

# COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT OF 2019

OCTOBER 22, 2019.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

[To accompany H.R. 2426]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2426) to amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:  
Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Copyright Alternative in Small-Claims Enforcement Act of 2019” or the “CASE Act of 2019”.

**SEC. 2. COPYRIGHT SMALL CLAIMS.**

(a) IN GENERAL.—Title 17, United States Code, is amended by adding at the end the following:

**“CHAPTER 15—COPYRIGHT SMALL CLAIMS**

“Sec.

“1501. Definitions.

“1502. Copyright Claims Board.

“1503. Authority and duties of the Copyright Claims Board.

“1504. Nature of proceedings.

“1505. Registration requirement.

“1506. Conduct of proceedings.

“1507. Effect of proceeding.

“1508. Review and confirmation by district court.

“1509. Relationship to other district court actions.

“1510. Implementation by Copyright Office.

“1511. Funding.

**“§ 1501. Definitions**

“In this chapter—

“(1) the term ‘party’—

“(A) means a party; and

“(B) includes the attorney of a party, as applicable;

“(2) the term ‘claimant’ means the real party in interest that commences a proceeding before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), non-infringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3);

“(3) the term ‘counterclaimant’ means a respondent in a proceeding before the Copyright Claims Board that—

“(A) asserts a permissible counterclaim under section 1504(c)(4) against the claimant in the proceeding; and

“(B) is the real party in interest with respect to the counterclaim described in subparagraph (A); and

“(4) the term ‘respondent’ means any person against whom a proceeding is brought before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), non-infringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3).

**“§ 1502. Copyright Claims Board**

“(a) IN GENERAL.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.

“(b) OFFICERS AND STAFF.—

“(1) COPYRIGHT CLAIMS OFFICERS.—The Register of Copyrights shall recommend 3 full-time Copyright Claims Officers to serve on the Copyright Claims Board in accordance with paragraph (3)(A). The Officers shall be appointed by the Librarian of Congress to such positions after consultation with the Register of Copyrights.

“(2) COPYRIGHT CLAIMS ATTORNEYS.—The Register of Copyrights shall hire not fewer than 2 full-time Copyright Claims Attorneys to assist in the administration of the Copyright Claims Board.

“(3) QUALIFICATIONS.—

“(A) COPYRIGHT CLAIMS OFFICERS.—

“(i) IN GENERAL.—Each Copyright Claims Officer shall be an attorney who has not fewer than 7 years of legal experience.

“(ii) EXPERIENCE.—Two of the Copyright Claims Officers shall have—

“(I) substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims; and

“(II) between those 2 Officers, have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.

“(iii) ALTERNATIVE DISPUTE RESOLUTION.—The Copyright Claims Officer not described in clause (ii) shall have substantial familiarity with copyright law and experience in the field of alternative dispute resolution, including the resolution of litigation matters through that method of resolution.

“(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be an attorney who has not fewer than 3 years of substantial experience in copyright law.

“(4) COMPENSATION.—

“(A) COPYRIGHT CLAIMS OFFICERS.—

“(i) DEFINITION.—In this subparagraph, the term ‘senior level employee of the Federal Government’ means an employee, other than an employee in the Senior Executive Service, the position of whom is classified above GS–15 of the General Schedule.

“(ii) PAY RANGE.—Each Copyright Claims Officer shall be compensated at a rate of pay that is not less than the minimum, and not more than the maximum, rate of pay payable for senior level employees of the Federal Government, including locality pay, as applicable.

“(B) COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be compensated at a rate of pay that is not more than the maximum rate of pay payable for level 10 of GS–15 of the General Schedule, including locality pay, as applicable.

“(5) TERMS.—

“(A) IN GENERAL.—Subject to subparagraph (B), a Copyright Claims Officer shall serve for a renewable term of 6 years.

“(B) INITIAL TERMS.—The terms for the first Copyright Claims Officers appointed under this chapter shall be as follows:

“(i) The first such Copyright Claims Officer appointed shall be appointed for a term of 4 years.

“(ii) The second Copyright Claims Officer appointed shall be appointed for a term of 5 years.

“(iii) The third Copyright Claims Officer appointed shall be appointed for a term of 6 years.

“(6) VACANCIES AND INCAPACITY.—

“(A) VACANCY.—

“(i) IN GENERAL.—If a vacancy occurs in the position of a Copyright Claims Officer, the Librarian of Congress shall, upon the recommendation of and in consultation with the Register of Copyrights, act expeditiously to appoint a Copyright Claims Officer for that position.

“(ii) VACANCY BEFORE EXPIRATION.—An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of the individual was appointed shall be appointed to serve a 6-year term.

“(B) INCAPACITY.—If a Copyright Claims Officer is temporarily unable to perform the duties of the Officer, the Librarian of Congress shall, upon recommendation of and in consultation with the Register of Copyrights, act expeditiously to appoint an interim Copyright Claims Officer to perform such duties during the period of such incapacity.

“(7) SANCTION OR REMOVAL.—Subject to section 1503(b), the Librarian of Congress may sanction or remove a Copyright Claims Officer.

“(8) ADMINISTRATIVE SUPPORT.—The Register of Copyrights shall provide the Copyright Claims Officers and Copyright Claims Attorneys with necessary administrative support, including technological facilities, to carry out the duties of the Officers and Attorneys under this chapter.

“(9) LOCATION OF COPYRIGHT CLAIMS BOARD.—The offices and facilities of the Copyright Claims Officers and Copyright Claims Attorneys shall be located at the Copyright Office.

**“§ 1503. Authority and duties of the Copyright Claims Board**

“(a) FUNCTIONS.—

“(1) COPYRIGHT CLAIMS OFFICERS.—Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Officers shall be as follows:

“(A) To render determinations on the civil copyright claims, counterclaims, and defenses that may be brought before the Officers under this chapter.

“(B) To ensure that claims, counterclaims, and defenses are properly asserted and otherwise appropriate for resolution by the Copyright Claims Board.

“(C) To manage the proceedings before the Officers and render rulings pertaining to the consideration of claims, counterclaims, and defenses, including with respect to scheduling, discovery, evidentiary, and other matters.

“(D) To request, from participants and nonparticipants in a proceeding, the production of information and documents relevant to the resolution of a claim, counterclaim, or defense.

“(E) To conduct hearings and conferences.

“(F) To facilitate the settlement by the parties of claims and counter-claims.

“(G)(i) To award monetary relief; and

“(ii) to include in the determinations of the Officers a requirement that certain activities under section 1504(e)(2) cease or be mitigated, if the party to undertake the applicable measure has so agreed.

“(H) To provide information to the public concerning the procedures and requirements of the Copyright Claims Board.

“(I) To maintain records of the proceedings before the Officers, certify official records of such proceedings as needed, and, as provided in section 1506(t), make the records in such proceedings available to the public.

“(J) To carry out such other duties as are set forth in this chapter.

“(K) When not engaged in performing the duties of the Officers set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

“(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Attorneys shall be as follows:

“(A) To provide assistance to the Copyright Claims Officers in the administration of the duties of those Officers under this chapter.

“(B) To provide assistance to members of the public with respect to the procedures and requirements of the Copyright Claims Board.

“(C) To provide information to potential claimants contemplating bringing a permissible action before the Copyright Claims Board about obtaining a subpoena under section 512(h) for the sole purpose of identifying a potential respondent in such an action.

“(D) When not engaged in performing the duties of the Attorneys set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

“(b) INDEPENDENCE IN DETERMINATIONS.—

“(1) IN GENERAL.—The Copyright Claims Board shall render the determinations of the Board in individual proceedings independently on the basis of the records in the proceedings before it and in accordance with the provisions of this title, judicial precedent, and applicable regulations of the Register of Copyrights.

“(2) CONSULTATION.—The Copyright Claims Officers and Copyright Claims Attorneys—

“(A) may consult with the Register of Copyrights on general issues of law; and

“(B) subject to section 1506(x), may not consult with the Register of Copyrights with respect to—

“(i) the facts of any particular matter pending before the Officers and the Attorneys; or

“(ii) the application of law to the facts described in clause (i).

“(3) PERFORMANCE APPRAISALS.—Notwithstanding any other provision of law or any regulation or policy of the Library of Congress or Register of Copyrights, any performance appraisal of a Copyright Claims Officer or Copyright Claims Attorney may not consider the substantive result of any individual determination reached by the Copyright Claims Board as a basis for appraisal except to the extent that result may relate to any actual or alleged violation of an ethical standard of conduct.

“(c) DIRECTION BY REGISTER.—Subject to subsection (b), the Copyright Claims Officers and Copyright Claims Attorneys shall, in the administration of their duties, be under the general direction of the Register of Copyrights.

“(d) INCONSISTENT DUTIES BARRED.—A Copyright Claims Officer or Copyright Claims Attorney may not undertake any duty that conflicts with the duties of the Officer or Attorney in connection with the Copyright Claims Board.

“(e) RECUSAL.—A Copyright Claims Officer or Copyright Claims Attorney shall recuse himself or herself from participation in any proceeding with respect to which the Copyright Claims Officer or Copyright Claims Attorney, as the case may be, has reason to believe that he or she has a conflict of interest.

“(f) EX PARTE COMMUNICATIONS.—Except as may otherwise be permitted by applicable law, any party to a proceeding before the Copyright Claims Board shall refrain from ex parte communications with the Copyright Claims Officers and the Register of Copyrights concerning the substance of any active or pending proceeding before the Copyright Claims Board.

“(g) JUDICIAL REVIEW.—Actions of the Copyright Claims Officers and Register of Copyrights under this chapter in connection with the rendering of any determina-

tion are subject to judicial review as provided under section 1508(c) and not under chapter 7 of title 5.

**“§ 1504. Nature of proceedings**

“(a) VOLUNTARY PARTICIPATION.—Participation in a Copyright Claims Board proceeding shall be on a voluntary basis in accordance with this chapter and the right of any party to instead pursue a claim, counterclaim, or defense in a district court of the United States or any other court, and to seek a jury trial, shall be preserved. The rights, remedies, and limitations under this section may not be waived except in accordance with this chapter.

“(b) STATUTE OF LIMITATIONS.—

“(1) IN GENERAL.—A proceeding may not be maintained before the Copyright Claims Board unless the proceeding is commenced, in accordance with section 1506(e), before the Copyright Claims Board within 3 years after the claim accrued.

“(2) TOLLING.—Subject to section 1507(a), a proceeding commenced before the Copyright Claims Board shall toll the time permitted under section 507(b) for the commencement of an action on the same claim in a district court of the United States during the period in which the proceeding is pending.

“(c) PERMISSIBLE CLAIMS, COUNTERCLAIMS, AND DEFENSES.—The Copyright Claims Board may render determinations with respect to the following claims, counterclaims, and defenses, subject to such further limitations and requirements, including with respect to particular classes of works, as may be set forth in regulations established by the Register of Copyrights:

“(1) A claim for infringement of an exclusive right in a copyrighted work provided under section 106 by the legal or beneficial owner of the exclusive right at the time of the infringement for which the claimant seeks damages, if any, within the limitations set forth in subsection (e)(1).

“(2) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106, consistent with section 2201 of title 28.

“(3) A claim under section 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter notification seeking to replace removed or disabled material, except that any remedies relating to such a claim in a proceeding before the Copyright Claims Board shall be limited to those available under this chapter.

“(4) A counterclaim that is asserted solely against the claimant in a proceeding—

“(A) pursuant to which the counterclaimant seeks damages, if any, within the limitations set forth in subsection (e)(1); and

“(B) that—

“(i) arises under section 106 or section 512(f) and out of the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), a claim of noninfringement brought under paragraph (2), or a claim of misrepresentation brought under paragraph (3); or

“(ii) arises under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), if the agreement could affect the relief awarded to the claimant.

“(5) A legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.

“(6) A single claim or multiple claims permitted under paragraph (1), (2), or (3) by one or more claimants against one or more respondents, but only if all claims asserted in any one proceeding arise out of the same allegedly infringing activity or continuous course of infringing activities and do not, in the aggregate, result in the recovery of such claim or claims for damages that exceed the limitations under subsection (e)(1).

“(d) EXCLUDED CLAIMS.—The following claims and counterclaims are not subject to determination by the Copyright Claims Board:

“(1) A claim or counterclaim that is not a permissible claim or counterclaim under subsection (c).

“(2) A claim or counterclaim that has been finally adjudicated by a court of competent jurisdiction or that is pending before a court of competent jurisdiction, unless that court has granted a stay to permit that claim or counterclaim to proceed before the Copyright Claims Board.

“(3) A claim or counterclaim by or against a Federal or State governmental entity.

“(4) A claim or counterclaim asserted against a person or entity residing outside of the United States, except in a case in which the person or entity initiated the proceeding before the Copyright Claims Board and is subject to counterclaims under this chapter.

“(e) PERMISSIBLE REMEDIES.—

“(1) MONETARY RECOVERY.—

“(A) ACTUAL DAMAGES, PROFITS, AND STATUTORY DAMAGES FOR INFRINGEMENT.—With respect to a claim or counterclaim for infringement of copyright, and subject to the limitation on total monetary recovery under subparagraph (D), the Copyright Claims Board may award either of the following:

“(i) Actual damages and profits determined in accordance with section 504(b), with that award taking into consideration, in appropriate cases, whether the infringing party has agreed to cease or mitigate the infringing activity under paragraph (2).

“(ii) Statutory damages, which shall be determined in accordance with section 504(c), subject to the following conditions:

“(I) With respect to works timely registered under section 412, so that the works are eligible for an award of statutory damages in accordance with that section, the statutory damages may not exceed \$15,000 for each work infringed.

“(II) With respect to works not timely registered under section 412, but eligible for an award of statutory damages under this section, statutory damages may not exceed \$7,500 per work infringed, or a total of \$15,000 in any 1 proceeding.

“(III) The Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages.

“(IV) The Copyright Claims Board may consider, as an additional factor in awarding statutory damages, whether the infringer has agreed to cease or mitigate the infringing activity under paragraph (2).

“(B) ELECTION OF DAMAGES.—With respect to a claim or counterclaim of infringement, at any time before final determination is rendered, and notwithstanding the schedule established by the Copyright Claims Board under section 1506(k), the claimant or counterclaimant shall elect—

“(i) to recover actual damages and profits or statutory damages under subparagraph (A); or

“(ii) not to recover damages.

“(C) DAMAGES FOR OTHER CLAIMS.—Damages for claims and counterclaims other than infringement claims, such as those brought under section 512(f), shall be subject to the limitation under subparagraph (D).

“(D) LIMITATION ON TOTAL MONETARY RECOVERY.—Notwithstanding any other provision of law, a party that pursues any one or more claims or counterclaims in any single proceeding before the Copyright Claims Board may not seek or recover in that proceeding a total monetary recovery that exceeds the sum of \$30,000, exclusive of any attorneys’ fees and costs that may be awarded under section 1506(y)(2).

“(2) AGREEMENT TO CEASE CERTAIN ACTIVITY.—In a determination of the Copyright Claims Board, the Board shall include a requirement to cease conduct if, in the proceeding relating to the determination—

“(A) a party agrees—

“(i) to cease activity that is found to be infringing, including removing or disabling access to, or destroying, infringing materials; or

“(ii) to cease sending a takedown notice or counter notice under section 512 to the other party regarding the conduct at issue before the Board if that notice or counter notice was found to be a knowing material misrepresentation under section 512(f); and

“(B) the agreement described in subparagraph (A) is reflected in the record for the proceeding.

“(3) ATTORNEYS’ FEES AND COSTS.—Notwithstanding any other provision of law, except in the case of bad faith conduct as provided in section 1506(y)(2), the parties to proceedings before the Copyright Claims Board shall bear their own attorneys’ fees and costs.

“(f) JOINT AND SEVERAL LIABILITY.—Parties to a proceeding before the Copyright Claims Board may be found jointly and severally liable if all such parties and relevant claims or counterclaims arise from the same activity or activities.

“(g) PERMISSIBLE NUMBER OF CASES.—The Register of Copyrights may establish regulations relating to the permitted number of proceedings each year by the same

claimant under this chapter, in the interests of justice and the administration of the Copyright Claims Board.

**“§ 1505. Registration requirement**

“(a) APPLICATION OR CERTIFICATE.—A claim or counterclaim alleging infringement of an exclusive right in a copyrighted work may not be asserted before the Copyright Claims Board unless—

“(1) the legal or beneficial owner of the copyright has first delivered a completed application, a deposit, and the required fee for registration of the copyright to the Copyright Office; and

“(2) a registration certificate has either been issued or has not been refused.

“(b) CERTIFICATE OF REGISTRATION.—Notwithstanding any other provision of law, a claimant or counterclaimant in a proceeding before the Copyright Claims Board shall be eligible to recover actual damages and profits or statutory damages under this chapter for infringement of a work if the requirements of subsection (a) have been met, except that—

“(1) the Copyright Claims Board may not render a determination in the proceeding until—

“(A) a registration certificate with respect to the work has been issued by the Copyright Office, submitted to the Copyright Claims Board, and made available to the other parties to the proceeding; and

“(B) the other parties to the proceeding have been provided an opportunity to address the registration certificate;

“(2) if the proceeding may not proceed further because a registration certificate for the work is pending, the proceeding shall be held in abeyance pending submission of the certificate to the Copyright Claims Board, except that, if the proceeding is held in abeyance for more than 1 year, the Copyright Claims Board may, upon providing written notice to the parties to the proceeding, and 30 days to the parties to respond to the notice, dismiss the proceeding without prejudice; and

“(3) if the Copyright Claims Board receives notice that registration with respect to the work has been refused, the proceeding shall be dismissed without prejudice.

“(c) PRESUMPTION.—In a case in which a registration certificate shows that registration with respect to a work was issued not later than 5 years after the date of the first publication of the work, the presumption under section 410(c) shall apply in a proceeding before the Copyright Claims Board, in addition to relevant principles of law under this title.

“(d) REGULATIONS.—In order to ensure that actions before the Copyright Claims Board proceed in a timely manner, the Register of Copyrights shall establish regulations allowing the Copyright Office to make a decision, on an expedited basis, to issue or deny copyright registration for an unregistered work that is at issue before the Board.

**“§ 1506. Conduct of proceedings**

“(a) IN GENERAL.—

“(1) APPLICABLE LAW.—Proceedings of the Copyright Claims Board shall be conducted in accordance with this chapter and regulations established by the Register of Copyrights under this chapter, in addition to relevant principles of law under this title.

