

Statement of

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**“Copyright Alternative in Small-Claims Enforcement Act of 2017”**

Committee on the Judiciary, U.S. House of Representatives

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Chairman Goodlatte, Ranking Member Nadler, and Members of the Committee, my name is Matt Schruers, and I serve as Vice President for Law and Policy at the Computer & Communications Industry Association, which represents Internet, technology, and communications firms. Thank you for the opportunity to discuss the proposal to create a copyright small claims proceeding. My statement today begins by considering the existing copyright environment. It then considers some potential scenarios where the small claims procedure might be deployed. Finally, it comments on five aspects of the May discussion draft of the bill that CCIA believes merit additional attention.

## **I. Existing Copyright Environment**

CCIA members strongly support the objective of copyright, and play a critical role promoting the ingenuity and creativity of their users worldwide. Services and platforms provided by CCIA members are enablers and facilitators for individual artists and creators everywhere. These technologies afford instantaneous and often free-to-the-user opportunities to reach and engage with audiences around the world, in ways not possible without the Internet.

Any new copyright remedy should be considered in the context of the existing remedies available to a copyright plaintiff. A rights-holder's current Title 17 toolbox includes injunctive relief, actual damages and profits, as well as statutory damages, which are available regardless of whether an actual injury has been suffered. The size of plaintiffs' maximum possible statutory awards has been increased several times since the 1976 Act, and is currently at \$150,000 per work infringed. In fact, a rights-holder may request the jury award both its actual damages and defendant's profits, and in the alternative, statutory damages, and at any time before final judgment choose which of those remedies maximizes its relief.<sup>1</sup> It is thus unlikely that the damages framework in Title 17 will ever under-compensate a plaintiff. The Copyright Act also provides attorney's fees, and impoundment and destruction of defendants' property.<sup>2</sup> Online, plaintiffs may avail themselves upon extrajudicial relief by means of Section 512 takedowns,<sup>3</sup> and of course the Act also provides for taxpayer-supported criminal enforcement in cases of willful infringement.<sup>4</sup>

The idea that copyright plaintiffs are generally underserved by the existing remedies toolbox is somewhat difficult to reconcile with current data about copyright plaintiffs' utilization of the federal court system. As I discussed with the Subcommittee in 2014, the statutory damages system has incentivized plaintiffs to inundate the federal litigation docket with instances of predatory enforcement, often referred to as copyright "trolling," similar to the phenomenon of patent trolling. As one news publication noted, "[t]he existing digital copyright system has also led to claims of abuses, bizarre false positives, political censorship, and even

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<sup>1</sup> 17 U.S.C. § 504(c)(1).

<sup>2</sup> *See generally* Tit. 17, ch. 5.

<sup>3</sup> As a result of the 1998 Digital Millennium Copyright Act, new remedies in Chapter 12 provide independent protection against removal of identifying information from copyrighted works, with awards of up to \$25,000 per violation. Plaintiffs also have remedies against the circumvention of technological measures that protect copyrighted works, with civil awards of up to \$2,500 and the possibility of criminal prosecution.

<sup>4</sup> 17 U.S.C. § 506(a) (criminal penalties, referencing 18 U.S.C. § 2319).

fraud”.<sup>5</sup> Some plaintiff misconduct that I identified in my 2014 testimony has led to criminal convictions.<sup>6</sup>

Since we last discussed copyright remedies four years ago, these cases continue to clog federal courts. In 2014, I discussed the proliferation of multi-defendant John Doe complaints in federal copyright litigation, many of them involving pornography. At that time, recent research from Professor Matthew Sag found that these John Doe cases comprised the majority of copyright cases in over 20% of U.S. federal trial courts, and a third of federal copyright cases involved pornography. Today, the data shows that this problematic trend has continued. A 2018 article co-authored by Prof. Sag finds that John Doe suits by these serial litigants account for nearly half of all copyright cases filed in the U.S. from 2014 to 2016, including around 10,000 lawsuits, implicating hundreds of thousands of defendants,<sup>7</sup> some wrongfully accused.<sup>8</sup>

Let me be clear: we recognize that these troll plaintiffs are *not* the plaintiffs about whom Members of the Committee are concerned today. Because Title 17 remedies are available to all litigants, however, we are mindful of how the small claims process would be invoked by the least meritorious litigant, including those for whom alleging infringement is business model.

## II. Potential Scenarios for Small Claims

One primary use case for the small claims proceeding appears to be the unauthorized use by a publication of a photographer’s work. Ensuring low-cost adjudication in cases of clear literal infringement is an important objective. However, the process will also be utilized in other scenarios, and it is these use cases that have led to questions in our industries.

