



October 21, 2019

Dear Member of Congress:

I am writing today to express Re:Create's concerns with the highly controversial H.R. 2426, the Copyright Alternative in Small-Claims Enforcement Act of 2019 ("CASE Act"), that might be considered under the suspension calendar this week. It is inappropriate for legislation that could potentially impact millions of Americans' financial health, be used to target schools, libraries and religious institutions, and has severe constitutional concerns to be on the floor of the United States House of Representatives with so little vetting and no opportunities to amend it at the Judiciary Committee or on the floor. I apologize for the length and density of this letter, but given the very serious constitutional and financial issues at stake, we wanted to make sure you had enough information to understand why this bill is not ready to have a vote under suspension of the rules.

Re:Create and our members, along with organizations like the American Civil Liberties Union, have worked hard over the last few months to find a constitutional way to create a small claims court that will not have a negative economic impact on Americans. We have done so in good faith, hoping to create legislation that will allow creators whose copyright has been infringed to seek remuneration. Re:Create wants to make this bill better to allow for the sponsors to have an excellent bill signed into law, which will not only help creators, but also users.

While there was a hearing held at the end of the 115th Congress on September 27, 2018,¹ there was no hearing in the 116th Congress. Most of the House Judiciary Committee has changed due to retirements and a new democratic majority in the House. Additionally, none of the numerous public interest groups or constitutional scholars that have issues with the legislation were invited to testify. Even so, with almost no notice, the bill was marked up late in the evening in the House Judiciary Committee on September 10, 2019, when Members were tired or simply leaving.² Furthermore, the CASE Act was added to the markup after a marathon session on several highly controversial firearms bills. Fortunately, multiple Members raised concerns and were promised by the sponsors that amendments would be considered before bringing the legislation to the floor. Unfortunately, there has been no opportunity to amend the bill. The manager's amendment is nearly identical to the original bill.

¹ <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108733>

² <https://www.congress.gov/bill/116th-congress/house-bill/2426>

Additionally, there has been a substantial misinformation campaign about the CASE Act. First, this is not a bill to attack “Big Tech.” In fact, as written, “Big Tech” will be able to “opt-out” of this procedure. Individuals who are sophisticated about copyright and why the small claims proceeding will be bad for them, will “opt out”— this includes large companies and sophisticated infringers. It will be the rest of Americans, from the elderly to teenagers, from small businesses to religious institutions that will have to figure out in 60 days how the entire copyright system works: the existence of things like registration and fair use, the difference between statutory damages and actual damages, and many more things to make an informed decision on whether to “opt out”. “Big Tech’s” opposition to the bill is based on how the procedure will be used to harass their users.

Furthermore, unless Congress is willing to spend millions in educating the general public about this brand new court, 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.³

Currently, approximately half the copyright docket of the US courts is “trolling”.⁴ And proponents have stated this legislation will curb “trolling” behavior by providing access to a small claims court. This is wholly misleading. Most infringement cases are thrown out of court due to lack of evidence or due to a lack of consideration of fair use, which is now required under the *Lenz* decision.⁵ “Trolling” behavior is not simply taking individuals to court, it is sending onerous demand letters threatening legal action or a settlement which is less than the sum of the proceeding. This legislation will increase trolling behavior by threatening Americans with a small claims proceeding that could cost \$30,000 or simply settling “out of court” for a “minimal” fee such as several thousand dollars.

This type of behavior is not new and it will only get worse if the CASE Act is signed into law. I implore you to familiarize yourself with the behavior of known copyright trolls like Prenda⁶ or Richard Liebowitz.⁷ And for those who remember what it was like before the Leahy-Smith

³ <https://www.census.gov/library/publications/2019/demo/p60-266.html>

⁴ Sag, Matthew, Copyright Trolling, An Empirical Study (August 24, 2014). Iowa Law Review, Forthcoming: <https://ssrn.com/abstract=2404950>

⁵ *Lenz v Universal Music Group*, 801 F.3d 1126 (9th Cir. 2015)

⁶ <https://arstechnica.com/tech-policy/2019/07/prenda-law-porn-troll-saga-ends-with-prison-for-founder/>

⁷ <http://www.abajournal.com/news/article/judge-sanctions-litigious-copyright-lawyer-notes-growing-body-of-law-on-when-to-punish-him>

America Invents Act was signed into law, “patent trolls” were using similar tactics to attack nonprofits and small businesses. There have been countless horror stories of individuals paying licensing fees of over \$2,000 for a claim that was not legitimate.⁸ Luckily, in the case of patent law, Congress acted.

