October 21, 2019

RE: Vote "NO" on H.R. 2426, the Copyright Alternative in Small-Claims Enforcement (CASE) Act

Dear Representative:

The American Civil Liberties Union (ACLU), on behalf of its 8 million members, supporters, and activists writes to oppose H.R. 2426, the Copyright Alternative in Small-Claims Enforcement (CASE Act) when it comes to the House floor this week.[1] Unless significant changes are made to protect the freedom of speech and due process, we urge you to vote "NO" on final passage. The ACLU will score this vote.

We urge you to vote "NO" on final passage of H.R. 2426, the Copyright Alternative in Small-Claims Enforcement Act.

In general, the bill would create a Copyright Claims Board (CCB) within the Copyright Office that would be empowered to adjudicate copyright infringement claims and counterclaims for actual and statutory damages not to exceed $30,000. We do not oppose the idea of creating a small claims process to allow copyright owners to assert infringement and be awarded damages for the harm caused. There is evidence that strongly suggests a need for such a system, as many copyright holders have argued.[2] However, because this bill could affect every person that communicates online, we believe that changes are needed to ensure adequate safeguards for due process and the protection of the freedom of speech.

Any system to enable easier enforcement of copyrights runs the risk of creating a chilling effect with respect to speech online. Section 512 of the Digital Millennium Copyright Act (DMCA) provides an instructive example of the ways in which a well-intentioned system for enforcing copyrights that nevertheless fails to build in adequate safeguards may harm the freedom of speech.[3] Section 512 creates a notice-and-takedown procedure that allows rights holders to require online service providers to quickly remove content after notification of infringement. In practice, that process has often been abused, with studies showing that many DMCA notices are meritless.[4]

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[1] H.R. 2426, 116th Cong. (2019).
[2] *See, e.g.*, Letter from Myra H. McCormack, President, American Intellectual Property Law Association, to Chairman Bob Goodlatte and Member Jerrold Nadler (Sept. 24, 2018), https://www.aipla.org/docs/default-source/advocacy/aipla-letter-to-hjc-on-h-r-3945-sept-2018.pdf?sfvrsn=89e3a63d_0; *Support the CASE Act*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/news-events/copyright-news-newsletters/copyright-small-claims/.
[3] 17 U.S.C. § 512.
[4] [4] Daphne Keller, *Empirical Evidence of Over-Removal By Internet Companies Under Intermediary Liability Laws*, CTR. FOR INTERNET & SOC'Y BLOG (Oct. 12, 2015), http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws (collecting studies); Marjorie Heins and Tricia

Meanwhile, counter-notices to defend against DMCA takedowns and require content be reposted are exceedingly rare, possibly due to structural limitations and risks associated with using a counter-notice.[5] Therefore, many DMCA takedowns involve legal and legitimate content that should never have been removed.

For example, journalists revealed that the government of Ecuador abused the DMCA to silence criticism of President Rafael Correa.[6] Artist Jonathan McIntosh's remix video Buffy vs. Edward: Twilight Remixed—a critique of the gender politics in the popular motion picture trilogy—was removed after a DMCA takedown notice.[7] It took three months before the film studio claiming infringement relented. The Electronic Frontier Foundation has detailed numerous other examples of this abuse.[8] The ease of filing a DMCA takedown notice, coupled with the difficulties in defending against a claim of infringement, have led to less speech online.

The CASE Act's new enforcement system will create similar risks of chilling speech by increasing the number of copyright infringement claims that will be brought. Many of these cases will be legitimate. However, some will not, and others, even if brought in good faith, may be defensible as fair use or for some other permissible reason. If legally unsophisticated people are drawn into the CCB process, with the possibility of being liable for $30,000 in damages, they may be forced to settle rather than risk far greater liability, even if they had not infringed. While additional attorneys to assist litigants through the process and additional public education on copyright infringement are helpful, these changes do not address the significant due process problems with the bill. Given the complex and fact-intensive nature of copyright claims and defenses, the design of a system to make copyrights easier to enforce must be carefully balanced, not only to permit rights holders to enforce their legitimate claims, but to protect the free exchange of information that has become essential to modern American life. To that end, there are a few ways in which the CASE Act could be improved to protect free speech and due process rights.

Meaningful Access to Judicial Review

As the bill currently stands, parties to claims adjudicated by the board often will lack meaningful access to judicial review because judicial review of determinations is limited to only three circumstances: (1) when the decision is the result of fraud, corruption, misrepresentation, or other misconduct; (2) when the Board exceeds its authority; or (3) when the defaulting party can establish excusable neglect.[9] This is particularly problematic because at least one study has shown that the Copyright Office may display bias in favor of

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Beckles, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL, BRENNAN CTR. FOR JUSTICE (2004).

[5] Jennifer M. Urban, Jo Karanganis, and Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, U.C. BERKELEY PUB. LAW RESEARCH PAPER NO. 2755628 (March 22, 2017).

[6] James Ball, *Ecuador's President Used Millions of Dollars of Public Funds to Censor Critical Online Videos,* BUZZFEED (Sept. 24, 2015), *available at* https://www.buzzfeednews.com/article/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds

[7] Johnathan McIntosh, *Buffy vs. Edward remix unfairly removed by Lionsgate*, ARSTECHNICA (Jan. 9, 2013), *available at* https://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/

[8] Comments of the Electronic Frontier Foundation before U.S. Copyright Office, *In the Matter of Section 512 Study*, Docket No. 2015-7 (Apr. 1, 2016) https://www.eff.org/document/eff-512-study-comments.

