

an election may be considered in appropriate cases by the presiding Officer in determining an amount of damages, if any, pursuant to 17 U.S.C. 1504. Such information will not be considered by the presiding Officer in any way in making its determination as to liability, and shall be considered only as to damages.

(f) *Final determinations.* (1) After considering the information and arguments provided by the parties during the merits conferences and any other conferences ordered by the presiding Officer, along with any submissions filed by the parties, the presiding Officer shall issue a *final determination*.

(2) If, as described in §227.1 of this subchapter, a respondent fails to appear or participate in a proceeding brought under the procedures set forth in this part, the presiding Officer shall transfer the proceedings to proceed under the rules governing default proceedings under part 227 of this subchapter, which may result in a *default determination* or dismissal of the claim. If proceedings continue under the rules governing default proceedings under part 227, any *default determination* must be issued by no fewer than two Officers. If the respondent cures a missed deadline or requirement, as described under §227.1(c) of this subchapter, the proceeding shall resume under the procedures set forth in this part and the presiding Officer shall issue a revised scheduling order, if necessary.

(g) *Additional conferences.* In its discretion or upon the request of any party, the presiding Officer may hold additional conferences, including to manage the conduct of the proceeding, address disputes between the parties, and engage in further discussion of the claims, counterclaims, or defenses and supporting evidence. Requests for a conference and any responses thereto shall follow the procedures set forth in §220.5(a)(1) of this subchapter.

(h) *No expert testimony.* Parties may not submit expert testimony for consideration. Any expert testimony submitted shall be disregarded by the assigned Officer.

[87 FR 30085, May 17, 2022; 87 FR 36061, June 15, 2022; 89 FR 2492, Jan. 16, 2024]

PART 227—DEFAULT

Sec.

227.1 Failure by respondent or counterclaim respondent to appear or participate in proceeding.

227.2 Submission of evidence by claimant or counterclaimant in support of default determination.

227.3 Notice of proposed default determination.

227.4 Opportunity for respondent or counterclaim respondent to submit evidence.

227.5 Issuance of determination.

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

SOURCE: 87 FR 30087, May 17, 2022, unless otherwise noted.

§227.1 Failure by respondent or counterclaim respondent to appear or participate in proceeding.

(a) *Notice of missed deadline or requirement.* If a respondent or counterclaim respondent fails to file a response or fails, without justifiable cause, to meet any filing deadline or other requirement set forth in the scheduling order or other order, upon notice of a party or by its own initiative, the Copyright Claims Board (Board) may issue a notice to the respondent or counterclaim respondent following the missed deadline or requirement. Requests to issue a notice regarding a missed deadline or requirement and any responses thereto shall follow the procedures set forth in §220.5(a)(1) of this subchapter.

(b) *Contents of default notice*—(1) *First default notice.* A notice issued under this section shall inform the respondent or counterclaim respondent that failure to participate in the proceeding may result in the Board entering a *default determination* against the respondent or counterclaim respondent, including dismissal of any counterclaims asserted by the defaulting respondent, and shall explain the legal effects of a *default determination*. The notice shall provide the respondent or counterclaim respondent with 30 days from the date of the notice to cure the missed deadline or requirement. The notice shall be issued to the respondent or counterclaim respondent through eCCB, as well as by mail and all known email addresses.

(2) *Second default notice.* If the respondent or counterclaim respondent has failed to respond within 15 days

after the first notice of the pendency of the *default determination*, the Board shall send a second notice to the respondent or counterclaim respondent according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the respondent or counterclaim respondent that it must cure the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to notice.* If the respondent or counterclaim respondent cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary. If the respondent or counterclaim respondent fails to timely cure but submits a response that indicates an intent to re-engage with the proceeding pursuant to the procedures set forth in § 220.5(a)(1) of this subchapter, the Board shall consider the response and either provide the respondent or counterclaim respondent with additional time to meet the deadline or proceed with the *default determination* process. If the respondent or counterclaim respondent fails to cure the missed deadline or requirement within the time specified by the notice and does not otherwise respond to the notice, the Board shall require the claimant or counterclaimant to submit evidence in support of a *default determination*, as set forth in § 227.2.

(d) *Multiple missed deadlines.* A respondent or counterclaim respondent may cure a missed deadline according to the procedure set forth in this section at least twice without default being issued. If the respondent or counterclaim respondent misses a third deadline in the scheduling order without good cause, the Board may, in its discretion, proceed directly to requiring submission of evidence to proceed with a *default determination* as set forth in § 227.2.