Clearly, the recognition that trolls might take advantage of a small claims process motivated the adjustable cap on the number of cases a litigant may bring. Concerns about misuse of the process by professional litigants require attention. In addition to trolling, we might anticipate small claims disputes pertaining to non-commercial digital uses of works. Today, a Digital Millennium Copyright Act takedown is often the end of such disputes, but a small claims proceeding may change that. CCIA’s concern in this context is not principally for members of the Association, for whom various copyright regulatory compliance burdens already exist, and are generally accepted as a cost of doing business. Instead, the concern stems from whether our members’ users’ customary activities on online services might lead to small claims disputes, including disputes alleging secondary liability and non-literal infringement.

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<sup>5</sup> Steven Melendez, *Here Come The Copyright Bots For Hire, With Lawyers In Tow*, Fast Company, Feb. 21, 2018, <https://www.fastcompany.com/40494777/here-come-the-copyright-robots-for-hire-with-lawyers-in-tow>.

<sup>6</sup> Dan Browning, *Minneapolis lawyer pleads guilty to federal fraud, money laundering charges in porn troll scheme*, Star Tribune, Aug. 17, 2018, <http://www.startribune.com/minneapolis-lawyer-pleads-guilty-to-federal-fraud-money-laundering-charges-in-porn-troll-scheme/491116791/>.

<sup>7</sup> Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 Iowa L. Rev. 571 (2018), available at <https://ilr.law.uiowa.edu/print/volume-103-issue-2/defense-against-the-dark-arts-of-copyright-trolling/> (“our best estimate is that the number of U.S. households who have received a settlement demand letter from the plaintiffs we regard as copyright trolls is in the hundreds of thousands”).

<sup>8</sup> *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-08333-ODW, 2016 WL 4472931 (C.D. Cal. Aug. 23, 2016).

Consider two examples:

- (a) The “distracted boyfriend” meme that circulated the Internet last year to express humorous social and political observations was a stock photography agency asset. While stock agencies with rights in that case focused on monetizing *commercial* use of the meme,<sup>9</sup> might the availability of a low-cost venue in future such scenarios draw private Internet users into disputes over wholly non-commercial uses?
- (b) The 3-year copyright litigation between Fox News and a New Jersey news publisher over Fox’s unauthorized uses of iconic photos following the September 11 attacks involved social media republication by Fox.<sup>10</sup> If a lower-cost adjudication procedure existed, might Fox’s social media followers who shared, reposted, or repurposed the original have been subjected to a small claims dispute?

The costs associated with adjudicating copyright disputes may have the effect of inhibiting meritorious cases at the margin, but they also discourage these kinds of disputes, involving unauthorized but economically insignificant non-commercial use. Reducing these hurdles to admit more deserving plaintiffs may also usher in more disputes involving non-commercial use online by individual Internet users.

### III. Observations on Current Small Claims Proposals

While CCIA is not presently in a position to support H.R. 3945 or the May discussion draft, we appreciate the opportunity to comment on the proposal and look forward to working with the Committee to find mechanisms that ensure individuals can obtain meaningful relief for losses from infringement. The following explores what CCIA regards as the most significant outstanding points of discussion on the bill.

1. *Opt-in versus opt-out.* Both the bill as introduced and the discussion draft circulated in May adhere to an “opt-out” model. As the Copyright Office noted in its 2013 report on a small claims proceeding, some kind of consent to a small claims proceeding is likely necessary to survive subsequent legal challenges, since individuals must affirmatively waive constitutionally guaranteed rights of trial by jury and appellate relief.<sup>11</sup>

It is unclear whether a “negative option” opt-out from jury trial and appellate rights is in fact “voluntary” for purposes of surviving constitutional muster.<sup>12</sup> Independent of whether the

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<sup>9</sup> Heather Schwedel, *Stock Marketing*, Slate, Aug. 29, 2017, [http://www.slate.com/articles/technology/technology/2017/08/shutterstock\\_tried\\_to\\_cash\\_in\\_on\\_the\\_distracted\\_guy\\_meme.html](http://www.slate.com/articles/technology/technology/2017/08/shutterstock_tried_to_cash_in_on_the_distracted_guy_meme.html).

<sup>10</sup> Andrew Chung, *Fox News, publisher, settle copyright dispute over iconic 9/11 photo*, Reuters, Feb. 16, 2016, <https://www.reuters.com/article/us-ip-fox-news-photo-idUSKCN0VP2HY>.

<sup>11</sup> U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>, at 28 n.172 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986)).

