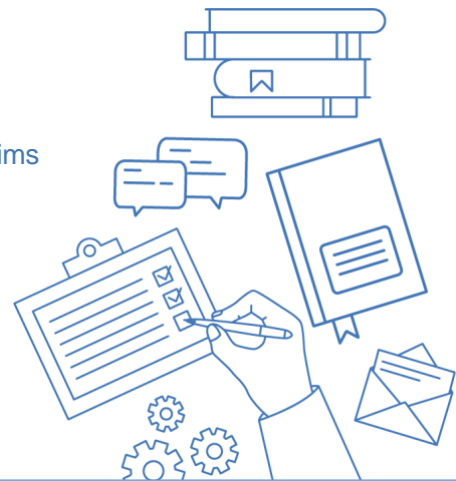


CCB HANDBOOK

Discovery

Discovery is the process by which the parties in a Copyright Claims Board (CCB) proceeding exchange information and documents relevant to the issues in a case. The CCB provides standard questions and document requests for parties to use. Parties must respond to requests truthfully and completely and provide the relevant information over which they have control.



Chapter at a Glance

- **General Discovery Procedures**
- **Changing Discovery Requirements**
- **Confidentiality and Highly Personal Information**
- **Discovery Disputes**
- **Using Discovery Material**

Why You Need This Information

Discovery is an important part of making your case. Discovery is the process of exchanging documents and information with the other parties to build your case. During this process, you will have a chance to gather the documents and information the CCB needs to fairly decide the issues raised in the claim. You also will receive the documents and information the other side has in their possession. The CCB has set up a standard process and forms you must use so that discovery can be completed as efficiently as possible.

Just as if you were in court, you are not allowed to withhold relevant information even if you think it might hurt your case. You will send your discovery materials directly to the other parties, and they will send their materials to you. The documents shared during discovery are generally the only ones you can use when you make your case before the CCB. The CCB will not be involved in the parties' exchange of discovery unless you have a dispute with the other parties.

HOW DID YOU GET HERE?

Discovery is part of the active phase of a CCB proceeding. The parties reach the discovery phase after the respondent has filed a response and any counterclaims, and the claimant has responded to those counterclaims. There will be a pre-discovery conference between the parties and a Copyright Claims Officer to make sure everyone understands what they must do in discovery.

WHERE YOU ARE IN A CCB PROCEEDING:

1. Claim Filed
2. Compliance Review
3. Service
4. Opt-Out Period
5. Proceeding Becomes Active
- 6. Discovery**
7. Settlement
8. Written Testimony
9. Determination
10. Post-Determination

WHAT HAPPENS NEXT?

After discovery ends, there will be a conference to discuss

- any updates the parties have for the CCB,
- how discovery information will be used,
- the possibility of settlement, and
- the next steps toward the CCB issuing a final determination.

After the conference, you will have time to use the information you've gathered to create written testimony. When you submit your written testimony and participate in a hearing, you typically cannot use any documents that have not been shared with the other side in discovery.

At any time, including during the discovery phase, you might decide you would like to settle your case. You can meet with a Copyright Claims Officer to discuss this at a settlement conference with the other parties.

General Discovery Procedures

The CCB will issue a standard [scheduling order](#) that covers the discovery timeline. This scheduling order is a communication from the CCB that sets forth the required deadlines. If a party wishes to change the scheduling order or add discovery items, they will have to submit a written request to the CCB. The CCB will grant a request only in limited circumstances. After the scheduling order, the CCB will hold a conference with the parties before discovery begins. During this conference,

- A Copyright Claims Officer will ask each side their view of the case and provide an overview of the proceeding.
- The Officer will explain the discovery process and the standard discovery request forms. These forms are used to exchange information and documents directly relevant to the issues in the proceeding. This provides all parties with the tools to fully uncover and understand the factual issues in the proceeding and to present their evidence to the CCB.
- The Officer will discuss the possibility of settling the proceeding.
- Parties will have an opportunity to raise any questions or concerns.

TIP: You should review the scheduling order and the standard discovery requests before the pre-discovery conference to get a sense of what kinds of information and documents you and the other parties will be expected to exchange during discovery and when these exchanges will happen. You may start gathering documents and information beforehand or figure out how you will best gather such information and documents.

After the pre-discovery conference, the parties will engage in two activities on their own:

1. develop answers to standard questions (known as “**interrogatories**”) and
2. conduct a reasonable search of their documents.

