July 10, 2019

Hon. Lindsey Graham, Chairman
Hon. Dianne Feinstein, Ranking Member
Senate Judiciary Committee
Washington, D.C. 20510

Re: CTA Concerns Over CASE Act, S. 1273

The Consumer Technology Association (CTA)[1] has serious concerns with the CASE Act, S. 1273. CTA urges the committee to hear and weigh these concerns over equity, due process, constitutionality and abuse of consumers before proceeding with this legislation.

CTA's core concerns with this legislation are:

- The CASE Act's non-judge Boards with opt-out jurisdiction invite well-funded "troll" litigants to target vulnerable consumers and small businesses, resulting in a deluge of unappealable default judgments against unsuspecting defendants.

- These Boards, with limited discovery and no right of appeal on the merits, would attract difficult "grey area" cases that even federal courts, with discovery and expert witnesses, have difficulty deciding and often disagree on. The result would be an amalgamation resulting from confusion between Board outcomes and federal court precedents.

- The Boards would almost certainly be unconstitutional. The Supreme Court has indicated that Article I tribunals should be limited to "public rights" cases *arising between the government and citizens.*[2] By contrast, the CASE Act creates Article I Boards for adjudicating private rights claims for relief against claimed private sector infringers. The Constitution clearly requires *judges* to resolve private rights among private parties, and the law requires *jury* access to adjudicate copyright disputes.[3]

Abuse by Trolls

[1] CTA is the trade association representing the $292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. CTA also owns and produces CES® – the world's gathering place for all those who thrive on the business of consumer technologies.
[2] *Oil States Energy Services, LLC v. Greene's Energy Group, LLC,* 584 U.S. (Slip Op. at 7), 138 S. Ct. 1365, 1378 (2018).
[3] As has been widely discussed, a truly voluntary system would inform defendants on an "opt-in" basis. This could save the constitutionality of S. 1273.

CTA appreciates that the drafters of S. 1273 have attempted to address concerns pertaining to the potential abuse of a non-judicial Board by copyright "trolls." Unfortunately, these efforts fall short of matching the ingenuity and creativity of professional troll lawyer syndicates. This is not a theoretical concern. Even under the current system, copyright trolling is near-epidemic. Between 2014 and 2016, copyright troll lawsuits constituted nearly 50% of all copyright cases on the federal dockets. Researchers have estimated that over 170,000 Internet users have been subjected to frivolous copyright threats since 2010.[4]

Troll attorneys leverage the threat of statutory damages—up to $30,000 in S. 1273–to intimidate individuals, artists and small businesses to "settle" more often than they actually file suit.[5] Unfortunately, the bill's limitation on numbers of suits by a single "claimant" (not by a lawyer or law firm) and the ease in which these businesses can find willing plaintiffs will barely be a speed bump for aggressive and unscrupulous troll lawyers.

The assessment of fines and attorney fees against frivolous litigants by federal judges has slowed down.[6] The Officers contemplated by the CASE Act, however, are not federal judges and have no power to levy fines or fees against the most outrageously unscrupulous litigants.

This lack of tools to vindicate defendants' rights is just one of the reasons why such Officers cannot fulfill the constitutionally mandated role of a federal judge. Nor can any judge do so subsequently on appeal, because the bill provides that Board cases are appealable only based on procedural or ethical deficiencies.

The complaint process under S. 1273 would also cause mass consumer confusion. While S. 1273 has conventional-appearing service requirements, communications from the "Board" would not be from a court, nor would they appear familiar to the potential consumer or small business defendants. Consumers are routinely warned about responding to phishing scams, including those that imitate service of process.[7] Given the minimal upfront investment needed for plaintiffs to broadly launch Board claims, it seems likely that a relatively high percentage of consumers who are already bombarded by junk and scam mail would not recognize the legitimacy of the service and would fail to respond. These unsuspecting citizens and small businesses would then be liable for default judgements of up to $30,000.

