, if the claimant seeks \$3,000 and opts for a micro claim, whether a counterclaimant seeks \$1,000, \$2,500, or \$6,000 should have no bearing on the claimant’s right to choose a micro claim proceeding.

### **226.2 Requesting a smaller claims proceeding**

In the statement, “[i]f the initial notice has already been issued, the claimant shall request reissuance of the initial notice with the smaller claim proceeding notice,” it is unclear what the Office means by “issued” and “reissuance.” The Office should clarify this statement.

## **3. Discovery**

### **a. 225.1 General Practices**

Section 225.1(b) explains that a party can request a modification of the scheduling order orally or by letter, and adds that “[a]ny party that objects to the requested scheduling modification may file a response letter within three days of the date of service of the letter request.” However, since the request can be made orally instead of by letter, this provision should be clarified to address the time period that the party has to respond when the request is made orally.

Section 225.1(c) says that, “[c]onferences may be held by one or more Copyright Claims Officers (“Officers”), with the exception of post-discovery conferences and any conferences to decide a dispute, both of which shall be held by one or more Officers.” Despite the uses of “may” and “shall,” as written, there is no difference between the two scenarios posed; in both

instances, the regulations permit (and require) the conference to be held by at least one Officer. Presumably the Office meant something different, which should be explained and clarified.

Section 225.1(e) explains that “[t]he use of expert witnesses in proceedings before the Board is highly disfavored and requests shall be rarely granted.” While we believe that expert witnesses should not be permitted before the CCB, we understand that the Office is bound by the requirements of the CASE Act to allow expert testimony in exceptional cases and for good cause. However, we request that the Office include in the regulations a requirement for claimants to disclose their intent to request permission to include expert testimony during the opt out period, or in the case of respondents, prior to submitting their response (while the claimant has the ability to voluntarily dismiss the proceeding), so that the opposing party can take that fact into consideration in deciding whether to proceed with the case. This is particularly important because, as a general matter, most parties would want or need to bring in their own expert to rebut an opposing party’s expert, and the expense associated with that would be cost prohibitive for most users of the CCB.

#### **b. 225.2 Standard Interrogatories**

Paragraph (b)(10) states that the standard interrogatories for infringement claims will include a reference to “[a] description and calculation of the damages suffered by the party as a result of the alleged infringement.” Parties bringing infringement claims have the option to pursue either statutory or actual damages (or to decline to pursue damages at all). Therefore, instead of a reference to a “calculation of the damages suffered by the party”—which alludes to a calculation of actual damages—the regulations should reference “a description of the damages sought, if any.”

#### **c. 225.4 Production of Documents**

Paragraph (f)(2) regarding electronically stored information was drafted in response to comments filed by the Copyright Alliance as well as MPA, RIAA and SIIA.<sup>8</sup> However, it was

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<sup>8</sup> “These commenters suggested that the regulations make clear that ESI productions must be limited to what is available through searches that a layperson can reasonably handle and should not require the retention of a discovery vendor.” Copyright Claims Board: Active Proceedings and Evidence, 86 Fed. Reg. 69890, 69901 (proposed Dec. 8, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26058.pdf>.

not our intention that parties be *prohibited* from performing more extensive searches or using the assistance of third parties where they deem necessary. Rather, our intention was to prevent the Board from *requiring* that a reasonable search necessarily include more than what could be performed by a layperson or the use of a vendor. We urge the Office to edit 225.4(f)(2)(i) by replacing “shall” with “need.”

Section 225.4(a) should be amended, as follows, to make clear that parties are permitted to withhold privileged documents: Parties in an active proceeding shall use the relevant set of standard production of document requests provided on the Board’s website. Standard production of document requests shall include, **unless privileged or protected from disclosure**, copies of:

#### **4. Records and Publication**

The narrative portion of the NPRM requests comment on whether “informal raw [hearing] transcripts, which may contain various errors, should be added to the official record.” We take the position that hearing transcripts should not be made public as a part of the official record. If the Office decides to permit them, transcripts should not be made public until the parties have been given a reasonable opportunity to review them in order to correct mistakes and request redaction of confidential information.

#### **5. Written Testimony**

Although it may not be appropriate for parties to submit written testimony by filling out a “form,” due to the variety of facts that may be relevant, the CCB should ensure that parties are given clear and specific instructions about how to draft written testimony and what should be included.

#### **6. Hearings**

In the narrative portion of the NPRM, the Office asks about “providing a mechanism for in-person hearings in the circumstance where such a hearing is requested by all parties and all parties can attend.” Section 1506(c)(2) seems to require that hearings take place exclusively through internet-based applications and other telecommunications facilities except in the limited circumstances articulated in that provision. However, if the Office decides to allow for in-person

hearings where requested by all parties, and determines that it is permitted to do so, such in-person hearings should only be permitted to the extent that doing so will not act as an impediment to a speedy resolution of the case.

Section 222.15(f) should be amended to read: Following a hearing on the merits of a case, no additional written testimony or evidence may be submitted to the Board ~~unless at the Board's specific request~~ except with leave of the Board.

We thank the Office for its attention to these comments and its dedication to implementing the CASE Act and ensuring that the Copyright Claims Board is the inexpensive, streamlined, and accessible forum that Congress intended.

Respectfully submitted,

Copyright Alliance	Music Artists Coalition (MAC)
American Photographic Artists (APA)	Music Creators North America (MCNA)
American Society for Collective Rights Licensing, Inc. (ASCRL)	Nashville Songwriters Association International (NSAI)
American Society of Media Photographers (ASMP)	National Press Photographers Association (NPPA)
Authors Guild	North American Nature Photography Association (NANPA)
CreativeFuture	Professional Photographers of America (PPA)
Digital Media Licensing Association (DMLA)	Recording Academy
Graphic Artists Guild	SAG-AFTRA
Independent Book Publishers Association (IBPA)	Society of Composers & Lyricists (SCL)
	Songwriters Guild of America, Inc. (SGA)
	Songwriters of North America (SONA)

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