Each party should refer to the standard set of instructions (listed below) they were assigned at the pre-discovery conference.

STANDARD SET OF WRITTEN QUESTIONS (INTERROGATORIES) TO ANSWER

- [For parties asserting infringement](#)
- [For parties defending against infringement or seeking a declaration of noninfringement](#)
- [For parties asserting misrepresentation](#)
- [For parties defending against misrepresentation](#)

STANDARD SET OF DOCUMENTS TO PRODUCE

- [For parties asserting infringement or defending against a claim for a declaration of noninfringement](#)
- [For parties defending against infringement or seeking a declaration of noninfringement](#)
- [For parties asserting misrepresentation](#)
- [For parties defending against misrepresentation](#)

These instructions provide directions about how to conduct discovery and definitions of important terms. You may have already gathered some of these documents and information and submitted them with your claim or response. If so, you do not have to produce them for the other parties again. Keep in mind that responding to discovery takes time. Don't leave responses or work until the last minute.

Typically, forty-five days after the pre-discovery conference, the parties exchange the documents they have gathered and provide the other parties with their answers to the standard questions. In general, the parties will send their discovery materials to each other by email. You should not send your discovery materials to the CCB or submit the materials through the eCCB platform.

Keep your discovery materials up to date. If you discover any additional information during the proceeding that would be responsive to the interrogatories or document requests, you must update your interrogatory responses or produce the documents to the other parties as soon as possible.

Finally, after the close of discovery, the presiding Officer will have an additional conference with the parties to discuss the progress of discovery, the next steps in the proceeding, and the possibility of settlement.

Certification of Discovery Responses

When you submit your complete discovery to the other party, you will need to certify that your responses are accurate and truthful. You will find the required statements at the end of each standard discovery form. You must sign and date the certification and may use an electronic signature.

Changing Discovery Requirements

There may be limited situations where one or more parties need to change the scope of the standard discovery procedures. In each case, the CCB must grant **leave** (permission) to change the scope of discovery, whether to amend a deadline, add additional discovery, or allow expert witnesses.

Deadline Extensions

It's a good idea to review the discovery requests promptly so that you have a sense of the information and documents you're expected to provide and can plan ahead to meet the deadlines in the scheduling

order. However, if you need to request a change to the schedule due to a legitimate conflict or because you need additional time to meet a deadline, the CCB may amend the scheduling order.

You may request this deadline extension during the pre-discovery conference. Otherwise, you must submit the request through a fillable form on eCCB. You can select the Request to Amend Scheduling Order option from the dropdown menu. The form has a box (limited to 4,000 characters) in which you can explain your reasons for a postponement, which deadlines you need to change, and what you need the new deadlines to be. It's better to submit a request to change the schedule before the deadline you want to extend has passed, as the CCB may be less likely to grant a request after a deadline.

TIP: The CCB is more likely to grant a request for a scheduling change when all parties agree with it. Check with the other parties in your proceeding to see if they agree with your requested change to the schedule. If they do, you can state that they have consented at the beginning of your request (or describe your attempt to contact them or state if they did not agree).

If another party submits a request to change the schedule, you are not required to submit a response to the request. However, if you disagree with the request, you may submit a response to explain why you disagree. That response must be submitted through a fillable form on eCCB and is limited to 4,000 characters. It must be submitted within seven days after the request is filed.

The CCB usually will wait to give all parties an opportunity to respond before granting a request, unless the requesting party states that they have the consent of other parties. However, the CCB can deny a request before the other parties respond. The CCB will make its decision by issuing an order through eCCB.

Additional Discovery

The scheduling order will have a deadline for submitting requests for additional discovery. A party may request additional discovery, such as customized document requests or additional written questions, only if the request is

- **Highly likely to lead to the production of information relevant to the core issues in the proceeding.** There must be a strong probability that the request will lead to key information. It's not enough if there is just a chance that the request will lead to information or if the request will lead to information related to unimportant issues in the proceeding.
- **Not overly burdensome on the party who will need to respond to the request.** If the responding party would need to spend significant amounts of time, energy, or money in responding to the request, the request is unlikely to be granted.
- **Specifically targeted at the information you're seeking.** Additional discovery is not an opportunity to cast a wide net for information. The request must be narrowly tailored to the key information you're seeking and nothing more.
- **Not already covered by standard CCB discovery.** The request must seek something new.