[9] H.R. 2426, § 1508(c)(1).

copyright holders.[10] Without meaningful access to judicial review, the CCB could become a venue that disproportionately favors rights holders to the detriment of the public interest.

What makes the CCB's nearly unreviewable authority even more troubling is that the board will inevitably be faced with tough questions about what is infringement, what is fair use, and what is protected speech. This bill could affect every Internet user who has ever shared an article or a photo without knowing whether they had proper permission or posted a video of themselves singing along to the latest pop song. With no court to correct the board's mistakes, the First Amendment will suffer. The CASE Act should be amended to ensure access to adequate meaningful judicial review consistent with the goals of creating a true small claims process for rights holders.

Additional Safeguards to Ensure Voluntary Participation

The CASE Act would require a respondent to participate in the small claims system unless he or she opted out within sixty days of service.[11] If the respondent failed to respond to notice served under the system for any number of reasons, he or she has thereby waived his or her right to a jury trial and loses the opportunity for review by an Article III court, except in narrow circumstances. We appreciate the inclusion of safeguards intended to provide notice to respondents of their opportunity to opt out of the CCB process. Under the bill, not only would claimants be required to properly serve notice to respondents, but the CCB would send an additional notice explaining that an infringement claim had been filed, that the respondent has the opportunity to opt out, and the consequences of failing to opt out.[12]

However, if respondents fail to opt out for any reason, they are deemed to have waived their right to a jury trial and lose most, if not all, access to substantive judicial review. If a default judgment results, respondents may be on the hook for up to $30,000 in damages, even if they fairly used the copyrighted work or were otherwise innocent of infringement. An opt-out system will also fail to capture repeat offenders and serial infringers, who will be familiar with their rights under the copyright laws and therefore will be likely to opt-out. Meanwhile unsophisticated respondents, including individual Internet users, will not be so savvy and could be subject to potentially large civil penalties.

We urge changes to include additional safeguards that will protect respondents, many of whom may be unsophisticated parties and individual Internet users. One solution would be to create a small claims process where both parties affirmatively opt-in to participation. Another might be to increase protections for respondents that fairly used a work by requiring consideration of fair use in every case that comes before the CCB.

Available Damages Should Be Further Limited

The CASE Act would permit recovery of damages of up to $30,000.[13] Plaintiffs could seek actual damages, statutory damages, or no damages.[14] Statutory damages are damages that

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[10] Meredith Whipple, *The Consequences of Regulatory Capture at the Copyright Office*, PUBLIC KNOWLEDGE (Sept. 8, 2016), https://www.publicknowledge.org/the-consequences-of-regulatory-capture-at-the-copyright-office/.
[11] H.R. 2426, § 1506(g)(1).
[12] *Id*. § 1506(g), (h).
[13] *Id*. § 1504(e)(1)(D).
[14] *Id*. § 1504(e)(1)(B).

can be awarded to a copyright owner where the range of monetary award is established by statute, rather than decided in reference to evidence of monetary losses.[15] Capped at $15,000 for registered works and $7,500 for unregistered works, the option to pursue statutory damages would be the most lucrative for nearly all plaintiffs, and therefore would likely become the default election. All a claimant would need to bring suit for $30,000 is to accuse someone of sharing 2 registered pictures without proper license or 4 unregistered pictures. Anyone who has ever shared their wedding photos online without knowing if they had the right permissions could face a claim for $30,000 instead of a likely much lower licensing fee. And anyone who has every posted a video of themselves singing along to songs by any musical artist could face the same.

The median American household income is less than $70,000;[16] therefore, a $30,000 damages award could bankrupt the average American family. Thirty thousand dollars also is a higher cap on damages than most other small claims processes. One of the primary arguments for enacting this system is that it will permit parties to avoid the legal expenses of hiring an attorney, but if many individual respondents would be at risk of financial ruin if they had to pay a $30,000 penalty, it seems unlikely that many of them would be able to take the risk of proceeding without an attorney to represent them.

The cap on damages should be lowered to ensure a true small claims process. For instance, the small claims system recently implemented in the United Kingdom places a £10,000 cap and is limited to actual damages.[17] Following this example and significantly lowering the cap on damages will permit rights holders to assert their claims through a less expensive process while simultaneously guarding against abuse of that process.

Any small claims process for copyrights must be procedurally fair to both sides of a dispute, ensuring access to meaningful judicial review at a minimum. And the penalty shouldn't threaten to leave families bankrupt. We urge to vote "NO" on final passage of H.R. 2426 unless significant changes are made to address the concerns raised in this letter. If you have any questions, please feel free to contact Kate Ruane (kruane@aclu.org).

Sincerely,

Ronald Newman
National Political Director

Kate Ruane
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[15] *See* 17 U.S.C. § 504. Copyright Alliance, *What Are Statutory Damages and Why Do They Matter?*, https://copyrightalliance.org/ca_faq_post/statutory-damages-why-do-they-matter/ (last visited Sept. 9, 2019).
[16] Emmie Martin, *This Map Shows How Much Money Americans Make in Every US State*, CNBC.com (Dec. 10, 2018), https://www.cnbc.com/2018/12/07/median-household-income-in-every-us-state-from-the-census-bureau.html.
[17] Christian Helmers, Yassine Lefouili, Brian J. Love, & Luke McDonagh, *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s IP Enterprise Court*, SANTA CLARA UNIV. SCH. OF LAW LEGAL STUDIES RESEARCH PAPERS SERIES NO. 2018-01 (2018).