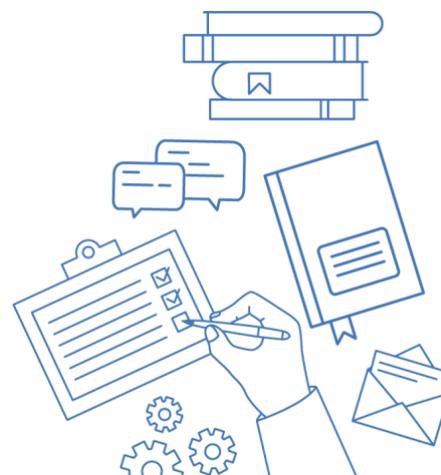


Opting Out

After you are served with a claim before the Copyright Claims Board (CCB), you have sixty days to make an important decision: whether to participate in or to opt out of the proceeding. This is called the “opt-out period.”



Chapter at a Glance

- Differences between the CCB and Federal Court
- How to Opt Out
- Blanket Opt-Out for Libraries and Archives

Why You Need This Information

If you have been served with a claim before the CCB, you have a choice: do you want to have the CCB decide the dispute described in the claim? If not, you can opt out of participating in the proceeding. You need to take into account, however, that opting out does not necessarily make the dispute disappear. The claimant still has the ability to sue you instead in federal court. As you make this decision, you may want to consider some of the differences between a CCB proceeding and a lawsuit in federal court.

Considerations for Whether to Opt Out

- In a CCB proceeding, a claimant cannot seek a total award of more than \$30,000, no matter how many claims it asserts. In federal court, there is no limit to the damages a plaintiff can seek.
- The CCB is a copyright-specific tribunal that only hears claims related to copyright, so it has expertise in handling these disputes. In federal court, your case would be decided by a judge who hears all sorts of cases (and may have handled few, if any, copyright cases) or by a jury.
- Compared to federal court cases, CCB proceedings are streamlined, meaning they typically take less time and cost considerably less.
- Because parties only exchange limited key documents and information in a CCB proceeding, the CCB might not be appropriate if your case is very complex and will involve a lot of third-party witnesses or need an expert witness.
- If you decide to opt out, the claimant can then sue you in federal court.

WHERE YOU ARE IN A CCB PROCEEDING:

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

How to Opt Out

You can opt out online through a form available on [eCCB](#), the CCB’s electronic filing and case management system. As described below, you can also use a paper form, but it is strongly recommended that you use eCCB to expedite the process.

What does it mean that you have received a CCB claim?

Claimants can choose to bring their copyright claims either before the CCB or in federal court. If a claimant brings a claim against you before the CCB, the CCB will check that the claim complies with relevant laws and regulations and give you enough information to respond. That doesn’t mean the CCB thinks the claimant will win; just that the claimant can move forward with formally delivering the claim, known as “[service](#).” The claimant may also ask you to skip formal delivery of the claim (“waiver of service”). The benefit of waiving service is that if you do not opt out and the CCB issues a scheduling order, you will be given more time to respond to the claim.

At this point, you have received the “[initial notice](#),” the claim, and the opt-out form. After you are served with the initial notice and claim, or agree to waive service, you have **sixty days** to make an important decision: whether to participate in or to opt out of the proceeding. This is called the “opt-out period.” You should also receive a second notice from the CCB reminding you that you were served with a claim, but it is the service of the initial notice that starts the sixty-day opt-out period. The CCB may, in exceptional circumstances, extend the opt-out period if it believes it would be fair and just to do so. For more information or questions, please [contact the CCB](#).

What do you need to do?

You need to make a decision to participate in or to opt out of the proceedings.

If you want to participate in the CCB proceeding, no further action is needed during the opt-out period. The proceeding will become “active” and move forward after the sixty days expires.

If you do not want to participate in the proceeding, you must opt out during the opt-out period using the CCB’s form, as described below, and the code provided in the notice you were served. You do not have to provide a reason.

What happens next?

If you opt out, the CCB will dismiss the claim against you and notify the claimant and any other parties. The claimant may then choose to bring the claim against you in federal court. If the claimant tries to refile the same claim against you in the CCB after you opt out, it will be dismissed again, unless you agreed to have the claim refiled.

If you do not opt out during the opt-out period, the claim enters the “**active phase**.” It will move forward to give you the opportunity to share your side of the dispute. You will file a response to the claim, and you and the other party will share certain information with each other. The CCB will then determine the outcome of the dispute. If the CCB issues a **Final Determination** and rules in favor of the claimant, you may be required to pay money to the claimant. If the CCB rules in your favor, the claimant

will get nothing. Following a final determination, the claimant cannot sue you in federal court on the same claim.