To request additional discovery

1. **Talk to the other parties.** Discuss the need for additional discovery. During this conversation, you must try to get the other parties' permission for additional discovery or reach a compromise if possible.
2. **Submit a request through eCCB.** Use the appropriate fillable form, with a limit of 10,000 characters. Your request must
 - a. Identify the additional discovery you want and the information you're seeking. **You must be very specific when identifying additional discovery.**
 - b. Describe the basis and reason for your request, referring to the requirements for granting additional discovery above.
 - c. State whether the other parties agree or disagree with your request.
 - d. Provide the specific wording of the additional request you want to give to the other parties.

TIP: The CCB is more likely to grant a request for additional discovery when all parties agree with it. Check with the other parties in your proceeding to see if they agree with your requested additional discovery. If they do, you can state that they have consented at the beginning of your request (or describe your attempt to contact them or state if they did not agree).

If another party submits a request for additional discovery, you are not required to submit a written statement objecting to the request. However, if you disagree with the request, you may submit a response to explain why you disagree. That response must be submitted through a fillable form on eCCB and is limited to 10,000 characters. It must be submitted within fourteen days after the request is filed.

Once the CCB has received a request for additional discovery and any response, it will consider the particular needs and circumstances of each proceeding, along with any burden of the request on the other parties, the amount of damages at issue in the proceeding, and the overall goal of efficiently resolving the proceeding. The CCB can deny a request before the party you are seeking discovery from responds. However, the CCB won't grant a request before the other party has an opportunity to respond, unless they have already agreed to the request. A decision will be made in the form of an order, which the CCB will issue through eCCB. If the request is granted, the CCB will set deadlines for the additional discovery.

Note that the CCB does not allow depositions. During a deposition (frequently used in federal litigation), a witness is asked questions by a party under oath, and their answers are transcribed and recorded by a court reporter and/or a videographer. Depositions involve formalistic requirements, are often extremely costly, and involve significant amounts of preparation; therefore, they are not appropriate for CCB proceedings

Requests for Admission

A request for admission is a written statement that one party presents to the other to either admit or deny.

EXAMPLE: The respondent sends a request for admission saying, "On June 2, 2022, you gave permission for me to post your photograph on my website." The claimant would then have to admit or deny that statement (or explain what parts they are admitting or denying, or state that they lack the knowledge to admit or deny).

In *rare* circumstances, the CCB may permit a party to serve requests for admission on another party as a form of additional discovery. Requests for admission are disfavored, and the CCB will only allow a party to serve requests for admission if good cause is shown. To ask to serve another party with a request for admission, follow the procedures for additional discovery above.

Parties who are interested in requests for admission may raise the issue in the pre-discovery conference. The CCB can provide additional information and guidance on the proper, limited form for requests for admission.

Expert Testimony

Though expert testimony is only prohibited if a claimant has chosen the “[smaller claims](#)” track, it is highly disfavored in all other CCB proceedings, and requests for expert discovery will rarely be granted. The CCB will only grant a request from a party to introduce an expert witness in exceptional circumstances when the party shows that the proceeding cannot fairly move forward without the use of an expert, balancing a variety of factors set forth below. The CCB will provide additional information to parties in a proceeding when a request for expert testimony has been granted.

SUBMITTING A REQUEST

If you believe the proceeding cannot fairly move forward unless you can introduce an expert, you first must contact the other parties in the proceeding to see if they agree with your request to introduce an expert. After this, you must submit a request using a fillable form through eCCB. Your request must be limited to 10,000 characters and must be submitted by the deadline for additional discovery in the scheduling order. Your request must

1. identify the expert you want to introduce by name,
2. identify the topics that your expert will testify about,
3. provide the estimated cost for your expert,
4. provide the basis and reasons for your request, and
5. state whether the other parties agree or disagree with your request.

TIP: The CCB is more likely to grant a request for an expert when all parties agree with it. Check with the other parties in your proceeding to see if they agree with your request for an expert. If they do, you can state that they have consented at the beginning of your request (or describe your attempt to contact them or state if they did not agree).

If another party submits a request for an expert, you are not required to submit a response to the request. However, if you disagree with the request, you may submit a response to explain why you disagree, including why you would be negatively affected if the CCB granted the request. The response must be submitted through a fillable form on eCCB and is limited to 10,000 characters. It must be submitted within fourteen days after the request is filed.

