

COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT OF 2017

HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS SECOND SESSION

SEPTEMBER 27, 2018

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115TH CONGRESS
1ST SESSION

H. R. 3945

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 4, 2017

Mr. JEFFRIES (for himself, Mr. MARINO, Mr. COLLINS of Georgia, Mr. SMITH of Texas, Ms. JUDY CHU of California, and Mr. TED LIEU of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to establish an alternative dispute resolution program for copyright small claims, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Copyright Alternative
5 in Small-Claims Enforcement Act of 2017” or the “CASE
6 Act of 2017”.

7 **SEC. 2. COPYRIGHT SMALL CLAIMS.**

8 (a) IN GENERAL.—Title 17, United States Code, is
9 amended by adding at the end the following new chapter:

(V)

1 **“CHAPTER 14—COPYRIGHT SMALL**
2 **CLAIMS**

“Sec.

“1401. Copyright Claims Board.

“1402. Authority and responsibilities of the Copyright Claims Board.

“1403. Nature of proceedings.

“1404. Registration requirement.

“1405. Conduct of proceedings.

“1406. Effect of proceeding.

“1407. Review and confirmation by district court.

“1408. Relationship to other district court actions.

“1409. Implementation by Copyright Office.

“1410. Funding.

“1411. Definitions.

3 **“§ 1401. Copyright Claims Board**

4 “(a) IN GENERAL.—There is hereby established in
5 the U.S. Copyright Office a copyright small claims pro-
6 gram (hereinafter referred to as the ‘Copyright Claims
7 Board’), which shall serve as an alternative forum in
8 which parties may voluntarily seek to resolve certain copy-
9 right claims, regarding any category of copyrighted work,
10 as further provided in this chapter.

11 “(b) OFFICERS AND STAFF.—

12 “(1) COPYRIGHT CLAIMS OFFICERS.—Upon rec-
13 ommendation of the Register of Copyrights, who
14 shall identify qualified candidates, the Librarian of
15 Congress shall appoint 3 full-time Copyright Claims
16 Officers to serve on the Copyright Claims Board.

17 “(2) COPYRIGHT CLAIMS ATTORNEYS.—The
18 Register of Copyrights shall hire no fewer than 2

1 full-time Copyright Claims Attorneys to assist in the
2 administration of the Copyright Claims Board.

3 “(3) QUALIFICATIONS.—

4 “(A) COPYRIGHT CLAIMS OFFICERS.—

5 Each Copyright Claims Officer shall be an at-
6 torney with no less than 7 years of legal experi-
7 ence. Two of the Copyright Claims Officers
8 shall have substantial experience in the evalua-
9 tion, litigation, or adjudication of copyright in-
10 fringement claims and, between them, shall
11 have represented or presided over a diversity of
12 copyright interests, including those of both own-
13 ers and users of copyrighted works. The third
14 Copyright Claims Officer shall have substantial
15 familiarity with copyright law and experience in
16 the field of alternative dispute resolution, in-
17 cluding the resolution of litigation matters
18 through such means.

19 “(B) COPYRIGHT CLAIMS ATTORNEYS.—

20 Each Copyright Claims Attorney shall be an at-
21 torney with no less than 3 years of substantial
22 experience in copyright law.

23 “(4) COMPENSATION.—Each Copyright Claims

24 Officer shall be compensated at not less than the
25 minimum and not more than the maximum rate of

1 pay for SL employees (or the equivalent) of the Fed-
2 eral Government, including locality pay, as applica-
3 ble. Each Copyright Claims Attorney shall be com-
4 pensated at not more than the maximum permissible
5 pay for level 10 of GS-15 of the General Schedule
6 (or the equivalent), including locality pay, as appli-
7 cable.

8 “(5) TERM.—Copyright Claims Officers shall
9 serve for 6-year terms that are renewable by the Li-
10 brarian of Congress upon recommendation of the
11 Register of Copyrights: *Provided, however,* That the
12 terms for the initial Copyright Claims Officers ap-
13 pointed hereunder shall be as follows: one Copyright
14 Claims Officer shall be appointed for 4 years, the
15 second shall be appointed for 5 years, and the third
16 shall be appointed for 6 years.

17 “(6) VACANCIES AND INCAPACITY.—

18 “(A) VACANCY.—If a vacancy shall occur
19 in the position of Copyright Claims Officer, the
20 Librarian of Congress shall, upon recommenda-
21 tion of the Register of Copyrights, who shall
22 identify qualified candidates, act expeditiously
23 to appoint a Copyright Claims Officer for that
24 position. An individual appointed to fill a va-
25 cancy occurring before the expiration of the

1 term for which his or her predecessor was ap-
2 pointed shall be appointed to serve for a 6-year
3 term.

4 “(B) INCAPACITY.—If a Copyright Claims
5 Officer is temporarily unable to perform his or
6 her duties, the Librarian of Congress shall,
7 upon recommendation of the Register of Copy-
8 rights, who shall identify qualified candidates,
9 act expeditiously to appoint an interim Copy-
10 right Claims Officer to perform such duties
11 during the period of such incapacity.

12 “(7) SUPERVISION AND REMOVAL.—Subject to
13 section 1402(b), the Copyright Claims Officers shall
14 be supervised and removable by the Librarian of
15 Congress.

16 “(8) ADMINISTRATIVE SUPPORT.—The Register
17 of Copyrights shall provide the Copyright Claims Of-
18 ficers and Copyright Claims Attorneys with nec-
19 essary administrative support, including techno-
20 logical facilities, to carry out their duties under this
21 chapter.

22 “(9) LOCATION OF COPYRIGHT CLAIMS
23 BOARD.—The offices and facilities of the Copyright
24 Claims Officers and Copyright Claims Attorneys
25 shall be located at the Copyright Office.

1 **“§ 1402. Authority and responsibilities of the Copy-**
2 **right Claims Board**

3 “(a) FUNCTIONS.—

4 “(1) COPYRIGHT CLAIMS OFFICERS.—Subject
5 to the provisions of this chapter and applicable regu-
6 lations, the functions of the Copyright Claims Offi-
7 cers shall be as follows:

8 “(A) To render determinations on such
9 civil copyright claims, counterclaims, and de-
10 fenses as are permitted to be brought before
11 them under this chapter.

12 “(B) To ensure that claims, counterclaims,
13 and defenses are properly asserted and other-
14 wise appropriate for resolution by the Copyright
15 Claims Board.

16 “(C) To manage the proceedings before
17 them and render rulings pertaining to the con-
18 sideration of claims, counterclaims, and de-
19 fenses, including scheduling, discovery, evi-
20 dentiary, and other matters.

21 “(D) To request the production of infor-
22 mation and documents relevant to the resolu-
23 tion of a claim, counterclaim, or defense from
24 participants in a proceeding and from non-
25 participants.

26 “(E) To conduct hearings and conferences.

1 “(F) To facilitate parties’ settlement of
2 claims and counterclaims.

3 “(G) To award monetary relief and also to
4 include in its determinations a requirement of
5 cessation or mitigation of infringing activity, in-
6 cluding takedown or destruction of infringing
7 materials, where the party to undertake such
8 measures has so agreed.

9 “(H) To provide information to the public
10 concerning the procedures and requirements of
11 the Copyright Claims Board.

12 “(I) To maintain records of the pro-
13 ceedings before them, certify official records of
14 such proceedings as needed, and make the
15 records in such proceedings available to the
16 public in accordance with law.

17 “(J) To carry out such other duties as are
18 prescribed in this chapter.

19 “(K) When not engaged in performing
20 their duties as prescribed in this chapter, to
21 perform such other duties as may be assigned
22 by the Register of Copyrights.

23 “(2) COPYRIGHT CLAIMS ATTORNEYS.—Subject
24 to the provisions of this chapter and applicable regu-

1 lations, the functions of the Copyright Claims Attor-
2 neys shall be as follows:

3 “(A) To provide assistance to the Copy-
4 right Claims Officers in the administration of
5 their duties under this chapter.

6 “(B) To provide assistance to members of
7 the public with respect to the procedures and
8 requirements of the Copyright Claims Board.

9 “(C) When not engaged in performing
10 their duties as prescribed in this chapter, to
11 perform such other duties as may be assigned
12 by the Register of Copyrights.

13 “(b) INDEPENDENCE IN DETERMINATIONS.—The
14 Copyright Claims Officers shall render their determina-
15 tions in individual proceedings independently on the basis
16 of the records in the proceedings before them and in ac-
17 cordance with the provisions of this title, judicial prece-
18 dent, and applicable regulations of the Register of Copy-
19 rights. The Copyright Claims Officers and Copyright
20 Claims Attorneys may consult with the Register of Copy-
21 rights on general issues of law, but, subject to section
22 1405(w), not with respect to the facts of any particular
23 matter pending before them or the application of law
24 thereto. Notwithstanding any other provision of law or any
25 regulation or policy of the Library of Congress or Register

1 of Copyrights, no performance appraisal of a Copyright
2 Claims Officer or Copyright Claims Attorney shall con-
3 sider the substantive result of any individual determina-
4 tion reached by the Copyright Claims Board as a basis
5 for appraisal except insofar as it may relate to any actual
6 or alleged violation of an ethical standard of conduct.

7 “(c) DIRECTION BY REGISTER.—Subject to sub-
8 section (b), the Copyright Claims Officers and Copyright
9 Claims Attorneys shall be generally directed in the admin-
10 istration of their duties by the Register of Copyrights.

11 “(d) INCONSISTENT DUTIES BARRED.—No Copy-
12 right Claims Officer or Copyright Claims Attorney may
13 undertake duties that conflict with his or her duties or
14 responsibilities in connection with the Copyright Claims
15 Board.

16 “(e) RECUSAL.—A Copyright Claims Officer or Copy-
17 right Claims Attorney shall recuse himself or herself from
18 participation in any proceeding with respect to which the
19 Copyright Claims Officer or Copyright Claims Attorney
20 has reason to believe that he or she has a conflict of inter-
21 est.

