

**Before the
U.S. COPYRIGHT OFFICE
Washington, D.C. 20559**

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| In the Matter of |) | |
| |) | |
| Copyright Claims Board: Initiation of |) | Docket No. 2021-6 |
| Proceedings and Related Procedures |) | |
| |) | |

COMMENTS OF PUBLIC KNOWLEDGE

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46-A (Emergency Examination Waiver)*

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I. INTRODUCTION

The CASE Act calls for the creation of a Copyright Claims Board (“CCB”) under the administration of the Copyright Office. On September 29, 2021, the Copyright Office issued a Notice of Proposed Rulemaking (NPRM) titled “Copyright Claims Board: Initiation of Proceedings and Related Procedures.”¹ Public Knowledge (PK) submits these comments in response.

As an initial matter, PK re-raises its concerns that the commenting timeline, despite the subsequent extensions, is insufficient to allow for a diverse cross-section of stakeholders to adequately provide feedback on the myriad rules presented within the NPRM.² Due to the complexity of issues raised and the compressed commenting timeline, PK only addresses the Copyright Office’s decision to leave the CCB’s subject matter jurisdiction up to Copyright Claims Officers in these comments. PK urges the Copyright Office to adopt rules that precisely define the subject matter jurisdiction of the CCB, narrowly tailoring what is suitable for review.

¹ Copyright Office, Copyright Claims Board: Initiation of Proceedings and Related Procedures Notice of Proposed Rulemaking, Docket No. 2021–6 (Sept. 29, 2021).

² Public Interest Commenters Letter to Kevin R. Amer and Whitney Levandusky re: CCB Rulemaking Extension Request (Nov. 5, 2021) (on file with the Copyright Office).

Such action will ensure that the CCB offers the streamlined, fair, user-friendly, and accessible dispute forum that Congress envisioned.³

Although PK has focused exclusively on this point, PK has additional concerns regarding counterclaims, the information provided to potential respondents regarding their possible defenses, and a respondent's access to communications between the CCB and its Officers and a claimant before the CCB issued a claimant's notice. PK hopes to address these concerns in greater detail in subsequent replies.

II. COPYRIGHT CLAIMS OFFICERS SHOULD NOT HAVE CARTE BLANCHE TO DETERMINE WHAT CLAIMS ARE OR ARE NOT SUITABLE FOR REVIEW BEFORE THE COPYRIGHT CLAIMS BOARD.

Public Knowledge urges the Copyright Office to adopt rules that narrowly tailor what is suitable for review by the CCB. By not doing so, the Copyright Office risks undermining the very purpose of the CCB—providing an alternative copyright claim forum that is affordable, user-friendly, streamlined, and fair.⁴ First, without rules that narrowly define what is suitable for review before the CCB, the Copyright Office increases the likelihood that the CCB Orders will ultimately end up in court anyway, making the process more expensive and less streamlined. Second, without specific rules to govern what is suitable for review, the CCB risks making inconsistent decisions, undermining its legitimacy by making it less fair for participants. Third, narrowly tailoring what is suitable for review will help streamline the process by reducing the number of decisions the CCB has to make.

³ See Initial NOI Comments of Senator Durbin, Senator Kennedy, and Representative Jeffries, In the Matter of Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, Docket No. 2021-6 (April 26, 2021).

⁴ *Id.*

A. Defining the CCB’s Subject Matter Jurisdiction Will Decrease the Likelihood that CCB Orders Will Ultimately End Up in Court.

Without rules that precisely define the CCB’s subject matter jurisdiction, the Copyright Office increases the likelihood that any party on the wrong side of a CCB Order may seek relief in court, defeating the CCB’s very purpose.

As a well-established alternative dispute mechanism, arbitration provides some insight into the judicial review a court has over such alternative adjudicatory bodies. Generally, the U.S. judicial system is very deferential to decisions made by arbitrators. But, even in arbitration, courts still have a right to review questions of “arbitrability.”⁵ Under the FAA, which governs U.S. national arbitration law, and the NY Convention, which governs international arbitration, courts have a right to vacate an arbitral award when arbitrators exceed their authority and rule on issues beyond the scope of the arbitration.⁶ The CASE Act itself reflects this type of judicial review, allowing a participant to challenge a CCB determination “[i]f the Copyright Claims Board exceeded its authority.”⁷

By failing to define the CCB’s subject matter jurisdiction precisely, the Copyright Office creates ambiguity about what is and is not suitable for review by the CCB, which increases the opportunity for a participant to challenge a CCB Order in court. This is particularly problematic for claims involving novel legal issues or creative mediums and complicated facts or technology. As Public Knowledge discussed in its initial NOI Comments, these issues do not belong before the Copyright Office, which would make them ripe for a challenge by any unsatisfied party.⁸

⁵ *BG Group v. Republic of Argentina*, 572 U.S. 25, 34 (2014).

⁶ 9 U.S.C. §10(a)(4); and NY Convention Art. V(c); *see also* 11 U.S.C. §11(b).

⁷ CASE Act §1508(c)(1)(B).

⁸ Comments of Public Knowledge, Re:Create, the Center for Democracy & Technology, R Street Institute, and Organization for Transformative Works, In the Matter of Copyright Alternative in Small-Claims Enforcement (“CASE”) Act Regulations, Docket No. 2021-6, 14-19 (April 26, 2021) [hereinafter Public Interest NOI Comments].

As Public Knowledge et al discussed in response to the initial NOI, there are also complicated constitutional issues with the very existence of a small claims court under the Copyright Office's purview. Failing to tailor the issues suitable for review by the CCB to those within clearly established legal precedents adds to that complication and increases the likelihood that CCB Orders will ultimately end up challenged in court, costing participants significant time and money.