Once the CCB receives a request for expert testimony and any response, the CCB will consider

- the particular circumstances and needs of the proceeding,
- whether the other parties agree with the request,
- the burden on the other parties in allowing the request,
- how much it would cost the other parties to retain a **rebuttal** witness,

- the amount of damages at issue in the proceeding, and
- the overall goal of efficiently resolving the proceeding.

The CCB may deny a request before the other parties' time to respond expires. However, the CCB will not grant a request before the other parties have an opportunity to respond unless all parties agree to the request. A decision will be made in the form of an order, which the CCB will issue through eCCB.

TIP: If you attempt to introduce expert testimony without the CCB's permission, the CCB will remove it from the record of the proceeding and will not consider it as part of the determination. This is the case regardless of the form in which the expert testimony is presented, including through fact witness statements.

Confidential and Highly Personal Information

Parties in a CCB proceeding are expected to evaluate whether the documents in their control contain confidential, highly personal, or **privileged** information.

Personally Identifiable Information (PII)

Parties must redact social security numbers, taxpayer identification numbers, birth dates, health information protected by law, the names of any individuals known to be minors, and financial account numbers from any public filings. These highly personal pieces of information are known as personally identifiable information, or PII.

Confidential Information

If there is confidential information in materials exchanged in discovery, a party may ask to apply the CCB's standard protective order to the proceeding. Confidential material covered by the protective order cannot be disclosed or used outside of the proceeding. The material must be truly confidential to apply. Confidential information is

- financial information not previously disclosed to the public;
- confidential and nonobvious business plans, product development information, or advertising or marketing plans previously not disclosed to the public;
- information of a truly personal or intimate nature regarding any individual not known by the public; or
- information the CCB grants leave (permission) to designate as confidential.

You must submit the request to apply the CCB's standard protective order through a fillable form on eCCB. You can select the Request for Protective Order option from the dropdown menu. The form will have a box (limited to 4,000 characters) in which you can explain your reasons for a standard protective order, but there is no need to go into much detail as the CCB's standard protective order applies as soon as a party requests it through eCCB.

When the CCB's protective order applies, the following provisions apply:

- The parties must evaluate documents on a case-by-case basis.
- The party in control of a document may designate it as "confidential" when there is a good faith belief that it consists of confidential information as described above.

- Parties must attempt to resolve confidentiality designations before bringing disputes to the CCB.
- Documents marked confidential may be submitted to the Board either **redacted** or **under seal**.
- Parties in receipt of confidential information may only use the information in connection with the proceeding.
- Parties in receipt of confidential information must destroy or return it within thirty days of a determination, dismissal, or end of an appeal period.

Violations of a protective order may constitute bad faith conduct. Please contact the Board if you need assistance with redacting documents and filing sealed documents on eCCB.

The CCB disfavors custom protective orders (protective orders drafted collectively by the parties, as opposed to using the CCB's standard protective order). However, the parties may request that the Board enter a custom protective order by using the fillable form on eCCB attaching both the custom protective order and a stipulation between parties that explains the need for a custom protective order.

Privileged Information

Any confidential communications with your legal counsel (including a lawyer, in-house counsel, or authorized law school representative) reflecting or seeking legal advice about the merits of the proceeding or other legal issues are considered privileged communications, which means that you do not have to produce them or record a log of them as part of the CCB proceeding. Other documents cannot be withheld as privileged unless the CCB grants a request to withhold additional documents.

Discovery Disputes

Disputes may come up during discovery. Examples of this include when a party fails to produce a document, refuses to respond to questions, provides irrelevant information, or takes issue with the scope of discovery. If this happens, you must try to work out the issue with the other party before asking the CCB to resolve the dispute.

Requesting a Discovery Conference

If you are unable to come to a resolution, you may request a conference with the CCB through eCCB using a fillable form.

- You should describe the dispute, explain your position on the dispute, and explain your attempts to resolve the dispute without the CCB's involvement.
- You must limit your request to 10,000 characters.
- If your dispute relates to written questions, you should attach the responses you've already received, if any.
- If your dispute relates to document requests, you can attach any documents specifically discussed in your request and relevant to the dispute.
- You can also attach communications (such as emails) related to the dispute.

Responding to a Request for a Discovery Conference

If another party files a request for a conference related to a discovery dispute, you may submit a response to the request through eCCB using a fillable form.

- You should describe your position regarding the dispute.
- You must submit your response within fourteen days of the request.
- You must limit your response to 10,000 characters.
- You may also upload supplementary materials relevant to your response, such as communications related to the dispute, or answers or documents you have provided that you believe satisfied the discovery request.