22 “(f) EX PARTE COMMUNICATIONS.—Except as may
23 otherwise be permitted by applicable law, any party to a
24 proceeding before the Copyright Claims Board shall re-
25 frain from ex parte communications with the Copyright

1 Claims Officers concerning the substance of any pro-
2 ceeding before the Copyright Claims Board.

3 “(g) JUDICIAL REVIEW.—Actions of the Copyright
4 Claims Officers and Register of Copyrights under this
5 chapter in connection with the rendering of individual de-
6 terminations are subject to judicial review as provided
7 under section 1407(c), and not under chapter 7 of title
8 5, United States Code.

9 **“§ 1403. Nature of proceedings**

10 “(a) VOLUNTARY PARTICIPATION.—Participation in
11 a Copyright Claims Board proceeding shall be on a vol-
12 untary basis in accordance with this chapter, and the right
13 of any party to instead pursue a claim, counterclaim or
14 defense in a United States district court or any other
15 court, and to seek a jury trial, shall be preserved.

16 “(b) STATUTE OF LIMITATIONS.—

17 “(1) IN GENERAL.—No proceeding shall be
18 maintained before the Copyright Claims Board un-
19 less it is commenced in accordance with section
20 1405(e) before the Copyright Claims Board within
21 three years after the claim that is the basis for the
22 proceeding accrued.

23 “(2) TOLLING.—Subject to section 1406(a), a
24 proceeding commenced before the Copyright Claims
25 Board shall toll the time permitted under section

1 507(b) of this title for commencement of an action
2 on the same claim in a United States district court
3 during the time it remains pending.

4 “(c) PERMISSIBLE CLAIMS, COUNTERCLAIMS AND
5 DEFENSES.—The Copyright Claims Officers may render
6 determinations with respect to the following claims, coun-
7 terclaims and defenses, subject to such further limitations
8 and requirements, including with respect to particular
9 classes of works, as may be set forth in regulations estab-
10 lished by the Register of Copyrights:

11 “(1) A claim for infringement of an exclusive
12 right of copyright provided under section 106 of this
13 title, asserted by the legal or beneficial owner of
14 such exclusive right at the time of infringement pur-
15 suant to which the claimant seeks damages, if any,
16 within the limitations set forth in subsection (e)(1).

17 “(2) A claim for a declaration of noninfringe-
18 ment of an exclusive right of copyright provided
19 under section 106 of this title, where an actual con-
20 troversy exists as evidenced by a written communica-
21 tion indicating that legal action against the claimant
22 is imminent due to specifically alleged infringing
23 conduct.

24 “(3) Notwithstanding any other provision of
25 law, a claim pursuant to section 512(f) of this title

1 for misrepresentation in connection with a notifica-
2 tion of claimed infringement or a counter notifica-
3 tion seeking to replace removed or disabled material:
4 *Provided, however,* That any remedies in such a pro-
5 ceeding before the Copyright Claims Board shall be
6 limited to those available under this chapter.

7 “(4) A counterclaim asserted solely against the
8 claimant or claimants in a proceeding pursuant to
9 which the counterclaimant or counterclaimants seek
10 damages, if any, within the limitations set forth in
11 subsection (c)(1), and that—

12 “(A) arises under section 106 or section
13 512(f) of this title, and out of the same trans-
14 action or occurrence that is the subject of a
15 claim of infringement brought under paragraph
16 (1), a claim of noninfringement brought under
17 paragraph (2), or a claim of misrepresentation
18 brought under paragraph (3); or

19 “(B) arises under an agreement pertaining
20 to the same transaction or occurrence that is
21 the subject of a claim of infringement brought
22 under paragraph (1) and could affect the relief
23 awarded to the claimant.

24 “(5) A legal or equitable defense, pursuant to
25 this title or otherwise available under law, in re-

1 sponse to a claim or counterclaim asserted under
2 this subsection.

3 “(6) A single claim or multiple claims permitted
4 under paragraph (1), (2), or (3) by one or more
5 claimants against one or more respondents: *Pro-*
6 *vided, however,* That all claims asserted in any one
7 proceeding arise out of the same allegedly infringing
8 activity or continuous course of infringing activities
9 and do not in the aggregate result in a claim for
10 damages in excess of the limitation provided in sub-
11 section (c)(1)(D).

12 “(d) EXCLUDED CLAIMS.—The following claims and
13 counterclaims are not subject to determination by the
14 Copyright Claims Board:

15 “(1) A claim or counterclaim that is not a per-
16 missible claim or counterclaim under subsection (c).

17 “(2) A claim or counterclaim that has been fi-
18 nally adjudicated by a court of competent jurisdic-
19 tion or that is already pending before a court of
20 competent jurisdiction, unless such court has issued
21 a stay to permit such claim or counterclaim to pro-
22 ceed before the Copyright Claims Board.

23 “(3) A claim or counterclaim by or against a
24 Federal or State government entity.

1 “(4) A claim or counterclaim asserted against a
2 person or entity residing outside of the United
3 States.

4 “(5) A claim or counterclaim dismissed by the
5 Copyright Claims Board pursuant to section
6 1405(f)(3).

7 “(e) PERMISSIBLE REMEDIES.—

8 “(1) MONETARY RECOVERY.—

9 “(A) ACTUAL DAMAGES, PROFITS, AND
10 LIMITED STATUTORY DAMAGES.—Subject to the
11 limitation on total monetary recovery set forth
12 in subparagraph (D), with respect to a claim or
13 counterclaim for infringement of copyright, the
14 Copyright Claims Board may award—

15 “(i) actual damages and profits deter-
16 mined in accordance with section 504(b) of
17 this title, which determination shall include
18 in appropriate cases consideration of
19 whether the infringing party has agreed to
20 cease or mitigate the infringing activity as
21 provided in paragraph (2); or

22 “(ii) limited statutory damages, which
23 shall be determined in accordance with sec-
24 tion 504(c) of this title, subject to the fol-
25 lowing conditions:

1 “(I) With respect to works timely
2 registered under section 412 of this
3 title, such that they are eligible for an
4 award of statutory damages under
5 that section, such limited statutory
6 damages shall not exceed \$15,000 per
7 work infringed.

8 “(II) With respect to works not
9 timely registered under section 412 of
10 this title, but eligible for an award of
11 statutory damages under this section,
12 limited statutory damages shall not
13 exceed \$7,500 per work infringed, or
14 a total of \$15,000 in any one pro-
15 ceeding.

16 “(III) The Copyright Claims
17 Board shall not make any finding or
18 consider whether the infringement was
19 committed willfully in making an
20 award of limited statutory damages.

21 “(IV) The Copyright Claims
22 Board may consider as an additional
23 factor in awarding limited statutory
24 damages whether the infringer has
25 agreed to cease or mitigate the in-

1 fringing activity as provided in para-
2 graph (2).

3 “(B) ELECTION OF DAMAGES.—With re-
4 spect to a claim or counterclaim of infringe-
5 ment, the claimant or counterclaimant shall
6 after the close of discovery and in accordance
7 with the schedule established by the Copyright
8 Claims Board pursuant to section 1405(j) elect
9 to pursue either actual damages and profits or
10 limited statutory damages as provided in sub-
11 paragraph (A).

12 “(C) OTHER DAMAGES.—Damages for
13 claims and counterclaims other than infringe-
14 ment claims shall be awarded in accordance
15 with applicable law and shall be subject to the
16 limitation set forth in subparagraph (D).

17 “(D) LIMITATION ON TOTAL MONETARY
18 RECOVERY.—Notwithstanding any other provi-
19 sion of law, a party who pursues any one or
20 more claims or counterclaims in any single pro-
21 ceeding before the Copyright Claims Board may
22 not seek or recover in such proceeding a total
23 monetary recovery that exceeds the sum of
24 \$30,000, exclusive of any attorneys’ fees and

1 costs that may be awarded under section
2 1405(x)(2).

3 “(2) AGREEMENT TO CEASE INFRINGING ACTIV-
4 ITY.—In any proceeding where a party agrees to
5 cease activity that is found to be infringing, includ-
6 ing removal or disabling of access to, or destruction
7 of, infringing materials, and such agreement is re-
8 flected in the record, the Copyright Claims Board
9 shall include in its determination a requirement that
10 such party cease his or her infringing conduct.

11 “(3) ATTORNEYS’ FEES AND COSTS.—Notwith-
12 standing any other provision of law, except in the
13 case of bad faith conduct as provided in section
14 1405(x)(2), the parties to proceedings before the
15 Copyright Claims Board shall bear their own attor-
16 neys’ fees and costs.

17 “(f) JOINT AND SEVERAL LIABILITY.—Parties to a
18 proceeding before the Copyright Claims Board may be
19 found jointly and severally liable if all such parties and
20 relevant claims or counterclaims arise from the same ac-
21 tivity or activities.

22 **“§ 1404. Registration requirement**

23 “(a) APPLICATION OR CERTIFICATE.—No claim or
24 counterclaim alleging infringement of an exclusive right
25 of copyright may be asserted before the Copyright Claims

1 Board unless the owner of the copyright has first delivered
2 a completed application, deposit and the required fee for
3 registration to the Copyright Office and either a registra-
4 tion certificate has been issued or has not been refused.

5 “(b) CERTIFICATE OF REGISTRATION.—Notwith-
6 standing any other provision of law, a claimant or counter-
7 claimant in a proceeding before the Copyright Claims
8 Board shall be eligible to recover actual damages and prof-
9 its or limited statutory damages for infringement of a
10 work under this chapter if the requirements of subsection
11 (a) have been met: *Provided, however, That—*

12 “(1) the Copyright Claims Board shall not
13 render a determination in the proceeding until a reg-
14 istration certificate has been issued by the Copyright
15 Office, submitted to the Copyright Claims Board
16 and made available to the other parties to the pro-
17 ceeding, and the other parties have been provided an
18 opportunity to address it;

19 “(2) if a proceeding cannot proceed further due
20 to an outstanding registration certificate for the
21 work, it shall be held in abeyance pending submis-
22 sion of the certificate to the Copyright Claims
23 Board; but if held in abeyance for more than one
24 year, the Copyright Claims Board may, upon pro-
25 viding written notice to the parties and 30 days to

1 respond, dismiss the proceeding without prejudice;
2 and

3 “(3) if the Copyright Claims Board receives no-
4 tice that registration has been refused by the Copy-
5 right Office, the proceeding shall be dismissed with-
6 out prejudice.

