

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

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

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Kathleen Burke*
Policy Counsel
Public Knowledge
1818 N Street, NW
Suite 410
Washington, DC 20036
**Admitted to the Bar under D.C. App. R.
46-A (Emergency Examination Waiver)*

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I. INTRODUCTION

Public Knowledge is a consumer-rights organization that represents the general public interest on technology issues, including copyright. 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 After reviewing the initial round comments, Public Knowledge (PK) submits these Reply Comments to address its concerns that the Motion Picture Association, Recording Industry Association of America, and Software and Information Industry Association (collectively Major Rightsholders), trade associations that represent major content industry stakeholders, have asserted that the Copyright Office should significantly limit the authority of Copyright Claims Attorneys (CCAs) to provide support, advice, and help to potential participants.²

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

² Comments of the Motion Picture Association, Inc., Recording Industry Association of America, Inc., and Software and Information Industry Association, In the Matter of Copyright Claims Board: Initiation of Proceedings and Related Procedures, Docket No. 2021-6 at 10 (Nov. 30, 2021).

Taking this suggestion would disproportionately harm potential participants and the general public who do not have the same resources as Major Rightsholders to secure private legal counsel. First, restricting the ability of CCAs to provide substantive advice to potential participants will undermine the CCB's purpose of providing an affordable, user-friendly, streamlined, and fair alternative forum for copyright claims. This will particularly impact the fairness for those who do not have the resources to secure their own counsel. Second, not only do CCAs have the authority to provide substantive advice to potential CCB participants, but they are also required to do so. Finally, the Copyright Office's general ban on providing legal advice does not impact this requirement.

II. COPYRIGHT CLAIMS BOARD ATTORNEYS SHOULD PROVIDE ADVICE TO POTENTIAL CCB PARTICIPANTS.

Contrary to assertions made by Major Rightsholders, the Copyright Office should encourage, rather than discourage Copyright Claims Board Attorneys (CCAs) to provide advice to CCB litigants, particularly those that have not secured legal counsel and intend to participate on a pro se basis. If the Copyright Office limits CCAs' ability to advise pro se litigants, then it will undermine the very purpose of the CCB before it is even operational.

As Senator Durbin, Senator Kennedy, and Representative Jeffries discussed in their comments to the initial NOI, the purpose of the CCB is to provide an alternative copyright claim forum that is (1) affordable, (2) user-friendly, (3) streamlined, and (4) fair.³ Yet, Major Rightsholders would have the Copyright Office enact policies that would undermine this purpose by preventing those who cannot afford legal counsel from receiving substantive advice from CCAs. Instead, PK urges the Copyright Office to encourage CCAs to provide advice to CCB

³ 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).

litigants, particularly those that are unrepresented by legal counsel, to ensure they can participate effectively.

First, allowing CCAs to provide substantive advice to potential participants will make the CCB more affordable. By providing substantive advice to potential participants, CCAs can help claimants avoid filing technically flawed or frivolous claims. This will help would-be claimants avoid unnecessary filing expenses and spare potential respondents the expense of answering a claim that has no real merit. Overall, by providing substantive advice, CCAs will make the CCB more affordable for all potential CCB litigants.

Second, allowing CCAs to provide substantive advice will make the whole process more user-friendly. Allowing the people responsible for administering the CCB to provide substantive advice to potential participants will make the CCB more user-friendly. After all, participants are the very people who will use the CCB. If CCAs are allowed to directly answer their questions, including substantive ones, then the system will necessarily be more friendly for users.

Third, by providing advice directly to potential participants, CCAs can help streamline the process of participating in a CCB proceeding. Currently, the CCB is not even operational and is a completely novel entity. This makes it difficult to anticipate what kinds of questions or information a potential participant may need or want. It is therefore highly likely that any information prepared for participants at this stage will have significant gaps that do not address the needs of participants. Instead of only pointing participants to pre-prepped information that may not answer a potential participant's specific question or questions, CCAs could take the time to answer participants directly, thereby streamlining the process for everyone.

Fourth, allowing CCAs to give substantive advice will make the system fairer, particularly for those who cannot secure their own legal counsel, by ensuring that cases are

decided on the merits, not procedural technicalities. Pro se litigants, particularly potential respondents, are at a significant disadvantage. Numerous commenters have addressed the power imbalance between claimants and respondents. By allowing CCAs to provide substantive advice to a potential respondent, the Copyright Office can avoid exacerbating this imbalance further. Moreover, by providing substantive advice to unrepresented participants, CCAs will improve the fairness of a proceeding in which only one party has secured legal counsel.

The Copyright Office should ensure that CCAs can provide substantive advice to potential participants because doing so is necessary to align the CCB with its purpose of providing an affordable, user-friendly, streamlined, and fair alternative dispute forum for copyright claims.

III. COPYRIGHT CLAIMS BOARD ATTORNEYS HAVE THE AUTHORITY TO ADVISE CCB LITIGANTS.

Contrary to Major Rightsholders' assertion, the CCAs have the authority and an obligation to provide substantive advice to the public, including potential participants. Additionally, the prohibition on the Copyright Office's ability to provide legal advice in the context of copyright registration has no bearing on the CCB's authority to give substantive advice.