The CCB may deny a request before other parties' time to respond expires. However, the CCB will not grant a request before the other parties have an opportunity to respond unless all parties agree to the request. After receiving the request and any response, the CCB may schedule a conference to discuss the discovery dispute if it thinks one would be helpful. If the CCB holds a conference, it may make a decision during the conference or afterward. If the CCB decides in favor of the party making the request, it will set a deadline by which the opposing party must comply with the decision.

Sanctions

If the CCB makes a decision on a request for a discovery dispute and another party still refuses to comply with that decision, you may request sanctions against the other party.

Sanctions are penalties imposed by the CCB for misbehavior during proceedings. Sanctions may include the CCB adopting an **adverse inference** against the other party about the facts related to the discovery they should have produced.

EXAMPLE: The CCB could decide that your refusal to answer discovery related to your rights to use certain materials is proof that you did not have such rights. As part of a final determination, the CCB may also consider any discovery sanctions as it considers awarding attorneys' fees and costs. Parties can avoid these concerns by producing everything that is required.

When the CCB resolves a discovery dispute, it will set a deadline for producing the relevant information. If the opposing party fails to comply, you must send a notice to the other party that they have ten more days to comply with the CCB's decision. This notice does not need to be in a specific format and may be sent by email. If, after ten days, the other party does not comply, you may file a request for sanctions with the CCB through eCCB using a fillable form.

- You must limit your request to 10,000 characters.
- You should describe why you're making the request and how the other side did not comply with the CCB's discovery order.
- If the dispute is about whether the answers to written questions were adequate, you should include the responses.
- If your dispute is about whether the documents produced were adequate, you can include the documents.
- You can also attach communications (such as emails) related to the dispute.

If another party files a request for a conference related to a discovery dispute, you may submit a response to the request describing your position regarding the dispute through eCCB using a fillable form. Your response must be limited to 10,000 characters and must be submitted within fourteen days of the request. You may also upload supplementary materials relevant to your response, such as communications related to the dispute or answers or documents you have provided that you believe satisfied the discovery request.

The CCB may deny a request before the other party's time to respond expires. However, the CCB won't grant a request before the other party has an opportunity to respond. After the CCB receives a request for sanctions and any response, it may schedule a conference to discuss the request for sanctions. A decision will be made in the form of an order, which the CCB will issue through eCCB.

Using Discovery Material

Reviewing the information and documents you receive from the other parties in discovery is as important as the search you conduct for documents and information that you provide to the other parties. When you receive discovery responses from another party, you should review the responses for completeness and for building and proving your case before the CCB.

First, you should review the discovery responses you receive for completeness. You should do this soon after receiving discovery responses to make sure the other parties provided all the information and documents they were required to provide in the discovery request and didn't omit anything.

Second, you should review the discovery responses carefully to determine how the information and documents provided by the other parties impact the issues in the proceeding. You should look for information that supports your claims or defenses as well as information that goes against your claims or defenses. For information that goes against your claims or defenses, you should consider whether the information is fatal to your case. Even if it isn't, you should think through how you'll explain the answers and evidence provided to the CCB when you make your case. A review of the other parties' answers and documents may also make you consider reaching out to the other parties or to the CCB to discuss settlement.

Keep in mind that the CCB's standard discovery requests are designed to produce information and documents that are relevant to the proceeding, but you don't need to use all the information and documents that are provided to you when you present your evidence and arguments to the CCB. If you receive a large amount of duplicative or clearly irrelevant information or documents, you may bring that to the CCB's attention as improper discovery practice.

Don't see your situation in this chapter? Get in touch! Email asktheboard@ccb.gov.

Glossary

- **Adverse inference:** A negative conclusion that's drawn from silence or the failure to provide responsive information.
- **Discovery:** The process by which the parties exchange information and documents relevant to the issues in the case.
- **Interrogatories:** A standard set of written questions that parties exchange and answer during the discovery process in order to prepare to present their case to the CCB.
- **Leave:** Permission that must be granted by the CCB in order for a party to take an action.
- **Privileged:** Any confidential communications with legal counsel reflecting or seeking legal advice about the merits of a proceeding or other legal issue.
- **Rebuttal:** A party's argument or evidence used to contradict the other side's argument or evidence.
- **Redacted:** To block out or remove particular pieces of information.
- **Under seal:** Filing documents with the CCB with restricted or private document access so that the general public may not view the content.