

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of Copyright Claims Board: Active Proceedings and Evidence)	Docket No. 2021-8
)	Submitted February 7, 2022

**COMMENTS OF THE
MOTION PICTURE ASSOCIATION, INC. AND RECORDING INDUSTRY
ASSOCIATION OF AMERICA, INC.**

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”) and the Recording Industry Association of America, Inc. (“RIAA”) (together, “Commenters”) are pleased to provide comments in response to the Notice of Proposed Rulemaking (“NPRM”) regarding Copyright Claims Board: Active Proceedings and Evidence, published at 86 Fed. Reg. 69,890 (Dec. 8, 2021) (Docket No. 2021-8).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA’s member companies are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The RIAA is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. Its membership—which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses—creates, manufactures and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

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.

However, after reviewing this NPRM, Commenters have significant concerns that the proposed rules and procedures are much too complex to fulfill the original goal of the system: to provide a forum for relatively quick and inexpensive resolution of small-dollar copyright claims, and which would be navigable even by *pro se* litigants. Instead, the proposed rules are much closer to the full Federal Rules of Civil Procedure than to the informal processes followed in existing state-court small-claims systems, which typically permit *no* discovery and *no* motion

practice. Given the amount of discovery and motion practice permitted under the proposed rule, the costs of litigation would, in many if not most cases, quickly exceed the amount in dispute, providing little incentive for either prospective claimants or respondents to opt for this forum.

In considering revisions to the proposed rule, Commenters urge that the Office, wherever possible and while still respecting the rights of all litigants, strive for simplicity. Complex rules and procedures, and extensive discovery, are simply not necessary or appropriate for the type of cases that will be litigated in CCB, where the universe of relevant documents and information will typically be quite limited. The drafters of the CASE Act made the eminently reasonable decision to design a system that emphasizes speed, cost savings, and ease-of-use, and the implementing regulations should conform to that decision wherever possible.

Below, Commenters focus on a small number of topics that we believe are most important in creating a system that best achieves the goals of the CASE Act. Commenters also endorse the comments of The Copyright Alliance, of which both MPA and RIAA are members, and which address some of the same topics, and others, in more detail.

II. “SMALLER CLAIMS” SHOULD BE TREATED LIKE TRUE SMALL CLAIMS CASES.

Commenters believe it is especially important to get the rules for “smaller claims”—those that do not exceed \$5,000—right, because we anticipate a heavy volume of such claims in CCB, perhaps even more than “regular” claims. Among the strongest proponents of creating a small-claims system were photographers, whose works are often infringed on a one-off basis, resulting in the loss of a license fee of a few hundred or a few thousand dollars. If CCB is to provide an efficient forum for resolution of such claims, it must provide a significantly streamlined process similar to a true state small-claims system, not the slightly simplified version of the Federal Rules of Civil Procedure in the Office’s proposed rule.

The NPRM’s proposed rules for smaller claims are much too complex and allow much too much discovery. The rules proposed for such claims are nearly identical to those for larger claims, except that: 1) no “additional” discovery would be permitted beyond the standard interrogatories, requests for admission, and requests for production of documents; 2) no experts would be allowed; and 3) the case would be heard by only one Copyright Claims Officer (“CCO”). But permitting even the standard types of discovery in these “smaller” cases is too much; the costs involved with propounding, responding to, and potentially disputing discovery matters through motion practice, would quickly exceed the maximum \$5,000 in dispute.

Instead, Commenters believe these smaller claims should be treated similarly to true small claims cases in existing state small-claims systems, where there is *no* discovery or motion practice permitted. Rather, the litigants simply appear in court, explain to the judge what happened, submit any supporting evidence, have witnesses provide other relevant evidence, answer questions from the court, and get a quick ruling. *See, e.g.*, Cal. Civ. Proc. Code §116.310(b) (“The pretrial discovery procedures described in Section 2019.010 are not permitted in small claims actions.”).¹ Commenters propose a system that would work as follows: After the initial claim designating the case as a “smaller claim” is processed and the respondent does not opt out, the claimant would file a “trial brief” not to exceed ten pages, explaining why it is entitled to relief, and attaching any relevant evidence in its possession (including witness statements). The respondent would then file its trial brief, attaching supporting evidence, and the claimant would get a five-page reply. At that point, the CCO could either decide the case on the

¹ In California, small claims brought by individuals are limited to \$10,000 and by corporations to \$5,000. *See* Cal. Civ. Proc. Code §§116.220-116.221. For a plain-English explanation of the process in Los Angeles County, see the “How do I present my case to the judge?” section of the self-help website (“You will only have a few minutes to give your side of the dispute. Give the judge an overview of your case and briefly make your points. The judge is only interested in hearing the facts of your dispute. Have your evidence available if the judge asks for it.”), available at <https://www.lacourt.org/division/smallclaims/SC0039.aspx>; *see also generally* SMALL CLAIMS Q&A, available at <https://www.lacourt.org/division/smallclaims/smallclaims.aspx>.

papers and issue a short written decision; or, if he or she believes it necessary, could set a hearing (by video) before ruling.

III. DISCOVERY MUST BE FURTHER CABINED.

The proposed rules for “regular” claims (i.e., not “smaller” claims) likewise permit too much discovery. If implemented without significant cabining, the discovery rules for CCB would result in significant burdens for litigants to propound, respond to, and dispute discovery, overwhelming the amount in dispute, undermining the effectiveness of the system, and leading both potential claimants and respondents to opt out. Commenters propose the following changes to further narrow permitted discovery.

A. Narrow Tailoring Should Apply to All Discovery.

Proposed Section 225.1(d)(1) provides:

Except for the standard discovery provided in this part, any additional discovery requested must be narrowly tailored to the issues at hand, not covered by the standard discovery set forth in this part, highly likely to lead to the production of information relevant to the core issues of the matter, and not result in an undue burden on the party responding to the request.