7 “(c) PRESUMPTION.—Where a certificate shows that
8 registration of a work was made before or within 5 years
9 of its first publication, the presumption set forth in section
10 410(c) of this title shall apply in a proceeding before the
11 Copyright Claims Board, in addition to relevant principles
12 of law under this title.

13 “(d) To ensure that actions before the Board proceed
14 in a timely manner, the Register of Copyrights shall pro-
15 mulgate regulations providing the Copyright Office with
16 the authority to issue a certificate of registration on an
17 expedited basis. Such regulations shall treat applications
18 for registration certificates pertaining to a proceeding be-
19 fore the Board on an expedited basis and separately from
20 all other applications for certificates of registration, except
21 those applications subject to special handling under 37
22 CFR 201.15.

23 **“§ 1405. Conduct of proceedings**

24 “(a) IN GENERAL.—Proceedings of the Copyright
25 Claims Board shall be conducted in accordance with this

1 chapter and regulations as implemented by the Register
2 of Copyrights, in addition to relevant principles of law
3 under this title. To the extent it appears there may be
4 conflicting judicial precedent on an issue of substantive
5 copyright law that cannot be reconciled, the Copyright
6 Claims Board shall follow the law of the Federal jurisdic-
7 tion where the action could have been brought if filed in
8 Federal district court, or, if it could have been brought
9 in more than one jurisdiction, the jurisdiction that the
10 Copyright Claims Board determines has the most signifi-
11 cant ties to the parties and conduct at issue.

12 “(b) RECORD.—The Copyright Claims Board shall
13 maintain records documenting the proceedings before it.

14 “(c) CENTRALIZED PROCESS.—Proceedings before
15 the Copyright Claims Board shall be conducted at the of-
16 fices of the Copyright Claims Board without the require-
17 ment of in-person appearances by parties or others, and
18 shall take place by means of written submissions and hear-
19 ings and conferences accomplished via Internet-based ap-
20 plications and other telecommunications facilities: *Pro-*
21 *vided, however,* That in cases where physical or other non-
22 testimonial evidence material to a proceeding cannot be
23 furnished to the Copyright Claims Board through avail-
24 able telecommunications facilities, the Copyright Claims
25 Board shall have the discretion to make alternative ar-

1 rangements for the submission of such evidence that do
2 not prejudice another party to the proceeding.

3 “(d) REPRESENTATION.—A party to a proceeding be-
4 fore the Copyright Claims Board may, but is not required
5 to be represented by—

6 “(1) an attorney; or

7 “(2) a law student who is qualified under appli-
8 cable law governing law students’ representation of
9 parties in legal proceedings and who provides such
10 representation on a pro bono basis.

11 “(e) COMMENCEMENT OF PROCEEDING.—To com-
12 mence a proceeding, a claimant shall, subject to such addi-
13 tional requirements as may be prescribed in regulations
14 established by the Register of Copyrights, file a claim with
15 the Copyright Claims Board, that—

16 “(1) includes a statement of material facts in
17 support of the claim;

18 “(2) is certified in accordance with subsection
19 (x)(1); and

20 “(3) is accompanied by a filing fee in such
21 amount as may be prescribed in regulations estab-
22 lished by the Register of Copyrights, which amount
23 shall be at least \$100, shall not exceed the cost of
24 filing an action in a United States district court,

1 and shall be established to further the goals of the
2 Copyright Claims Board.

3 “(f) REVIEW OF CLAIMS AND COUNTERCLAIMS.—

4 “(1) CLAIMS.—Upon filing, a claim shall be re-
5 viewed by a Copyright Claims Attorney to ensure
6 that it complies with applicable regulations and this
7 chapter, including the following:

8 “(A) If the claim is found to comply, the
9 claimant shall be so notified and instructed to
10 proceed with service of the claim as provided in
11 subsection (g).

12 “(B) If the claim is found not to comply,
13 the claimant shall be notified that the claim is
14 deficient and permitted to file an amended
15 claim within 30 days of the date of such notice
16 without the requirement of an additional filing
17 fee. If the claimant files a compliant claim with-
18 in that period, he or she shall be so notified and
19 instructed to proceed with service of the claim.
20 If the claim is refiled within the 30-day period
21 but still fails to comply, the claimant will again
22 be notified that the claim is deficient and pro-
23 vided a second opportunity to amend it within
24 30 days without the requirement of an addi-
25 tional filing fee. If the claim is refiled again

1 within the second 30-day period and is compli-
2 ant, the claimant shall be so notified and in-
3 structed to proceed with service, but if the
4 claim still fails to comply, upon confirmation of
5 its noncompliance by a Copyright Claims Offi-
6 cer, the proceeding shall be dismissed without
7 prejudice. The Copyright Claims Board shall
8 also dismiss without prejudice any proceeding
9 in which a compliant claim is not filed within
10 the applicable 30-day time period.

11 “(C) For purposes of this paragraph, a
12 claim against an online service provider for in-
13 fringement by reason of storage of or referral
14 or linking to infringing material that may be
15 subject to the limitations on liability set forth
16 in section 512(b), section 512(e), or section
17 512(d) of this title, shall be considered non-
18 compliant unless the claimant affirms in the
19 statement required under subsection (e)(1) of
20 this section that he or she has previously noti-
21 fied the service provider of the claimed infringe-
22 ment in accordance with section 512(b)(2)(E),
23 section 512(e)(3), or section 512(d)(3) of this
24 title, as applicable, and the service provider
25 failed to remove or disable access to the mate-

1 rial expeditiously upon the provision of such no-
2 tice: *Provided, however,* That if a claim is found
3 to be noncompliant under this subparagraph,
4 the Copyright Claims Board shall provide the
5 claimant with information concerning the serv-
6 ice of such a notice pursuant to the relevant
7 provision of this title.

8 “(2) COUNTERCLAIMS.—Upon filing and service
9 of a counterclaim, the counterclaim shall be reviewed
10 by a Copyright Claims Attorney to ensure that it
11 complies with the provisions of this chapter and ap-
12 plicable regulations. If the counterclaim is found not
13 to comply, the counterclaimant and other parties
14 shall be notified that it is deficient and the counter-
15 claimant permitted to file and serve an amended
16 counterclaim within 30 days of the date of such no-
17 tice. If the counterclaimant files and serves a compli-
18 ant counterclaim within that period, the counter-
19 claimant and other parties shall be so notified. If the
20 counterclaim is refiled and served within the 30-day
21 period but still fails to comply, the counterclaimant
22 and other parties will again be notified that it is de-
23 ficient and the counterclaimant provided a second
24 opportunity to amend it within 30 days. If the coun-
25 terclaim is refiled and served again within the sec-

1 ond 30-day period and is compliant, the counter-
2 claimant and parties shall be so notified, but if the
3 counterclaim still fails to comply, upon confirmation
4 of its noncompliance by a Copyright Claims Officer,
5 the counterclaim, but not the proceeding, shall be
6 dismissed without prejudice.

7 “(3) DISMISSAL FOR GOOD CAUSE.—The Copy-
8 right Claims Board shall dismiss a proceeding with-
9 out prejudice if, upon reviewing a claim or counter-
10 claim, or at any other time in a proceeding, the
11 Copyright Claims Board concludes that it is unsuit-
12 able for determination by the Copyright Claims
13 Board, including due to the following:

14 “(A) The failure to join a necessary party.

15 “(B) The lack of an essential witness, evi-
16 dence, or expert testimony.

17 “(C) Determination of a relevant issue of
18 law or fact that could exceed the competence of
19 the Copyright Claims Board.

20 “(g) SERVICE OF NOTICE AND CLAIMS.—To proceed
21 with a claim against a respondent, a claimant must within
22 90 days of receiving notification to proceed with service
23 file proof of service on the respondent with the Copyright
24 Claims Board. To effectuate service on a respondent, the
25 claimant must cause notice of the proceeding and a copy

1 of the claim to be served on the respondent, either by per-
2 sonal service or pursuant to a waiver of personal service,
3 as prescribed in regulations established by the Register of
4 Copyrights. Such regulations shall include the following
5 requirements and conditions:

6 “(1) The notice of the proceeding shall adhere
7 to a prescribed form and shall set forth the nature
8 of the Copyright Claims Board and proceeding, the
9 respondent’s right to opt out, and the consequences
10 of opting out and not opting out, including a promi-
11 nent statement that, by not opting out within the
12 30-day period, the respondent—

13 “(A) will forgo the opportunity to have the
14 dispute decided by a court created under article
15 III of the Constitution of the United States;
16 and

17 “(B) will be waiving the right to a jury
18 trial regarding the dispute.

19 “(2) The copy of the claim served on the re-
20 spondent shall be as it was filed with the Copyright
21 Claims Board.

22 “(3) Personal service of a notice and claim may
23 be effected by an individual who is not a party to
24 the proceeding and is over the age of 18.

1 “(4) An individual, other than a minor or in-
2 competent individual, may be served by—

3 “(A) following State law for serving a sum-
4 mons in an action brought in courts of general
5 jurisdiction in the State where service is made;
6 or

7 “(B) doing any of the following:

8 “(i) Delivering a copy of the notice
9 and claim to the individual personally.

10 “(ii) Leaving a copy of each at the in-
11 dividual’s dwelling or usual place of abode
12 with someone of suitable age and discre-
13 tion who resides there.

14 “(iii) Delivering a copy of each to an
15 agent authorized by appointment or by law
16 to receive service of process.

17 “(5) A corporation, partnership or unincor-
18 porated association that is subject to suit in courts
19 of general jurisdiction under a common name may
20 be served by—

21 “(A) following State law for serving a sum-
22 mons in an action brought in courts of general
23 jurisdiction in the State where service is made;
24 or

1 “(B) delivering a copy of the notice and
2 claim to an officer, a managing or general
3 agent or any other agent authorized by appoint-
4 ment or by law to receive service of process in
5 an action brought in courts of general jurisdic-
6 tion and, if the agent is one authorized by stat-
7 ute and the statute so requires, by also mailing
8 a copy of each to the respondent.