Differences between the CCB and Federal Court

When deciding whether to participate in a CCB proceeding, keep in mind that there are important differences between the CCB and federal court, such as the costs involved, the time and complexity of procedures, and the subject matter expertise of the decision makers. The table below lays out some of the key differences between CCB proceedings and federal court lawsuits.

- Remember: Even if you decide to opt out of the CCB, the dispute may still continue, and the claimant can still sue you in federal court. If you stay in the CCB proceeding, the CCB determinations are final and the same claims cannot be brought again between the same parties. So, while there are ways to challenge a CCB determination, if you decide to participate, you won't be able to later go to court to have the claim and your defenses reheard.

The costs to resolve a dispute are different in the CCB and federal court.

In the CCB . . .

- Participants in CCB proceedings are allowed to hire a lawyer, but the system is set up so that participants, including both individuals and businesses, can represent themselves instead, or may be able to obtain [free representation](#) from a volunteer organization or law student.
- CCB proceedings do not involve the extensive discovery found in federal court, which can be costly and time-consuming.
- The CCB will rarely if ever permit testimony by expert witnesses.
- CCB hearings are all virtual. You will not be required to travel or appear in person before the CCB.

In federal court . . .

- Parties typically need to hire and pay for a lawyer (and many companies are required to), which can be a major expense.
- Parties may need to pay for court reporters for depositions, for extensive document searches and storage, for process servers for discovery on third-party witnesses, and for fees for expert witnesses.
- Federal courts generally require the parties to travel to and attend hearings and trials in person.

The CCB and federal court have different procedures.

In the CCB . . .

- Participants are only required to exchange limited key documents and information.
- Hearings and conferences are held virtually using video conferencing, so there is no need to travel.
- When an issue arises during a proceeding, the CCB allows you to make requests to the Board using simple fillable forms.
- The CCB procedures have been designed to permit individuals and businesses to represent themselves without lawyers.
- You cannot require a witness to appear before the CCB.
- If the case is complex, the limited opportunity for discovery may make it more difficult to obtain all the information you need.

In federal court . . .

- Parties typically engage in more complex, expensive, and time-consuming discovery, including depositions, broader interrogatories and document requests, requests for admission, third-party subpoenas, and expert witnesses.
- Conferences, hearings, and trials are typically held in person at the courthouse.
- Parties normally need legal representation.
- Witnesses can be required to appear.
- Federal cases often have formal motions needing extensive work and knowledge of the law and the court's rules.

The CCB is a copyright-specific tribunal that only hears claims related to copyright.

In the CCB . . .

- Disputes will be decided by a panel of three Copyright Claims Officers who are experienced in copyright law.
- CCB claims must be copyright-specific, and other types of claims are not allowed.

In federal court . . .

- Federal judges generally do not have specialized subject-matter expertise. They deal with many different legal disputes. Some may have heard many copyright cases, while others may have dealt with very few, if any, cases.
- Disputes are often resolved by a jury with no knowledge of copyright law other than what they are instructed by the judge.
- In federal court, the parties can add as many other claims as they want in addition to the copyright claims.

The penalties are different in the CCB and federal court.

In the CCB . . .

- The maximum the respondent can be ordered to pay in damages in a single proceeding is \$30,000, no matter how many claims are included. If the notice you received says your proceeding is on a “smaller claims” track, it will also say that the maximum damages is \$5,000.
- **Statutory damages** are limited to no more than \$15,000 per infringed work, and the CCB won’t consider whether the **infringement** was knowing or deliberate in determining the amount.
- The statutory damages maximum per work infringed is reduced to \$7,500 if the work wasn’t registered within certain time constraints.
- A participant who acts in bad faith (for example, by making frivolous filings or acting in a way to harass the other side) may have to pay the other side’s costs and fees, up to \$5,000.
- The CCB does not have the power to order you to stop or modify your activities unless you advise the CCB during the proceeding that you will agree to do so. If you agree to do so, the Board may consider this in setting the amount of damages (and agreeing to this will not make it more likely that the Board finds against you).

In federal court . . .

- Awards of **actual damages** and an **infringer’s profits** in federal court are unlimited.
- Statutory damages can be up to \$30,000 per infringed work, and up to \$150,000 per work if the infringement was knowing or deliberate.
- While there is no limitation on the amount of actual damages or infringer’s profits that can be awarded, statutory damages are not available at all if the work isn’t registered within certain time constraints.
- Larger sanctions can be awarded in federal court for bad faith actions, and the court always has the power to make the losing side of a case pay the other side’s attorneys’ fees and costs without any cap.
- The court has the power to order a respondent to stop or modify activities, in addition to any damages award.