“(2) CONFLICTING PRECEDENT.—If it appears that there may be conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States, or, if the action could have been brought in more than 1 such jurisdiction, the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue.

“(b) RECORD.—The Copyright Claims Board shall maintain records documenting the proceedings before the Board.

“(c) CENTRALIZED PROCESS.—Proceedings before the Copyright Claims Board shall—

“(1) be conducted at the offices of the Copyright Claims Board without the requirement of in-person appearances by parties or others; and

“(2) take place by means of written submissions, hearings, and conferences carried out through internet-based applications and other telecommunications facilities, except that, in cases in which physical or other nontestimonial evidence material to a proceeding cannot be furnished to the Copyright Claims Board through available telecommunications facilities, the Copyright Claims Board may make alternative arrangements for the submission of such evidence that do not prejudice any other party to the proceeding.

“(d) REPRESENTATION.—A party to a proceeding before the Copyright Claims Board may be, but is not required to be, represented by—

“(1) an attorney; or

“(2) a law student who is qualified under applicable law governing representation by law students of parties in legal proceedings and who provides such representation on a pro bono basis.

“(e) COMMENCEMENT OF PROCEEDING.—In order to commence a proceeding under this chapter, a claimant shall, subject to such additional requirements as may be prescribed in regulations established by the Register of Copyrights, file a claim with the Copyright Claims Board, that—

“(1) includes a statement of material facts in support of the claim;

“(2) is certified under subsection (y)(1); and

“(3) is accompanied by a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights.

“(f) REVIEW OF CLAIMS AND COUNTERCLAIMS.—

“(1) CLAIMS.—Upon the filing of a claim under subsection (e), the claim shall be reviewed by a Copyright Claims Attorney to ensure that the claim complies with this chapter and applicable regulations, subject to the following:

“(A) If the claim is found to comply, the claimant shall be notified regarding that compliance and instructed to proceed with service of the claim under subsection (g).

“(B) If the claim is found not to comply, the claimant shall be notified that the claim is deficient and be permitted to file an amended claim not later than 30 days after the date on which the claimant receives the notice, without the requirement of an additional filing fee. If the claimant files a compliant claim within that 30-day period, the claimant shall be so notified and be instructed to proceed with service of the claim. If the claim is refiled within that 30-day period and still fails to comply, the claimant shall again be notified that the claim is deficient and shall be provided a second opportunity to amend the claim within 30 days after the date of that second notice, without the requirement of an additional filing fee. If the claim is refiled again within that second 30-day period and is compliant, the claimant shall be so notified and shall be instructed to proceed with service of the claim, but if the claim still fails to comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the proceeding shall be dismissed without prejudice. The Copyright Claims Board shall also dismiss without prejudice any proceeding in which a compliant claim is not filed within the applicable 30-day period.

“(C)(i) Subject to clause (ii), for purposes of this paragraph, a claim against an online service provider for infringement by reason of the storage of or referral or linking to infringing material that may be subject to the limitations on liability set forth in subsection (b), (c), or (d) of section 512 shall be considered noncompliant unless the claimant affirms in the statement required under subsection (e)(1) of this section that the claimant has previously notified the service provider of the claimed infringement in accordance with subsection (b)(2)(E), (c)(3), or (d)(3) of section 512, as applicable, and the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice.

“(ii) If a claim is found to be noncompliant under clause (i), the Copyright Claims Board shall provide the claimant with information concerning the service of such a notice under the applicable provision of section 512.

“(2) COUNTERCLAIMS.—Upon the filing and service of a counterclaim, the counterclaim shall be reviewed by a Copyright Claims Attorney to ensure that the counterclaim complies with the provisions of this chapter and applicable regulations. If the counterclaim is found not to comply, the counterclaimant and the other parties to the proceeding shall be notified that the counterclaim is deficient, and the counterclaimant shall be permitted to file and serve an amended counterclaim within 30 days after the date of such notice. If the counterclaimant files and serves a compliant counterclaim within that 30-day period, the counterclaimant and such other parties shall be so notified. If the counterclaim is refiled and served within that 30-day period but still fails to comply, the counterclaimant and such other parties shall again be notified that the counterclaim is deficient, and the counterclaimant shall be provided a second opportunity to amend the counterclaim within 30 days after the date of the second notice. If the counterclaim is refiled and served again within that second 30-day period and is compliant, the counterclaimant and such other parties shall be so notified, but if the counterclaim still fails to comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the counterclaim, but not the proceeding, shall be dismissed without prejudice.



“(3) DISMISSAL FOR UNSUITABILITY.—The Copyright Claims Board shall dismiss a claim or counterclaim without prejudice if, upon reviewing the claim or counterclaim, or at any other time in the proceeding, the Copyright Claims Board concludes that the claim or counterclaim is unsuitable for determination by the Copyright Claims Board, including on account of any of the following:

- “(A) The failure to join a necessary party.
- “(B) The lack of an essential witness, evidence, or expert testimony.
- “(C) The determination of a relevant issue of law or fact that could exceed either the number of proceedings the Copyright Claims Board could reasonably administer or the subject matter competence of the Copyright Claims Board.

“(g) SERVICE OF NOTICE AND CLAIMS.—In order to proceed with a claim against a respondent, a claimant shall, within 90 days after receiving notification under subsection (f) to proceed with service, file with the Copyright Claims Board proof of service on the respondent. In order to effectuate service on a respondent, the claimant shall cause notice of the proceeding and a copy of the claim to be served on the respondent, either by personal service or pursuant to a waiver of personal service, as prescribed in regulations established by the Register of Copyrights. Such regulations shall include the following requirements:

“(1) The notice of the proceeding shall adhere to a prescribed form and shall set forth the nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out, and the consequences of opting out and not opting out, including a prominent statement that, by not opting out within 60 days after receiving the notice, the respondent—

“(A) loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States; and

“(B) waives the right to a jury trial regarding the dispute.

“(2) The copy of the claim served on the respondent shall be the same as the claim that was filed with the Copyright Claims Board.

“(3) Personal service of a notice and claim may be effected by an individual who is not a party to the proceeding and is older than 18 years of age.

“(4) An individual, other than a minor or incompetent individual, may be served by—

“(A) complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made;

“(B) delivering a copy of the notice and claim to the individual personally;

“(C) leaving a copy of the notice and claim at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

“(D) delivering a copy of the notice and claim to an agent designated by the respondent to receive service of process or, if not so designated, an agent authorized by appointment or by law to receive service of process.

“(5)(A) A corporation, partnership, or unincorporated association that is subject to suit in courts of general jurisdiction under a common name shall be served by delivering a copy of the notice and claim to its service agent. If such service agent has not been designated, service shall be accomplished—

“(i) by complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made; or

“(ii) by delivering a copy of the notice and claim to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process in an action brought in courts of general jurisdiction in the State where service is made and, if the agent is one authorized by statute and the statute so requires, by also mailing a copy of the notice and claim to the respondent.

“(B) A corporation, partnership or unincorporated association that is subject to suit in courts of general jurisdiction under a common name may elect to designate a service agent to receive notice of a claim against it before the Copyright Claims Board by complying with requirements that the Register of Copyrights shall establish by regulation. The Register of Copyrights shall maintain a current directory of service agents that is available to the public for inspection, including through the internet, and may require such corporations, partnerships, and unincorporated associations designating such service agents to pay a fee to cover the costs of maintaining the directory.

“(6) In order to request a waiver of personal service, the claimant may notify a respondent, by first class mail or by other reasonable means, that a proceeding has been commenced, such notice to be made in accordance with regulations established by the Register of Copyrights, subject to the following:

“(A) Any such request shall be in writing, shall be addressed to the respondent, and shall be accompanied by a prescribed notice of the proceeding, a copy of the claim as filed with the Copyright Claims Board, a prescribed form for waiver of personal service, and a prepaid or other means of returning the form without cost.

“(B) The request shall state the date on which the request is sent, and shall provide the respondent a period of 30 days, beginning on the date on which the request is sent, to return the waiver form signed by the respondent. The signed waiver form shall, for purposes of this subsection, constitute acceptance and proof of service as of the date on which the waiver is signed.

“(7)(A) A respondent’s waiver of personal service shall not constitute a waiver of the respondent’s right to opt out of the proceeding.

“(B) A respondent who timely waives personal service under paragraph (6) and does not opt out of the proceeding shall be permitted a period of 30 days, in addition to the period otherwise permitted under the applicable procedures of the Copyright Claims Board, to submit a substantive response to the claim, including any defenses and counterclaims.

“(8) A minor or an incompetent individual may only be served by complying with State law for serving a summons or like process on such an individual in an action brought in the courts of general jurisdiction of the State where service is made.

“(9) Service of a claim and waiver of personal service may only be effected within the United States.

“(h) NOTIFICATION BY COPYRIGHT CLAIMS BOARD.—The Register of Copyrights shall establish regulations providing for a written notification to be sent by, or on behalf of, the Copyright Claims Board to notify the respondent of a pending proceeding against the respondent, as set forth in those regulations, which shall—

“(1) include information concerning the respondent’s right to opt out of the proceeding, the consequences of opting out and not opting out, and a prominent statement that, by not opting out within 60 days after the date of service under subsection (g), the respondent loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States and waives the right to a jury trial regarding the dispute; and

“(2) be in addition to, and separate and apart from, the notice requirements under subsection (g).

“(i) OPT-OUT PROCEDURE.—Upon being properly served with a notice and claim, a respondent who chooses to opt out of the proceeding shall have a period of 60 days, beginning on the date of service, in which to provide written notice of such choice to the Copyright Claims Board, in accordance with regulations established by the Register of Copyrights. If proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the Copyright Claims Board within that 60-day period, the proceeding shall be deemed an active proceeding and the respondent shall be bound by the determination in the proceeding to the extent provided under section 1507(a). If the respondent opts out of the proceeding during that 60-day period, the proceeding shall be dismissed without prejudice, except that, in exceptional circumstances and upon written notice to the claimant, the Copyright Claims Board may extend that 60-day period in the interests of justice.

“(j) SERVICE OF OTHER DOCUMENTS.—Documents submitted or relied upon in a proceeding, other than the notice and claim, shall be served in accordance with regulations established by the Register of Copyrights.

“(k) SCHEDULING.—Upon confirmation that a proceeding has become an active proceeding, the Copyright Claims Board shall issue a schedule for the future conduct of the proceeding. The schedule shall not specify a time that a claimant or counterclaimant is required make an election of damages that is inconsistent with section 1504(e). A schedule issued by the Copyright Claims Board may be amended by the Copyright Claims Board in the interests of justice.

“(l) CONFERENCES.—One or more Copyright Claims Officers may hold a conference to address case management or discovery issues in a proceeding, which shall be noted upon the record of the proceeding and may be recorded or transcribed.

“(m) PARTY SUBMISSIONS.—A proceeding of the Copyright Claims Board may not include any formal motion practice, except that, subject to applicable regulations and procedures of the Copyright Claims Board—

“(1) the parties to the proceeding may make requests to the Copyright Claims Board to address case management and discovery matters, and submit responses thereto; and

“(2) the Copyright Claims Board may request or permit parties to make submissions addressing relevant questions of fact or law, or other matters, includ-

ing matters raised sua sponte by the Copyright Claims Officers, and offer responses thereto.

“(n) DISCOVERY.—Discovery in a proceeding shall be limited to the production of relevant information and documents, written interrogatories, and written requests for admission, as provided in regulations established by the Register of Copyrights, except that—

“(1) upon the request of a party, and for good cause shown, the Copyright Claims Board may approve additional relevant discovery, on a limited basis, in particular matters, and may request specific information and documents from participants in the proceeding and voluntary submissions from nonparticipants, consistent with the interests of justice;

“(2) upon the request of a party, and for good cause shown, the Copyright Claims Board may issue a protective order to limit the disclosure of documents or testimony that contain confidential information; and

“(3) after providing notice and an opportunity to respond, and upon good cause shown, the Copyright Claims Board may 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.

“(o) EVIDENCE.—The Copyright Claims Board may consider the following types of evidence in a proceeding, and such evidence may be admitted without application of formal rules of evidence:

“(1) Documentary and other nontestimonial evidence that is relevant to the claims, counterclaims, or defenses in the proceeding.

“(2) Testimonial evidence, submitted under penalty of perjury in written form or in accordance with subsection (p), limited to statements of the parties and nonexpert witnesses, that is relevant to the claims, counterclaims, and defenses in a proceeding, except that, in exceptional cases, expert witness testimony or other types of testimony may be permitted by the Copyright Claims Board for good cause shown.

“(p) HEARINGS.—The Copyright Claims Board may conduct a hearing to receive oral presentations on issues of fact or law from parties and witnesses to a proceeding, including oral testimony, subject to the following:

“(1) Any such hearing shall be attended by not fewer than two of the Copyright Claims Officers.

“(2) The hearing shall be noted upon the record of the proceeding and, subject to paragraph (3), may be recorded or transcribed as deemed necessary by the Copyright Claims Board.

“(3) A recording or transcript of the hearing shall be made available to any Copyright Claims Officer who is not in attendance.

“(q) VOLUNTARY DISMISSAL.—

“(1) BY CLAIMANT.—Upon the written request of a claimant that is received before a respondent files a response to the claim in a proceeding, the Copyright Claims Board shall dismiss the proceeding, or a claim or respondent, as requested, without prejudice.

“(2) BY COUNTERCLAIMANT.—Upon written request of a counterclaimant that is received before a claimant files a response to the counterclaim, the Copyright Claims Board shall dismiss the counterclaim, such dismissal to be without prejudice.

“(3) CLASS ACTIONS.—Any party in an active proceeding before the Copyright Claims Board who receives notice of a pending or putative class action, arising out of the same transaction or occurrence, in which that party is a class member may request in writing dismissal of the proceeding before the Board. Upon notice to all claimants and counterclaimants, the Copyright Claims Board shall dismiss the proceeding without prejudice.

“(r) SETTLEMENT.—

“(1) IN GENERAL.—At any time in an active proceeding, some or all of the parties may—

“(A) jointly request a conference with a Copyright Claims Officer for the purpose of facilitating settlement discussions; or

“(B) submit to the Copyright Claims Board an agreement providing for settlement and dismissal of some or all of the claims and counterclaims in the proceeding.

“(2) ADDITIONAL REQUEST.—A submission under paragraph (1)(B) may include a request that the Copyright Claims Board adopt some or all of the terms of the parties’ settlement in a final determination in the proceeding.

“(s) FACTUAL FINDINGS.—Subject to subsection (n)(3), the Copyright Claims Board shall make factual findings based upon a preponderance of the evidence.

“(t) DETERMINATIONS.—

“(1) NATURE AND CONTENTS.—A determination rendered by the Copyright Claims Board in a proceeding shall—

- “(A) be reached by a majority of the Copyright Claims Board;
- “(B) be in writing, and include an explanation of the factual and legal basis of the determination;
- “(C) set forth any terms by which a respondent or counterclaim respondent has agreed to cease infringing activity under section 1504(e)(2);
- “(D) to the extent requested under subsection (r)(2), set forth the terms of any settlement agreed to under subsection (r)(1); and
- “(E) include a clear statement of all damages and other relief awarded, including under subparagraphs (C) and (D).

“(2) DISSENT.—A Copyright Claims Officer who dissents from a decision contained in a determination under paragraph (1) may append a statement setting forth the grounds for that dissent.

“(3) PUBLICATION.—Each final determination of the Copyright Claims Board shall be made available on a publicly accessible website. The Register shall establish regulations with respect to the publication of other records and information relating to such determinations, including the redaction of records to protect confidential information that is the subject of a protective order under subsection (n)(2).

“(4) FREEDOM OF INFORMATION ACT.—All information relating to proceedings of the Copyright Claims Board under this title is exempt from disclosure to the public under section 552(b)(3) of title 5, except for determinations, records, and information published under paragraph (3).

“(u) RESPONDENT’S DEFAULT.—If a proceeding has been deemed an active proceeding but the respondent has failed to appear or has ceased participating in the proceeding, as demonstrated by the respondent’s failure, without justifiable cause, to meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may enter a default determination, including the dismissal of any counterclaim asserted by the respondent, as follows and in accordance with such other requirements as the Register of Copyrights may establish by regulation:

“(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.

“(2) If 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, including email addresses, reflected in the records of the proceeding before the Copyright Claims Board, of the pendency of a default determination by the Copyright Claims Board and of the legal significance of such determination. Such notice shall be accompanied by the proposed default determination and shall provide that the respondent has a period of 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed default determination.

“(3) If the respondent responds to the notice provided under paragraph (2) within the 30-day period provided in such paragraph, the Copyright Claims Board shall consider respondent’s submissions and, after allowing the other parties to address such submissions, maintain, or amend its proposed determination as appropriate, and the resulting determination shall not be a default determination.

“(4) If the respondent fails to respond to the notice provided under paragraph (2), the Copyright Claims Board shall proceed to issue the default determination as a final determination. Thereafter, the respondent may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the default determination.

“(v) CLAIMANT’S FAILURE TO PROCEED.—

“(1) FAILURE TO COMPLETE SERVICE.—If a claimant fails to complete service on a respondent within the 90-day period required under subsection (g), the Copyright Claims Board shall dismiss that respondent from the proceeding without prejudice. If a claimant fails to complete service on all respondents within that 90-day period, the Copyright Claims Board shall dismiss the proceeding without prejudice.

“(2) FAILURE TO PROSECUTE.—If a claimant fails to proceed in an active proceeding, as demonstrated by the claimant’s failure, without justifiable cause, to

meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may, upon providing written notice to the claimant and a period of 30 days, beginning on the date of the notice, to respond to the notice, and after considering any such response, issue a determination dismissing the claimants' claims, which shall include an award of attorneys' fees and costs, if appropriate, under subsection (y)(2). Thereafter, the claimant may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the determination of dismissal.

“(w) REQUEST FOR RECONSIDERATION.—A party may, within 30 days after the date on which the Copyright Claims Board issues a final determination in a proceeding under this chapter, submit a written request for reconsideration of, or an amendment to, such determination if the party identifies a clear error of law or fact material to the outcome, or a technical mistake. After providing the other parties an opportunity to address such request, the Copyright Claims Board shall either deny the request or issue an amended final determination.