9 “(6) To request a waiver of personal service,
10 the claimant may notify a respondent by first class
11 mail or other reasonable means that a proceeding
12 has been commenced in accordance with regulations
13 established by the Register of Copyrights, which
14 shall include the following:

15 “(A) Any such request shall be in writing
16 and addressed to the respondent, and be accom-
17 panied by a prescribed notice of the proceeding
18 and copy of the claim as filed with the Copy-
19 right Claims Board, as well as a prescribed
20 form for waiver of personal service, and a pre-
21 paid or costless means of returning the form.

22 “(B) The request shall state the date it
23 was sent and provide the respondent 30 days to
24 return the signed waiver form, which signed
25 waiver shall constitute acceptance and proof of

1 service as of the date it is signed for purposes
2 of this subsection.

3 “(7) A respondent’s waiver of personal service
4 shall not constitute a waiver of the respondent’s
5 right to opt out of the proceeding: *Provided, however,*
6 That a respondent who timely waives personal serv-
7 ice and does not opt out shall be allowed an addi-
8 tional 30 days beyond the amount of time normally
9 permitted under the applicable procedures of the
10 Copyright Claims Board to submit a substantive re-
11 sponse to the claim, including any defenses and
12 counterclaims.

13 “(8) A minor or an incompetent individual may
14 only be served by following State law for serving a
15 summons or like process on such an individual in an
16 action brought in the courts of general jurisdiction
17 of the State where service is made.

18 “(9) Service of a claim and waiver of personal
19 service may only be effected within the United
20 States.

21 “(h) OPT-OUT PROCEDURE.—Upon being properly
22 served with a notice and claim, a respondent who chooses
23 to opt out of the proceeding shall have 30 days from the
24 date of service in which to provide written notice of such
25 choice to the Copyright Claims Board, in accordance with

1 regulations established by the Register of Copyrights. If
2 proof of service has been filed by the claimant and the
3 respondent does not submit an opt-out notice to the Copy-
4 right Claims Board within 30 days of service, the pro-
5 ceeding shall be deemed an active proceeding and the re-
6 spondent shall be bound by the result to the extent pro-
7 vided under section 1406(a). If the respondent opts out
8 during that period, the proceeding shall be dismissed with-
9 out prejudice: *Provided, however,* That in exceptional cir-
10 cumstances and upon written notice to the claimant, the
11 Copyright Claims Board may extend such 30-day period
12 in the interests of justice.

13 “(i) SERVICE OF OTHER DOCUMENTS.—Other docu-
14 ments submitted or relied upon in the proceeding shall be
15 served as provided in regulations established by the Reg-
16 ister of Copyrights.

17 “(j) SCHEDULING.—Upon confirmation that a pro-
18 ceeding has become an active proceeding, the Copyright
19 Claims Board shall issue a schedule for future conduct of
20 the proceeding. A schedule issued by the Copyright Claims
21 Board may be amended by the Copyright Claims Board
22 in the interests of justice.

23 “(k) CONFERENCES.—One or more Copyright Claims
24 Officers may hold a conference to address case manage-
25 ment or discovery issues in a proceeding: *Provided, how-*

1 *ever*, That such conference shall not be addressed to ulti-
2 mate issues of fact or law. Any such conference shall be
3 noted upon the record of the proceeding and may be re-
4 corded or transcribed.

5 “(l) PARTY SUBMISSIONS.—There shall be no formal
6 motion practice in a Copyright Claims Board proceeding:
7 *Provided, however*, That, subject to applicable regulations
8 and the procedures of the Copyright Claims Board—

9 “(1) the parties to a proceeding shall be per-
10 mitted to make requests to the Copyright Claims
11 Board to address case management and discovery
12 matters, and submit responses thereto; and

13 “(2) the Copyright Claims Board may request
14 or permit parties to make submissions addressing
15 relevant questions of fact or law, or other matters,
16 including matters raised sua sponte by the Copy-
17 right Claims Officers, and offer responses thereto.

18 “(m) DISCOVERY.—Discovery shall be limited to the
19 production of relevant information and documents, written
20 interrogatories, and written requests for admission, as fur-
21 ther provided in regulations established by the Register
22 of Copyrights: *Provided, however*, That—

23 “(1) upon request of a party, and for good
24 cause shown, the Copyright Claims Board shall have
25 the discretion to approve additional limited discovery

1 in particular matters, and may request specific in-
2 formation and documents from participants in the
3 proceeding and voluntary submissions from non-
4 participants;

5 “(2) upon request of a party, and for good
6 cause shown, the Copyright Claims Board may issue
7 a protective order to limit the disclosure of docu-
8 ments or testimony that contain confidential infor-
9 mation; and

10 “(3) after providing notice and an opportunity
11 to respond, and upon good cause shown, the Copy-
12 right Claims Board may apply an adverse inference
13 with respect to disputed facts against a party who
14 has failed timely to provide discovery materials in
15 response to a proper request for materials that could
16 be relevant to such facts.

17 “(n) EVIDENCE.—The Copyright Claims Board may
18 consider the following types of evidence, which may be ad-
19 mitted without application of formal rules of evidence:

20 “(1) Documentary and other nontestimonial
21 evidence that is relevant to the claims, counterclaims
22 or defenses in a proceeding.

23 “(2) Testimonial evidence, submitted under
24 penalty of perjury in written form or in accordance
25 with subsection (o), limited to statements of the par-

1 ties and nonexpert witnesses, that is relevant to the
2 claims, counterclaims and defenses in a proceeding:
3 *Provided, however,* That in exceptional cases expert
4 witness testimony or other types of testimony may
5 be permitted by the Copyright Claims Board for
6 good cause shown.

7 “(o) HEARINGS.—The Copyright Claims Board may
8 conduct a hearing to receive oral presentations on issues
9 of fact or law from parties and witnesses to a proceeding,
10 including oral testimony: *Provided, however,* That—

11 “(1) any such hearing shall be attended by at
12 least two of the Copyright Claims Officers;

13 “(2) the hearing shall be noted upon the record
14 of the proceeding and, subject to paragraph (3), may
15 be recorded or transcribed as deemed necessary by
16 the Copyright Claims Board; and

17 “(3) a recording or transcript of the hearing
18 shall be made available to a Copyright Claims Offi-
19 cer who is not in attendance.

20 “(p) VOLUNTARY DISMISSAL.—

21 “(1) BY CLAIMANT.—Upon written request of a
22 claimant received prior to a respondent’s filing of a
23 response to a claim, the Copyright Board shall dis-
24 miss the proceeding, or a claim or respondent, as re-
25 quested, such dismissal to be without prejudice.

1 “(2) BY COUNTERCLAIMANT.—Upon written re-
2 quest of a counterclaimant received prior to a claim-
3 ant’s filing of a response to a counterclaim, the
4 Copyright Claims Board shall dismiss the counter-
5 claim, such dismissal to be without prejudice.

6 “(q) SETTLEMENT.—At any time in an active pro-
7 ceeding some or all of the parties may—

8 “(1) jointly request a conference with a Copy-
9 right Claims Officer for the purpose of facilitating
10 settlement discussions; or

11 “(2) submit to the Copyright Claims Board an
12 agreement providing for settlement and dismissal of
13 some or all of the claims and counterclaims in the
14 proceeding, which submission may also include a re-
15 quest that the Copyright Claims Board adopt some
16 or all of the terms of the parties’ settlement in a
17 final determination.

18 “(r) FACTUAL FINDINGS.—Subject to subsection
19 (m)(3), the Copyright Claims Board shall make factual
20 findings based upon a preponderance of the evidence.

21 “(s) DETERMINATIONS.—

22 “(1) NATURE AND CONTENTS.—A determina-
23 tion rendered by the Copyright Claims Board in a
24 proceeding shall—

1 “(A) be reached by a majority of the Copy-
2 right Claims Board;

3 “(B) be in writing, and include an expla-
4 nation of the factual and legal basis of the deci-
5 sion therein;

6 “(C) pursuant to section 1403(e)(2), set
7 forth any terms by which a respondent or coun-
8 terclaim respondent has agreed to cease infring-
9 ing activity;

10 “(D) pursuant to subsection (q)(2) and to
11 the extent agreed by the parties, set forth the
12 terms of any settlement to the extent requested
13 by the parties; and

14 “(E) include a clear statement of all dam-
15 ages and other relief awarded, including pursu-
16 ant to subparagraphs (C) and (D).

17 “(2) DISSENT.—A Copyright Claims Officer
18 who dissents from a decision contained in a deter-
19 mination may append a statement setting forth the
20 grounds for his or her dissent.

21 “(3) PUBLICATION.—Final determinations of
22 the Copyright Claims Board shall be made available
23 on a publicly accessible website with other records to
24 be made available to the public in accordance with
25 law: *Provided, however,* That such records may be

1 redacted by the Copyright Claims Board to protect
2 confidential information that is the subject of a pro-
3 tective order under subsection (m)(2).

4 “(t) RESPONDENT’S DEFAULT.—Where a proceeding
5 has been deemed an active proceeding but the respondent
6 has failed to appear or has ceased participating in the pro-
7 ceeding, as demonstrated by his or her failure to meet one
8 or more deadlines or requirements set forth in the sched-
9 ule adopted by the Copyright Claims Board pursuant to
10 subsection (j) without justifiable cause, the Copyright
11 Claims Board may enter a default determination, includ-
12 ing the dismissal of any counterclaim asserted by a re-
13 spondent, as follows and in accordance with such other
14 requirements as the Register of Copyrights may prescribe
15 by regulation:

16 “(1) The Copyright Claims Board shall require
17 the claimant to submit relevant evidence and other
18 information in support of his or her claim and any
19 asserted damages and, upon review of such evidence
20 and any other requested submissions from the claim-
21 ant, shall determine whether the materials so sub-
22 mitted are sufficient to support a finding in favor of
23 the claimant under applicable law and, if so, the ap-
24 propriate relief and damages, if any, to be awarded.

