BEFORE THE
U.S. COPYRIGHT OFFICE

Copyright Claims Board: Active Proceedings and Evidence	**Docket No. 2021-8**

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the request for comments published by the U.S. Copyright Office in the Federal Register on May 17, 2022, regarding the Copyright Claims Board (CCB) procedures for "smaller claims" codified at 37 CFR Part 226.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 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.

In promulgating the final rule on Active Proceedings and Evidence, the Copyright Office made significant changes to the proposed rules regarding smaller claims proceedings. We applaud the Office for its responsiveness to concerns raised by the copyright community and agree with the Office that the final rule's "updated, streamlined procedure for smaller claims substantially addresses commenters' concerns, will provide a clear alternative to both the CCB's standard proceeding and to Federal litigation, and will ultimately incentivize claimants to use the CCB's smaller claims procedures where appropriate."

Of the 239 small claims proceedings filed with the CCB as of November 11, 2022, 91 of those proceedings have been filed as "smaller claims"—approximately 38%. While it is still early, it is encouraging to see that a substantial number of claimants are interested in taking advantage of the

smaller claims process. We welcome the opportunity to submit additional written comments on this and other CCB final rules as we continue to review the regulations, observe how the regulations operate in practice, and have more qualitative and quantitative data to consider. In the meantime, we offer the following comments on the smaller claims regulations:

Comments on Section 226.2

The regulations in 37 CFR 226.2 state that "[a] claimant may request consideration of a claim under the smaller claim procedures in this part at the time of filing a claim. The claimant may change its choice as to whether to have its claim considered under the smaller claim procedures…" As written, the language seems to suggest that a claimant who initially chooses to have the proceeding considered under the smaller claims procedures may be able to change their choice and have the proceeding considered under standard small claims procedures, but that a claimant who initially opts to have the proceeding considered under the standard small claims procedures may not have that same opportunity. This reading is further supported by the fact that there is no mention of an opportunity for a claimant to change their choice outside of Part 226 – "Smaller Claims" or § 226.2 "Requesting a smaller claims proceeding." In contrast to the regulatory text, the language used in the CCB Handbook[1] suggests that the Office intends to allow claimants the opportunity to switch their initial election in both contexts. If that is the case, we suggest that the Office clarify the language in section 226.2 and also include reference to the opportunity for claimants to change their choice in another section of the regulations (for example, in Part 222).

Relatedly, the CCB Handbook states that "[o]nce you have served your initial notice and claim on any other parties, you cannot change your choice of a standard or smaller claims track."[2] This conflicts with the language in section 226.2, which states that "[o]nce the claimant has served the *initial notice* on any respondent, the claimant may not amend its choice without consent of the other parties and leave of the Board." With regard to that same sentence in section 226.2, as written, the regulations suggest that a claimant could change their choice at *any point* after service of the initial notice (including well into a proceeding). While we recognize that the Handbook has no legal

[1] "Once you have served your initial notice and claim on any other parties, you cannot change your choice of a standard or smaller claims track." 4 UNITED STATES COPYRIGHT OFFICE, CCB HANDBOOK: SMALLER CLAIMS 5 (2022), https://ccb.gov/handbook/Smaller-Claims.pdf.

[2] *Id.*

effect, we agree with the approach articulated in the Handbook. We believe that the ability for a claimant to change their choice should terminate at a specific time and that the specific time should be upon service of the initial notice. A claimant should not be permitted to change their choice after notice has been served on a respondent, regardless of whether the respondent might consent. If, after serving notice, the claimant determines that they wish to switch from a smaller claims proceeding to a standard small claims proceeding, or vice versa, the claimant has the ability to withdraw their claim and file it again to reflect the new choice.

Comments on Section 226.4[3]

The last sentence in 226.4(b) says, "The Board or presiding Officer may issue additional scheduling orders or amend the scheduling order at its own discretion or upon request of a party pursuant to § 222.11(d) of this subchapter." It appears that "additional scheduling orders" are distinct from an amended scheduling order, and there does not appear to be a parallel regulation permitting "additional scheduling orders" for standard small claims proceedings (see 222.11(d)). We ask that the Office clarify the distinction between additional scheduling orders and an amended scheduling order and explain the context in which the Board would issue additional scheduling orders rather than amend an existing scheduling order.

The first sentence of section 226.4(d)(3) says, "If a party fails to submit evidence in accordance with the presiding Officer's request, or submits evidence that was not served on the other parties or provided by the other side, the presiding Officer may discuss *such failure* with the parties during the merits conference…" (emphasis added). The way this sentence is drafted, the phrase "such failure" can only be read to refer back to the first clause (referencing the party's failure to submit evidence) and not the second clause (referencing a party's submission of evidence that was not served on the other parties) since the latter is not phrased as a "failure." The Office likely intends that the presiding Officer be able to discuss both the failure to submit evidence in accordance with the request and submission of evidence without proper service during the merits conference. If this is correct, we recommend that the language be clarified. In the context of permitting the presiding Officer to draw an adverse inference, the second sentence in 226.4(d)(3) also references "the failure to submit evidence" without reference to submission of evidence without proper service (and the same is true of 226.4(e)). It is unclear whether the Office intends

[3] In section 226.4(d)(2)(iii), the word "to" is missing between the words "relating" and "the witness's."

that the presiding Officer be permitted to draw an adverse inference in a situation where a party submits evidence that was not served on the other parties or provided by the other side. If that is the intent, we recommend that the language be clarified.

We appreciate the opportunity to submit these comments and the Copyright Office's responsiveness to concerns raised by the copyright community. We are happy to discuss these matters more thoroughly or answer any questions about these comments. As the CCB is still quite new, we also welcome the opportunity to submit additional written comments on this and other CCB final rules to address other concerns that might arise in the coming months and years.

Respectfully submitted,

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