(emphasis added). Commenters agree with the thrust of this provision, but believe it should apply to *all* discovery in CCB—not just to the “additional discovery” permitted beyond the standard forms. In addition, this provision should specify that discovery must be limited to the facts and circumstances of the particular case, and should not extend to *other* transactions in which either party may have engaged, even if they are similar to the case at bar—a discovery category that, in regular federal-court litigation, often results in significant disputes over scope, burden, and

confidentiality, which are difficult and very expensive to resolve. The scope of discovery must remain very narrow and targeted if CCB is to fulfill its goal.

Relatedly, if read literally, certain of the categories of documents listed in proposed Section 225.4(a) seem to encompass large volumes of documents that are *not* directly related to the dispute itself. In particular, “[a]ll other documents of which the party is reasonably aware that conflict with the party’s claims or defenses” and “[a]ll documents related to damages” could be read to include the type of “other similar transaction” evidence that is not appropriate for this small-claims forum. Again, this problem can be fixed by making the limitations in proposed section 225.1(d)(1) applicable to *all* discovery in CCB.

And lastly, proposed Section 225.4(f)(1)’s requirement that, in responding to document requests, parties must search “the files of any of the party’s agents, employees, representatives, or others acting on the party’s behalf” goes too far. While such broad searches may be necessary in regular federal litigation where hundreds of thousands or millions of dollars is at stake, it is neither necessary nor appropriate in the small-claims context, where the cost and burden associated with such extensive searching would be wildly out of proportion to the amounts in dispute. Searches for responsive documents should be limited to the responding party itself.

B. No Requests for Admission

Requests for admission can be useful tools for narrowing issues before trial in large, complex cases. But they are also prone to use of tendentious language by both the propounder of the RFA as well as the responding party, resulting in semantic battles between sophisticated attorneys that are unlikely to advance the adjudication of a copyright small-claims matter. On balance, Commenters do not believe RFAs are appropriate for the CCB setting, especially because their nature does not permit the use of standard forms. Drafting and responding to RFAs would consume significant time, and likely for little benefit. And Commenters have serious

doubts that many *pro se* litigants, either claimants or respondents, would be able to engage in meaningful exchange of RFAs and responses—or engage in motion practice to resolve potential disputes about them. RFAs and responses to them tend to be written in particularly legalistic language, and risk becoming a trap for the unwary *pro se* litigant. To the extent the Office believes Section 1506(n) of the CASE Act would not permit the complete elimination of RFAs, Commenters suggest that they only be permitted where both parties are represented by counsel, or, as an alternative, that they only be permitted after obtaining leave of the CCB to propound specific RFAs.

C. No Depositions

Neither the proposed rule nor the CASE Act mentions depositions as a permissible form of discovery, and, if it is the Office’s intent that depositions not be permitted, Commenters agree. However, to foreclose any possibility of depositions, the rules should simply state, “No depositions are permitted in CCB proceedings.” As Commenters previously stated in our April 26, 2021 comments in response to the CASE Act Notification of Inquiry, “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.”²

D. Further limit on experts

While Commenters acknowledge that expert testimony is mentioned in the CASE Act, *see* 17 U.S.C. §1506(o)(2), and appreciates that the proposed rule provides that “[t]he use of

² *See* Motion Picture Association, Inc., Recording Industry Ass’n of America, Inc., and Software and Information Industry Ass’n NOI Initial Comments, at 13, *available at* <https://www.regulations.gov/comment/COLC-2021-0001-0023>

expert witnesses in proceedings before the Board is highly disfavored and requests shall be rarely granted,” proposed Section 225.1(e), we suggest one additional safeguard. Specifically, the regulations should state that if a claimant intends to use an expert, it must disclose that intent in its initial claim, giving the potential respondent the ability to consider that factor in deciding whether to opt out, or potentially to retain its own expert to rebut the claimant’s. If the claimant fails to note an intent to use an expert in the initial claim, it should be precluded from using one in the case. Likewise, if the respondent intends to use an expert, it should be required to disclose that intent before submitting a response to the claim, giving the claimant an opportunity to voluntarily dismiss its claim if it does not wish to participate in a small-claims proceeding that includes experts.

IV. IN THE DEFAULT CONTEXT, THE CCB SHOULD NOT RAISE DEFENSES FOR AN ABSENT RESPONDENT.

Proposed section 227.3(a) provides that in considering evidence presented by the claimant in the default context, “the Board shall consider whether the respondent has a meritorious defense.” Commenters respectfully disagree; the CCB should not step into the shoes of the defaulting respondent and raise defenses on its behalf. First, such consideration of defenses not raised by the respondent would contravene the CASE Act, which specifies the scope of CCB’s role in adjudicating defaults, which does not include raising defenses for the absent respondent. *See* 17 U.S.C. §1506(u)(1) (“The Copyright Claims Board shall require the claimant to submit relevant evidence and other information in support of the claimant’s claim and any asserted damages and, upon review of such evidence and any other requested submissions from the claimant, shall 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.”). In the analogous federal-court litigation context, “a

party's default is deemed to constitute a concession of all well pleaded allegations of liability.” *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). And courts **do not** consider potential affirmative defenses in the default context. *See* Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 6-D (“As entry of default establishes liability, it also precludes affirmative defenses such as set-off claims, comparative fault, failure to mitigate damages, etc.”) (citing *Greyhound Exhibitgroup*, 973 F.2d at 159); *cf.* Fed. R. Civ. P. 8(b)(1) (“In responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party.”); *id.* R. 8(c) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense....”).

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ben Sheffner', with a long horizontal line extending to the right.

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