B. The CCB Needs Specific Rules Regarding What Is Suitable for Review to Create Consistency to Protect Its Legitimacy as An Alternative Dispute Forum and Ensure Fairness.

Creating specific rules that govern what types of disputes are suitable for the CCB's review will also help address the risk that the CCB will inconsistently determine what issues are suitable for review. This is critical because consistency is one of the core principles that determines the legitimacy of an adjudicatory body and the CASE Act's ban on treating CCB determinations as precedential even with the CCB itself undermines this principle.⁹

Consistency is a core principle underlying the justice system: like cases should be treated alike. Scholars have referred to this principle as a "maxim" underlying judicial systems dating back to Aristotle.¹⁰ Cardozo described it best, "If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights."¹¹ At its core, consistency is a key aspect of what humans consider "fair" and "just." When one person is treated differently, especially when punitive measures are involved, it rankles a very basic sense of what is fair. This is why consistency is a

⁹ See CASE Act §1507(a)(3).

¹⁰ Although some scholars after recognizing this principle have disparaged consistency, as Cardozo pointed out, "[l]ogical consistency does not cease to be a good because it is not the supreme good." Compare John E. Coons, *Consistency*, 75 Calif. L. Rev. 59, 59-60 (Jan. 1987) with Benjamin N. Cardozo, *The Nature of the Judicial Process*, 32 (1921).

¹¹ Cardozo, *supra* note 10 at 33 (internal citations omitted).

key aspect of what makes an adjudicatory body legitimate. As Cardozo explained, “Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the evenhanded administration of justice in the courts.”¹²

This issue is particularly relevant in alternative dispute forums, such as the CCB. If potential participants cannot rely on the CCB to make consistent decisions, they have no reason to trust the CCB and can simply opt out or bring their claim in court instead. If potential participants do not view the CCB as legitimate, it is essentially dead-in-the-water since it is a *voluntary* dispute forum.¹³

The CASE Act’s limitation on the CCB’s ability to treat its determinations as precedential further complicates this issue.¹⁴ Not only has the Copyright Office has declined to offer guidance or narrowly tailor the subject matter jurisdiction of the CCB, but there is also no judicial precedent on this issue to guide the Copyright Claims Officers. In addition, Copyright Claims Officers cannot rely on prior CCB determinations.¹⁵ This means they will have significant power to determine what is and is not within the CCB’s purview without any obligation to their prior decisions on similar issues. Worse still, Copyright Claims Officers that want to create consistency by referring to their prior decisions are explicitly forbidden from relying on prior CCB decisions.¹⁶ Even if a Copyright Claims Officer can make such determinations consistently without the ability to review and refer to their prior determinations simply by following the same logic, what happens when new Copyright Claims Officers with different views on the CCB’s subject matter jurisdiction are appointed?

¹² *Id.* at 34.

¹³ CASE Act §1504(a).

¹⁴ CASE Act §1507(a)(3).

¹⁵ *Id.*

¹⁶ *Id.*

Without the ability to treat prior decisions as precedent, there is a high likelihood that Copyright Officers will inconsistently decide what is and is not suitable for review before the CCB. The Copyright Office can help eliminate this risk by creating more detailed rules regarding what is suitable. These rules, rather than forbidden prior precedent, can serve as the necessary tool to create consistency. This, in turn, will make the CCB fairer and preserve its legitimacy in the eyes of potential participants.

C. Narrowly Defining What Is Suitable for Review Will Help Streamline the CCB's Process By Decreasing the Decisions a Copyright Claims Officer Has to Make.

By narrowly tailoring what types of claims are suitable for review before the CCB, the Copyright Office can streamline the process and make it more accessible by removing complicated issues from the CCB's review and decreasing the number of determinations a CCB officer has to make.

First, limiting what is suitable for review by the CCB will streamline the process by decreasing the number of complicated works that could end up in front of a Copyright Claims Officer. As Public Knowledge et al. wrote in its initial comments, there are certain complex copyright claims that the CCB should not review: issues involving novel questions of law, complicated facts or creative works, new technologies, and fair use.¹⁷ All of these issues raise complex questions and concerns that would push the limits of what the CCB can handle since the CASE Act limits the CCB's discovery and fact-finding tools.¹⁸ By eliminating these issues from the CCB's subject matter jurisdiction, the Copyright Office can ensure that only those claims that easily fit within established precedent are reviewable by the CCB, thereby streamlining the process and avoiding difficult claims from the outset.

¹⁷ Public Interest NOI Comments, *supra* note 8 at 14-19.

¹⁸ *Id.* at 17.

Second, providing specific rules regarding what issues are suitable for review will decrease the likelihood that a Copyright Officer will even need to determine whether a claim is suitable for review. This will streamline the process by eliminating one more step. And, claimants can avoid bringing a claim only to find out that it is unsuitable after they have gone through the process of filing, sending notice, etc. The fewer decisions a Copyright Claims Officer has to make regarding a particular claim, the more streamlined and accessible the CCB will be for everyone, especially participants.

Narrowly tailoring the subject matter jurisdiction of the CCB is critical to streamlining the process because it prevents the CCB from reviewing complicated claims and decreases the number of issues a Copyright Officer will have to decide on a particular claim.

III. CONCLUSION

PK urges the Copyright Office to initiate a separate rulemaking process to create rules that precisely define and narrowly tailor the subject matter jurisdiction of the CCB. In addition to limiting the number of legal issues that threaten the CCB, such rules will help the CCB function as the accessible, fair, streamlined, and user-friendly dispute forum Congress intended.

Respectfully submitted,

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