

raised by a party, all documents submitted by the parties through their statements submitted under § 222.15 shall be deemed admitted and marked as exhibits in the same order as presented through the documentary evidence a party submitted with the party statement. To the extent additional documents are allowed by the Board at a hearing on the merits, such evidence may also be presented as exhibits to all parties and marked by the presenting party starting with the next number after the exhibits attached to the party's document statement.

(2) *Summary exhibits.* The contents of voluminous documentary evidence which cannot be conveniently examined at the hearing may be presented in the form of a chart, summary, or calculation. Absent leave of the Board, evidence supporting the summary exhibit must have been produced to the other parties in discovery and admitted as exhibits, and the summary exhibit must be disclosed to the other parties in the proceeding at least seven days before the hearing.

(d) *New exhibits for use in cross-examination or redirect examination.* Exhibits not submitted as part of written testimony may not be used at a hearing without leave of the Board. Leave to use such exhibits may be requested before or during the hearing. Requests to use an exhibit not submitted as part of written testimony and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

[87 FR 30077, May 17, 2022]

PART 223—OPT-OUT PROVISIONS

Sec.

223.1 Respondent's opt-out.

223.2 Libraries and archives opt-out procedures.

223.3 Class action opt-out procedures.

AUTHORITY: 17 U.S.C. 702, 1510.

SOURCE: 87 FR 13176, Mar. 9, 2022, unless otherwise noted.

§ 223.1 Respondent's opt-out.

(a) *Effect of opt-out on particular proceeding.* A respondent may opt out of a proceeding before the Copyright Claims Board (Board) pursuant to 17 U.S.C. 1506(i) following the procedures set

forth in this section. A respondent's opt-out shall result in the dismissal of the claim without prejudice.

(b) *Content of opt-out notification.* The respondent's opt-out notification shall include—

(1) The docket number assigned by the Board and contained in either the *initial notice* served by the claimant or the *second notice*;

(2) The respondent's name;

(3) The respondent's mailing address;

(4) An affirmation that the respondent shall not appear before the Board with respect to the claim served by the claimant;

(5) A certification under penalty of perjury that the individual completing the notification is the respondent identified in the claim served by the claimant or is the legal counsel or *authorized representative* of the respondent identified in the claim and has been directed and authorized by the respondent to opt out of the particular proceeding; and

(6) The typed, printed, or handwritten signature of the respondent or its legal counsel or *authorized representative*, and, if the signature is handwritten, a typed or printed name.

(c) *Process of opting out.* Upon being served with a notice and claim, a respondent may complete the opt-out process by—

(1) Completing and submitting the Board's online opt-out notification form available through the Board's electronic filing system (eCCB) as identified in the *initial notice* and *second notice* and providing an email address for confirmation; or

(2) Completing and submitting the paper opt-out notification form included with the *initial notice* and *second notice*, providing a mailing address or email address to receive confirmation, and delivering it to the Board, either by—

(i) First-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) A third party commercial carrier, that guarantees delivery no later than two days from the day of deposit with the service.

(3) An online or paper opt-out notification is not complete unless the confirmation code, provided with both the

§ 223.2

initial notice and *second notice*, is included in the submission.

(d) *Effect of improper service.* If a respondent is improperly served under 37 CFR 222.5 and completes the opt-out process described in paragraph (c) of this section, a respondent's timely opt-out will still be effective and result in the dismissal of the claim without prejudice.

(e) *Timing of opt out.* The respondent has 60 days from the date of service or waiver of service to provide notice of its opt-out election. When the last day of that period falls on a weekend or a Federal holiday, the ending date shall be extended to the next Federal work day.

(1) When opting out via the online form under paragraph (c)(1) of this section, the respondent's opt-out notification must be submitted by 11:59 p.m. Eastern Time on the last day of the opt-out period.

(2) When opting out under paragraph (c)(2) of this section, the respondent's opt-out notification must be postmarked, dispatched by a commercial carrier, courier, or messenger, or hand-delivered to the Office no later than the 60-day deadline.

(f) *Extension of opt-out period.* The Board may extend the 60-day period to opt out in exceptional circumstances and in the interests of justice and upon written notice to the claimant. Either a respondent individually or the parties jointly may contact the Board through a Copyright Claims Attorney to request an extension of the opt-out period.

(g) *Multiple respondents.* In claims involving multiple respondents, each respondent who elects to opt out must separately complete the opt-out process.