“(x) REVIEW BY REGISTER.—If the Copyright Claims Board denies a party a request for reconsideration of a final determination under subsection (w), that party may, within 30 days after the date of such denial, request review of the final determination by the Register of Copyrights in accordance with regulations established by the Register. Such request shall be accompanied by a reasonable filing fee, as provided in such regulations. The review by the Register shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination. After providing the other parties an opportunity to address the request, the Register shall either deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination. Such amended final determination shall not be subject to further consideration or review, other than under section 1508(c).

“(y) CONDUCT OF PARTIES AND ATTORNEYS.—

“(1) CERTIFICATION.—The Register of Copyrights shall establish regulations requiring certification of the accuracy and truthfulness of statements made by participants in proceedings before the Copyright Claims Board.

“(2) BAD FAITH CONDUCT.—Notwithstanding any other provision of law, in any proceeding in which a determination is rendered and it is established that a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, then, unless inconsistent with the interests of justice, the Copyright Claims Board shall in such determination award reasonable costs and attorneys' fees to any adversely affected party of in an amount of not more than \$5,000, except that—

“(A) if an adversely affected party appeared pro se in the proceeding, the award to that party shall be for costs only, in an amount of not more than \$2,500; and

“(B) in extraordinary circumstances, such as where a party has demonstrated a pattern or practice of bad faith conduct as described in this paragraph, the Copyright Claims Board may, in the interests of justice, award costs and attorneys' fees in excess of the limitations under this paragraph.

“(3) ADDITIONAL PENALTY.—If the Board finds that on more than one occasion within a 12-month period a party pursued a claim, counterclaim, or defense before the Copyright Claims Board for a harassing or other improper purpose, or without a reasonable basis in law or fact, that party shall be barred from initiating a claim before the Copyright Claims Board under this chapter for a period of 12 months beginning on the date on which the Board makes such a finding. Any proceeding commenced by that party that is still pending before the Board when such a finding is made shall be dismissed without prejudice, except that if a proceeding has been deemed active under subsection (i), the proceeding shall be dismissed under this paragraph only if the respondent provides written consent thereto.

“(z) REGULATIONS FOR SMALLER CLAIMS.—The Register of Copyrights shall establish regulations to provide for the consideration and determination, by at least one Copyright Claims Officer, of any claim under this chapter in which total damages sought do not exceed \$5,000 (exclusive of attorneys' fees and costs) that are otherwise consistent with this chapter. A determination issued under this subsection shall have the same effect as a determination issued by the entire Copyright Claims Board.

**“§ 1507. Effect of proceeding**

“(a) DETERMINATION.—Subject to the reconsideration and review processes provided under subsections (w) and (x) of section 1506 and section 1508(c), the issuance of a final determination by the Copyright Claims Board in a proceeding, including a default determination or determination based on a failure to prosecute, shall, solely with respect to the parties to such determination, preclude relitigation before any court or tribunal, or before the Copyright Claims Board, of the claims and counterclaims asserted and finally determined by the Board, and may be relied upon for such purpose in a future action or proceeding arising from the same specific activity or activities, subject to the following:

“(1) A determination of the Copyright Claims Board shall not preclude litigation or relitigation as between the same or different parties before any court or tribunal, or the Copyright Claims Board, of the same or similar issues of fact or law in connection with claims or counterclaims not asserted or not finally determined by the Copyright Claims Board.

“(2) A determination of ownership of a copyrighted work for purposes of resolving a matter before the Copyright Claims Board may not be relied upon, and shall not have any preclusive effect, in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.

“(3) Except to the extent permitted under this subsection and section 1508, any determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.

**“(b) CLASS ACTIONS NOT AFFECTED.—**

“(1) IN GENERAL.—A proceeding before the Copyright Claims Board shall not have any effect on a class action proceeding in a district court of the United States, and section 1509(a) shall not apply to a class action proceeding in a district court of the United States.

“(2) NOTICE OF CLASS ACTION.—Any party to an active proceeding before the Copyright Claims Board who receives notice of a pending class action, arising out of the same transaction or occurrence as the proceeding before the Copyright Claims Board, in which the party is a class member shall either—

“(A) opt out of the class action, in accordance with regulations established by the Register of Copyrights; or

“(B) seek dismissal under section 1506(q)(3) of the proceeding before the Copyright Claims Board.

“(c) OTHER MATERIALS IN PROCEEDING.—Except as permitted under this section and section 1508, a submission or statement of a party or witness made in connection with a proceeding before the Copyright Claims Board, including a proceeding that is dismissed, may not be cited or relied upon in, or serve as the basis of, any action or proceeding concerning rights or limitations on rights under this title before any court or tribunal, including the Copyright Claims Board.

“(d) APPLICABILITY OF SECTION 512(g).—A claim or counterclaim before the Copyright Claims Board that is brought under subsection (c)(1) or (c)(4) of section 1504, or brought under subsection (c)(6) of section 1504 and that relates to a claim under subsection (c)(1) or (c)(4) of such section, qualifies as an action seeking an order to restrain a subscriber from engaging in infringing activity under section 512(g)(2)(C) if—

“(1) notice of the commencement of the Copyright Claims Board proceeding is provided by the claimant to the service provider’s designated agent before the service provider replaces the material following receipt of a counter notification under section 512(g); and

“(2) the claim brought alleges infringement of the material identified in the notification of claimed infringement under section 512(c)(1)(C).

“(e) FAILURE TO ASSERT COUNTERCLAIM.—The failure or inability to assert a counterclaim in a proceeding before the Copyright Claims Board shall not preclude the assertion of that counterclaim in a subsequent court action or proceeding before the Copyright Claims Board.

“(f) OPT-OUT OR DISMISSAL OF PARTY.—If a party has timely opted out of a proceeding under section 1506(i) or is dismissed from a proceeding before the Copyright Claims Board issues a final determination in the proceeding, the determination shall not be binding upon and shall have no preclusive effect with respect to that party.

**“§ 1508. Review and confirmation by district court**

“(a) IN GENERAL.—In any proceeding in which a party has failed to pay damages, or has failed otherwise to comply with the relief, awarded in a final determination of the Copyright Claims Board, including a default determination or a determination based on a failure to prosecute, the aggrieved party may, not later than 1 year

after the date on which the final determination is issued, any reconsideration by the Copyright Claims Board or review by the Register of Copyrights is resolved, or an amended final determination is issued, whichever occurs last, apply to the United States District Court for the District of Columbia or any other appropriate district court of the United States for an order confirming the relief awarded in the final determination and reducing such award to judgment. The court shall grant such order and direct entry of judgment unless the determination is or has been vacated, modified, or corrected under subsection (c). If the United States District Court for the District of Columbia or other district court of the United States, as the case may be, issues an order confirming the relief awarded by the Copyright Claims Board, the court shall impose on the party who failed to pay damages or otherwise comply with the relief, the reasonable expenses required to secure such order, including attorneys' fees, that were incurred by the aggrieved party.

“(b) FILING PROCEDURES.—

“(1) APPLICATION TO CONFIRM DETERMINATION.—Notice of the application under subsection (a) for confirmation of a determination of the Copyright Claims Board and entry of judgment shall be provided to all parties to the proceeding before the Copyright Claims Board that resulted in the determination, in accordance with the procedures applicable to service of a motion in the district court of the United States where the application is made.

“(2) CONTENTS OF APPLICATION.—The application shall include the following:

“(A) A certified copy of the final or amended final determination of the Copyright Claims Board, as reflected in the records of the Copyright Claims Board, following any process of reconsideration or review by the Register of Copyrights, to be confirmed and rendered to judgment.

“(B) A declaration by the applicant, under penalty of perjury—

“(i) that the copy is a true and correct copy of such determination;

“(ii) stating the date it was issued;

“(iii) stating the basis for the challenge under subsection (c)(1); and

“(iv) stating whether the applicant is aware of any other proceedings before the court concerning the same determination of the Copyright Claims Board.

“(c) CHALLENGES TO THE DETERMINATION.—

“(1) BASES FOR CHALLENGE.—Not later than 90 days after the date on which Copyright Claims Board issues a final or amended final determination in a proceeding, or not later than 90 days after the date on which the Register of Copyrights completes any process of reconsideration or review of the determination, whichever occurs later, a party may seek a court order vacating, modifying, or correcting the determination of the Copyright Claims Board in the following cases:

“(A) If the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct.

“(B) If the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue.

“(C) In the case of a default determination or determination based on a failure to prosecute, if it is established that the default or failure was due to excusable neglect.

“(2) PROCEDURE TO CHALLENGE.—

“(A) NOTICE OF APPLICATION.—Notice of the application to challenge a determination of the Copyright Claims Board shall be provided to all parties to the proceeding before the Copyright Claims Board, in accordance with the procedures applicable to service of a motion in the court where the application is made.

“(B) STAYING OF PROCEEDINGS.—For purposes of an application under this subsection, any judge who is authorized to issue an order to stay the proceedings in an any other action brought in the same court may issue an order, to be served with the notice of application, staying proceedings to enforce the award while the challenge is pending.

**“§ 1509. Relationship to other district court actions**

“(a) STAY OF DISTRICT COURT PROCEEDINGS.—Subject to section 1507(b), a district court of the United States shall issue a stay of proceedings or such other relief as the court determines appropriate with respect to any claim brought before the court that is already the subject of a pending or active proceeding before the Copyright Claims Board.

“(b) ALTERNATIVE DISPUTE RESOLUTION PROCESS.—A proceeding before the Copyright Claims Board under this chapter shall qualify as an alternative dispute resolution process under section 651 of title 28 for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.

**“§ 1510. Implementation by Copyright Office**

**“(a) REGULATIONS.—**

“(1) IMPLEMENTATION GENERALLY.—The Register of Copyrights shall establish regulations to carry out this chapter. Such regulations shall include the fees prescribed under subsections (e) and (x) of section 1506. The authority to issue such fees shall not limit the authority of the Register of Copyrights to establish fees for services under section 708. All fees received by the Copyright Office in connection with the activities under this chapter shall be deposited by the Register of Copyrights and credited to the appropriations for necessary expenses of the Office in accordance with section 708(d). In establishing regulations under this subsection, the Register of Copyrights shall provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings instituted under this chapter, including by implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party.

**“(2) LIMITS ON MONETARY RELIEF.—**

“(A) IN GENERAL.—Subject to subparagraph (B), not earlier than 3 years after the date on which Copyright Claims Board issues the first determination of the Copyright Claims Board, the Register of Copyrights may, in order to further the goals of the Copyright Claims Board, conduct a rule-making to adjust the limits on monetary recovery or attorneys’ fees and costs that may be awarded under this chapter.

“(B) EFFECTIVE DATE OF ADJUSTMENT.—Any rule under subparagraph (A) that makes an adjustment shall take effect at the end of the 120-day period beginning on the date on which the Register of Copyrights submits the rule to Congress and only if Congress does not, during that 120-day period, enact a law that provides in substance that Congress does not approve the rule.

“(b) NECESSARY FACILITIES.—Subject to applicable law, the Register of Copyrights may retain outside vendors to establish internet-based, teleconferencing, and other facilities required to operate the Copyright Claims Board.

“(c) FEES.—Any filing fees, including the fee to commence a proceeding under section 1506(e), shall be prescribed in regulations established by the Register of Copyrights. The sum total of such filing fees shall be in an amount of at least \$100, may not exceed the cost of filing an action in a district court of the United States, and shall be fixed in amounts that further the goals of the Copyright Claims Board.

**“§ 1511. Funding**

“There are authorized to be appropriated such sums as may be necessary to pay the costs incurred by the Copyright Office under this chapter that are not covered by fees collected for services rendered under this chapter, including the costs of establishing and maintaining the Copyright Claims Board and its facilities.”.

(b) CLERICAL AMENDMENT.—The table of chapters for title 17, United States Code, is amended by adding after the item relating to chapter 14 the following:

“15. Copyright Small Claims ..... 1501”.

**SEC. 3. IMPLEMENTATION.**

Not later than 1 year after the date of enactment of this Act, the Copyright Claims Board established under section 1502 of title 17, United States Code, as added by section 2 of this Act, shall begin operations.

**SEC. 4. STUDY.**

Not later than 3 years after the date on which Copyright Claims Board issues the first determination of the Copyright Claims Board under chapter 15 of title 17, United States Code, as added by section 2 of this Act, the Register of Copyrights shall conduct, and report to Congress on, a study that addresses the following:

(1) The use and efficacy of the Copyright Claims Board in resolving copyright claims, including the number of proceedings the Copyright Claims Board could reasonably administer.

(2) Whether adjustments to the authority of the Copyright Claims Board are necessary or advisable, including with respect to—

(A) eligible claims, such as claims under section 1202 of title 17, United States Code; and

(B) works and applicable damages limitations.

(3) Whether greater allowance should be made to permit awards of attorneys’ fees and costs to prevailing parties, including potential limitations on such awards.

(4) Potential mechanisms to assist copyright owners with small claims in ascertaining the identity and location of unknown online infringers.



(5) Whether the Copyright Claims Board should be expanded to offer mediation or other nonbinding alternative dispute resolution services to interested parties.

(6) Such other matters as the Register of Copyrights believes may be pertinent concerning the Copyright Claims Board.

#### SEC. 5. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provision or the amendment to any other person or circumstance, shall not be affected.

### Purpose and Summary

H.R. 2426, the “Copyright Alternative in Small-Claims Enforcement of 2019” or the “CASE Act of 2019,” creates a Copyright Claims Board (the “Board”), located in the U.S. Copyright Office and intended to be a forum for lower-value copyright disputes in which participation is voluntary for both claimants and respondents. The copyright small claims process the bill establishes is intended to be accessible especially for *pro se* parties and those with little prior formal exposure to copyright laws who cannot otherwise afford to have their claims and defenses heard in federal court.

The bill provides that participation in a Copyright Claims Board proceeding is voluntary.<sup>1</sup> A respondent may opt out within 60 days of being served with a claim.<sup>2</sup> The Board is composed of three Copyright Claims Officers recommended by the Register of Copyrights and appointed by the Librarian of Congress. The Board must “render determinations . . . independently,” and must adhere to existing case law.<sup>3</sup> The Copyright Claims Officers serve under the general direction of the Register of Copyrights,<sup>4</sup> and may be sanctioned or removed by the Librarian of Congress.<sup>5</sup>

Parties may appear *pro se* or be represented by an attorney or by a law student acting *pro bono*.<sup>6</sup> Copyright Claims Attorneys are tasked with assisting the public, including potential claimants and respondents with respect to the procedures and requirements for litigating before the Board.<sup>7</sup> To ensure that the proceedings are streamlined and efficient, discovery is circumscribed.<sup>8</sup> Additionally, for the category of smaller claims of \$5,000 or less, the Register of Copyrights must issue rules under which a single Copyright Claims Officer can hear claims, which otherwise have the procedural protections of any other claim before the Copyright Claims Board.<sup>9</sup>

The Copyright Claims Board is empowered to hear claims for copyright infringement, for declarations of non-infringement, and for misrepresentation under section 512(f) of the Digital Millennium Copyright Act (“DMCA”).<sup>10</sup> Total damages are capped at \$30,000 per proceeding, and \$15,000 in statutory damages per work. The statutory damages cap is \$7,500 for works that were not

<sup>1</sup> See H.R. 2426, 116th Cong. § 2(a) (2019) (to be codified at 15 U.S.C. § 1504(a)). Subsequent citations of the new sections to be codified under the Act will reference only the to-be-codified section.

<sup>2</sup> *Id.* § 1506(i).

<sup>3</sup> *Id.* § 1503(b).

<sup>4</sup> *Id.* § 1503(c).

<sup>5</sup> *Id.* § 1502(b)(7).

<sup>6</sup> *Id.* § 1506(d).

<sup>7</sup> See *id.* § 1503(a).

<sup>8</sup> *Id.* § 1506(n).

<sup>9</sup> *Id.* § 1506(z).

<sup>10</sup> *Id.* § 1504(c).

timely registered pursuant to 17 U.S.C. § 412, but whose registration is a condition of the proceeding becoming final. The Board cannot issue injunctions, but if the parties agree to cease any infringing activity, including taking down a work from an online platform, the Board must include those terms in the determination.<sup>11</sup> At any point before the Board issues a final determination, the claimant or counterclaimant can elect to receive statutory damages, actual damages plus profits, or no damages.<sup>12</sup> The Board may award up to \$5,000 (or \$2,500 if the party is *pro se*) in costs and attorneys' fees if a party is found to have acted in bad faith, and, in extraordinary circumstances, more.<sup>13</sup> The Board may also bar a party that has pursued frivolous or bad faith claims from appearing before it for a year, and may dismiss that party's outstanding claims without prejudice.<sup>14</sup>

Decisions of the Board are subject to a request for reconsideration by the Board.<sup>15</sup> A denial of such a request may be reviewed by the Register of Copyrights.<sup>16</sup> Federal district courts may vacate, modify, or correct a Board determination where the determination was issued as a result of misconduct, where the Board exceeded its authority or failed to resolve a claim, or where a default determination or dismissal for failure to prosecute was the result of excusable neglect.<sup>17</sup> Parties may also seek a court order to enforce the Board's decisions.<sup>18</sup>

## Background and Need for the Legislation

### I. GENERAL BACKGROUND

The CASE Act is the product of more than 15 years of consideration by the Committee.<sup>19</sup> In 2006, the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a hearing focused on alternatives to district court litigation for small copyright claims, including, most notably, a small claims court.<sup>20</sup> In 2011, the House Judiciary Committee, observing that “the costs of litigating in federal court have become increasingly prohibitive,” requested that the Copyright Office undertake a study on the shortfalls of the current system and, after soliciting input from interested stakeholders, recommend changes “that will improve the adjudication of small copyright claims and thereby enable all copyright owner to more fully realize the promise of exclusive rights enshrined in our Constitution.”<sup>21</sup>

<sup>11</sup> *Id.* § 1506(t)(1)(C); *see also id.* § 1504(c)(2).

<sup>12</sup> *Id.* § 1504(e)(1)(B).

<sup>13</sup> *Id.* § 1506(y).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 1506(w).

<sup>16</sup> *Id.* § 1506(x).

<sup>17</sup> *Id.* § 1508(c).

<sup>18</sup> *Id.* § 1508(a).

<sup>19</sup> *See generally* Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 26 Geo. Mason L. Rev. 65, 69 (2018), <http://georgemasonlawreview.org/wp-content/uploads/2019/04/26-1-3-Aistars.pdf>.

<sup>20</sup> *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006), <https://www.govinfo.gov/content/pkg/CHRG-109hhrg26767/pdf/CHRG-109hhrg26767.pdf>.