The type of counterclaims allowed in the CCB and federal court are different.

In the CCB . . .

- Counterclaims are generally limited to the same types of claims a claimant can bring: copyright infringement, a declaration that actions are not infringing, or **misrepresentation** in a DMCA notice or counter-notice.

In federal court . . .

- A defendant can bring any counterclaim, as long as it is related to the same facts and circumstances as the plaintiff’s claims.

- You may also bring a counterclaim due to an agreement and directly related the claimant’s allegations of infringement if that could affect the money awarded to the claimant.

For more information about federal courts, visit the United States Courts’ [website](#).

How to Opt Out

If you decide to opt out, there are two ways to do so. The fastest way is online through [eCCB](#), the CCB’s electronic filing and case management system. Opting out online also guarantees you immediate email confirmation. Alternatively, you can prepare the paper opt-out form that you received when you were served with the initial notice and claim and deliver it to the CCB, but it is strongly recommended that you use eCCB to avoid delays.

The [eCCB homepage](#) displays buttons under the “Welcome to eCCB” header. If you click on the “**Opt out of proceedings**” button, the “Opt out of proceedings” form page will appear. You can also reach the form from the homepage by selecting “Opt out of proceedings” from a set of buttons near the bottom. Although you do not need to register for eCCB in order to opt out, eCCB users who are logged into their eCCB accounts will see the same options on the homepage. Another “Opt out of proceedings” tab, displayed at the top of every page of the eCCB website, leads to the same form.

Information for the Opt-Out Form

The opt-out form will ask you for some standard information, such as your email address and your mailing address. For security, there is some specialized information unique to a CCB proceeding.

DOCKET NUMBER

Each proceeding has its own unique docket number, and this docket number will be on the initial notice and claim that you received. You will need to enter this information in the opt-out form. If you wish to find the proceeding where you are a respondent, you can search by docket number or party name on eCCB, including on the eCCB opt-out page.

OPT-OUT KEYCODE

The opt-out keycode is a unique verification code provided to each respondent on the claim and initial notice. If there are multiple respondents in a proceeding, each will have their own unique keycode. These confidential, unique keycodes allow the CCB to confirm that the opt-out notification is submitted by the actual respondent, or someone that the respondent authorized.

The CCB also includes the opt-out keycode with the second notice about the proceeding, which it sends during the opt-out period.

RESPONDENT

You will need to provide the name of the respondent who is opting out, whether it is a person or a business. If the claim is against several respondents, each respondent must complete the opt-out process

separately. If one person is representing multiple respondents, the representative must do a separate opt-out for each respondent; each one will have its own opt-out keycode. Even if one or more respondents opt out, a proceeding can continue against any remaining respondents.

AFFIRMATION AND CERTIFICATION

You must check a box stating that the respondent opting out will not appear in the proceeding, and certifying that you are authorized to submit the opt-out form. If you are the respondent, you can always submit the form for yourself, but you can also authorize your lawyer or another representative to submit it for you. For example, if the respondent is a business, the opt-out form can be submitted by a lawyer, an owner, partner, officer, or member of the business, or an employee who is directed to file the form. A law student supervised by a law school clinic or a pro bono legal services organization can also be an authorized representative. More information about representation before the CCB is available in [the Representation chapter](#).

You make your certification under penalty of perjury, which means that you are stating that your statements are true and accurate and that you understand that there may be monetary or other penalties if what you say is not true. You will check a CAPTCHA box to confirm that the submission is valid and click “Submit” to proceed. That will complete the opt-out process, and you will receive an electronic confirmation of receipt.

WHO ARE YOU?

You must certify that you are the respondent or an authorized representative of the respondent. If you are the respondent’s authorized representative, you will need to provide your full name.

Opting Out Online

If you opt out through the online notification form on [eCCB](#), you must submit a complete form by 11:59 p.m. eastern time on the last day of the sixty-day opt-out period. Late opt-outs are not valid.

eCCB is designed to make it easy to opt out. You do not need to register as an eCCB user in order to opt out of a CCB proceeding.

The electronic opt-out form is easy to fill out and submit. You will be prompted to provide the information identified above. A few tips:

- To provide your docket number, you will select your proceeding from the list of dockets in the drop-down menu. The list includes the docket numbers and the names of a claimant and a respondent for each CCB proceeding for which the opt-out period is not over.
- You can also find the proceeding by typing a party’s name in the search field in the drop-down menu.
- You should make sure that you select the right proceeding by checking the information in the claim and initial notice.