(h) *Confirmation of opt-out.* When a respondent has completed the opt-out process, the Board shall notify all parties to the proceeding.

(i) *Effect of opt out on refiled claims.* If the claimant attempts to refile a claim against the same respondent(s), covering in substance the same acts and the same theories of recovery after the respondent's initial opt-out notification, the Board shall apply the prior opt-out election and dismiss the claim unless the claimant can demonstrate

37 CFR Ch. II (7–1–25 Edition)

that the respondent affirmatively has agreed to resubmission of the parties' dispute to the Board for resolution.

(j) *Effect of opt-out on unrelated claims.* The respondent's opt-out for a particular claim shall not be construed as an opt-out for claims involving different acts or different theories of recovery.

[87 FR 17007, Mar. 25, 2022]

§ 223.2 Libraries and archives opt-out procedures.

(a) *Opt-out notification.* (1) A library or archives that wishes to preemptively opt out of participating in Copyright Claims Board ("Board") proceedings under 17 U.S.C. 1506(aa) may do so by submitting written notification to the Board. The notification shall include a signed certification under penalty of perjury that the library or archives qualifies for the limitations on exclusive rights under 17 U.S.C. 108 and the signatory is authorized to submit the form on the library's or archives' behalf.

(2) The submission described in paragraph (a)(1) of this section shall list the name and physical address of each library or archives to which the preemptive opt out applies and shall be signed by a person with the authority described in paragraph (c) of this section. The library or archives must also provide a point of contact for future correspondence, including phone number, mailing address, email address, and the website for the library or archives, if available, and shall notify the Board if this information changes.

(3) The Board will accept the facts stated in the submission described in paragraphs (a)(1) and (2) of this section, unless they are implausible or conflict with sources of information that are known to the Board or the general public.

(4) If a Federal court determines that an entity described in paragraph (a)(1) of this section does not qualify for the limitations on exclusive rights under 17 U.S.C. 108, that entity must inform the Board of that determination and submit a copy of the relevant order or opinion, if any, within 14 days after the determination is issued.

(5) An opt-out under this section extends to a library's or archives' employee acting within the scope of their employment, but does not apply to employees acting outside the scope of their employment.

(6) For the purposes of this section, the date that the Board posts the opt-out information on its website as described in paragraph (b) in this section, after receipt, review, and processing of the notification described in paragraph (a)(1) of this section, will be the effective date of a preemptive opt-out election, except as noted in paragraph (a)(9) of this section. A preemptive opt-out election would not compel dismissal of a claim that the Board has found compliant and has instructed the claimant to serve prior to the preemptive opt-out election's effective date. A respondent who wishes to opt out of such a claim should follow the directions provided in the served notice of proceeding.

(7) A library or archives may rescind its preemptive opt-out election under this section, such that it may participate in Board proceedings, by providing written notification to the Board in accordance with such instructions as are provided on the Board's website. A library or archives may submit no more than one such rescission notification per calendar year.

(8) The notification described in paragraph (a)(1) of this section shall be submitted to the Board in accordance with such instructions as are provided on the Board's website.

(9) A blanket opt-out filed by a library or archives in accordance with this section before April 8, 2022 will become effective on that date.

(b) *Review of eligibility.* (1) The Board will maintain on its website a public list of libraries and archives that have preemptively opted out of Board proceedings pursuant to paragraph (a) of this section. If the Register determines pursuant to paragraph (a)(3) of this section that an entity does not qualify for the preemptive opt-out provision, the Office will communicate to the point of contact described in paragraph (a)(2) of this section that it does not intend to add the entity to the public list, or that it intends to remove the entity from that list, and will allow the enti-

ty to provide evidence supporting its qualification for the exemption within 30 days. If the entity fails to respond, or if, after reviewing the entity's response, the Register determines that the entity does not qualify for the limitations on exclusive rights under section 108 of title 17, the entity will not be added to, or will be removed from, the public list. If the Register determines that the entity qualifies for the limitations on exclusive rights under 17 U.S.C. 108, the entity will be added to, or remain on, the libraries and archives preemptive opt-out list. This provision does not limit the Office's ability to request additional information from the point of contact listed pursuant to paragraph (a)(2) of this section. Any determination by the Register regarding an entity's qualifying status for the limitations on exclusive rights under 17 U.S.C. 108 is solely for the purpose of determining whether the entity qualifies for the preemptive opt out under 17 U.S.C. 1506(aa) and does not constitute a legal conclusion for any other purpose.