§ 227.2 Submission of evidence by claimant or counterclaimant in support of default determination.

(a) *General.* If a respondent or counterclaim respondent fails to appear or ceases to participate in the proceeding and the Board elects to proceed to a *de-*

fault determination, the Board shall require the claimant or counterclaimant to submit written direct testimony, as set forth in § 222.15(b) of this subchapter.

(b) *Additional evidence.* Following submission of the claimant's or counterclaimant's written testimony in support of a *default determination*, the Board shall consider the claimant's or counterclaimant's submissions and may request any additional evidence from the claimant or counterclaimant within the claimant's or counterclaimant's possession.

§ 227.3 Notice of proposed default determination.

(a) *Consideration of evidence.* Following submission of evidence by the claimant or counterclaimant, as set forth in § 227.2, the Board shall review such evidence and shall determine whether it is sufficient to support a finding in favor of the claimant or counterclaimant under applicable law. As part of its review, the Board shall consider whether the respondent or counterclaim respondent has a meritorious defense. If the Board finds the evidence sufficient to support a finding in favor of the claimant or counterclaimant, it shall determine the appropriate relief and damages, if any, to be awarded.

(1) If the Board determines that the evidence is sufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed *default determination*.

(2) If the Board determines that the evidence is insufficient to support a finding in favor of the claimant or counterclaimant, the Board shall prepare a proposed determination dismissing the proceeding without prejudice and shall provide written notice of such proposed determination to the claimant or counterclaimant. The claimant or counterclaimant may submit a response to the proposed determination within 30 days of the date of the notice of proposed determination. Such response shall follow the procedures set forth in § 220.5(b) of this subchapter and be limited to seven pages. After considering any response from the claimant or counterclaimant, the

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Board shall either maintain its proposed determination and dismiss the proceeding without prejudice or determine that the evidence is sufficient to support a finding in favor of the claimant or counterclaimant and prepare a proposed *default determination*.

(b) *Proposed default determination.* The proposed *default determination* shall include a finding in favor of the claimant or counterclaimant and the damages awarded, if any. The proposed *default determination* shall also include dismissal of any counterclaims asserted by the defaulting respondent.

(c) *Notice to respondent or counterclaim respondent.* The Board shall provide written notice to the respondent or counterclaim respondent of the pendency of the *default determination* and the legal significance of the *default determination*, including any liability for damages, if applicable, as set forth in 17 U.S.C. 1506(u)(2). The notice shall be accompanied by the proposed *default determination* and shall provide the respondent or counterclaim respondent 30 days, beginning on the date of the notice, to submit any evidence or other information in opposition to the proposed *default determination*.

§ 227.4 Opportunity for respondent or counterclaim respondent to submit evidence.

(a) *Response to notice by respondent or counterclaim respondent.* The respondent or counterclaim respondent may submit in writing any evidence or information in opposition to the proposed *default determination* within 30 days of the issuance of the proposed *default determination* absent an extension of that time by the Board. The form of that response shall follow the procedures for written response testimony under § 222.15(b) of this subchapter. If the respondent or counterclaim respondent fails to timely submit evidence but submits a response that indicates an intent to submit evidence in opposition to the proposed *default determination*, the Board shall consider the response and either provide the respondent or counterclaim respondent with additional time to submit evidence or proceed with issuing the *default determination*.

(b) *Response to respondent's or counterclaim respondent's submissions.* If the respondent or counterclaim respondent provides any evidence or other information in response to the notice of the pending *default determination*, the other parties to the proceeding shall be provided an opportunity to address such a submission by following the procedures for written reply testimony under § 222.15(c) of this subchapter within 21 days of the respondent's submission.

(c) *Hearings.* The Board may hold a hearing related to *default determinations* at its discretion.

§ 227.5 Issuance of determination.

(a) *Determination after respondent or counterclaim respondent submits evidence.* If the respondent or counterclaim respondent provides evidence or information as set forth in § 227.4, the Board shall consider all submissions, including any responses to the respondent's or counterclaim respondent's submission. The Board then shall maintain or amend its proposed *default determination*. The resulting determination shall not be a *default determination* and instead shall be a *final determination*. The respondent or counterclaim respondent may not challenge such determination under 17 U.S.C. 1508(c)(1)(C) and may only request reconsideration pursuant to 17 U.S.C. 1506(w) and the procedures set forth in part 230 of this subchapter.