Opting Out by Mail

You can also opt out by preparing and delivering a paper opt-out form to the CCB. This form is included with the materials that you received when you were served with the initial notice and claim, and requires the same information as the online form. The CCB also sends you the opt-out form with the reminder “second notice” sent during the sixty-day opt-out period (if you have not already opted out). It is **strongly recommended** that you use eCCB; the eCCB opt-out will be submitted immediately, and you

will receive an instant email receipt confirming that it has been submitted. Mailed opt-out forms will take much longer to arrive and be processed.

DELIVERING A PAPER OPT-OUT

When you have filled out your paper opt-out form, you can mail it to the CCB at the address on the form, either by first-class mail through the USPS or through a third-party commercial carrier (for example, FedEx, UPS, DHL, etc.). If you send it by a commercial carrier, delivery must be guaranteed no later than two days from the day you give it to the carrier.

A paper opt-out form must be postmarked or dispatched by a commercial carrier no later than the sixty-day deadline.

Blanket Opt-Out for Libraries and Archives

Generally, respondents who do not wish to have claims against them heard by the CCB must opt out of each proceeding individually. A special rule for libraries and archives, including their employees acting in the scope of their employment, allows them to opt out of all CCB proceedings in advance, before anyone files a claim against them. This is called a preemptive or blanket opt-out. In order to preemptively opt out, the library or archives must qualify for the special exceptions set out in section 108 of the Copyright Act. The Copyright Office maintains a [public list](#) of the libraries and archives that have opted out of all proceedings.

If you wish to file a claim against a library or archives, including their employees acting in the scope of their employment, you should check the libraries and archives opt-out list first, in order to avoid paying an unnecessary filing fee for a claim that will not move forward. You can, however, bring a claim against an entity on the list if your statement of material facts supports a belief that it is not eligible to be on the opt-out list. The Copyright Office will then determine whether the library or archives is eligible or not.

If you represent a library or archives and wish to preemptively opt out of all CCB proceedings on its behalf, you must fill out and submit [the online form](#). Libraries and archives do not have to pay a fee to preemptively opt out, and the opt-out election does not need to be renewed—it stays in effect unless and until it is rescinded.

The Libraries and Archives Opt-Out Form requires the following:

- A certification signed, under penalty of perjury, by any person with the authority to take legally binding actions on behalf of the library or archives in connection with litigation. The certification affirms that the library or archives qualifies for the exceptions set forth in [section 108](#) of the Copyright Act.
 - **Please note:** If a federal court later determines that a library or archives does not qualify for the section 108 exceptions, that entity must inform the CCB of the federal court determination and submit a copy of the relevant order or opinion within fourteen days after it is issued.
- The library's or archives' name, physical address, website (if applicable), and point of contact for correspondence, including the point of contact's work phone number, mailing address and email address. The library or archives must notify the CCB if this information changes.
 - Multiple libraries or archives may be included in the same submission if information for each one is listed separately, and the filer has the authority to submit the notification on behalf of all of them.

A library or archives may rescind its opt-out election by providing written notification to the CCB via the libraries-archives@ccb.gov email. This will permit the library or archives to participate in CCB proceedings. It can later resubmit an opt-out form as described above. However, a library or archives may submit no more than one such rescission notification per calendar year.

If a library or archives that has filed a blanket opt-out of all CCB proceedings is served with a CCB initial notice and claim, it may be because it filed its blanket opt-out form after that particular claim was already approved for service. In this situation, the blanket opt-out would not be effective for that specific claim. But the library or archives can still opt out for that claim by using the individual opt-out process.

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

Glossary

- **Active Phase:** When the respondent has not opted out, the portion of the proceeding starting from the end of the sixty-day opt-out period and continuing until the CCB's final determination of your case.
- **Actual damages:** Money awarded based on the harm the claimant or counterclaimant suffered.
- **Final determination/Determination:** The CCB's ruling as to who actually wins the case, with any awards, and with the CCB's reasons for its findings.
- **Infringement:** Copyright infringement occurs when a copyrighted work is reproduced, distributed, publicly performed or displayed, or made into a derivative work without permission of the copyright owner, if the use does not qualify for an exception, such as fair use.
- **Infringer's profits:** The money that the infringer earned in profits from their unlawful use of another's work.
- **Statutory damages:** An alternative to actual damages, allowing a successful claimant or counterclaimant to receive an award in an amount within a set range that the court or the CCB considers just.