<sup>21</sup> *See* Letter from Lamar Smith, Chairman, H. Comm. on the Judiciary, to Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office (Oct. 11, 2011), *included in* U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

The Committee’s request to the Copyright Office emphasized the importance of ensuring that copyright interests without high expected damages have some mode of enforceability so that individual creators, “many of whom rely upon the promise of exclusive rights associated with the grant of copyright to earn a living and provide for their families[,] . . . have a realistic ability to enforce those rights when they have a comparatively modest claim for damages.”<sup>22</sup> The request noted:

On an individual level, the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works. On a collective level, the inability to enforce rights corrodes respect for the rule of law and deprives society of the benefit of new and expressive works of authorship.<sup>23</sup>

The Copyright Office delivered its report in 2013. The report observed that modern information technology has made it easy to make unauthorized copies of protected works “at virtually no cost, much to the detriment of authors and the market for their works,” but that, perhaps ironically, as the rate of infringement has increased, so too have the barriers to pursuing copyright claims in the federal courts.<sup>24</sup> The report further described how “federal court is effectively inaccessible to copyright owners seeking redress for claims of relatively low economic value, especially individual creators of limited resources.”<sup>25</sup> The Copyright Office analyzed a range of alternative models and attendant constitutional limitations,<sup>26</sup> and ultimately recommended the creation of a small claims tribunal housed in the Copyright Office.<sup>27</sup> The Copyright Office’s report and supporting materials are incorporated here as part of the legislative history of the CASE Act.<sup>28</sup> The Copyright Office’s report included proposed model legislation. The CASE Act was introduced in the 114th Congress based on this proposal. The bill was reintroduced in both the 115th and 116th Congresses with several revisions.

Meanwhile, the Committee has continued to examine the need for a small claims tribunal. The record that was developed shows that the concerns that sparked this process more than 15 years ago remain valid, and that the need for this legislation has increased rather than abated. For example, during a hearing on September 27, 2018, Jenna Close, a photographer and small business owner, offered testimony on the need for a small claims process:

Why do visual artists so often forego legal action? The answer is simple. Federal court litigation is too burdensome and too expensive. The cost of bringing the suit alone would likely dwarf any potential favorable verdict. The re-

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Copyright Small Claims*, *supra* note 20, at 1.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.* at 27 (constitutional issues); *id.* at 51 (state court models); *id.* at 62 (administrative proceedings, Article I courts, alternative dispute resolution procedures, and international models).

<sup>27</sup> *Id.* at 92.

<sup>28</sup> Those materials include the record of the Office’s three notices of inquiry, joint roundtable conducted with the United States Patent and Trademark Office and the George Washington University Law School, and multiday public hearings held in New York and Los Angeles. See *Remedies for Copyright Small Claims*, Copyright.gov, <https://www.copyright.gov/docs/smallclaims/> (last visited Oct. 21, 2019).

ality of the system today makes infringement losses a cost of doing business, and not one that many creators can afford. The time to end this historic inequity is now.<sup>29</sup>

The Register of Copyrights echoed Ms. Close’s testimony at an oversight hearing held by the Committee on June 26, 2019:

Overall, this situation means that low-dollar but still valuable copyrighted works often may be infringed with impunity, with individual creators and small businesses often lacking an effective remedy. Similarly, these hurdles may be insurmountable for the majority of users who believe that they have a strong fair use defense or are otherwise using a copyrighted work pursuant to an exception or limitation that allows their use . . . .<sup>30</sup>

## II. CONSTITUTIONAL CONSIDERATIONS

### A. *The Copyright Clause*

The CASE Act flows from the Copyright Clause, the Constitutional grant of power to Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>31</sup> The Copyright Clause embodies the “conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and investors”<sup>32</sup> and empowers Congress to create a “system” that promotes these goals.<sup>33</sup> The small claims process created by the CASE Act reflects the Congressional determination that a modern copyright system requires a small claims process to effectively promote the creation and distribution of new works, in order to ensure that creators can obtain a monetary return on their investment of time, energy, and ingenuity into the creative process.

### B. *The Appointments Clause*

The Copyright Claims Board is structured to comply with the Constitution’s Appointments Clause.<sup>34</sup> The Copyright Claims Officers are appointed as inferior officers for a fixed term by the Senate-confirmed Librarian of Congress; their terms are renewable, but not automatically so. The Librarian may also sanction or remove the Claims Officers.<sup>35</sup> Both the Copyright Claims Officers and Copyright Claims Attorneys work under the general direction of the Register of Copyrights, who reports to the Librarian of Congress.<sup>36</sup> Determinations of the Board are subject to review by the

<sup>29</sup> See *Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing on H.R. 3945 Before the H. Comm. on the Judiciary*, 115th Cong. 10 (2018), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg33419/pdf/CHRG-115hhrg33419.pdf>.

<sup>30</sup> *Oversight of the U.S. Copyright Office: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Karyn A. Temple, U.S. Register of Copyrights), <https://docs.house.gov/meetings/JU/JU00/20190626/109696/HHRG-116-JU00-Wstate-TempleK-20190626-U3.pdf>.

<sup>31</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>32</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

<sup>33</sup> *Eldred*, 537 U.S. at 213.

<sup>34</sup> U.S. Const. art. II, § 2, cl. 2; see also *Lucia v. SEC*, 138 S. Ct. 2044, 2051–55 (2018); *Freytag v. Comm’r*, 501 U.S. 868, 880–92 (1991).

<sup>35</sup> See *Edmond v. United States*, 520 U.S. 651, 665 (1997) (“The power to remove officers, we have recognized, is a powerful tool for control.”).

<sup>36</sup> See *id.* at 666.

Register of Copyrights, who reports to the Librarian of Congress.<sup>37</sup> Thus, the Claims Officers' decisions and actions are all ultimately accountable to a Senate-confirmed principal officer, the Librarian of Congress.

### *C. Article III and Seventh Amendment Rights*

Any alternative forum not presided over by a federal judge must satisfy three constitutional requirements that inhere from the Seventh Amendment right to a jury trial and the Constitution's vesting of judicial power primarily in Article III tribunals. Two of these protections are personal: The general rule is that the Constitution secures both the right to a jury trial in civil cases where more than \$20 is at issue and the right to have a case heard before an Article III tribunal.<sup>38</sup> Both of these rights can be waived so long as the waiver is knowing and voluntary.<sup>39</sup> The third protection is structural: Congress cannot confer the government's judicial power on non-Article III entities such that it has impermissibly threatened the institutional integrity of the federal courts.<sup>40</sup>

Particularly where participation in a non-Article tribunal is mandatory, this inquiry can turn in part on whether the new adjudicatory body deals with "public rights" as opposed to "private rights." The difficulty here lies in the fact that the Supreme Court "has not definitively explained the distinction between public and private rights,"<sup>41</sup> eschewing bright lines for a mix of functional, formal, and historical considerations. Moreover, the case law in this area "ha[s] not been entirely consistent."<sup>42</sup> At least for some purposes, the case law suggests that the grant of a copyright should be considered a public right.<sup>43</sup>

The voluntary nature of the proceedings established by the CASE Act shifts the focus from the public rights analysis to considerations of whether those proceedings encroach upon the integrity of the federal courts. The Supreme Court has stated that "consent remains highly relevant when determining . . . whether a particular adjudication" duly respects the rights to a jury trial and Article III adjudication, as well as the federal courts' exercise of judicial power.<sup>44</sup> Consent can be explicit or inferred, but "notification of the right to refuse" participation in a non-Article III forum "is a prerequisite to any inference of consent."<sup>45</sup> The CASE Act is designed to ensure that the participation of respondents is voluntary and includes explicit requirements that respondents be informed of their right to refuse to participate in the copyright small claims process and the constitutional rights that attend that choice.<sup>46</sup>

Other elements of the Board's structure and authority are designed to preclude encroachment on the federal judiciary. The Board cannot make new copyright law; instead, it is statutorily

<sup>37</sup> *Cf. id.* at 665 ("What is significant is that the judges . . . have no power to render a final decision . . . unless permitted to do so by other Executive Officers.").

<sup>38</sup> *CFTC v. Schor*, 478 U.S. 833, 848–49 (1986).

<sup>39</sup> See *Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1948 (2015).

<sup>40</sup> *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018); *Schor*, 478 U.S. at 857; *Sharif*, 135 S. Ct. at 1945.

<sup>41</sup> *Oil States*, 138 S. Ct. at 1373 (quotations omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also *Aistars*, *supra* note 19, at 75–76.

<sup>44</sup> *Sharif*, 135 S. Ct. at 1942 & n.11.

<sup>45</sup> *Id.* at 1948.

<sup>46</sup> H.R. 2426 § 1506(g).

bound to follow existing precedent.<sup>47</sup> The Board cannot enforce its determinations; rather, the Board’s determinations are “enforceable only by order of a district court.”<sup>48</sup> The Board’s decisions are subject to district court review on limited but well-established grounds that parallel Section 10 of the Federal Arbitration Act.<sup>49</sup> The Supreme Court has not held that the Federal Arbitration Act, which permits a far wider set of issues to be resolved by private arbitration and subject to arguably less judicial review, threatens the integrity of the judicial branch. Moreover, the small claims tribunal created by the CASE Act is subject-matter limited to statutory copyright law, rather than the common law. Ancillary issues fall outside of the Board’s statutory jurisdiction—its “subject matter competence.”<sup>50</sup> And subject matter experts—regarding both copyright law and alternative dispute resolution—must comprise the Board.<sup>51</sup>

#### D. Procedural Due Process

The CASE Act is drafted to meet the Due Process Clause’s guarantee of fundamental fairness in a federal proceeding. Due Process is “flexible . . . and it calls for such procedural protections as the particular situation demands,” which include the basic requirements of personal jurisdiction, notice, and the opportunity to be heard.<sup>52</sup> The copyright small claims process created by the CASE Act includes due process protections appropriate for the context of a voluntary, streamlined agency adjudicatory process, as described further below.

First, the CASE Act is designed so that parties can participate remotely in proceedings. Accordingly, because the parties will not have to appear in person before the Board, personal jurisdiction can be established by their minimum relevant contacts within the United States and its territories, as well as by their consent.<sup>53</sup>

The Act’s service of process provisions are modeled on Rule 4 of the Federal Rules of Civil Procedure, with the additional protections that a claim must first be reviewed by a Claims Attorney and, if the claim complies with the Act, service of the claim must include a clear and prominent explanation of the respondent’s right to opt out of the proceeding and the rights the respondent waives if it does not.<sup>54</sup>

The Act also requires that the parties have a meaningful opportunity to be heard.<sup>55</sup> If the parties are proceeding *pro se*, their papers and assertions are construed liberally in favor of adjudicating applicable claims and defenses; they may in any event raise those

<sup>47</sup> *Id.* §§ 1503(b), 1506(a).

<sup>48</sup> *Id.* § 1508(a); *Stern*, 564 U.S. at 491.

<sup>49</sup> H.R. 2426 § 1508(b).

<sup>50</sup> *Id.* § 1506(f)(3)(C); *Stern v. Marshall*, 564 U.S. 462, 491 (2011). For use of the term “subject matter competence,” see, e.g., *Williams v. Metzler*, 132 F.3d 937, 941 (3d Cir. 1997); *Burns v. U.S. R.R. Retirement Bd.*, 701 F.2d 189, 179 (D.C. Cir. 1983).

<sup>51</sup> H.R. 2426 1502; see *Stern*, 564 U.S. at 491; *Schor*, 478 U.S. at 855–56.

<sup>52</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018); *Mathews v. Eldridge*, 424 U.S. 319, 332–34 (1976).

<sup>53</sup> See *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1785 (2017); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982); see generally 4 Fed. Prac. & Proc. Civ. § 1068.1 (4th ed.).

<sup>54</sup> H.R. 2426 § 1506.

<sup>55</sup> Compare the Act’s provision of guidelines for the conduct of proceedings under new § 1506 with the procedural protections described in *Copyright Small Claims*, *supra* note 20, at 47–48 and notes therein.

defenses in their response to the notice of claim, through documentary and testimonial evidence, at telephonic or livestreamed hearings, and through written submissions. Parties may conduct discovery and obtain protective orders.<sup>56</sup> Parties also have greater protection against default than in federal court, as explained below.

The Act also provides multiple opportunities for the parties to contest the Board's determinations. They may seek reconsideration by the Board and review by the Register of Copyrights.<sup>57</sup> They may also seek review in federal district court on grounds similar to those available under the Federal Arbitration Act.<sup>58</sup> Determinations are therefore reviewable for violations of fundamental fairness.<sup>59</sup>

### III. INTENDED OPERATION OF THE CASE ACT

Consistent with Congress's intent that the CASE Act create an alternative forum to district court litigation, many of the terms and processes used in the Act are drawn from preexisting, related state and federal statutory language, the Federal Rules of Civil Procedure, and established case law. Notwithstanding these antecedents, the statute is intended to create a novel dispute resolution forum. The statute should be construed as a whole and in light of its purposes to establish an efficient, effective, and voluntary alternative forum where unsophisticated parties can meaningfully and predictably resolve their claims under the Copyright Act and with its associated defenses.<sup>60</sup>

#### 1. Federal Practice and Procedure

While principles of federal procedure are relevant to the CASE Act, the Act is not intended to simply mimic federal practice. The Act derives from the recognition that the cost and complexity of litigating in federal court has made it functionally impossible for many creators to meaningfully enforce their rights. The Act also draws from the experience and practices of state, international, and nongovernmental small claims and alternative dispute resolution forums.<sup>61</sup> The Register of Copyrights should consider these various precedents in implementing the CASE Act, taking advantage of the grant of regulatory authority to create rules and procedures most appropriate to create an efficient dispute resolution forum that also affords due process protections.

As the Copyright Office report noted, “[t]he hallmark of a small claims proceeding is that traditional rules of civil procedure are significantly relaxed in order to save litigants effort and expense.”<sup>62</sup> Similarly, “even where more traditional rules of procedure apply, they may be construed liberally by the court so litigants are not intimidated by the technicalities of formal court procedure.” And, “in most small claims settings, judges significantly control the manner in which a case proceeds, exercising considerable discretion con-

<sup>56</sup> H.R. 2426 § 1506.

<sup>57</sup> *Id.* § 1506(w)–(x).

<sup>58</sup> Compare *id.* § 1508, with 9 U.S.C. § 10; see also *Copyright Small Claims*, *supra* note 20, at 78–79.

<sup>59</sup> *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 545 (2d Cir. 2016).

<sup>60</sup> See *FCC v. AT&T, Inc.*, 562 U.S. 397, 407–09 (2011).

<sup>61</sup> See, e.g., *Copyright Small Claims*, *supra* note 20, at 51–90.

<sup>62</sup> *Id.* at 57.

cerning the application of procedural and evidentiary rules.”<sup>63</sup> The Act is intended to embody these key principles.

To be sure, some principles common in federal practice may also apply to proceedings before the Board. For example, the understanding that documents filed by unrepresented parties must be liberally construed and held to less stringent standards than documents drafted by lawyers should apply to Board proceedings, perhaps with even greater force.<sup>64</sup> In other words, the Board is required to consider the legal claims and defenses presented by the facts of each case, even if the parties have not pleaded each with the specificity that would normally be expected in federal courts with parties represented by counsel.

Similarly, while Board proceedings can result in damages awards upon a finding of liability, the Act reflects an intent to encourage compromise and settlement.<sup>65</sup> At least one Copyright Claims Officer must have experience with alternative dispute resolution, facilitating settlement is part of the Board’s statutory mandate, and the Act establishes a set of rights and duties designed to promote compromise.<sup>66</sup>

The Act also creates a dispute resolution forum that is subject-matter limited to copyright, in contrast to, for example, the Federal Rules of Civil Procedure, which apply to diverse civil claims. Thus, the Act reflects the understanding that “federal court procedural rules are not tuned to the specific needs of copyright litigants” and that the additional requirements of the Copyright Act can multiply the cost and complexity of a case.<sup>67</sup> The optional and voluntary nature of the copyright small claims process further distinguishes it from mandatory federal court proceedings.<sup>68</sup> Consequently, the Copyright Office should consider these various factors when determining the specific procedures needed to effectuate this Act.

## 2. Default

The Act establishes a strong presumption against default judgments. Defaults are disfavored in federal court, and courts have denied motions for entry of default based on the presence of a meritorious defense, including the defense of fair use.<sup>69</sup>

Relative to federal courts, the Copyright Claims Board has both more statutory authority and a greater obligation to scrutinize the merits of a claim. Courts applying Federal Rule of Civil Procedure 55 generally limit themselves to evaluating the plaintiff’s well-pleaded allegations and any materials attached to the complaint, although they have discretion to go beyond the pleadings.<sup>70</sup> In contrast, Section 1506(u) created under the CASE Act requires that the Copyright Claims Board require the claimant, in addition to the pleadings, “submit relevant evidence and other information” to support the claim and any asserted damages. In cases where the

<sup>63</sup> *Id.* at 57–58.

<sup>64</sup> *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Higgs v. Att’y Gen.*, 655 F.3d 333, 339 (3rd Cir. 2011); *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010).

<sup>65</sup> *See, e.g., Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001); *cf. Fed. R. Civ. P.* 68; 28 U.S.C. § 651 *et seq.*

<sup>66</sup> H.R. 2426 §§ 1502(b)(3)(A)(iii), 1503(a)(1)(f), 1506(r).

<sup>67</sup> *Copyright Small Claims*, *supra* note 20, at 16.

<sup>68</sup> *See id.* at 2–3.

<sup>69</sup> *See, e.g., Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 281 (D. Conn. 2008); *Klemmer v. Evans*, No. C–08–03732 JCS, 2009 WL 10695592, at \*8 (N.D. Cal. Feb. 13, 2009); *see generally* 10A Fed. Prac. & Proc. Civ. § 2685 (4th ed.).

<sup>70</sup> 10A Fed. Prac. & Proc. Civ. § 2688.1 (4th ed.).



respondent is absent, the Board is expected to carefully scrutinize the available evidence, and consistent with district court practice, and consider applicable affirmative defenses such as fair use, where warranted by the circumstances of the case. Likewise, the claimant must provide evidence to prove damages even if the respondent is not present.

