

July 17, 2019

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
290 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Graham, Ranking Member Feinstein and Members of the Senate Judiciary Committee:

We are writing today to express our opposition to S. 1273, the Copyright Alternative in Small-Claims Enforcement Act of 2019 (“CASE Act”). Our diverse groups have many disagreements on many areas of public policy, but we all agree that creating a “small claims” quasi-judicial proceeding in the Copyright Office without the affirmative consent of all parties to participate is unwise.

Artists are finding new ways to share their content every day. Many depend on online platforms like Medium, WordPress, Facebook, Etsy and YouTube to become popular. These platforms have become key tools for many Americans to share photos, music and even literary works. The internet has completely reshaped how Americans enjoy creative works. And if signed into law, the CASE Act will not only make it more difficult for artists to find new audiences, but also put their audiences at risk.

Under the CASE Act, any American organization or individual—from small businesses to religious institutions to nonprofits to our grandparents and children—could be subject to up to \$30,000 or more in damages for something as simple as posting a photo on their Instagram account, retweeting a meme, or using a photo to promote their nonprofit online. This excessive penalty, even before attorneys’ fees, is equivalent to more than half the annual take-home pay for many American households. Many Americans could face the prospect of bankruptcy for merely sharing a meme or posting a photo—a result which Congress should avoid.

The fact that defendants can be brought before the tribunal—and settlements can be concluded and approved—before the work has even been *registered* means that even those who exercise due diligence in looking for the source of a work can be subject to these penalties. In contrast, registration is a prerequisite to bringing an infringement action for statutory damages in federal court.

The tribunal is not limited to individual creators—it creates new opportunities for attorneys and copyright trolls to exploit the system and take advantage of American consumers. Similar to the patent troll problems, the CASE Act will open up American businesses and consumers to mass threats of being subject to this process and other abusive tactics. The 60-day opt-out period is

not an effective solution, since unsophisticated members of the American public will not understand these new legal procedures and will unintentionally incur default judgments for which they will be liable with no meaningful right to appeal. Ironically, most of the large commercial users that proponents of the legislation complain about will opt out, while small businesses, nonprofits, and individuals will end up being subject to the procedure because they will not understand their opt-out rights in time. Additionally, the threat of an action will lead many Americans with limited resources to pay unscrupulous attorneys to just go away, further incentivizing abusive behavior.

Furthermore, the proposed legislation has many constitutional concerns. It establishes an unprecedented judicial function within the legislative branch, eroding over two centuries of separation of powers *and* the role of Article III courts under our Constitution while removing the constitutional right to a jury trial. Additionally, it denies Americans' rights to due process. The tribunal's ruling would be final in most circumstances, leaving defendants without any appeal or legal recourse, even for clear errors of law. And because the bill grants the Copyright Office the open-ended ability to increase available statutory damages, we are concerned the problem will get worse over time.

We recognize that changes have been made to address some of our concerns, but they don't go far enough. A simple solution that would solve some of these problems would be to require both parties to opt in to the Copyright Office's involvement. In our conversations with the Copyright Office, while they support this legislation, they have not taken a position on the question of opt-out vs. opt-in and would continue to support the legislation if it was amended to be opt-in.

Unfortunately, none of the issues above has even been subject to a hearing in the Senate. The bill is being marked-up without going through the normal vetting and process. Committee members have not had the opportunity to hear from stakeholders on the record on why they support or oppose this legislation, or on ways to improve it. Given the many significant challenges outlined above, the prudent thing at this juncture would be to reject the CASE Act.

We thank you for your time and attention to all of these matters and look forward to working with you on finding the right policy solutions to promote creativity and innovation, without hurting American consumers. We are sympathetic to the difficulties individual artists experience in enforcing their copyrights. However, creating a likely unconstitutional process that will potentially lead to litigation abuse that could bankrupt many Americans, small businesses, and nonprofits is not the right way to proceed. We encourage you to reject the CASE Act and its flawed approach.

Respectfully,

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