(b) *Determination after respondent or counterclaim respondent fails to respond to notice.* If the respondent or counterclaim respondent fails to respond to the notice of pending *default determination*, the Board shall issue the proposed *default determination* as a *final determination*. The respondent or counterclaim respondent may only challenge such determination to the extent permitted under 17 U.S.C. 1508(c) or the procedures set forth in paragraph (c) of this section.

(c) *Vacating a default determination.* If additional proceedings have not been initiated under 17 U.S.C. 1508(c), the respondent or counterclaim respondent may request in writing that the *default determination* be vacated and provide the reasons why the decision should be vacated. A request to vacate the *default determination* must be filed within 30 days of the determination, shall be no

more than 12 pages, and shall meet the requirements set forth in § 220.5(b) of this subchapter; and a response to that request must be filed within 30 days of the request to vacate, shall be no more than 12 pages, and shall meet the requirements set forth in § 220.5(b). The Board may vacate the *default determination* in the interests of justice.

PART 228—CLAIMANT’S FAILURE TO PROCEED

Sec.

228.1 Claimant or counterclaimant’s failure to complete service.

228.2 Claimant or counterclaimant’s failure to prosecute.

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

SOURCE: 87 FR 30088, May 17, 2022, unless otherwise noted.

§ 228.1 Claimant or counterclaimant’s failure to complete service.

(a) *Failure to serve a respondent who is not a necessary party.* If a claimant fails to timely complete service on a respondent who is not a necessary party, pursuant to § 222.14 of this subchapter, the Copyright Claims Board (Board) shall dismiss that respondent from the proceeding without prejudice. The proceeding shall continue against any remaining respondents.

(b) *Failure to serve a respondent who is a necessary party.* If a claimant fails to timely complete service on a respondent who is a necessary party, pursuant to § 222.14 of this subchapter, the Board shall dismiss the proceeding without prejudice.

(c) *Complete failure to serve respondents.* For a claim to proceed, a claimant must complete service on at least one respondent. If a claimant does not timely file any proof of service, the Board shall dismiss the proceeding without prejudice.

§ 228.2 Claimant or counterclaimant’s failure to prosecute.

(a) *General.* If a claimant or counterclaimant fails to proceed in an *active proceeding* without justifiable cause, as demonstrated by a failure to meet any filing deadline or requirement set forth in the scheduling order or other order, upon request of a party or on its own initiative, the Board shall issue a no-

tice following the missed deadline or requirement. Requests to issue a notice regarding a missed deadline or requirement and any responses thereto shall follow the procedures set forth in § 220.5(a)(1) of this subchapter.

(b) *Contents of failure to prosecute notice.* (1) A notice issued under paragraph (a) of this section shall inform the claimant or counterclaimant that failure to proceed in the proceeding may result in the Board issuing a determination dismissing the claimant’s or counterclaimant’s claims, including an award of attorneys’ fees and costs where appropriate, and shall explain the legal effects of such a determination. The notice shall provide the claimant or counterclaimant with 30 days, beginning on the date of the notice, to respond to the notice and meet the missed deadline or requirement. The notice shall be issued to the claimant or counterclaimant by mail and all known email addresses.

(2) If the claimant or counterclaimant has failed to respond 15 days after the notice of the failure to proceed, the Board shall send a second notice to the claimant or counterclaimant according to the procedures set forth in paragraph (b)(1) of this section. Such notice shall attach the first notice and shall remind the claimant or counterclaimant that it must respond and meet the missed deadline or requirement within 30 days from the date of the first notice.

(c) *Response to failure to prosecute notice.* (1) If the claimant or counterclaimant cures the missed deadline or requirement within the time specified by the notice, the proceeding shall resume and the Board shall issue a revised scheduling order, if necessary.

(2) If the claimant or counterclaimant fails to cure the missed deadline or requirement within the time specified by the notice but submits a response that indicates an intent to re-engage with the proceeding pursuant to the procedures set forth in § 220.5(a)(1) of this subchapter, the Board shall consider the response and either provide the claimant or counterclaimant with additional time to cure the missed deadline or requirement or issue a determination dismissing the claims or counterclaims.