### 3. Relationship to Substantive Copyright Law

The CASE Act establishes a voluntary and optional alternative forum to hear small copyright claims; it does not change the underlying law on which those claims are based. The Act takes copyright law as it finds it: the Act does not alter the substantive provisions of the Copyright Act or the case law construing it, and the Board's determinations must follow existing precedent.<sup>71</sup> The Act also leaves copyright law as it finds it: the determinations of the Board may not be cited or relied upon, and the Board must dismiss claims that, among other things, would require it to make truly novel case law.<sup>72</sup>

The Act does, however, create greater limits on a respondent's liability. The Copyright Claims Board is flatly prohibited, for example, from enhancing statutory damages for willful infringement, which plaintiffs often seek in federal court.<sup>73</sup> Under the Act, statutory damages are capped at \$15,000 per work.<sup>74</sup> When determining damages, the Board is also required to consider whether an infringing party has agreed to cease or mitigate their infringing activity.<sup>75</sup> Total damages are limited to \$30,000 or less regardless of the number of works at issue or the type of damages sought. In contrast, the Copyright Act does not cap awards for actual damages and profits and does not restrict the total amount that can be recovered in a given case.<sup>76</sup> The damages caps do not alter existing law regarding calculating and proving damages, nor do they prevent the Board from considering manifestly unreasonable damage demands in the course of assessing whether the claimant acted in bad faith.

The CASE Act also takes a more liberal attitude towards the commencement of a proceeding while registration of a work is in progress.<sup>77</sup> In federal court, registration is a prerequisite to filing a lawsuit.<sup>78</sup> While this rule is designed to encourage prompt registration, the registration process can be complex and expensive.<sup>79</sup> Small claimants may not be aware of the consequences of not registering in a timely manner, and they may not be able to afford either the relatively high fee to expedite registration or, if they produce numerous works, even the initial registration fee.<sup>80</sup> If they

<sup>71</sup> See H.R. 2426 § 1503(b)(1).

<sup>72</sup> *Id.* §§ 1507(a), 1507(c), 1506(f).

<sup>73</sup> *Id.* § 1504(e); see Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. Rev. 400, 418 (2019).

<sup>74</sup> Compare H.R. 2426 § 1504(e), with 17 U.S.C. § 504(c).

<sup>75</sup> H.R. 2426 § 1504(e)(1)(A)(ii)(III).

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* §§ 1504(e), 1505. The claims processing rules are found at 17 U.S.C. §§ 411–412; see also *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157–66 (2010).

<sup>78</sup> See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 888 (2019).

<sup>79</sup> See Nimmer on Copyright § 7.16[B]–[C]; see also *id.* § 7.16[B] (noting that “an elaborate scheme applies to registration as a prerequisite to a suit for copyright infringement”); see also *Fourth Estate*, 139 S. Ct. at 886; *Copyright Small Claims*, *supra* note 20, at 16 (“The registration requirement . . . is not as straightforward as it may appear.”).

<sup>80</sup> See 17 U.S.C. § 411(a); *Fourth Estate*, 139 S. Ct. at 887.

fail to timely register, they cannot recover statutory damages in suits brought in district court. Moreover, the legislative record shows that many small claimants currently do not register their works because they do not expect to be able to enforce their rights in federal court.<sup>81</sup>

To address these dynamics, the Act permits participants in the small claims process to bring a claim or counterclaim for infringement so long as the owner has applied to register the work and that application has not been denied.<sup>82</sup> A work registered outside the bounds of 17 U.S.C. 412 results in a lower statutory damages cap of \$7,500 per work, half of the maximum award for a work that was timely registered.<sup>83</sup> The Board cannot, however, award any damages—statutory or otherwise—or issue a determination until a registration has been issued.<sup>84</sup> This process is intended to strike a balance between still encouraging timely registration of works with the promise of a higher damages caps with the reality that smaller creators may have numerous understandable reasons for not routinely engaging in the registration process.

### **Hearings**

The Committee on the Judiciary held no hearings on H.R. 2426 in the 116th Congress, but received testimony on this bill from the Register of Copyrights, Karyn Temple, on June 26, 2019. In the 115th Congress the Committee on the Judiciary held a legislative hearing on a previous version of this bill, H.R. 3945, on September 27, 2018.

### **Committee Consideration**

On September 10, 2019, the Committee met in open session and ordered the bill, H.R. 2426, favorably reported as amended, by a voice vote, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that no rollcall votes occurred during the Committee’s consideration of H.R. 2426.

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

<sup>81</sup> See, e.g., *Copyright Small Claims*, *supra* note 20, at 17.

<sup>82</sup> H.R. 2426 § 1505.

<sup>83</sup> *Id.* § 1504(e).

<sup>84</sup> *Id.* § 1505(b).

### Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2426, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

<b>H.R. 2426, CASE Act of 2019</b>			
As ordered reported by the House Committee on the Judiciary on September 10, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Deficit Effect	0	0	0
Spending Subject to Appropriation (Outlays)	0	10	not estimated
Statutory pay-as-you-go procedures apply?	No	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

H.R. 2426 would establish the Copyright Claims Board (CCB) within the Copyright Office as a forum for parties to voluntarily resolve small copyright claims. Under the bill, the Library of Congress would appoint three copyright claims officers, in consultation with the Copyright Office, to manage CCB proceedings and to make judgements on copyright claims, counterclaims, and defenses. H.R. 2426 would require the Copyright Office to hire at least two copyright claims attorneys and administrative support staff to assist those officers, and to obtain necessary equipment and facilities. Finally, the Copyright Office would need to conduct a study on the use and efficacy of the CCB and report their findings to the Congress.

Using information from the Copyright Office, CBO estimates that in total implementing H.R. 2426 would cost \$10 million over the 2019–2024 period, assuming appropriation of the estimated amounts.

CBO estimates that in 2020, the Copyright Office would spend less than \$500,000 to issue rules to establish the CCB. In 2021, CBO estimates that the Copyright Office would spend about \$2 million on one-time costs such as a hearing room, computers, and teleconferencing equipment. Salaries and other reoccurring costs such as printing, postage, and maintaining the case management system maintenance would cost \$2 million a year over the 2021–2024 period, CBO estimates.

H.R. 2426 would establish two new filing fees that certain claimants would pay to access CCB services; those fees would be credited to the Copyright Office's appropriation account as discretionary off-

setting collections.<sup>1</sup> CBO cannot determine the amount of CCB filing fees that would be collected under the bill because the demand for CCB services is unclear. As a result, CBO has not included an estimate of those fees in this cost estimate. Any filing fees collected in a given year would decrease net spending subject to appropriation.

On September 19, 2019, CBO transmitted a cost estimate for S. 1273, the CASE Act of 2019, as reported by the Senate Committee on the Judiciary on September 12, 2019. The two bills are similar and CBO's estimated budgetary effects are the same for both bills.

The CBO staff contact for this estimate is David Hughes. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 2426 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2426 would establish a voluntary and optional process, located in the U.S. Copyright Office and overseen by a Copyright Claims Board, to resolve small copyright claims.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2426 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short Title.* Section 1 sets forth the short title of the bill as the “Copyright Alternative in Small-Claims Enforcement Act of 2019” or the “CASE Act of 2019”.

*Sec. 2. Copyright Small Claims.* Section 2 amends title 17 of the United States Code to add a new chapter 15. The following describes the sections comprising new chapter 15.

*New § 1501—Definitions.* Section 1501 defines various terms that appear in new chapter 15.

*New § 1502—Copyright Claims Board and Staff.* Section 1502 establishes the Copyright Claims Board (“Board”) as a voluntary alternative dispute resolution forum, located within and supported by the U.S. Copyright Office, to resolve certain copyright claims and

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<sup>1</sup> Under current law, any filing fee must be between \$100 and \$400; these restrictions would apply to CCB filing fees.

sets forth the hiring, qualifications, compensation, and terms of the Board and staff.

The Board consists of three experienced copyright attorneys, called Copyright Claims Officers (“Claims Officers”), appointed by the Librarian of Congress after recommendation by the Register of Copyrights. Claims Officers may be sanctioned or removed by the Librarian of Congress, in consultation with the Register of Copyrights, limited only by section 1503(b). The Librarian of Congress must act expeditiously to fill any vacancy or, if an existing Claims Officer temporarily cannot perform their duties, appoint an interim Claims Officer.

The Claims Officers must have at least seven years of legal experience. Two Claims Officers must have copyright litigation or adjudication experience, and, taken together, must have represented (or, if their experience is primarily adjudicatory, presided over) a diversity of copyright interests. The third Claims Officer must have both copyright and alternative dispute resolution experience. This latter qualification is particularly important, given the nature of proceedings before the Claims Board and the Officers’ statutory mandate to facilitate settlement.<sup>85</sup>

The Claims Officers are paid at the level of compensation for senior level (“SL”) government employees. They have six-year terms, but their initial terms are staggered at four, five, and six years. Their terms are renewable, but not automatically so.<sup>86</sup>

The Claims Officers are assisted by two or more Copyright Claims Attorneys (“Claims Attorneys”). The Claims Attorneys must each have at least three years of copyright experience and may be paid at up to grade 15 of the General Schedule for government employees.

The Register of Copyrights must provide the Copyright Claims Officers and Attorneys with the administrative and technological support they need to carry out their duties. This mandate should be construed with special regard to sections 1506(b) and (c), which make clear that, more than many fora, the Board depends on up-to-date technology to function.

*New § 1503—Authority and Duties of the Copyright Claims Board.* Section 1503 sets forth the duties and powers of the Copyright Claims Board.

Although subject to general direction by the Register of Copyrights, the Board’s determinations must be based only on the record before it, preexisting judicial precedent, and the provisions of the CASE Act and any applicable regulations. Copyright Claims Officers and Attorneys may consult with the Register of Copyrights regarding general issues of law, but the Register’s review of a proceeding is limited to the process provided by section 1506(w).

Except in the case of unethical conduct, the substantive result of Board determinations may not be used in the performance appraisals of the Claims Officers or Attorneys.

The Claims Officers and Attorneys are barred from inconsistent duties and subject to mandatory recusal under an objective stand-

<sup>85</sup> See *Copyright Small Claims*, *supra* note 20, at 130 (“[A]n alternative small claims process could benefit substantially from a decisionmaker who has meaningful background and experience in ADR.”).

<sup>86</sup> Compare H.R. 2426 § 1502, with *Copyright Small Claims*, *supra* note 20, at 134 (proposing automatically renewable terms).

ard. The Claims Officers and the Register are barred from *ex parte* communications related to active or pending proceedings before the Board.

The actions of the Board and Register in connection with a determination are subject to judicial review as specified in § 1508(c) rather than review provisions of the Administrative Procedure Act.

*New § 1504—Nature of Proceedings.* Section 1504 establishes that proceedings before the Board must be voluntary and confirms that parties retain any preexisting right to instead proceed in court or another adjudicatory forum if they so choose. The right to bring a claim before the Board or to opt out of the proceedings, as well as the rights, remedies, and limitations under this section may not be waived unless the waiver is made in accordance with the Act.

Section 1504(b) provides for a three-year statute of limitations on bringing claims to the Board, and that bringing such actions may toll the statute of limitations for bringing suit in federal court under 17 U.S.C. § 507.

Section 1504(c) sets forth the permissible claims, counterclaims, defenses, and remedies available in Board proceedings. Subject to applicable monetary limits, permissible claims before the Board include a claim for infringement or a declaration of non-infringement under 17 U.S.C. § 106; a claim of misrepresentation under § 512(f) of the Digital Millennium Copyright Act (“DMCA”); and certain limited counterclaims. Parties may assert any legal or equitable defenses to any such claims or counterclaims.

Claims can be brought by one or more claimants against one or more respondents, but the claims must all arise out of the same activity or a continuous course of conduct and total damages cannot exceed the applicable monetary limits established pursuant to § 1504(e)(1). Some claims and counterclaims are specifically excluded from Board determination, such as claims that are already pending before or adjudicated by a federal court, claims against a federal or state governmental entity or claims against a person or entity residing outside of the United States.

The Board can award actual damages and profits, which are determined pursuant to 17 U.S.C. § 504(b), or limited statutory damages determined pursuant to 17 U.S.C. § 504(c), but which are capped at \$15,000 per work for works timely registered pursuant to 17 U.S.C. § 412, and \$7,500 per work for works that are later registered under Section 1505. The Board may not consider whether the infringement was willful in assessing limited statutory damages, but it can take into account a respondent’s willingness or refusal to cease or mitigate infringing activities, as well as any clause or provision of 17 U.S.C. § 504(c) not specifically prohibited by the Act.

Before final determination, the claimant must elect either actual damages and profits, limited statutory damages, or no damages. This provision is intended to mirror the process established by 17 U.S.C. § 504. The total monetary award in a single proceeding is capped at \$30,000, exclusive of any attorneys’ fees and costs awarded for bad faith conduct under § 1506 (which are generally capped at \$5,000 or \$2,500 for parties proceeding *pro se*).

In addition to monetary awards, the Board shall include in its determination a requirement for a respondent to cease or mitigate infringing conduct if the respondent has agreed to do so. The Board

may not issue injunctions. Each party shall bear its own attorney fees and costs, except when the Board awards the fees and costs because of bad faith litigation.

The Register of Copyrights may prescribe regulations as to the number of cases that may be filed by a single claimant in a given year. This provision functions as both a docket management tool for the Board and as protection against abusive conduct.

*New § 1505—Registration Requirement.* A claim or counterclaim for infringement cannot be asserted before the Board unless the legal or beneficial owner of the copyright has filed an application for registration, deposit, and required fee with the Copyright Office and a registration certificate has been issued or has not been refused. While the Board may hold a proceeding with respect to the pending claim or claims where a registration application is pending before the Copyright Office, the Board may not render a determination until a registration certificate is issued by the Copyright Office.

If there is more than a one-year delay before a certificate is granted, the Board may dismiss the proceeding without prejudice. The Register may establish expedited proceedings to process registration applications for works that are the subject of a Board proceeding. Proceedings may be held in abeyance automatically for up to one year pending submission of a registration certificate. After one year, the Board may dismiss the proceeding without prejudice upon notice and a 30-day response period to the parties. The same presumption under § 410(c) applies for works registered not less than 5 years after the date of publication. The Register is directed to establish regulations concerning expedited registration procedures for works before the Board.

*New § 1506—Conduct of Proceedings.* Section 1506 sets forth the Board proceedings in detail. In general, the Board is directed to follow the legal precedents applicable in the jurisdiction with the most connections to the claim. Subsection (b) requires the Board to maintain records to document all proceedings. Subsection (c) notes that no in-person appearances are required and that video conferencing is encouraged. Subsection (d) states that parties are not required to have legal representation but may choose to have an attorney or a pro bono legal clinic represent them.

Pursuant to subsection (e), a proceeding is commenced only after a statement of material facts is filed by the claimant along with the filing fee specified by the Register. Before a claim is heard, subsection (f) requires that it must first be reviewed by a Copyright Claims Attorney who has the authority to require a refile with specified deadlines if the original filing does not comply with applicable regulations. Claims shall be dismissed without prejudice if a claim cannot be heard by the Board due to the failure to join a necessary party; the lack of an essential witness, evidence or expert testimony; or the determination of the claim imposes too great a burden upon the Board or is beyond the subject matter competence of the Board. Counterclaims are permissible after a similar review by a Claims Attorney.

Pursuant to subsections (g) and (h), claims must be served within 90 days of approval of the claim by a Board Attorney using a standardized process and notice format established by the Register. The notice shall contain a prominent statement concerning the

ability of a respondent to opt out within 60 days and the impact of not opting out. Several requirements govern the service of the notice and waivers of personal service, which are modeled on Rule 4 of the Federal Rules of Civil Procedure. The Board may maintain its own list of designated agents that have been submitted by corporations, partnerships, or unincorporated associations. Personal service may also be waived via returning a signed form to the Board, at no cost to the Respondent. However, waiver of personal service does not constitute waiver of the right to opt out. All service of a claim and waiver of personal service may only occur within the United States. The means of service for other documents are governed by regulations established by the Register of Copyrights pursuant to subsection (j).

The opt-out procedure in subsection (i) sets forth that respondents have 60 calendar days to opt-out of the small claims process after being served with the claim.

After the respondent does not opt out, the proceeding is considered to be active pursuant to subsection (k) allowing for scheduling of the proceeding in addition to conferences and discovery authorized in subsection (l) to occur.

Subsections (m), (n), and (o) govern the materials and evidence to be considered by the Board. Discovery shall occur pursuant to regulations established by the Register. There is no formal motion practice before the Board, although the Board may request submissions *sua sponte* or at the request of parties to the proceeding. Mandatory submission of discovery materials is limited to the parties in the proceeding although the Board may request voluntary submissions from non-parties. Any confidential information may be covered by a protective order to limit public disclosure. The Board may consider relevant evidence to the claims in a proceeding including sworn testimony. Expert witnesses are not permitted unless the Board agrees that good cause can be shown for them.

Subsections (p), (q), (r), (s), and (t) provide the statutory framework for how hearings are conducted including potential voluntary dismissals and settlements. Conferences may be held by one or more Officers which may be recorded or transcribed to assist the other Board members as well as being part of the claim record. Board determinations shall be made by a majority of the Officers, in writing and based upon a preponderance of the evidence standard. All determinations shall be made publicly available although confidential information shall be redacted. Information related to the proceedings are exempt from disclosure under the Freedom of Information Act.

Subsections (u) and (v) address proceedings that are not able to proceed either due to a respondent's default or a claimant's failure to proceed. Unless a justifiable cause can be shown, a respondent can be found in default if they fail to appear or cease to participate in a proceeding. If this occurs, the Board shall prepare a proposed default determination after a showing of sufficient evidence by the claimant and provide a written notice with the proposed finding to the respondent and give the respondent 30 days to provide information in opposition to the proposed default determination. Such default determination may only be challenged pursuant to § 1508(c). If a claimant fails to complete service, the claims against each respondent with failed service shall be dismissed without prej-



udice. If a claimant fails to prosecute, the Board may dismiss the claim and award attorneys' fees and costs as appropriate.

Requests for reconsideration are permitted in writing to the Board within 30 days after the final determination, pursuant to subsection (w). Pursuant to subsection (x), if the request is refused by the Board, a party may appeal for a review by the Register of Copyrights who shall determine if the Board abused its discretion in denying reconsideration and, if abuse is found, remand the claim to the Board for specific issues identified in the remand.