A. The CASE Act Requires Copyright Claims Board Attorney's to Provide More than Just Information to the Public.

Several core principles of statutory interpretation all lead to the same result: the CASE Act requires CCAs to provide substantive advice to the public, including potential and active CCB participants.

It is a well-known principle of statutory interpretation that the word “shall” is mandatory, whereas the word “may” is permissive.⁴ Congress used the word “shall” to establish the CCAs' functions. Section 1503(a)(2) of the CASE Act states that “the functions of the Copyright Claims Attorneys *shall* be as follows...”⁵ This means that CCAs must perform the enumerated functions that follow. If Congress had intended CCAs to pick-and-choose what they are supposed to do, Congress would have used “may” instead. But it did not, so CCAs cannot shirk any of the functions Congress assigned them.

This is important because one of the CCAs' enumerated functions is “to provide assistance to members of the public with respect to the procedures and requirements of the Copyright Claims Board.”⁶ Two principles of statutory interpretation reveal that this function requires CCAs to do more than simply provide information to potential participants: (1) different phrasings, must have different meanings;⁷ and (2) ordinary words should be given their ordinary meanings.⁸

In addition to enumerating the functions of the CCAs, the CASE Act also enumerates the functions of the Copyright Claims Board Officers (CCOs), stating that CCOs shall “provide information to the public concerning the procedures and requirements of the Copyright Claims Board.”⁹ This language mirrors the same language describing the function of the CCAs except in

⁴ *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.”); *Rastelli v. Warden, Metro. Correctional Center*, 782 F.2d 17, 23 (2d Cir. 1986) (“The use of a permissive verb—‘may review’ instead of ‘shall review’—suggests a discretionary rather than mandatory review process.”).

⁵ Emphasis added.

⁶ CASE Act, § 1503(a)(2)(B).

⁷ This is encapsulated in the statutory interpretation principle that “effect must be given to all the words of the statute if possible so that none will be void, superfluous, or *redundant*.” In *re Winton Lumber Co.*, 57 Idaho 131, 136, 63 P.2d 664, 666 (1936) (emphasis added).

⁸ In the absence of a statutory definition, “we construe a statutory term in accordance with its ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

⁹ CASE Act, § 1503(a)(1)(H).

one critical detail. CCOs are only allowed to *provide information* to the public, whereas CCAs must *provide assistance*. This distinction demonstrates one of the core differences between CCOs who are supposed to preside over CCB proceedings as impartial judicial figures and CCAs who are must take a more active role in helping the public (and, as members of the public, potential participants).

This is further confirmed by looking at the ordinary dictionary definitions of assistance, assisting, and information. Merriam Websters Online Dictionary defines assistance as “the act of assisting someone.”¹⁰ It then defines assisting as “giving support or help to make it easier for someone to do something or for something to happen.”¹¹ In contrast, “information” is defined as “knowledge that you get about someone or something.”¹² The definition of assistance requires the CCAs to take active steps to help or make it easier for the public to participate in the CCB. By contrast, CCOs are only required to provide knowledge. Thus, CCAs are statutorily required to actively help members of the public that seek their advice.

B. The Copyright Office’s General Ban on Providing Legal Advice Does Not Apply to the CCB.

Major Rightsholders claim that 37 C.F.R. 201.2(a)(3) limits the ability of the CCB (and its CCAs) to provide legal advice. But, this assertion overstates the scope of 37 C.F.R. 201.2(a)(3) by conflating the Copyright Office with the CCB. The CCB is not the same as the Copyright Office. While the Register of Copyright has some oversight of the CCB, Congress explicitly intended that the CCB function as an independent and impartial body. The CASE Act demonstrates this separation repeatedly. For example, Section 1503(b)(2) allows CCAs and

¹⁰ Assistance, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/assistance> (last accessed Dec. 15, 2021).

¹¹ Assisting, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/assisting> (last accessed Dec. 15, 2021).

¹² Information, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/information> (last accessed Dec. 15, 2021).

CCOs to consult with the Register of Copyrights only on general issues of law, not specific facts, proceedings, or the application of law to specific matters before the CCB. This puts the decision of whether to even consult the Register in the hands of the CCAs and CCOs while also preventing the Register from influencing the outcome of specific proceedings. Thus, because there is sufficient separation between the CCB and the Copyright Office, 37 C.F.R. 201.2(a)(3) does not apply to the CCB and cannot prevent CCAs from providing substantive advice to potential CCB participants.

V. CONCLUSION

PK urges the Copyright Office to carefully consider recommendations that would prevent participants who cannot afford legal counsel from receiving substantive advice about the CCB, particularly when such a recommendation comes from Major Rightsholders who will have no issue affording private legal advice. The CCB's procedural rules should support its purpose, not undermine it. Severely limiting the advice CCAs can provide to potential participants would make the CCB more expensive, less user-friendly, complicated to navigate, and unfair for those who cannot afford counsel. Since CCAs are actively required to provide assistance by the CASE Act, and the Copyright Office's general ban on giving legal advice does not impact this authority, the Copyright Office must allow CCAs to provide substantive advice that will ensure all members of the public can adequately participate in the CCB should they wish to.

Respectfully submitted,

Kathleen Burke
Policy Counsel*
Public Knowledge
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Suite 410
Washington, DC 20036
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