If an infringement occurs before a work is registered, in an Article 3 court, a plaintiff can only recover actual damages, not statutory damages. The CASE Act would change this for the small claims proceeding by allowing statutory damages of \$7,500 for sharing a single photo on Instagram, including those that are not registered. This means that for unregistered works, the small claims proceeding will have a higher available damages award than in a regular court, going against the very nature of small claims. Given that sharing photos online is an activity done by millions of Americans every day, by voting “yes,” Members risk taking thousands of dollars or more out of the pocketbooks of their constituents.

Furthermore, the proposed legislation has many constitutional concerns. The legislation is structured to create an Article 1 authorized proceeding for a traditional judicial function. While we have created Article 1 proceedings within the Executive Branch or at an independent regulatory agency, to our knowledge there has not been an Article 1 proceeding created within the Legislative Branch. Under our separation of powers system of government, courts will be highly skeptical of an attempt by Congress to take power away from the courts and give it to themselves.

Additionally, even when a judicial function is given to the Executive Branch, it has to pass the “Public Rights Doctrine” test to protect the right to a trial by jury in civil cases. The Supreme Court has specifically held in a unanimous decision that copyright actions are subject to the 7th Amendment guarantee, even in a case for legislatively directed statutory damages.⁹ Congress may establish a public right, separate from actions that affect the federal government, that involves an action related to protection of the public, such as health or welfare, and may establish an executive tribunal in which to adjudicate these rights.¹⁰ An Article 1 tribunal may adjudicate these public rights in a fact-finding role, but there needs to be consent, due process and review by an Article 3 court.¹¹ Private rights or rights involving matters between private parties that have their origins in common law are resolved only in Article 3 federal courts.¹²

⁸<https://arstechnica.com/series/attack-of-the-scanner-patents/>

⁹ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)

¹⁰ *Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442 (1977)

¹¹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)

¹² *Stern v. Marshall*, 564 U.S. 462 (2011)

In this case, the bill fails this test. First, copyright infringement actions are private rights involving matters between private parties that the Supreme Court has held have their origins in the common law. Additionally, they do not fall into the category of broader public rights like public health or welfare. This means the legislation would likely not be subject to the Public Rights exception to the 7th Amendment. In a memo attacking the integrity of Re:Create, Public Knowledge and the Electronic Frontier Foundation, it is argued that a recent Supreme Court decision related to the Patent Trial and Appeal Board (“PTAB”) is the equivalent of the CASE small claims proceeding.¹³ However, the legal analysis in this memo is flawed. The court specifically found the granting and re-examination of a patent meets the public right doctrine test, not infringement actions which are common law. The PTAB reviews its own agency’s issuance of a patent. In other words, the PTAB does not consider whether or nor a party infringed upon the patent; it only reviews whether or not the patent should have been granted in the first place. The CASE Act board will have a completely separate function: it will review whether or not an individual infringed upon a copyright, which is a function of a common law Article 3 court.

Even under the *very* remote possibility that a court finds that the CASE Act small claims court is a public right, it would still fail the public rights test. Public rights that do not involve the government as a party like the PTAB are required to have a *de novo* right of appeal to the courts.¹⁴ As written, the CASE Act does not allow appeals to the courts on errors of fact or law, easily failing this test. Additionally, it is questionable if the 60-day opt out would pass the consent requirement. And, the proceeding lacks traditional due process requirements such as the ability to call witnesses, the right to cross-examine and potentially the right to present evidence because of its limited discovery. Given the CASE Act fails one of the requirements, and may fail the other two, the legislation will not pass the public rights test.

While this letter is extremely long and complicated, I have not even brought up the myriad of other issues in this legislation around exercise of fair use rights, the default judgment enforcement procedure, the fact that it would be the largest small claims proceeding in the United States, that small claims are intended for simple not complicated areas of the law, and it is opt-in for plaintiffs but opt-out for defendants. None of these issues have been vetted under normal procedure at the House Judiciary Committee. Re:Create wants to work with Members and creators supporting this legislation by finding a constitutional bill that will not have such a large financial impact on your constituents.

¹³ Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. ____ (2018)

¹⁴ A *de novo* right of appeal means that the courts show no deference to the ruling of the lower tribunal and can review it for both fact and law. Appeals of arbitration decisions are also *de novo*.

However, the creation of an 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. To avoid all these issues, we must consider amending the legislation and holding public hearings. If this bill is signed into law, not only will it likely be considered unconstitutional, but constituents will be upset with their Member for making them potentially pay thousands each time they share a photo online and creators will not have access to the streamlined procedure they were promised.

If you would like to talk further about this legislation, do not hesitate to email me at jlamel@insight-dc.com or call me at (202) 844-2066. Thank you for your time and attention to this urgent matter.

Respectfully,

Joshua Lamel
Executive Director
Re:Create