Subsection (y) authorizes actions by the Register and the Board to take specific actions in order to address bad faith conduct through awarding attorneys' fees, costs, and financial sanctions in the amount of up to \$5,000 (\$2,500 if the adversely affected party appeared *pro se*) or higher in cases of extraordinary circumstances or where a pattern or practice of bad faith conduct has occurred. Parties can also be barred from Board proceedings if, on more than one occasion within a 12-month period, they come before the Board for a harassing or other improper purpose. If such abuse is found by the Board, the party is then banned from initiating a claim before the Board for an additional 12 months from the date of the finding, and all pending proceedings are dismissed without prejudice (upon the respondent's consent, if the proceeding is active).

The Register of Copyrights is also directed to establish additional regulations to hear claims below \$5,000, exclusive of any attorney's fees and costs, by one Claims Officer. These regulations are to be consistent with the regulations that apply to larger claims filed with the Board.

*New § 1507—Effect of Proceeding.* Section 1507 provides that a final determination precludes re-litigation of the claims and counterclaims before any court, tribunal or the Board as to the same parties, but it does not preclude litigation of the same issues of fact or law not finally determined by the Board. Determinations of the Board may not be cited or relied upon as legal precedent. A court reviewing a determination under § 1508 may, however, cite that determination.

A proceeding before the Claims Board shall have no effect on a class action proceeding. A party to a proceeding who receives notice of a pending class action may opt out of the class action.

If a claimant who has a proceeding concerning material subject to a DMCA takedown notice timely notifies the service provider of the proceeding, the proceeding will satisfy § 512(g) of the DMCA, 17 U.S.C. § 512(g), and preclude the service provider from replacing the material that was subject to the takedown notice.

A federal court will stay proceedings or order other appropriate relief when a party files a claim that is already the subject of an active proceeding before the Board. There are no compulsory counterclaims before the Board, and failure to plead a counterclaim has no preclusive effect.

If a party opts out or is dismissed from a proceeding before the issuance of a final determination, the determination shall not be binding upon the party.

*New § 1508—Review and Confirmation by District Court.* Subject to meeting specified filing procedures, a party may seek enforcement in an appropriate U.S. district court if the other party has failed to pay damages awarded by the Board or otherwise failed to

comply with the relief awarded in a final determination. Within 90 days of a final determination by the Board, a party to the proceeding may seek an order vacating, modifying, or correcting a determination of the Board if it was issued as a result of fraud, corruption, or other misconduct; if the Board exceeded its authority; or if excusable neglect causes the issuance of a default determination. Case law construing parallel provisions of the Federal Arbitration Act, 9 U.S.C. § 10, may be instructive in further elucidating the scope of this limited right to appeal to federal court.

*New § 1509—Relationship to Other District Court Actions.* Section 1509 provides that a district court must issue a stay of proceedings if the claim is already the subject of a pending or active proceeding before the Board. The Board qualifies as an alternative dispute resolution process under 28 U.S.C. § 651 for purposes of referring cases from the federal courts.

*New § 1510—Implementation by Copyright Office.* Section 1510 gives the Register of Copyrights regulatory and fee-setting authority to implement the copyright small claims proceedings. The Register has flexibility to vary fee amounts and the timing when fees are assessed to effectuate the purposes of the Act. The Register is also given rulemaking authority to adjust the limits on monetary recovery or attorney fees no earlier than three years after the Board issues its first determination. The Register may retain outside vendors to establish the necessary operational facilities.

*New § 1511—Funding.* Section 1511 authorizes appropriations to fund the Board and also makes certain clerical amendments.

*Sec. 3. Implementation.* Section 3 provides that the Board is to begin operations not later than one year after the enactment of the Act.

*Sec. 4. Study.* Section 4 requires that, within three years of the Board's issuance of its first determination, the Register is to conduct a study and report to Congress on the use and efficacy of the Board and other recommendations to adjust the Board, such as the scope of eligible claims, work and damage limitations, the awarding of attorneys' fees and costs, and other possible mechanisms to assist small copyright holders.

*Sec. 5. Severability.* Section 5 provides that if any provision or application of the Act is held to be unconstitutional, the remaining provisions or applications of the Act retain legal force and effect.

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 2426, as reported, are shown as follows:

#### **CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

## TITLE 17, UNITED STATES CODE

Chap.		Sec.
1.	Subject Matter and Scope of Copyright .....	101
	* * * * *	
15.	<b>Copyright Small Claims</b> .....	<b>1501</b>
	* * * * *	

## CHAPTER 15—COPYRIGHT SMALL CLAIMS

Sec.

1501. *Definitions.*1502. *Copyright Claims Board.*1503. *Authority and duties of the Copyright Claims Board.*1504. *Nature of proceedings.*1505. *Registration requirement.*1506. *Conduct of proceedings.*1507. *Effect of proceeding.*1508. *Review and confirmation by district court.*1509. *Relationship to other district court actions.*1510. *Implementation by Copyright Office.*1511. *Funding.***§ 1501. Definitions***In this chapter—*(1) *the term “party”—*(A) *means a party; and*(B) *includes the attorney of a party, as applicable;*(2) *the term “claimant” means the real party in interest that commences a proceeding before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3);*(3) *the term “counterclaimant” means a respondent in a proceeding before the Copyright Claims Board that—*(A) *asserts a permissible counterclaim under section 1504(c)(4) against the claimant in the proceeding; and*(B) *is the real party in interest with respect to the counterclaim described in subparagraph (A); and*(4) *the term “respondent” means any person against whom a proceeding is brought before the Copyright Claims Board under section 1506(e), pursuant to a permissible claim of infringement brought under section 1504(c)(1), noninfringement brought under section 1504(c)(2), or misrepresentation brought under section 1504(c)(3).***§ 1502. Copyright Claims Board**(a) *IN GENERAL.—There is established in the Copyright Office the Copyright Claims Board, which shall serve as an alternative forum in which parties may voluntarily seek to resolve certain copyright claims regarding any category of copyrighted work, as provided in this chapter.*(b) *OFFICERS AND STAFF.—*(1) *COPYRIGHT CLAIMS OFFICERS.—The Register of Copyrights shall recommend 3 full-time Copyright Claims Officers to serve on the Copyright Claims Board in accordance with paragraph*

(3)(A). *The Officers shall be appointed by the Librarian of Congress to such positions after consultation with the Register of Copyrights.*

(2) *COPYRIGHT CLAIMS ATTORNEYS.—The Register of Copyrights shall hire not fewer than 2 full-time Copyright Claims Attorneys to assist in the administration of the Copyright Claims Board.*

(3) *QUALIFICATIONS.—*

(A) *COPYRIGHT CLAIMS OFFICERS.—*

(i) *IN GENERAL.—Each Copyright Claims Officer shall be an attorney who has not fewer than 7 years of legal experience.*

(ii) *EXPERIENCE.—Two of the Copyright Claims Officers shall have—*

(I) *substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims; and*

(II) *between those 2 Officers, have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.*

(iii) *ALTERNATIVE DISPUTE RESOLUTION.—The Copyright Claims Officer not described in clause (ii) shall have substantial familiarity with copyright law and experience in the field of alternative dispute resolution, including the resolution of litigation matters through that method of resolution.*

(B) *COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be an attorney who has not fewer than 3 years of substantial experience in copyright law.*

(4) *COMPENSATION.—*

(A) *COPYRIGHT CLAIMS OFFICERS.—*

(i) *DEFINITION.—In this subparagraph, the term “senior level employee of the Federal Government” means an employee, other than an employee in the Senior Executive Service, the position of whom is classified above GS–15 of the General Schedule.*

(ii) *PAY RANGE.—Each Copyright Claims Officer shall be compensated at a rate of pay that is not less than the minimum, and not more than the maximum, rate of pay payable for senior level employees of the Federal Government, including locality pay, as applicable.*

(B) *COPYRIGHT CLAIMS ATTORNEYS.—Each Copyright Claims Attorney shall be compensated at a rate of pay that is not more than the maximum rate of pay payable for level 10 of GS–15 of the General Schedule, including locality pay, as applicable.*

(5) *TERMS.—*

(A) *IN GENERAL.—Subject to subparagraph (B), a Copyright Claims Officer shall serve for a renewable term of 6 years.*

(B) *INITIAL TERMS.—The terms for the first Copyright Claims Officers appointed under this chapter shall be as follows:*

(i) *The first such Copyright Claims Officer appointed shall be appointed for a term of 4 years.*

(ii) *The second Copyright Claims Officer appointed shall be appointed for a term of 5 years.*

(iii) *The third Copyright Claims Officer appointed shall be appointed for a term of 6 years.*

(6) **VACANCIES AND INCAPACITY.**—

(A) **VACANCY.**—

(i) **IN GENERAL.**—*If a vacancy occurs in the position of a Copyright Claims Officer, the Librarian of Congress shall, upon the recommendation of and in consultation with the Register of Copyrights, act expeditiously to appoint a Copyright Claims Officer for that position.*

(ii) **VACANCY BEFORE EXPIRATION.**—*An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of the individual was appointed shall be appointed to serve a 6-year term.*

(B) **INCAPACITY.**—*If a Copyright Claims Officer is temporarily unable to perform the duties of the Officer, the Librarian of Congress shall, upon recommendation of and in consultation with the Register of Copyrights, act expeditiously to appoint an interim Copyright Claims Officer to perform such duties during the period of such incapacity.*

(7) **SANCTION OR REMOVAL.**—*Subject to section 1503(b), the Librarian of Congress may sanction or remove a Copyright Claims Officer.*

(8) **ADMINISTRATIVE SUPPORT.**—*The Register of Copyrights shall provide the Copyright Claims Officers and Copyright Claims Attorneys with necessary administrative support, including technological facilities, to carry out the duties of the Officers and Attorneys under this chapter.*

(9) **LOCATION OF COPYRIGHT CLAIMS BOARD.**—*The offices and facilities of the Copyright Claims Officers and Copyright Claims Attorneys shall be located at the Copyright Office.*

**§ 1503. Authority and duties of the Copyright Claims Board**

(a) **FUNCTIONS.**—

(1) **COPYRIGHT CLAIMS OFFICERS.**—*Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Officers shall be as follows:*

(A) *To render determinations on the civil copyright claims, counterclaims, and defenses that may be brought before the Officers under this chapter.*

(B) *To ensure that claims, counterclaims, and defenses are properly asserted and otherwise appropriate for resolution by the Copyright Claims Board.*

(C) *To manage the proceedings before the Officers and render rulings pertaining to the consideration of claims, counterclaims, and defenses, including with respect to scheduling, discovery, evidentiary, and other matters.*

(D) *To request, from participants and nonparticipants in a proceeding, the production of information and documents*

relevant to the resolution of a claim, counterclaim, or defense.

(E) To conduct hearings and conferences.

(F) To facilitate the settlement by the parties of claims and counterclaims.

(G)(i) To award monetary relief; and

(ii) to include in the determinations of the Officers a requirement that certain activities under section 1504(e)(2) cease or be mitigated, if the party to undertake the applicable measure has so agreed.

(H) To provide information to the public concerning the procedures and requirements of the Copyright Claims Board.

(I) To maintain records of the proceedings before the Officers, certify official records of such proceedings as needed, and, as provided in section 1506(t), make the records in such proceedings available to the public.

(J) To carry out such other duties as are set forth in this chapter.

(K) When not engaged in performing the duties of the Officers set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject to the provisions of this chapter and applicable regulations, the functions of the Copyright Claims Attorneys shall be as follows:

(A) To provide assistance to the Copyright Claims Officers in the administration of the duties of those Officers under this chapter.

(B) To provide assistance to members of the public with respect to the procedures and requirements of the Copyright Claims Board.

(C) To provide information to potential claimants contemplating bringing a permissible action before the Copyright Claims Board about obtaining a subpoena under section 512(h) for the sole purpose of identifying a potential respondent in such an action.

(D) When not engaged in performing the duties of the Attorneys set forth in this chapter, to perform such other duties as may be assigned by the Register of Copyrights.

(b) INDEPENDENCE IN DETERMINATIONS.—

(1) IN GENERAL.—The Copyright Claims Board shall render the determinations of the Board in individual proceedings independently on the basis of the records in the proceedings before it and in accordance with the provisions of this title, judicial precedent, and applicable regulations of the Register of Copyrights.

(2) CONSULTATION.—The Copyright Claims Officers and Copyright Claims Attorneys—

(A) may consult with the Register of Copyrights on general issues of law; and

(B) subject to section 1506(x), may not consult with the Register of Copyrights with respect to—

(i) the facts of any particular matter pending before the Officers and the Attorneys; or

(ii) the application of law to the facts described in clause (i).

(3) *PERFORMANCE APPRAISALS.*—Notwithstanding any other provision of law or any regulation or policy of the Library of Congress or Register of Copyrights, any performance appraisal of a Copyright Claims Officer or Copyright Claims Attorney may not consider the substantive result of any individual determination reached by the Copyright Claims Board as a basis for appraisal except to the extent that result may relate to any actual or alleged violation of an ethical standard of conduct.

(c) *DIRECTION BY REGISTER.*—Subject to subsection (b), the Copyright Claims Officers and Copyright Claims Attorneys shall, in the administration of their duties, be under the general direction of the Register of Copyrights.

(d) *INCONSISTENT DUTIES BARRED.*—A Copyright Claims Officer or Copyright Claims Attorney may not undertake any duty that conflicts with the duties of the Officer or Attorney in connection with the Copyright Claims Board.

(e) *RECUSAL.*—A Copyright Claims Officer or Copyright Claims Attorney shall recuse himself or herself from participation in any proceeding with respect to which the Copyright Claims Officer or Copyright Claims Attorney, as the case may be, has reason to believe that he or she has a conflict of interest.

(f) *EX PARTE COMMUNICATIONS.*—Except as may otherwise be permitted by applicable law, any party to a proceeding before the Copyright Claims Board shall refrain from ex parte communications with the Copyright Claims Officers and the Register of Copyrights concerning the substance of any active or pending proceeding before the Copyright Claims Board.

(g) *JUDICIAL REVIEW.*—Actions of the Copyright Claims Officers and Register of Copyrights under this chapter in connection with the rendering of any determination are subject to judicial review as provided under section 1508(c) and not under chapter 7 of title 5.

#### **§ 1504. Nature of proceedings**

(a) *VOLUNTARY PARTICIPATION.*—Participation in a Copyright Claims Board proceeding shall be on a voluntary basis in accordance with this chapter and the right of any party to instead pursue a claim, counterclaim, or defense in a district court of the United States or any other court, and to seek a jury trial, shall be preserved. The rights, remedies, and limitations under this section may not be waived except in accordance with this chapter.

(b) *STATUTE OF LIMITATIONS.*—

(1) *IN GENERAL.*—A proceeding may not be maintained before the Copyright Claims Board unless the proceeding is commenced, in accordance with section 1506(e), before the Copyright Claims Board within 3 years after the claim accrued.

(2) *TOLLING.*—Subject to section 1507(a), a proceeding commenced before the Copyright Claims Board shall toll the time permitted under section 507(b) for the commencement of an action on the same claim in a district court of the United States during the period in which the proceeding is pending.

(c) *PERMISSIBLE CLAIMS, COUNTERCLAIMS, AND DEFENSES.*—The Copyright Claims Board may render determinations with respect to the following claims, counterclaims, and defenses, subject to such

*further limitations and requirements, including with respect to particular classes of works, as may be set forth in regulations established by the Register of Copyrights:*

*(1) A claim for infringement of an exclusive right in a copyrighted work provided under section 106 by the legal or beneficial owner of the exclusive right at the time of the infringement for which the claimant seeks damages, if any, within the limitations set forth in subsection (e)(1).*

*(2) A claim for a declaration of noninfringement of an exclusive right in a copyrighted work provided under section 106, consistent with section 2201 of title 28.*

*(3) A claim under section 512(f) for misrepresentation in connection with a notification of claimed infringement or a counter notification seeking to replace removed or disabled material, except that any remedies relating to such a claim in a proceeding before the Copyright Claims Board shall be limited to those available under this chapter.*

*(4) A counterclaim that is asserted solely against the claimant in a proceeding—*

*(A) pursuant to which the counterclaimant seeks damages, if any, within the limitations set forth in subsection (e)(1); and*

*(B) that—*

*(i) arises under section 106 or section 512(f) and out of the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), a claim of noninfringement brought under paragraph (2), or a claim of misrepresentation brought under paragraph (3); or*

*(ii) arises under an agreement pertaining to the same transaction or occurrence that is the subject of a claim of infringement brought under paragraph (1), if the agreement could affect the relief awarded to the claimant.*

*(5) A legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.*

*(6) A single claim or multiple claims permitted under paragraph (1), (2), or (3) by one or more claimants against one or more respondents, but only if all claims asserted in any one proceeding arise out of the same allegedly infringing activity or continuous course of infringing activities and do not, in the aggregate, result in the recovery of such claim or claims for damages that exceed the limitations under subsection (e)(1).*

*(d) EXCLUDED CLAIMS.—The following claims and counterclaims are not subject to determination by the Copyright Claims Board:*

*(1) A claim or counterclaim that is not a permissible claim or counterclaim under subsection (c).*

*(2) A claim or counterclaim that has been finally adjudicated by a court of competent jurisdiction or that is pending before a court of competent jurisdiction, unless that court has granted a stay to permit that claim or counterclaim to proceed before the Copyright Claims Board.*

*(3) A claim or counterclaim by or against a Federal or State governmental entity.*



(4) A claim or counterclaim asserted against a person or entity residing outside of the United States, except in a case in which the person or entity initiated the proceeding before the Copyright Claims Board and is subject to counterclaims under this chapter.

(e) *PERMISSIBLE REMEDIES.*—

(1) *MONETARY RECOVERY.*—

(A) *ACTUAL DAMAGES, PROFITS, AND STATUTORY DAMAGES FOR INFRINGEMENT.*—With respect to a claim or counterclaim for infringement of copyright, and subject to the limitation on total monetary recovery under subparagraph (D), the Copyright Claims Board may award either of the following:

(i) Actual damages and profits determined in accordance with section 504(b), with that award taking into consideration, in appropriate cases, whether the infringing party has agreed to cease or mitigate the infringing activity under paragraph (2).

(ii) Statutory damages, which shall be determined in accordance with section 504(c), subject to the following conditions:

(I) With respect to works timely registered under section 412, so that the works are eligible for an award of statutory damages in accordance with that section, the statutory damages may not exceed \$15,000 for each work infringed.

(II) With respect to works not timely registered under section 412, but eligible for an award of statutory damages under this section, statutory damages may not exceed \$7,500 per work infringed, or a total of \$15,000 in any 1 proceeding.