1 “(2) If the claimant has met his or her burden
2 under paragraph (1), the Copyright Claims Board
3 shall prepare a proposed default determination and
4 provide written notice to the respondent at all ad-
5 dresses, including email addresses, reflected in the
6 records of the proceeding before the Copyright
7 Claims Board, concerning the pendency of a default
8 determination by the Copyright Claims Board and
9 the legal significance of such determination. Such
10 notice shall be accompanied by the proposed default
11 determination and provide that the respondent has
12 30 days from the date of the notice to submit any
13 evidence or other information in opposition to the
14 proposed default determination.

15 “(3) If the respondent responds to the notice
16 provided under paragraph (2) within the 30-day pe-
17 riod, the Copyright Claims Board shall consider re-
18 spondent’s submissions and, after allowing the other
19 parties to address such submissions, maintain or
20 amend its proposed determination as appropriate,
21 and the resulting determination shall not be a de-
22 fault determination.

23 “(4) If the respondent fails to respond to the
24 notice provided under paragraph (2), the Copyright
25 Claims Board shall proceed to issue the default de-

1 termination as a final determination. Thereafter, the
2 respondent may only challenge such determination to
3 the extent permitted under section 1407(c): *Pro-*
4 *vided, however,* That prior to the initiation of any
5 additional proceedings under section 1407, the
6 Copyright Claims Board shall have the discretion to
7 vacate the default determination in the interests of
8 justice.

9 “(u) CLAIMANT’S FAILURE TO PROCEED.—

10 “(1) FAILURE TO COMPLETE SERVICE.—If a
11 claimant fails to complete service on a respondent
12 within the 90-day period as prescribed in subsection
13 (g), that respondent shall be dismissed from the pro-
14 ceeding without prejudice; and if a claimant fails to
15 complete service on all respondents within the 90-
16 day period, the proceeding shall be dismissed by the
17 Copyright Claims Board without prejudice.

18 “(2) FAILURE TO PROSECUTE.—If a claimant
19 fails to proceed in an active proceeding, as dem-
20 onstrated by his or her failure to meet one or more
21 deadlines or requirements set forth in the schedule
22 adopted by the Copyright Claims Board pursuant to
23 subsection (j) without justifiable cause, the Copy-
24 right Claims Board may, upon providing written no-
25 tice to the claimant and 30 days to respond, issue

1 a determination dismissing the claimants' claims,
2 which shall include an award of attorneys' fees and
3 costs if appropriate under subsection (x)(2). There-
4 after, the claimant may only challenge such deter-
5 mination to the extent permitted under section
6 1407(c): *Provided, however,* That prior to the initi-
7 ation of any additional proceedings under section
8 1407, the Copyright Claims Board shall have the
9 discretion to vacate the determination of dismissal in
10 the interests of justice.

11 “(v) RECONSIDERATION.—A party may, within 30
12 days of the date of issuance of a final determination by
13 the Copyright Claims Board, submit a written request for
14 reconsideration of, or an amendment to, such determina-
15 tion if the party identifies a clear error of law or fact ma-
16 terial to the outcome, or a technical mistake. After pro-
17 viding the other parties an opportunity to address such
18 request, the Copyright Claims Board shall respond by de-
19 nying the request or issuing an amended final determina-
20 tion.

21 “(w) REVIEW BY REGISTER.—A party who has been
22 denied reconsideration by the Copyright Claims Board
23 may, within 30 days of the date of such denial, request
24 review by the Register of Copyrights in accordance with
25 regulations established by the Register of Copyrights,

1 which regulations shall provide for a reasonable filing fee.
2 The Register's review shall be limited to consideration of
3 whether the Copyright Claims Board abused its discretion
4 in denying reconsideration. After providing the other par-
5 ties an opportunity to address the request, the Register
6 shall respond by denying the request or remanding the
7 proceeding to the Copyright Claims Board for reconsider-
8 ation of identified issues and issuance of an amended final
9 determination, which amended final determination shall
10 not be subject to further consideration or review other
11 than pursuant to section 1407(c).

12 “(x) CONDUCT OF PARTIES AND ATTORNEYS.—

13 “(1) CERTIFICATION.—The Register of Copy-
14 rights shall establish regulations concerning certifi-
15 cation of the accuracy and truthfulness of state-
16 ments made by participants in proceedings before
17 the Copyright Claims Board.

18 “(2) BAD FAITH CONDUCT.—Notwithstanding
19 any other provision of law, in any proceeding in
20 which a determination is rendered and—

21 “(A) it is established that a party pursued
22 a claim, counterclaim or defense for a harassing
23 or other improper purpose, or without reason-
24 able basis in law or fact; or

1 “(B) the claimant’s claim is dismissed for
2 failure to prosecute pursuant to subsection
3 (u)(2), unless inconsistent with the interests of
4 justice, the Copyright Claims Board shall in
5 such determination award reasonable attorneys’
6 fees and costs to any adversely affected party or
7 parties in a total amount not to exceed \$5,000:
8 *Provided, however,* that if an adversely affected
9 party appeared pro se in the proceeding, the
10 award to that party shall be of costs only and
11 no more than \$2,500.

12 “(3) If it is established that on more than one
13 occasion within a 12 month period a party pursued
14 a claim, counterclaim or defense before the Board
15 for a harassing or other improper purpose, or with-
16 out reasonable basis in law or fact, such party shall
17 be barred from initiating a claim before the Board
18 for a period of 12 months.

19 “(y) Notwithstanding anything to the contrary in this
20 chapter, the Register of Copyrights may promulgate regu-
21 lations allowing for the disposition of any claim in which
22 total damages sought are \$5,000 or less (exclusive of at-
23 torneys’ fees and costs). At a minimum, any such regula-
24 tions shall provide—

1 “(1) for one copyright claims officer to consider
2 and issue a determination with regard to the claim;
3 and

4 “(2) for which a copyright claims attorney shall
5 review the claim and determine whether the case
6 shall be heard by one officer or the Board.

7 “(z) A claimant may request the Board to issue a
8 subpoena to a service provider for identification of an al-
9 leged infringer of claimant’s copyrighted work. The Copy-
10 right Office shall promulgate regulations governing, at
11 minimum, the issuance of the subpoena, the contents of
12 the request, the contents of the subpoena, and the obliga-
13 tions of a service provider who is issued a subpoena. The
14 regulations shall further require that the claimant seeking
15 the subpoena must make a sworn declaration to the effect
16 that the purpose for which the subpoena is sought is to
17 obtain the identity of an alleged infringer and that such
18 information will only be used for the purpose of protecting
19 rights under this Act. Such subpoenas shall be enforceable
20 by the United States District Court for the District of Co-
21 lumbia.

22 **“§ 1406. Effect of proceeding**

23 “(a) DETERMINATION.—Subject to the reconsider-
24 ation and review processes afforded by sections 1405(v)
25 and 1405(w), respectively, and section 1407(c), the ren-

1 dering of a final determination by the Copyright Claims
2 Board in a proceeding, including a default determination
3 or determination based on failure to prosecute, shall, solely
4 with respect to the parties to such determination, preclude
5 relitigation before any court or tribunal, or before the
6 Copyright Claims Board, of the claims and counterclaims
7 asserted and finally determined by such determination,
8 and may be relied upon for such purpose in a future action
9 or proceeding arising from the same specific activity or
10 activities: *Provided, however, That—*

11 “(1) a determination of the Copyright Claims
12 Board shall not preclude litigation or relitigation as
13 between the same or different parties before any
14 court or tribunal, or the Copyright Claims Board, of
15 the same or similar issues of fact or law in connec-
16 tion with claims or counterclaims not asserted and
17 finally determined by the determination of the Copy-
18 right Claims Board;

19 “(2) a determination of ownership of a copy-
20 righted work for purposes of resolving a matter be-
21 fore the Copyright Claims Board shall not be relied
22 upon, and shall have no preclusive effect, in any
23 other action or proceeding before any other court or
24 tribunal, including the Copyright Claims Board; and

1 “(3) except to the extent permitted in this sub-
2 section and section 1407, no determination of the
3 Copyright Claims Board shall be cited or relied upon
4 as legal precedent in any other action or proceeding
5 before any court or tribunal, including the Copyright
6 Claims Board.

7 “(b) OTHER MATERIALS IN PROCEEDING.—Except
8 as permitted under this section and section 1407, a sub-
9 mission or statement of a party or witness made in connec-
10 tion with a proceeding before the Copyright Claims Board,
11 including a proceeding that is dismissed, shall not be cited
12 or relied upon in, or serve as the basis of, any action or
13 proceeding concerning rights or limitations on rights
14 under this title before any court or tribunal, including the
15 Copyright Claims Board.

16 “(c) WITH RESPECT TO SECTION 512(g).—Notwith-
17 standing any other provision of law, the commencement
18 of a proceeding by a claimant before the Copyright Claims
19 Board against a subscriber of a service provider that seeks
20 a declaration of infringement concerning material that has
21 been removed or to which access has been disabled by the
22 service provider in response to a notification of claimed
23 infringement by the claimant pursuant to section
24 512(c)(1)(C) of this title shall be a basis to preclude the
25 replacement of such material by the service provider pur-

1 suant to section 512(g) of this title if notice of the com-
2 mencement of the Copyright Claims Board proceeding is
3 provided by the claimant to the service provider's des-
4 ignated agent not less than 10 nor more than 14 business
5 days following receipt of a counter notification by the serv-
6 ice provider pursuant to section 512(g) of this title.

7 “(d) FAILURE TO ASSERT COUNTERCLAIM.—The
8 failure or inability to assert a counterclaim in a proceeding
9 before the Copyright Claims Board shall not preclude its
10 assertion in a subsequent court action or proceeding be-
11 fore the Copyright Claims Board.

12 “(e) OPT-OUT OR DISMISSAL OF PARTY.—If a party
13 has timely opted out of a proceeding under section
14 1405(h) or is dismissed from a proceeding prior to the
15 issuance of a final determination by the Copyright Claims
16 Board, the determination shall not be binding upon and
17 shall have no preclusive effect with respect to that party.