(2) A claimant seeking to assert a claim under this section against a library or archives, or an employee thereof acting within the scope of their employment, that it believes is improperly included on the public list described in paragraph (b)(1) of this section may file the claim with the Board pursuant to 17 U.S.C. 1506(e) and applicable regulations. The claimant must include in its statement of material facts allegations sufficient to support that belief. If the Board concludes, as part of its review of the claim pursuant to 17 U.S.C. 1506(f), that the claimant has alleged facts sufficient to support the conclusion that the library or archives is ineligible for the preemptive opt-out, and the Register agrees, the library or archives will be given an opportunity to provide evidence supporting its qualification for the exemption pursuant to paragraph (a)(1) of this section. If the Register concludes that evidence submitted by the library or archives supports its qualification for the exemption, the library or archives will remain on the list and the associated allegations by the claimant will be stricken. After these allegations are stricken, if the claim includes

§ 223.3

other respondents and is otherwise complaint, the claimant will be instructed to proceed with service of the claim against the remaining respondents. Alternatively, if the Register concludes that the library or archives has not provided evidence to support its qualification for the exemption, the library or archives will be removed from the blanket opt-out list. The claim will then be reviewed for compliance and, if found to be compliant, the claimant will be instructed to proceed with service of the claim.

(3) Any determination made under paragraph (b)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(c) *Authority.* Any person with the authority to take legally binding actions on behalf of a library or archives in connection with litigation may submit a notification under paragraph (a) of this section.

(d) *Multiple libraries and archives in a single submission.* A notification under paragraph (a) of this section may include multiple libraries or archives in the same submission if each library or archives is listed separately in the submission and the submitter has the authority described under paragraph (c) of this section to submit the notification on behalf of all libraries and archives included in the submission.

§ 223.3 Class action opt-out procedures.

(a) *Opt-out or dismissal procedures.* Any party to an active proceeding before the Copyright Claims Board (“Board”) who receives notice of a pending or putative class action, arising out of the same transaction or occurrence as the proceeding before the Board, in which the party is a class member, shall either opt out of the class action or seek written dismissal of the proceeding before Board within 14 days of receiving notice of the pending class action. If a party seeks written dismissal of the proceeding before the Board, upon notice to all claimants and counterclaimants, the Board shall dismiss the proceeding without prejudice.

(b) *Filing requirement.* A copy of the notice indicating a party’s intent to opt out of a class action proceeding

37 CFR Ch. II (7–1–25 Edition)

must be filed with the Board within 14 days after the filing of the notice with the court.

(c) *Timing.* The time periods provided in paragraphs (a) and (b) of this section may be extended by the Board for good cause shown.

(d) *Failure to notify Board.* If a party fails to make a timely election under paragraph (a) of this section, the Board is authorized to take corrective action as it deems necessary, which may include dismissal of a pending claim before the Board with or without prejudice, notifying the class action court of any final determination by the Board, or vacating a final determination of the Board. The Board may, in its discretion, direct a party to show cause why action under paragraph (a) of this section was not taken.

PART 224—REVIEW OF CLAIMS BY OFFICERS AND ATTORNEYS

Sec.

224.1 Compliance review.

224.2 Dismissal for unsuitability.

AUTHORITY: 17 U.S.C. 702, 1510.

SOURCE: 87 FR 17007, Mar. 25, 2022, unless otherwise noted.

§ 224.1 Compliance review.

(a) *Compliance review by Copyright Claims Attorney.* Upon the filing of a claim or counterclaim with the Copyright Claims Board (Board), a Copyright Claims Attorney shall review the claim for compliance with 17 U.S.C. chapter 15 and this subchapter, as provided in this section.

(b) *Substance of compliance review.* The Copyright Claims Attorney shall review the claim or counterclaim for compliance with all legal and formal requirements for a claim or counterclaim before the Board, including:

(1) The provisions set forth under this subchapter;

(2) The requirements set forth in 17 U.S.C. 1504(c), (d), and (e)(1); and

(3) Whether the allegations in the claim or the counterclaim clearly do not state a claim upon which relief can be granted.

(c) *Issuing finding.* Upon completing a compliance review, the Copyright Claims Attorney shall notify the party