(III) The Copyright Claims Board may not make any finding that, or consider whether, the infringement was committed willfully in making an award of statutory damages.

(IV) The Copyright Claims Board may consider, as an additional factor in awarding statutory damages, whether the infringer has agreed to cease or mitigate the infringing activity under paragraph (2).

(B) *ELECTION OF DAMAGES.*—With respect to a claim or counterclaim of infringement, at any time before final determination is rendered, and notwithstanding the schedule established by the Copyright Claims Board under section 1506(k), the claimant or counterclaimant shall elect—

(i) to recover actual damages and profits or statutory damages under subparagraph (A); or

(ii) not to recover damages.

(C) *DAMAGES FOR OTHER CLAIMS.*—Damages for claims and counterclaims other than infringement claims, such as those brought under section 512(f), shall be subject to the limitation under subparagraph (D).

(D) *LIMITATION ON TOTAL MONETARY RECOVERY.*—Notwithstanding any other provision of law, a party that pursues any one or more claims or counterclaims in any single

*proceeding before the Copyright Claims Board may not seek or recover in that proceeding a total monetary recovery that exceeds the sum of \$30,000, exclusive of any attorneys' fees and costs that may be awarded under section 1506(y)(2).*

(2) **AGREEMENT TO CEASE CERTAIN ACTIVITY.**—*In a determination of the Copyright Claims Board, the Board shall include a requirement to cease conduct if, in the proceeding relating to the determination—*

(A) *a party agrees—*

(i) *to cease activity that is found to be infringing, including removing or disabling access to, or destroying, infringing materials; or*

(ii) *to cease sending a takedown notice or counter notice under section 512 to the other party regarding the conduct at issue before the Board if that notice or counter notice was found to be a knowing material misrepresentation under section 512(f); and*

(B) *the agreement described in subparagraph (A) is reflected in the record for the proceeding.*

(3) **ATTORNEYS' FEES AND COSTS.**—*Notwithstanding any other provision of law, except in the case of bad faith conduct as provided in section 1506(y)(2), the parties to proceedings before the Copyright Claims Board shall bear their own attorneys' fees and costs.*

(f) **JOINT AND SEVERAL LIABILITY.**—*Parties to a proceeding before the Copyright Claims Board may be found jointly and severally liable if all such parties and relevant claims or counterclaims arise from the same activity or activities.*

(g) **PERMISSIBLE NUMBER OF CASES.**—*The Register of Copyrights may establish regulations relating to the permitted number of proceedings each year by the same claimant under this chapter, in the interests of justice and the administration of the Copyright Claims Board.*

### **§ 1505. Registration requirement**

(a) **APPLICATION OR CERTIFICATE.**—*A claim or counterclaim alleging infringement of an exclusive right in a copyrighted work may not be asserted before the Copyright Claims Board unless—*

(1) *the legal or beneficial owner of the copyright has first delivered a completed application, a deposit, and the required fee for registration of the copyright to the Copyright Office; and*

(2) *a registration certificate has either been issued or has not been refused.*

(b) **CERTIFICATE OF REGISTRATION.**—*Notwithstanding any other provision of law, a claimant or counterclaimant in a proceeding before the Copyright Claims Board shall be eligible to recover actual damages and profits or statutory damages under this chapter for infringement of a work if the requirements of subsection (a) have been met, except that—*

(1) *the Copyright Claims Board may not render a determination in the proceeding until—*

(A) *a registration certificate with respect to the work has been issued by the Copyright Office, submitted to the Copyright Claims Board, and made available to the other parties to the proceeding; and*

- (B) *the other parties to the proceeding have been provided an opportunity to address the registration certificate;*
- (2) *if the proceeding may not proceed further because a registration certificate for the work is pending, the proceeding shall be held in abeyance pending submission of the certificate to the Copyright Claims Board, except that, if the proceeding is held in abeyance for more than 1 year, the Copyright Claims Board may, upon providing written notice to the parties to the proceeding, and 30 days to the parties to respond to the notice, dismiss the proceeding without prejudice; and*
- (3) *if the Copyright Claims Board receives notice that registration with respect to the work has been refused, the proceeding shall be dismissed without prejudice.*
- (c) **PRESUMPTION.**—*In a case in which a registration certificate shows that registration with respect to a work was issued not later than 5 years after the date of the first publication of the work, the presumption under section 410(c) shall apply in a proceeding before the Copyright Claims Board, in addition to relevant principles of law under this title.*
- (d) **REGULATIONS.**—*In order to ensure that actions before the Copyright Claims Board proceed in a timely manner, the Register of Copyrights shall establish regulations allowing the Copyright Office to make a decision, on an expedited basis, to issue or deny copyright registration for an unregistered work that is at issue before the Board.*

#### **§ 1506. Conduct of proceedings**

- (a) **IN GENERAL.**—
- (1) **APPLICABLE LAW.**—*Proceedings of the Copyright Claims Board shall be conducted in accordance with this chapter and regulations established by the Register of Copyrights under this chapter, in addition to relevant principles of law under this title.*
- (2) **CONFLICTING PRECEDENT.**—*If it appears that there may be conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States, or, if the action could have been brought in more than 1 such jurisdiction, the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue.*
- (b) **RECORD.**—*The Copyright Claims Board shall maintain records documenting the proceedings before the Board.*
- (c) **CENTRALIZED PROCESS.**—*Proceedings before the Copyright Claims Board shall—*
- (1) *be conducted at the offices of the Copyright Claims Board without the requirement of in-person appearances by parties or others; and*
- (2) *take place by means of written submissions, hearings, and conferences carried out through internet-based applications and other telecommunications facilities, except that, in cases in which physical or other nontestimonial evidence material to a proceeding cannot be furnished to the Copyright Claims Board through available telecommunications facilities, the Copyright*

*Claims Board may make alternative arrangements for the submission of such evidence that do not prejudice any other party to the proceeding.*

(d) *REPRESENTATION.*—A party to a proceeding before the Copyright Claims Board may be, but is not required to be, represented by—

- (1) *an attorney; or*
- (2) *a law student who is qualified under applicable law governing representation by law students of parties in legal proceedings and who provides such representation on a pro bono basis.*

(e) *COMMENCEMENT OF PROCEEDING.*—In order to commence a proceeding under this chapter, a claimant shall, subject to such additional requirements as may be prescribed in regulations established by the Register of Copyrights, file a claim with the Copyright Claims Board, that—

- (1) *includes a statement of material facts in support of the claim;*
- (2) *is certified under subsection (y)(1); and*
- (3) *is accompanied by a filing fee in such amount as may be prescribed in regulations established by the Register of Copyrights.*

(f) *REVIEW OF CLAIMS AND COUNTERCLAIMS.*—

(1) *CLAIMS.*—Upon the filing of a claim under subsection (e), the claim shall be reviewed by a Copyright Claims Attorney to ensure that the claim complies with this chapter and applicable regulations, subject to the following:

(A) *If the claim is found to comply, the claimant shall be notified regarding that compliance and instructed to proceed with service of the claim under subsection (g).*

(B) *If the claim is found not to comply, the claimant shall be notified that the claim is deficient and be permitted to file an amended claim not later than 30 days after the date on which the claimant receives the notice, without the requirement of an additional filing fee. If the claimant files a compliant claim within that 30-day period, the claimant shall be so notified and be instructed to proceed with service of the claim. If the claim is refiled within that 30-day period and still fails to comply, the claimant shall again be notified that the claim is deficient and shall be provided a second opportunity to amend the claim within 30 days after the date of that second notice, without the requirement of an additional filing fee. If the claim is refiled again within that second 30-day period and is compliant, the claimant shall be so notified and shall be instructed to proceed with service of the claim, but if the claim still fails to comply, upon confirmation of such non-compliance by a Copyright Claims Officer, the proceeding shall be dismissed without prejudice. The Copyright Claims Board shall also dismiss without prejudice any proceeding in which a compliant claim is not filed within the applicable 30-day period.*

(C)(i) *Subject to clause (ii), for purposes of this paragraph, a claim against an online service provider for infringement by reason of the storage of or referral or linking*

*to infringing material that may be subject to the limitations on liability set forth in subsection (b), (c), or (d) of section 512 shall be considered noncompliant unless the claimant affirms in the statement required under subsection (e)(1) of this section that the claimant has previously notified the service provider of the claimed infringement in accordance with subsection (b)(2)(E), (c)(3), or (d)(3) of section 512, as applicable, and the service provider failed to remove or disable access to the material expeditiously upon the provision of such notice.*

*(ii) If a claim is found to be noncompliant under clause (i), the Copyright Claims Board shall provide the claimant with information concerning the service of such a notice under the applicable provision of section 512.*

*(2) COUNTERCLAIMS.—Upon the filing and service of a counterclaim, the counterclaim shall be reviewed by a Copyright Claims Attorney to ensure that the counterclaim complies with the provisions of this chapter and applicable regulations. If the counterclaim is found not to comply, the counterclaimant and the other parties to the proceeding shall be notified that the counterclaim is deficient, and the counterclaimant shall be permitted to file and serve an amended counterclaim within 30 days after the date of such notice. If the counterclaimant files and serves a compliant counterclaim within that 30-day period, the counterclaimant and such other parties shall be so notified. If the counterclaim is refiled and served within that 30-day period but still fails to comply, the counterclaimant and such other parties shall again be notified that the counterclaim is deficient, and the counterclaimant shall be provided a second opportunity to amend the counterclaim within 30 days after the date of the second notice. If the counterclaim is refiled and served again within that second 30-day period and is compliant, the counterclaimant and such other parties shall be so notified, but if the counterclaim still fails to comply, upon confirmation of such noncompliance by a Copyright Claims Officer, the counterclaim, but not the proceeding, shall be dismissed without prejudice.*

*(3) DISMISSAL FOR UNSUITABILITY.—The Copyright Claims Board shall dismiss a claim or counterclaim without prejudice if, upon reviewing the claim or counterclaim, or at any other time in the proceeding, the Copyright Claims Board concludes that the claim or counterclaim is unsuitable for determination by the Copyright Claims Board, including on account of any of the following:*

*(A) The failure to join a necessary party.*

*(B) The lack of an essential witness, evidence, or expert testimony.*

*(C) The determination of a relevant issue of law or fact that could exceed either the number of proceedings the Copyright Claims Board could reasonably administer or the subject matter competence of the Copyright Claims Board.*

*(g) SERVICE OF NOTICE AND CLAIMS.—In order to proceed with a claim against a respondent, a claimant shall, within 90 days after receiving notification under subsection (f) to proceed with service,*

*file with the Copyright Claims Board proof of service on the respondent. In order to effectuate service on a respondent, the claimant shall cause notice of the proceeding and a copy of the claim to be served on the respondent, either by personal service or pursuant to a waiver of personal service, as prescribed in regulations established by the Register of Copyrights. Such regulations shall include the following requirements:*

*(1) The notice of the proceeding shall adhere to a prescribed form and shall set forth the nature of the Copyright Claims Board and proceeding, the right of the respondent to opt out, and the consequences of opting out and not opting out, including a prominent statement that, by not opting out within 60 days after receiving the notice, the respondent—*

*(A) loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States; and*

*(B) waives the right to a jury trial regarding the dispute.*

*(2) The copy of the claim served on the respondent shall be the same as the claim that was filed with the Copyright Claims Board.*

*(3) Personal service of a notice and claim may be effected by an individual who is not a party to the proceeding and is older than 18 years of age.*

*(4) An individual, other than a minor or incompetent individual, may be served by—*

*(A) complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made;*

*(B) delivering a copy of the notice and claim to the individual personally;*

*(C) leaving a copy of the notice and claim at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or*

*(D) delivering a copy of the notice and claim to an agent designated by the respondent to receive service of process or, if not so designated, an agent authorized by appointment or by law to receive service of process.*

*(5)(A) A corporation, partnership, or unincorporated association that is subject to suit in courts of general jurisdiction under a common name shall be served by delivering a copy of the notice and claim to its service agent. If such service agent has not been designated, service shall be accomplished—*

*(i) by complying with State law for serving a summons in an action brought in courts of general jurisdiction in the State where service is made; or*

*(ii) by delivering a copy of the notice and claim to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process in an action brought in courts of general jurisdiction in the State where service is made and, if the agent is one authorized by statute and the statute so requires, by also mailing a copy of the notice and claim to the respondent.*

*(B) A corporation, partnership or unincorporated association that is subject to suit in courts of general jurisdiction under a common name may elect to designate a service agent to receive*

notice of a claim against it before the Copyright Claims Board by complying with requirements that the Register of Copyrights shall establish by regulation. The Register of Copyrights shall maintain a current directory of service agents that is available to the public for inspection, including through the internet, and may require such corporations, partnerships, and unincorporated associations designating such service agents to pay a fee to cover the costs of maintaining the directory.

(6) In order to request a waiver of personal service, the claimant may notify a respondent, by first class mail or by other reasonable means, that a proceeding has been commenced, such notice to be made in accordance with regulations established by the Register of Copyrights, subject to the following:

(A) Any such request shall be in writing, shall be addressed to the respondent, and shall be accompanied by a prescribed notice of the proceeding, a copy of the claim as filed with the Copyright Claims Board, a prescribed form for waiver of personal service, and a prepaid or other means of returning the form without cost.

(B) The request shall state the date on which the request is sent, and shall provide the respondent a period of 30 days, beginning on the date on which the request is sent, to return the waiver form signed by the respondent. The signed waiver form shall, for purposes of this subsection, constitute acceptance and proof of service as of the date on which the waiver is signed.

(7)(A) A respondent's waiver of personal service shall not constitute a waiver of the respondent's right to opt out of the proceeding.

(B) A respondent who timely waives personal service under paragraph (6) and does not opt out of the proceeding shall be permitted a period of 30 days, in addition to the period otherwise permitted under the applicable procedures of the Copyright Claims Board, to submit a substantive response to the claim, including any defenses and counterclaims.

(8) A minor or an incompetent individual may only be served by complying with State law for serving a summons or like process on such an individual in an action brought in the courts of general jurisdiction of the State where service is made.

(9) Service of a claim and waiver of personal service may only be effected within the United States.

(h) NOTIFICATION BY COPYRIGHT CLAIMS BOARD.—The Register of Copyrights shall establish regulations providing for a written notification to be sent by, or on behalf of, the Copyright Claims Board to notify the respondent of a pending proceeding against the respondent, as set forth in those regulations, which shall—

(1) include information concerning the respondent's right to opt out of the proceeding, the consequences of opting out and not opting out, and a prominent statement that, by not opting out within 60 days after the date of service under subsection (g), the respondent loses the opportunity to have the dispute decided by a court created under article III of the Constitution of the United States and waives the right to a jury trial regarding the dispute; and

(2) be in addition to, and separate and apart from, the notice requirements under subsection (g).

(i) **OPT-OUT PROCEDURE.**—Upon being properly served with a notice and claim, a respondent who chooses to opt out of the proceeding shall have a period of 60 days, beginning on the date of service, in which to provide written notice of such choice to the Copyright Claims Board, in accordance with regulations established by the Register of Copyrights. If proof of service has been filed by the claimant and the respondent does not submit an opt-out notice to the Copyright Claims Board within that 60-day period, the proceeding shall be deemed an active proceeding and the respondent shall be bound by the determination in the proceeding to the extent provided under section 1507(a). If the respondent opts out of the proceeding during that 60-day period, the proceeding shall be dismissed without prejudice, except that, in exceptional circumstances and upon written notice to the claimant, the Copyright Claims Board may extend that 60-day period in the interests of justice.

(j) **SERVICE OF OTHER DOCUMENTS.**—Documents submitted or relied upon in a proceeding, other than the notice and claim, shall be served in accordance with regulations established by the Register of Copyrights.

(k) **SCHEDULING.**—Upon confirmation that a proceeding has become an active proceeding, the Copyright Claims Board shall issue a schedule for the future conduct of the proceeding. The schedule shall not specify a time that a claimant or counterclaimant is required make an election of damages that is inconsistent with section 1504(e). A schedule issued by the Copyright Claims Board may be amended by the Copyright Claims Board in the interests of justice.

(l) **CONFERENCES.**—One or more Copyright Claims Officers may hold a conference to address case management or discovery issues in a proceeding, which shall be noted upon the record of the proceeding and may be recorded or transcribed.

(m) **PARTY SUBMISSIONS.**—A proceeding of the Copyright Claims Board may not include any formal motion practice, except that, subject to applicable regulations and procedures of the Copyright Claims Board—

(1) the parties to the proceeding may make requests to the Copyright Claims Board to address case management and discovery matters, and submit responses thereto; and

(2) the Copyright Claims Board may request or permit parties to make submissions addressing relevant questions of fact or law, or other matters, including matters raised sua sponte by the Copyright Claims Officers, and offer responses thereto.