18 **“§ 1407. Review and confirmation by district court**

19 “(a) IN GENERAL.—In any proceeding in which a
20 party has failed to pay monies as required or otherwise
21 comply with the relief awarded in a final determination
22 of the Copyright Claims Board, including a default deter-
23 mination or a determination based on failure to prosecute,
24 the aggrieved party may, within one year of the issuance
25 of such final determination, resolution of any reconsider-

1 ation by the Copyright Claims Board or review by the Reg-
2 ister of Copyrights, or issuance of an amended final deter-
3 mination, whichever occurs last, apply to the United
4 States District Court for the District of Columbia or any
5 other federal district court of competent jurisdiction for
6 an order confirming the final relief awarded and reducing
7 such award to judgment. The court shall grant such order
8 and direct entry of judgment unless the determination is
9 or has been vacated, modified or corrected as permitted
10 under subsection (c). If the United States District Court
11 for the District of Columbia or any other federal district
12 court of competent jurisdiction issues an order confirming
13 the relief awarded by the Board, the Court must impose
14 on the party who failed to pay damages or otherwise com-
15 ply with the relief, the reasonable expenses required to se-
16 cure such order, including attorney fees, incurred by the
17 aggrieved party.

18 “(b) FILING PROCEDURES.—

19 “(1) Notice of the application for confirmation
20 of a determination of the Copyright Claims Board
21 and entry of judgment shall be provided to all par-
22 ties to the proceeding before the Copyright Claims
23 Board, in accordance with the procedures applicable
24 to service of a motion in United States District
25 Court for the District of Columbia.

1 “(2) The application shall include a certified
2 copy of the final or amended final determination of
3 the Copyright Claims Board, as reflected in the
4 records of the Copyright Claims Board, following
5 any process of reconsideration or review by the Reg-
6 ister of Copyrights, to be confirmed and rendered to
7 judgment, as well as a declaration by the applicant
8 under penalty of perjury that it is a true and correct
9 copy of such determination, the date it was issued,
10 and whether the applicant is aware of any other pro-
11 ceedings before the United States District Court
12 concerning the same determination of the Copyright
13 Claims Board.

14 “(e) CHALLENGES TO THE DETERMINATION.—

15 “(1) BASES FOR CHALLENGE.—Upon applica-
16 tion of a party to the Copyright Claims Board pro-
17 ceeding within 90 days of the issuance of a final or
18 amended final determination by the Copyright
19 Claims Board following any process of reconsider-
20 ation or review by the Register of Copyrights, the
21 United States District Court for the District of Co-
22 lumbia may issue an order vacating, modifying or
23 correcting a determination of the Copyright Claims
24 Board in the following cases:

1 “(A) Where the determination was issued
2 or as a result of fraud, corruption, misrepresen-
3 tation, or other misconduct.

4 “(B) Where the Copyright Claims Board
5 exceeded its authority or failed to render a final
6 and definite determination concerning the sub-
7 ject matter at issue.

8 “(C) In the case of a default determination
9 or determination based on failure to prosecute,
10 where it is established that the default or fail-
11 ure was due to excusable neglect.

12 “(2) PROCEDURE TO CHALLENGE.—

13 “(A) Notice of the application to challenge
14 a determination of the Copyright Claims Board
15 shall be provided to all parties to the proceeding
16 before the Copyright Claims Board, in accord-
17 ance with the procedures applicable to service of
18 a motion in United States District Court for
19 the District of Columbia.

20 “(B) The application shall include a cer-
21 tified copy of the final or amended final deter-
22 mination, as reflected in the records of the
23 Copyright Claims Board following any process
24 of reconsideration or review by the Register of
25 Copyrights, that is the subject of the applica-

1 tion, as well as a declaration by the applicant
2 under penalty of perjury that it is a true and
3 correct copy of such determination, the date it
4 was issued, the basis for challenge under sub-
5 section (c)(1), and whether the applicant is
6 aware of any other proceedings before the
7 United States District Court concerning the
8 same determination of the Copyright Claims
9 Board. For the purposes of the application, any
10 judge who might make an order to stay the pro-
11 ceedings in an action brought in the same
12 court, may make an order, to be served with the
13 notice of application, staying proceedings to en-
14 force the award.

15 **“§ 1408. Relationship to other district court actions**

16 “(a) STAY OF DISTRICT COURT PROCEEDINGS.—A
17 United States district court shall order a stay of pro-
18 ceedings or such other relief as it deems appropriate with
19 respect to any claim brought before it that is already the
20 subject of a pending active proceeding before the Copy-
21 right Claims Board.

22 “(b) DISTRICT COURT COST AND FEE AWARDS.—In
23 any case before a United States district court in which
24 the court is considering whether to award costs or attor-
25 neys’ fees to a prevailing party pursuant to section 505

1 of this title, the district court may in its discretion take
2 into account, among other relevant factors, whether the
3 nonprevailing party had the option and could have chosen
4 to proceed before the Copyright Claims Board in lieu of
5 the district court.

6 “(c) ALTERNATIVE DISPUTE RESOLUTION PROC-
7 ESS.—The Copyright Claims Board shall qualify as an al-
8 ternative dispute resolution process under section 651 of
9 title 28 for purposes of referral of eligible cases by United
10 States district courts upon consent of the parties.

11 **“§ 1409. Implementation by Copyright Office**

12 “(a) REGULATIONS.—

13 “(1) IMPLEMENTATION GENERALLY.—The Reg-
14 ister of Copyrights shall establish regulations to im-
15 plement the Copyright Claims Board as con-
16 templated by this chapter, including the establish-
17 ment of the fees prescribed by sections 1405(c)(3)
18 and 1405(w), which authority shall not limit the
19 Register’s more general authority to establish fees
20 for services in accordance with section 708 of this
21 title. All fees received by the Copyright Office in
22 connection with the activities under this chapter
23 shall be deposited by the Register and credited to
24 the appropriations for necessary expenses of the Of-
25 fice in accordance with section 708(d) of this title.

1 “(2) LIMITS ON MONETARY RELIEF.—The Reg-
2 ister may conduct a rulemaking to adjust the limits
3 on monetary recovery or attorneys’ fees and costs
4 that may be awarded under this chapter to further
5 the goals of the Copyright Claims Board: *Provided,*
6 *however,* That any resulting rule that makes such an
7 adjustment shall become effective at the end of a pe-
8 riod of 120 days after the rule is submitted to Con-
9 gress and only if Congress does not enact a law
10 within such 120-day period that provides in sub-
11 stance that Congress does not approve of the new
12 rule.

13 “(b) NECESSARY FACILITIES.—Subject to applicable
14 law, the Register of Copyrights may retain outside vendors
15 to establish Internet-based, teleconferencing and other fa-
16 cilities required to operate the Copyright Claims Board.

17 **“§ 1410. Funding**

18 “There are authorized to be appropriated such sums
19 as may be necessary to pay the costs incurred by the Copy-
20 right Office under this chapter that are not covered by
21 fees collected for services rendered under this chapter, in-
22 cluding the costs of establishing and maintaining the
23 Copyright Claims Board and its facilities.

24 **“§ 1411. Definitions**

25 “As used in this chapter—

1 “(1) the term ‘party’ refers to both a party and
2 the party’s attorney, as applicable;

3 “(2) the term ‘person’ (including ‘his’ and
4 ‘her’) refers to both an individual and an entity that
5 is amenable to legal process under applicable law;
6 and

7 “(3) the term ‘United States’ has the meaning
8 given in section 101 of this title.”.

9 (b) CLERICAL AMENDMENT.—The table of chapters
10 for title 17, United States Code, is amended by adding
11 after the item relating to chapter 13 the following new
12 item:

“14. Copyright Small Claims 1401”.

13 **SEC. 3. IMPLEMENTATION.**

14 The Copyright Claims Board shall begin operation no
15 later than one year after of the date of the enactment of
16 this Act.

17 **SEC. 4. STUDY.**

18 Not later than 3 years after the issuance of the first
19 determination by the Copyright Claims Board, the Reg-
20 ister of Copyrights shall deliver a study to Congress that
21 addresses—

22 (1) the use and efficacy of the Copyright
23 Claims Board in resolving copyright claims;

24 (2) whether adjustments to the authority of the
25 Copyright Claims Board, including eligible claims

1 and works and applicable damages limitations, are
2 necessary or advisable;

3 (3) whether greater allowance should be made
4 to permit awards of attorneys' fees and costs to pre-
5 vailing parties, including potential limitations on
6 such awards;

7 (4) potential mechanisms to assist copyright
8 owners with small claims in ascertaining the identity
9 and location of unknown online infringers;

10 (5) whether the Copyright Claims Board should
11 be expanded to offer mediation or other nonbinding
12 alternative dispute resolution services to interested
13 parties; and

14 (6) such other matters as the Register of Copy-
15 rights believes may be pertinent concerning the
16 Copyright Claims Board.

17 **SEC. 5. SEVERABILITY.**

18 If any provision of this Act is declared unconstitu-
19 tional, the validity of the remainder of this Act shall not
20 be affected.

○

COPYRIGHT ALTERNATIVE IN SMALL-CLAIMS ENFORCEMENT ACT OF 2017

THURSDAY, SEPTEMBER 27, 2018

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC

The committee met, pursuant to call, at 2:20 p.m., in Room 2141, Rayburn House Office Building, Hon. Bob Goodlatte [chairman of the committee] presiding.

Present: Representatives Goodlatte, Smith, Chabot, Issa, Gohmert, Marino, Collins, Buck, Handel, Nadler, Lofgren, Johnson of Georgia, Jeffries, Cicilline, Lieu, Jayapal, and Demings.

Staff Present: Shelley Husband, Staff director; Branden Ritchie, Deputy Staff Director; Zach Somers, Parliamentarian and General Counsel; and Joe Keeley, Chief Counsel, Subcommittee on Courts, Intellectual Property, and the Internet.

Chairman GOODLATTE. Good morning. The Judiciary Committee will come to order. And without objection, the chair is authorized to declare a recess of the committee at any time.