<sup>12</sup> The Copyright Office characterized this approach as “somewhat more ambitious” from a due process perspective. *Id.* at 99.

opt-out approach is constitutionally sound, CCIA regards opt-in as more appropriate for administering a dispute resolution process that we assume parties are actually consenting to. If indeed an opt-out approach is necessary to make the small claims process meaningful, this suggests most disputes will result in defaults, which calls into question whether parties are in fact being voluntarily bound in the first place.<sup>13</sup>

A fee-based ‘one-time’ opt-out, as described in the May discussion draft, could address the concerns of larger online services and platform providers who are accustomed to regulatory compliance obligations. This is less likely to be of use to individual non-commercial users of online services, however.

2. *Permissible volume of litigation.* As introduced, the bill placed no limit on the volume of litigation that a plaintiff could bring before the tribunal. The May discussion draft proposes an adjustable cap on the number of proceedings that a plaintiff may bring before the small claims tribunal. This addition is prudently focused on limiting access to the industrial-scale litigants that we currently see swamping the federal judiciary. Because shell entities are a common feature of IP troll litigation, however, CCIA recommends that this provision be strengthened to ensure that it binds all real parties in interest, to prevent circumvention of the cap through assignees, proxies, or shell entities.<sup>14</sup> It is also unclear why the Copyright Office would have statutory authorization to adjust this cap. The Office has no power to adjust other Title 17 remedies, and this Committee has frequently done so as the need arose.

3. *Copyright Office rulemaking authority to increase awards.* Section 1409(a)(2) grants the Copyright Office rulemaking power to increase the size of awards. As noted above, the Office does not have the power to adjust Title 17 remedies, which raises the risk that awards could be increased to encompass disputes that no longer qualify as ‘small.’ Congress can and frequently does adjust statutory awards in Title 17, indicating that there is no need to delegate that function to an organ here, when small claims remedies and district court remedies could diverge.

4. *Statutory damages for unregistered works.* Both the initial bill and the May discussion draft enable a plaintiff that declined to register a work consistent with Section 412 to nevertheless obtain certain statutory awards. At present, obtaining a statutory award under Section 504(c) requires timely registration, per Section 412. This prerequisite has long served to encourage registration of works that the author regards as having potential economic value. As digital services are increasingly focused on licensing and lawfully making available at scale large volumes of digital works, registration data is a critical public resource. This data helps ensure creators are compensated. Conditioning the availability of statutory awards upon timely registration is sound policy, and CCIA urges the Committee not to depart from that.

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<sup>13</sup> Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, Berkeley Tech. L.J., Jan. 3, 2018, <http://btlj.org/2018/01/scholarly-concerns-about-a-proposed-small-copyright-claims-tribunal/>, at 5 (stating that “due process concerns loom large”).

<sup>14</sup> Notably, the bill prohibits victims of bad faith conduct from obtaining any damages. Instead, it restricts remedies against bad faith use of the process to limited fees and costs. See Section 1405(x)(2).

5. *Limitations on appellate relief.* The bill limits the appellate remedies available to a small claims litigant to “fraud, corruption, misrepresentation, or other misconduct”, cases where the Board exceeds its jurisdiction, or excusable neglect. As noted previously in relation to the opt-out mechanism, it is unclear whether this negative-option approach will survive subsequent legal challenge. As a policy matter, withholding appellate recourse in a venue that may be on the bleeding edge of developing copyright common law is a recipe for legal confusion. CCIA urges the Committee to provide traditional appellate recourse from any small claims tribunal. This avenue could be similar to the appellate recourse available from agency determinations regarding patents and trademarks.

#### **IV. Conclusion**

As noted earlier, there is some tension between assessments that the toolbox of remedies currently available to rights-holders is insufficient, and the fact that copyright “trolling” business models have proliferated in recent years. Some copyright plaintiffs may be inadequately advised by counsel, or their remedies may be limited because they elected not to register their works, but also cannot prove an economic injury that could be remedied with *actual* damages under 504(b). In both cases, CCIA believes copyright plaintiffs would benefit from additional educational efforts by the Copyright Office regarding the variety of remedies available under existing law, and how to take advantage of those remedies. Rights-holders would also benefit from resources that facilitate use of the Office’s services, in the mold of the Patent and Trademark Office’s Inventor Assistance Center. Such a program could also serve an important role where private individuals who believed they were engaging in non-commercial speech online find themselves as defendants in small claims proceedings.

Separately, CCIA believes there would be benefits to lowering the overall cost of registration to encourage greater use of this particularly American aspect of the copyright system. Insofar as rights-holders’ remedies are limited by neglecting the important step of registration, we should explore policies to encourage, expedite, and streamline the registration process. Recognizing that the Copyright Office’s registration functions entail real costs, CCIA encourages the Committee to facilitate the Office partnering with the private sector to reduce those costs.

CCIA appreciates the opportunity to discuss this proposal. We share the Committee’s goals of ensuring that creators have the incentives, tools, and remedies to bring the product of their creativity to market, and look forward to working with the Committee toward that end.