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[4] *See* Matthew Sag and Jake Haskell, Defense Against the Dark Arts of Copyright Trolling 103 Iowa Law Review 571 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933200.
[5] *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108 – 1110 (2015), http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1530&context=facpubs.
[6] *See, e.g.*, Eric Goldman, *The Righthaven Debacle, 5 Years Later*, Technology & Marketing Law Blog, March 17, 2015, http://blog.ericgoldman.org/archives/2015/03/the-righthaven-debacle-5-years-later.htm.
[7] *See, e.g.*, SNOPES, *Court Notice Scam*, https://www.snopes.com/fact-check/court-notice-scam/.

The Claims Board is Ill-Suited for the Difficult Grey Area Complaints It Would Attract

If all the threatened or actual cases likely to be brought to the Board were instances of clear violation, these deficiencies would be less serious for defendants. However, the Board will likely attract difficult "grey area" copyright cases not yet conclusively decided in the district courts or the courts of appeal including the following examples:

- Copyrightability and copying of software and music.
- Standing to sue on the basis of license rather than ownership of a work.
- Whether fair use should be a defense to charges of copying music.[8]
- Whether private, personal home recording infringes copyright is subject to implied license or is a fair use.[9]
- Whether a privately commissioned arrangement of a work for a school performance infringes as a derivative work.[10]
- The standard for determining contributory or vicarious infringement in a variety of contexts.

Many suits will inevitably be against consumers based on conduct that most people take for granted as a fair use. The Board and its procedures will prove inadequate protection for the public. Fair use, though developed in the case law, remains highly specific to context and motivation–the sort of intent issues often addressed to juries.

Similarly, determinations of secondary liability often rest on assessments of the motivations of both plaintiff and defendant. S. 1273 allows for dismissal of cases where determining the facts or law "could exceed the subject matter competence of the Copyright Claims Board," but there seems little point to this legislation if the Board will declare all fair use cases off-limits. At the very least, this Committee should require a clear and definitive statement of what types of cases the Board ***can*** competently judge at a hearing.

While the Case Act is not intentionally designed to set copyright precedents, Officers will inevitably establish a body of decisions that are widely known to the copyright bar and litigants. *At least some of these outcomes will vary from or disagree with outcomes reached in U.S. district courts and circuit courts of appeal,* particularly on "grey area" issues discussed above, where the issue has never been addressed out of fear of creating unclear precedent or where the circuits are "split." The Act's edict that Officers in such cases "back" one circuit or another is likely to confuse precedent in the federal courts and inevitably result in cases wrongly decided at the Board level, for which no appeal on the merits can be heard.

Fundamentally, the Copyright Claims Board system *removes much of the risk inherent in suing consumers, small businesses and innovators*. Fear of establishing an adverse judicial precedent

[8] *See*, e.g., Lee, Edward, Fair Use Avoidance in Music Cases (June 26, 2018). Boston College Law Review, Vol. 59, No. 6, 2018. Available at SSRN: https://ssrn.com/abstract=3232783.
[9] *See* Robert Schwartz, *The Demise of Copyright Toleration*, TechDirt, May 24, 2018, https://www.techdirt.com/articles/20180523/00333639884/demise-copyright-toleration.shtml.
[10] *Id.*

(such as on consumer in-home fair use) has protected consumers from being personally sued for activities confined in their own homes.[11] That the legislation would make the system "voluntary" in allowing removal to the federal courts is likely to be of no or limited comfort to consumers receiving notice of a suit (nor can unsophisticated users be expected to fully understand their opt-out rights after receiving an official and intimidating letter from the government). It is only the better-funded and more sophisticated defendants who are more likely to opt out.

The Copyright Claims Board system would be set up to favor trolls and unscrupulous litigants who want to extort quick settlements from small or unsophisticated defendants faced with claims of massive $30,000 statutory damages for conduct that is lawful or that they had assumed to be lawful.

All these problems would be solved with a simple opt-in system, which would require the defendant to knowingly consent to adjudication by the Claims Board. We urge the Committee to include such an opt-in mechanism.

For all of the above reasons, CTA urges this committee to conduct a hearing before proceeding with S. 1273 and ensure that any Claims Board will not be used as a platform for copyright trolls and frivolous litigants to leverage underserved payouts from American citizens and small businesses.

CTA appreciates this opportunity to provide its views.

Respectfully submitted,

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[11] Some consumers were initially made defendants in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("Sony") but were dropped from the case in response to public and press reaction. Subsequent consumer suits have focused on online activity potentially involving many other households.