We welcome everyone to this morning's hearing at H.R. 3945, the Copyright Alternative in Small-Claims Enforcement Act of 2017.

I will begin by recognizing myself for an opening statement.

Like all creators, copyright owners, large and small, deserve to be compensated for their efforts. Thanks to the growth of the Internet economy, a creator now has the ability to distribute their works worldwide. However, this also means that those who view intellectual property as something worth stealing, also have a means to more easily distribute stolen works.

Small businesses make up the majority of American businesses, many of which are family-owned. They could be farmers, restaurants, dry cleaners, or any number of other professions. Just like larger businesses, they face issues that need judicial resolution, such as nonpayment, breach of contract, and other issues that directly impact their bottom lines.

Fortunately, a robust State court system exists to address business disputes. Larger companies and small businesses use a variety of measures to reduce the chances of theft and nonpayment, only turning to the courts when necessary. Litigation in America is expensive, and is not for the faint of heart. There are even State small claims courts for smaller value claims.

However, for most intellectual property disputes, only the Federal court system can hear legal disputes, and there is no equivalent small claims process.

This has led to one category of American creators frequently being on the losing end of intellectual property theft, small intellectual property creators.

Visual artists have identified the lack of such a small-claims process as a major detriment to their ability to hold those who infringe their works accountable.

During the last Congress, there were two separate bills to create a small-claims system for low-value copyright claims.

I am pleased that Congressman Jeffries has led the way this year on combined legislation, and that he and his staff have worked tirelessly with interested parties to incorporate a number of major changes to the legislation in order to improve its effectiveness and limit the ability of bad actors to abuse it.

Earlier this year, the ranking member and I spoke about the importance of this issue for small creators. And I am glad to see that our colleagues have made so much progress.

Today's hearing will highlight all of this hard work and identify any potential remaining areas of concern.

The committee's goal, which I know is shared by Congressman Jeffries, is to implement an effective process for resolving small-value copyright claims.

Just like owners of physical property, American creators deserve a remedy when their intellectual property is used without the appropriate compensation.

It is now my pleasure to recognize the ranking member of the committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, 5 years ago, you spearheaded a comprehensive bipartisan review of the copyright system that consisted of careful, thoughtful analysis of various provisions of the Copyright Code, as well as how the copyright system is working for creators and users alike.

At the culmination of that review, a few areas of consensus emerged, one of which was the need to reform the music licensing system.

With legislation to address that issue unanimously sent off to the President this week, we can move on to the next issue calling out for action, namely the need to establish a small claims court to resolve small dollar infringement claims.

A fundamental principle of law is that there is no right without a remedy. But unfortunately, many copyright holders today, particularly many visual artists lack sufficient remedies to protect their rights.

This is because the cost of pursuing infringement claim in Federal court, particularly for small creators, is far greater, as much as 10 times or more, than the expected damages they would receive in a successful suit, making it virtually impossible to protect their works.

While the damages at stake in these infringement claims may be small in terms of sheer dollar amount, even a few thousand dollars

in uncollected royalties would represent a huge loss of income for someone like a photographer making just \$35,000 or \$40,000 a year. And few attorneys will take a case when such limited damages are at stake, because they would likely not recoup their costs.

Even if the creator did successfully obtain judgment in his or her favor, the total cost of litigation would likely dwarf the damages awarded, making it a Pyrrhic victory, at best.

The CASE Act seeks to address this important problem.

This bipartisan legislation introduced by our colleague, Representative Hakeem Jeffries, would establish a claims court within the Copyright Office to hear a copyright suit seeking \$30,000 or less in total damages.

As envisioned by the CASE Act, this route will be less expensive and much easier to navigate, even without an attorney, than Federal court. Based in large part on recommendations from the Copyright Office which conducted an exhaustive study of this issue, the bill would provide an affordable means for small creators to vindicate their rights.

Although a small claims court would provide a more conducive forum for small creators to file suit, the court's limited jurisdiction based on the bill's fairly nominal damage limit, as well as the reduced cost that would be incurred in defending against an infringement claim, or in seeking a declaratory judgment that use of a copyrighted work constitutes fair use, should make it an appealing venue for copyright users as well.

If, however, a defendant would prefer not to submit to the jurisdiction of the small claims court, the bill allows such defendant to opt out.

In recognition of certain concerns that are expressed by some stakeholders, Representative Jeffries worked tirelessly to refine this legislation, and as a result, now includes a number of revisions suggested by these stakeholders, including the organizations represented by two of our witnesses today.

These revisions include very heightened due process protections and provisions intended to reduce potential abuse of the system.

Nevertheless, some stakeholders still have certain concerns about the bill. That is why I am pleased to be holding this hearing today, so that we can better understand these concerns, and, hopefully, find solutions that may be acceptable to all stakeholders.

I am a proud cosponsor of this legislation, and I thank Mr. Jeffries for his outstanding leadership on this issue.

I also want to recognize the efforts of Representative Judy Chu, who introduced similar legislation in the last Congress, as well as the other cosponsors of this bill.

I look forward to hearing from our witnesses, and I hope that today's hearing will help us lay the foundation for further action on this important legislation.

I yield back the balance of my time.

Chairman GOODLATTE. Thank you, Mr. Nadler.

It is now my pleasure to recognize the ranking member of the Subcommittee on Courts, the Internet and Intellectual Property, the gentleman from Georgia, Mr. Johnson, and ask that perhaps he could, at the conclusion of his remarks, yield to the chief sponsor of the legislation.

Mr. JOHNSON OF GEORGIA. I would be happy to do so.

Chairman GOODLATTE. The gentleman is recognized.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman. This hearing gives us an opportunity to examine the Copyright Alternative and Small-Claims Enforcement Act, also known as the CASE Act, which would provide copyright owners with an alternative to the expensive process of bringing infringement claims in Federal court.

The CASE Act is supported by all types of the creators, including photographers, illustrators, songwriters, and authors.

Currently, Federal courts have exclusive jurisdiction over copyright claims. Federal litigation is expensive, and many small creators cannot afford to enforce their rights.

The Copyright Office provided a detailed report on this issue, and I thank them for their hard work, which has helped us work towards a legislative solution.

Many of their recommendations are included in this bill. I am happy that stakeholders have been in negotiations about ways to further improve the bill. The most recent discussion draft of the bill includes many changes that attempt to address stakeholder concerns.

While I am aware that there are still remaining concerns about the bill, I hope we can use this hearing as a way to continue to work together on the issue.

I want to thank Congressman Hakeem Jeffries, Congressman Tom Marino, Congressman Doug Collins, and Congresswoman Judy Chu, as well as Congressman Ted Lieu for their work in putting together what this bill is as it is introduced today.

I would now like to yield the balance of my time to the author of this important legislation, Congressman Hakeem Jeffries.

Mr. JEFFRIES. Well, thank you, Congressman Johnson, for yielding. I thank the chairman, Mr. Goodlatte, as well as Ranking Member Jerry Nadler, and my lead Republican sponsor, Congressman Marino, as well as all of my colleagues who have worked hard on this legislation.

Today, we are considering H.R. 3945, otherwise known as the CASE Act, which would create a fair and balanced forum for small creators to be able to vindicate their copyright under law.

Copyright infringement is not a victimless crime. Photographers, illustrators, visual artists, writers, individual songwriters, musicians, all rely upon their creative works in order to put food on the table and support their families. But with every infringement, they lose an opportunity to do so.

Unfortunately, under the current system, these creators are given a right without an adequate remedy.

As reported in the Copyright Office report from 2013, many copyright owners are independent creators who have very small infringement claims, but these creators do not have the means to vindicate their rights and protect their works from infringement in an Article III Federal court system.

Survey conducted by the American Intellectual Property Lawyers Association reveal that the median cost to pursue a copyright infringement lawsuit, with damages less than \$1 million, is approximately \$350,000. The CASE Act would contemplate providing a

remedy for people whose infringement claims do not exceed \$30,000.

Between the burden of attorney and court fees and the delay experienced, small creative artists and others who rely upon their copyright works as their bread and butter, are left without any vehicle or enforcement remedy.

The CASE Act will help fill this void by establishing a voluntary alternative form for small copyright owners that will enable them to enforce and protect their content in a fair, timely and affordable manner, and would also afford respondents the ability to do the same.

The forum will be headed up by a new entity called the Copyright Claims Board, the CCB, housed within the Copyright Office. It is designed to allow both pro se rights holders as well as pro se respondents to obtain a fair proceeding.

With the simplified process, this does not require the personal appearance of either parties, the board proceeding would not only be advantageous for the rights holder, but also would advantage pro se respondents as well, as but would not be saddled with similarly high costs of District Court litigation.

Because either party can easily opt out, the CCB satisfies the Article III and due process requirements of the Constitution and many safeguards have been built in to ensure that it will be fair and balanced, and above all else, it is consistent with our Article I, Section 8, Clause 8 responsibility to make sure that we promote the progress of science and useful arts in this context, allowing creators to be able to vindicate their rights under law.

I yield back.

Chairman GOODLATTE. We welcome our distinguished witnesses. And if you would all please rise, I will begin by swearing you in. Please raise your right hand.

Do you, and each of you, solemnly swear that the testimony you about to give, shall be the truth, the whole truth and nothing but the truth, so help you God?

Chairman GOODLATTE. Thank you. Let the record show that each of the witnesses answered in the affirmative.

Our first witness is Mr. David Trust. Mr. Trust is the Chief Executive Officer of the Professional Photographers of America.

Our second witness is Mr. Matthew Schruers. Mr. Schruers is the Vice President for Law and Policy at the Computer and Communications Industry Association.

Our third witness is Ms. Jenna Close. Ms. Close is the Director of Photography at Buck the Cubicle.

Our fourth witness is Mr. Jonathan Berroya. Mr. Berroya is the Senior Vice President and General Counsel for the Internet Association.

And our final witness is Mr. Keith Kupferschmid. Mr. Kupferschmid is the Chief Executive Officer of the Copyright Alliance.