(n) **DISCOVERY.**—Discovery in a proceeding shall be limited to the production of relevant information and documents, written interrogatories, and written requests for admission, as provided in regulations established by the Register of Copyrights, except that—

(1) upon the request of a party, and for good cause shown, the Copyright Claims Board may approve additional relevant discovery, on a limited basis, in particular matters, and may request specific information and documents from participants in the proceeding and voluntary submissions from nonparticipants, consistent with the interests of justice;

(2) upon the request of a party, and for good cause shown, the Copyright Claims Board may issue a protective order to limit



*the disclosure of documents or testimony that contain confidential information; and*

*(3) after providing notice and an opportunity to respond, and upon good cause shown, the Copyright Claims Board may 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.*

*(o) EVIDENCE.—The Copyright Claims Board may consider the following types of evidence in a proceeding, and such evidence may be admitted without application of formal rules of evidence:*

*(1) Documentary and other nontestimonial evidence that is relevant to the claims, counterclaims, or defenses in the proceeding.*

*(2) Testimonial evidence, submitted under penalty of perjury in written form or in accordance with subsection (p), limited to statements of the parties and nonexpert witnesses, that is relevant to the claims, counterclaims, and defenses in a proceeding, except that, in exceptional cases, expert witness testimony or other types of testimony may be permitted by the Copyright Claims Board for good cause shown.*

*(p) HEARINGS.—The Copyright Claims Board may conduct a hearing to receive oral presentations on issues of fact or law from parties and witnesses to a proceeding, including oral testimony, subject to the following:*

*(1) Any such hearing shall be attended by not fewer than two of the Copyright Claims Officers.*

*(2) The hearing shall be noted upon the record of the proceeding and, subject to paragraph (3), may be recorded or transcribed as deemed necessary by the Copyright Claims Board.*

*(3) A recording or transcript of the hearing shall be made available to any Copyright Claims Officer who is not in attendance.*

*(q) VOLUNTARY DISMISSAL.—*

*(1) BY CLAIMANT.—Upon the written request of a claimant that is received before a respondent files a response to the claim in a proceeding, the Copyright Claims Board shall dismiss the proceeding, or a claim or respondent, as requested, without prejudice.*

*(2) BY COUNTERCLAIMANT.—Upon written request of a counterclaimant that is received before a claimant files a response to the counterclaim, the Copyright Claims Board shall dismiss the counterclaim, such dismissal to be without prejudice.*

*(3) CLASS ACTIONS.—Any party in an active proceeding before the Copyright Claims Board who receives notice of a pending or putative class action, arising out of the same transaction or occurrence, in which that party is a class member may request in writing dismissal of the proceeding before the Board. Upon notice to all claimants and counterclaimants, the Copyright Claims Board shall dismiss the proceeding without prejudice.*

*(r) SETTLEMENT.—*

*(1) IN GENERAL.—At any time in an active proceeding, some or all of the parties may—*

- (A) jointly request a conference with a Copyright Claims Officer for the purpose of facilitating settlement discussions;  
or
- (B) submit to the Copyright Claims Board an agreement providing for settlement and dismissal of some or all of the claims and counterclaims in the proceeding.
- (2) *ADDITIONAL REQUEST.*—A submission under paragraph (1)(B) may include a request that the Copyright Claims Board adopt some or all of the terms of the parties' settlement in a final determination in the proceeding.
- (s) *FACTUAL FINDINGS.*—Subject to subsection (n)(3), the Copyright Claims Board shall make factual findings based upon a preponderance of the evidence.
- (t) *DETERMINATIONS.*—
- (1) *NATURE AND CONTENTS.*—A determination rendered by the Copyright Claims Board in a proceeding shall—
- (A) be reached by a majority of the Copyright Claims Board;
- (B) be in writing, and include an explanation of the factual and legal basis of the determination;
- (C) set forth any terms by which a respondent or counterclaim respondent has agreed to cease infringing activity under section 1504(e)(2);
- (D) to the extent requested under subsection (r)(2), set forth the terms of any settlement agreed to under subsection (r)(1); and
- (E) include a clear statement of all damages and other relief awarded, including under subparagraphs (C) and (D).
- (2) *DISSENT.*—A Copyright Claims Officer who dissents from a decision contained in a determination under paragraph (1) may append a statement setting forth the grounds for that dissent.
- (3) *PUBLICATION.*—Each final determination of the Copyright Claims Board shall be made available on a publicly accessible website. The Register shall establish regulations with respect to the publication of other records and information relating to such determinations, including the redaction of records to protect confidential information that is the subject of a protective order under subsection (n)(2).
- (4) *FREEDOM OF INFORMATION ACT.*—All information relating to proceedings of the Copyright Claims Board under this title is exempt from disclosure to the public under section 552(b)(3) of title 5, except for determinations, records, and information published under paragraph (3).
- (u) *RESPONDENT'S DEFAULT.*—If a proceeding has been deemed an active proceeding but the respondent has failed to appear or has ceased participating in the proceeding, as demonstrated by the respondent's failure, without justifiable cause, to meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may enter a default determination, including the dismissal of any counterclaim asserted by the respondent, as follows and in accordance with such other requirements as the Register of Copyrights may establish by regulation:

(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.*

(2) *If 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, including email addresses, reflected in the records of the proceeding before the Copyright Claims Board, of the pendency of a default determination by the Copyright Claims Board and of the legal significance of such determination. Such notice shall be accompanied by the proposed default determination and shall provide that the respondent has a period of 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed default determination.*

(3) *If the respondent responds to the notice provided under paragraph (2) within the 30-day period provided in such paragraph, the Copyright Claims Board shall consider respondent's submissions and, after allowing the other parties to address such submissions, maintain, or amend its proposed determination as appropriate, and the resulting determination shall not be a default determination.*

(4) *If the respondent fails to respond to the notice provided under paragraph (2), the Copyright Claims Board shall proceed to issue the default determination as a final determination. Thereafter, the respondent may only challenge such determination to the extent permitted under section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the default determination.*

(v) **CLAIMANT'S FAILURE TO PROCEED.—**

(1) **FAILURE TO COMPLETE SERVICE.**—*If a claimant fails to complete service on a respondent within the 90-day period required under subsection (g), the Copyright Claims Board shall dismiss that respondent from the proceeding without prejudice. If a claimant fails to complete service on all respondents within that 90-day period, the Copyright Claims Board shall dismiss the proceeding without prejudice.*

(2) **FAILURE TO PROSECUTE.**—*If a claimant fails to proceed in an active proceeding, as demonstrated by the claimant's failure, without justifiable cause, to meet one or more deadlines or requirements set forth in the schedule adopted by the Copyright Claims Board under subsection (k), the Copyright Claims Board may, upon providing written notice to the claimant and a period of 30 days, beginning on the date of the notice, to respond to the notice, and after considering any such response, issue a determination dismissing the claimants' claims, which shall include an award of attorneys' fees and costs, if appropriate, under subsection (y)(2). Thereafter, the claimant may only challenge such determination to the extent permitted under*

section 1508(c), except that, before any additional proceedings are initiated under section 1508, the Copyright Claims Board may, in the interests of justice, vacate the determination of dismissal.

(w) *REQUEST FOR RECONSIDERATION.*—A party may, within 30 days after the date on which the Copyright Claims Board issues a final determination in a proceeding under this chapter, submit a written request for reconsideration of, or an amendment to, such determination if the party identifies a clear error of law or fact material to the outcome, or a technical mistake. After providing the other parties an opportunity to address such request, the Copyright Claims Board shall either deny the request or issue an amended final determination.

(x) *REVIEW BY REGISTER.*—If the Copyright Claims Board denies a party a request for reconsideration of a final determination under subsection (w), that party may, within 30 days after the date of such denial, request review of the final determination by the Register of Copyrights in accordance with regulations established by the Register. Such request shall be accompanied by a reasonable filing fee, as provided in such regulations. The review by the Register shall be limited to consideration of whether the Copyright Claims Board abused its discretion in denying reconsideration of the determination. After providing the other parties an opportunity to address the request, the Register shall either deny the request for review, or remand the proceeding to the Copyright Claims Board for reconsideration of issues specified in the remand and for issuance of an amended final determination. Such amended final determination shall not be subject to further consideration or review, other than under section 1508(c).

(y) *CONDUCT OF PARTIES AND ATTORNEYS.*—

(1) *CERTIFICATION.*—The Register of Copyrights shall establish regulations requiring certification of the accuracy and truthfulness of statements made by participants in proceedings before the Copyright Claims Board.

(2) *BAD FAITH CONDUCT.*—Notwithstanding any other provision of law, in any proceeding in which a determination is rendered and it is established that a party pursued a claim, counterclaim, or defense for a harassing or other improper purpose, or without a reasonable basis in law or fact, then, unless inconsistent with the interests of justice, the Copyright Claims Board shall in such determination award reasonable costs and attorneys' fees to any adversely affected party of in an amount of not more than \$5,000, except that—

(A) if an adversely affected party appeared *pro se* in the proceeding, the award to that party shall be for costs only, in an amount of not more than \$2,500; and

(B) in extraordinary circumstances, such as where a party has demonstrated a pattern or practice of bad faith conduct as described in this paragraph, the Copyright Claims Board may, in the interests of justice, award costs and attorneys' fees in excess of the limitations under this paragraph.

(3) *ADDITIONAL PENALTY.*—If the Board finds that on more than one occasion within a 12-month period a party pursued a claim, counterclaim, or defense before the Copyright Claims

*Board for a harassing or other improper purpose, or without a reasonable basis in law or fact, that party shall be barred from initiating a claim before the Copyright Claims Board under this chapter for a period of 12 months beginning on the date on which the Board makes such a finding. Any proceeding commenced by that party that is still pending before the Board when such a finding is made shall be dismissed without prejudice, except that if a proceeding has been deemed active under subsection (i), the proceeding shall be dismissed under this paragraph only if the respondent provides written consent thereto.*

(z) **REGULATIONS FOR SMALLER CLAIMS.**—*The Register of Copyrights shall establish regulations to provide for the consideration and determination, by at least one Copyright Claims Officer, of any claim under this chapter in which total damages sought do not exceed \$5,000 (exclusive of attorneys' fees and costs) that are otherwise consistent with this chapter. A determination issued under this subsection shall have the same effect as a determination issued by the entire Copyright Claims Board.*

#### **§ 1507. Effect of proceeding**

(a) **DETERMINATION.**—*Subject to the reconsideration and review processes provided under subsections (w) and (x) of section 1506 and section 1508(c), the issuance of a final determination by the Copyright Claims Board in a proceeding, including a default determination or determination based on a failure to prosecute, shall, solely with respect to the parties to such determination, preclude relitigation before any court or tribunal, or before the Copyright Claims Board, of the claims and counterclaims asserted and finally determined by the Board, and may be relied upon for such purpose in a future action or proceeding arising from the same specific activity or activities, subject to the following:*

(1) *A determination of the Copyright Claims Board shall not preclude litigation or relitigation as between the same or different parties before any court or tribunal, or the Copyright Claims Board, of the same or similar issues of fact or law in connection with claims or counterclaims not asserted or not finally determined by the Copyright Claims Board.*

(2) *A determination of ownership of a copyrighted work for purposes of resolving a matter before the Copyright Claims Board may not be relied upon, and shall not have any preclusive effect, in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.*

(3) *Except to the extent permitted under this subsection and section 1508, any determination of the Copyright Claims Board may not be cited or relied upon as legal precedent in any other action or proceeding before any court or tribunal, including the Copyright Claims Board.*

(b) **CLASS ACTIONS NOT AFFECTED.**—

(1) **IN GENERAL.**—*A proceeding before the Copyright Claims Board shall not have any effect on a class action proceeding in a district court of the United States, and section 1509(a) shall not apply to a class action proceeding in a district court of the United States.*

(2) *NOTICE OF CLASS ACTION.*—Any party to an active proceeding before the Copyright Claims Board who receives notice of a pending class action, arising out of the same transaction or occurrence as the proceeding before the Copyright Claims Board, in which the party is a class member shall either—

(A) opt out of the class action, in accordance with regulations established by the Register of Copyrights; or

(B) seek dismissal under section 1506(q)(3) of the proceeding before the Copyright Claims Board.

(c) *OTHER MATERIALS IN PROCEEDING.*—Except as permitted under this section and section 1508, a submission or statement of a party or witness made in connection with a proceeding before the Copyright Claims Board, including a proceeding that is dismissed, may not be cited or relied upon in, or serve as the basis of, any action or proceeding concerning rights or limitations on rights under this title before any court or tribunal, including the Copyright Claims Board.

(d) *APPLICABILITY OF SECTION 512(g).*—A claim or counterclaim before the Copyright Claims Board that is brought under subsection (c)(1) or (c)(4) of section 1504, or brought under subsection (c)(6) of section 1504 and that relates to a claim under subsection (c)(1) or (c)(4) of such section, qualifies as an action seeking an order to restrain a subscriber from engaging in infringing activity under section 512(g)(2)(C) if—

(1) notice of the commencement of the Copyright Claims Board proceeding is provided by the claimant to the service provider's designated agent before the service provider replaces the material following receipt of a counter notification under section 512(g); and

(2) the claim brought alleges infringement of the material identified in the notification of claimed infringement under section 512(c)(1)(C).

(e) *FAILURE TO ASSERT COUNTERCLAIM.*—The failure or inability to assert a counterclaim in a proceeding before the Copyright Claims Board shall not preclude the assertion of that counterclaim in a subsequent court action or proceeding before the Copyright Claims Board.

(f) *OPT-OUT OR DISMISSAL OF PARTY.*—If a party has timely opted out of a proceeding under section 1506(i) or is dismissed from a proceeding before the Copyright Claims Board issues a final determination in the proceeding, the determination shall not be binding upon and shall have no preclusive effect with respect to that party.

#### **§ 1508. Review and confirmation by district court**

(a) *IN GENERAL.*—In any proceeding in which a party has failed to pay damages, or has failed otherwise to comply with the relief, awarded in a final determination of the Copyright Claims Board, including a default determination or a determination based on a failure to prosecute, the aggrieved party may, not later than 1 year after the date on which the final determination is issued, any reconsideration by the Copyright Claims Board or review by the Register of Copyrights is resolved, or an amended final determination is issued, whichever occurs last, apply to the United States District Court for the District of Columbia or any other appropriate district court of the United States for an order confirming the relief award-

*ed in the final determination and reducing such award to judgment. The court shall grant such order and direct entry of judgment unless the determination is or has been vacated, modified, or corrected under subsection (c). If the United States District Court for the District of Columbia or other district court of the United States, as the case may be, issues an order confirming the relief awarded by the Copyright Claims Board, the court shall impose on the party who failed to pay damages or otherwise comply with the relief, the reasonable expenses required to secure such order, including attorneys' fees, that were incurred by the aggrieved party.*

*(b) FILING PROCEDURES.—*

*(1) APPLICATION TO CONFIRM DETERMINATION.—Notice of the application under subsection (a) for confirmation of a determination of the Copyright Claims Board and entry of judgment shall be provided to all parties to the proceeding before the Copyright Claims Board that resulted in the determination, in accordance with the procedures applicable to service of a motion in the district court of the United States where the application is made.*

*(2) CONTENTS OF APPLICATION.—The application shall include the following:*

*(A) A certified copy of the final or amended final determination of the Copyright Claims Board, as reflected in the records of the Copyright Claims Board, following any process of reconsideration or review by the Register of Copyrights, to be confirmed and rendered to judgment.*

*(B) A declaration by the applicant, under penalty of perjury—*

*(i) that the copy is a true and correct copy of such determination;*

*(ii) stating the date it was issued;*

*(iii) stating the basis for the challenge under subsection (c)(1); and*

*(iv) stating whether the applicant is aware of any other proceedings before the court concerning the same determination of the Copyright Claims Board.*

*(c) CHALLENGES TO THE DETERMINATION.—*

*(1) BASES FOR CHALLENGE.—Not later than 90 days after the date on which Copyright Claims Board issues a final or amended final determination in a proceeding, or not later than 90 days after the date on which the Register of Copyrights completes any process of reconsideration or review of the determination, whichever occurs later, a party may seek a court order vacating, modifying, or correcting the determination of the Copyright Claims Board in the following cases:*

*(A) If the determination was issued as a result of fraud, corruption, misrepresentation, or other misconduct.*

*(B) If the Copyright Claims Board exceeded its authority or failed to render a final determination concerning the subject matter at issue.*

*(C) In the case of a default determination or determination based on a failure to prosecute, if it is established that the default or failure was due to excusable neglect.*

*(2) PROCEDURE TO CHALLENGE.—*

(A) *NOTICE OF APPLICATION.*—Notice of the application to challenge a determination of the Copyright Claims Board shall be provided to all parties to the proceeding before the Copyright Claims Board, in accordance with the procedures applicable to service of a motion in the court where the application is made.

(B) *STAYING OF PROCEEDINGS.*—For purposes of an application under this subsection, any judge who is authorized to issue an order to stay the proceedings in an any other action brought in the same court may issue an order, to be served with the notice of application, staying proceedings to enforce the award while the challenge is pending.

#### **§ 1509. Relationship to other district court actions**

(a) *STAY OF DISTRICT COURT PROCEEDINGS.*—Subject to section 1507(b), a district court of the United States shall issue a stay of proceedings or such other relief as the court determines appropriate with respect to any claim brought before the court that is already the subject of a pending or active proceeding before the Copyright Claims Board.

(b) *ALTERNATIVE DISPUTE RESOLUTION PROCESS.*—A proceeding before the Copyright Claims Board under this chapter shall qualify as an alternative dispute resolution process under section 651 of title 28 for purposes of referral of eligible cases by district courts of the United States upon the consent of the parties.

#### **§ 1510. Implementation by Copyright Office**

(a) *REGULATIONS.*—

(1) *IMPLEMENTATION GENERALLY.*—The Register of Copyrights shall establish regulations to carry out this chapter. Such regulations shall include the fees prescribed under subsections (e) and (x) of section 1506. The authority to issue such fees shall not limit the authority of the Register of Copyrights to establish fees for services under section 708. All fees received by the Copyright Office in connection with the activities under this chapter shall be deposited by the Register of Copyrights and credited to the appropriations for necessary expenses of the Office in accordance with section 708(d). In establishing regulations under this subsection, the Register of Copyrights shall provide for the efficient administration of the Copyright Claims Board, and for the ability of the Copyright Claims Board to timely complete proceedings instituted under this chapter, including by implementing mechanisms to prevent harassing or improper use of the Copyright Claims Board by any party.

(2) *LIMITS ON MONETARY RELIEF.*—

(A) *IN GENERAL.*—Subject to subparagraph (B), not earlier than 3 years after the date on which Copyright Claims Board issues the first determination of the Copyright Claims Board, the Register of Copyrights may, in order to further the goals of the Copyright Claims Board, conduct a rulemaking to adjust the limits on monetary recovery or attorneys' fees and costs that may be awarded under this chapter.

(B) *EFFECTIVE DATE OF ADJUSTMENT.*—Any rule under subparagraph (A) that makes an adjustment shall take ef-



*fect at the end of the 120-day period beginning on the date on which the Register of Copyrights submits the rule to Congress and only if Congress does not, during that 120-day period, enact a law that provides in substance that Congress does not approve the rule.*

*(b) NECESSARY FACILITIES.—Subject to applicable law, the Register of Copyrights may retain outside vendors to establish internet-based, teleconferencing, and other facilities required to operate the Copyright Claims Board.*

*(c) FEES.—Any filing fees, including the fee to commence a proceeding under section 1506(e), shall be prescribed in regulations established by the Register of Copyrights. The sum total of such filing fees shall be in an amount of at least \$100, may not exceed the cost of filing an action in a district court of the United States, and shall be fixed in amounts that further the goals of the Copyright Claims Board.*

#### **§ 1511. Funding**

*There are authorized to be appropriated such sums as may be necessary to pay the costs incurred by the Copyright Office under this chapter that are not covered by fees collected for services rendered under this chapter, including the costs of establishing and maintaining the Copyright Claims Board and its facilities.*

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