Thank you. I look forward to hearing from all of you today. Your written statement will be entered into the record in its entirety, and we ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on the table. When the light switches from green to yellow, you have 1 minute

to conclude your testimony. When the light turns red, that is it. Time is up. And finish your remarks. Thank you very much.

Mr. Trust, you may begin.

TESTIMONIES OF DAVID TRUST, CHIEF EXECUTIVE OFFICER, PROFESSIONAL PHOTOGRAPHERS OF AMERICA; MATTHEW SCHRUEERS, VICE PRESIDENT, LAW AND POLICY, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA); JENNA CLOSE, DIRECTOR OF PHOTOGRAPHY, BUCK THE CUBICLE; JONATHAN BERROYA, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, INTERNET ASSOCIATION; AND KEITH KUPFERSCHMID, CHIEF EXECUTIVE OFFICER, COPYRIGHT ALLIANCE

TESTIMONY OF DAVID TRUST

Mr. TRUST. Thank you, Mr. Chairman. And Chairman Goodlatte, Ranking Member Nadler, and members of the committee, it is a pleasure to be here with you today.

I have been asked to speak on behalf of Professional Photographers of America. We represent about 50,000 professional photographers, but in this particular instance, I have been also asked to speak on behalf of hundreds and hundreds of thousands of other small creators, including graphic designers and illustrators and other photographic groups that have joined together as a coalition of visual artists. Together, they make up the majority of America's copyright communities.

It is true that in terms of sheer number of creators, copyright is much more small business than it is large. And that is healthy. Our country's creative diversity is a good thing; it is good for the economy; it is good for our society. And fostering a broad and diverse range of creators is the very foundation of copyright law.

But the diversity is only of value if we are able to protect all of those creators. The harsh reality of copyright in America is that it works for some creators, less for others, and not at all for the majority.

The problem is in the remedy for copyright. As it stands now, small creators who have seen their work used without permission, or just outright stolen, have had one path for relief, filing a lawsuit in U.S. Federal court. Of course, the reality is that path is no path at all.

Nobody is going to sue in Federal court over an infringement that averages well under \$3,000. The math simply works against most creators.

And let's remember, it doesn't have to be big money to make a big difference. A \$500- or \$1,200 infringement can be the difference in paying the mortgage, or healthcare, or food on the table for the first family vacation in 5 years.

The truth is, visual artists have, for decades, felt disenfranchised by America's copyright system, and for good reason. Where there is no remedy, there is no protection.

Now, we realize that this is an unintended consequence based on the evolution of copyright, and in particular, technology.

Nobody made a decision to leave out small creators, but with the CASE Act, we can make a decision to include them under the same umbrella of protections afforded other creators.

If this supersonic, evolving-by-the-second, hyper-competitive business environment we all live in teaches us anything, it is that we will pay attention to the needs of small businesses or we will lose them. And let me rush to point out that being a real professional photographer has little to do with the camera and everything to do with the years of training. The camera is perhaps the least of their tools.

I can purchase a really nice drafting table. It doesn't make me an architect. Small creators dedicate years, decades, even generations, honing a craft that enriches our lives.

And here is a significant side note. Listen to this. Less than 5 percent of professional photographers regularly register their work with the Copyright Office. Is it because they don't value their work? Quite the contrary.

Research indicates that copyright and protecting their work is one of the issues that keeps them awake at night. They don't register because there is no viable remedy, which means 95 percent of possibly the largest class of copyright holder in America never pays a dime into the copyright system.

Our system disenfranchises the majority of its consuming universe. Small claims is the start to turning that around.

Are there concerns by others? I guess so, but it is hard to understand why. We are Americans. We believe in the protection of law.

If you make and sell furniture for a living, we protect you from theft. If you make and sell electronics, cars, or clothing, and sell those on Amazon or Etsy or eBay, we protect you from theft. If you make and sell tacos from a truck around the corner from the Rayburn Building, we protect you from theft.

Why, then, would we not create a remedy, a small claims process to protect hundreds of thousands of small creators who beautify and enrich and add color to our lives.

Oh, and by the way, if someone doesn't like the idea of participating in small claims, it is no problem. It is optional, just opt out.

We depend on these creators, we need these creators. Let's remember that when the Constitution what was drafted to include copyright, there were no motion pictures or software or networks. And don't get me wrong, we stand with all creators and all creators deserve protection. But at the time of the drafting of the Constitution, the copyright superstars were the authors and illustrators and artists and composers and songwriters, followed 60 years later by the first multimedia creators, professional photographers.

Chairman Goodlatte and members of the committee, we all see the work of these small creators almost from the moment we open our eyes in the morning until we close them again at the end of the day.

For decades, generations, these small creators have been unprotected and underrepresented by our copyright system. We are at a crossroads. I truly believe that we will stand with our small creators or we will watch them disappear one by one, and with them, the color and the life that they bring to our world.

America's copyright system should be a beacon on the hill for the rest of the world, and creating a small claims remedy through the CASE Act puts us into position to become just that.

You are very gracious. Thank you so much for your time.

Chairman GOODLATTE. Thank you, Mr. Trust. Mr. Schruers, welcome.

TESTIMONY OF MATT SCHRUEERS

Mr. SCHRUEERS. Thank you. Chairman Goodlatte, Ranking Member Nadler, members of the committee. My name is Matt Schruers. I'm the VP for Law and Policy at CCIA, which represents Internet technology and communications firms.

Thank you for the opportunity to discuss this claims proposal today. CCIA has a significant interest in properly scoped copyright remedies. Our members play a critical role in the existing creative landscape providing services, tools, and platforms that enable and facilitate users' ingenuity expression and creativity worldwide.

These technologies afford the instantaneous and often free-to-the-user access, providing opportunities to reach out and engage with audiences around the world in ways not possible without the Internet.

A new remedy for copyright plaintiffs should be considered in the context of the existing remedies available. That copyrights already robust remedies could be underserving plaintiffs is somewhat difficult to reconcile with the current wave of Federal copyright litigation.

2018 research found that serial litigants filing shotgun style, multiparty Doe claims frequently on pornographic works accounted for nearly half of all U.S. copyright litigation from 2014 to 2016. That is thousands of lawsuits against hundreds of thousands of potential defendants, many wrongfully accused.

But let me be clear, that we recognize troll plaintiffs are not the plaintiffs about whom we are concerned today. However, Title 17 remedies are available to all, and can be invoked by both the most and least meritorious litigant, including those for whom litigation is a business model.

So while litigating unauthorized literal use of visual works appears to be the intended use case here, we are also mindful of other potential plaintiffs. And the bill does contemplate that trolls may utilize the small-claims process.

We could also anticipate small claims pertaining to noncommercial digital uses of works. Whereas the DMCA currently is often used to conclude such disputes, a small claims tribunal might result in internet users and small businesses customary, lawful, online activities becoming small claims fodder, including disputes alleging potential secondary liability and nonliteral infringement.

The noncommercial circulation of internet memes, commentary on cultural and political matters, social media debates and internet plagiarism accusations are not particularly suitable nor worthy of Federal resolution, but those, too, could be expected in a small claims process.

Users should not fear litigation for participating in lawful online social media discourse. And businesses using online platforms to

reach their customers should not fear another venue where they can be targeted competitors with specious IP claims.

So while CCIA is not presently in a position to support H.R. 3945 or the subsequent discussion draft, we appreciate the opportunity to discuss the proposal. And I will note briefly what CCIA regards as the most significant outstanding points.

As the written statement I have submitted describes in greater detail, those points are the negative option, opt out model of the process, the authority of the Copyright Office to increase or remove the cap on the number of suits that can be brought, as well as the size of statutory awards.

And permitting statutory awards without timely registration, given the importance of registration data, particularly to digital services in finding creators and ensuring that they are properly compensated for their creativity.

So in conclusion, CCIA believes that educational resources, perhaps in the mold of PTOs and venture assistant center, and a lower overall cost of registration, as well as efforts to encourage, facilitate, and streamline the registration, would facilitate better outcomes for copyright plaintiffs.

We share the committee's goals in ensuring that creators have both the incentives and the tools to create and distribute their creativity. And we look forward to working with you in furtherance of that goal.

I am happy to take any questions.

Chairman GOODLATTE. Thank you, Mr. Schruers.

Ms. Close, welcome.

TESTIMONY OF JENNA CLOSE

Ms. CLOSE. Thank you.

Mr. Chairman, Mr. Ranking Member, and distinguished members of the committee.

My name is Jenna Close, and I am a commercial photographer based in San Diego, California, Congressman Issa's district.

I appear before the committee today on behalf of myself and the American Society of Media Photographers, of which I am a past national board chairperson.

I am here to express support for H.R. 3945, the CASE Act. At the outset, I want to thank you and other members for your interest in helping provide individual creators and small businesses with the legal tools they need to protect their creative works from those who use them without permission or compensation.

I am not an attorney. I am not a copyright lawyer. I am not here today to discuss legal specifics that are spelled out in H.R. 3945. I am here to explain why individual creators like myself are so frustrated when it comes to the operation of our current copyright system.

Quite simply, we have a right to protect our creative efforts under copyright law, but we are routinely unable to enforce those rights because of the cost and complexities of bringing a lawsuit in Federal court, the only place to bring a copyright infringement suit today.

As an independent creator, I appreciate and believe in the idea of copyright. I always retain my copyright in my contracts with cli-

ents. At the same time, I do not routinely register my works. I consider myself an intermittent registerer.

I would, however, register my images more regularly if given a streamlined, reliable, and affordable path for pursuing infringement.

Copyright registration is an investment in time and money, and yet with the present situation, it is rare that there is a positive return on that investment.

Regrettably, like so many other visual artists, my partner John and I often find our works infringed, not only online, but also in print.

We have even witnessed our photos enlarged as a backdrop to a competitor's trade show booth, while our paying client was rightfully using the same art work at the same trade show in their own booth.

To help the committee better understand the scope of infringements my colleagues and I face, I did a little experiment.

A couple days ago I did a so-called reverse image search on one of my most frequently infringed images. A reverse image search involves uploading a photo to images.google.com. Google then returns a list of every website on which that exact image is found.

During this most recent search, I found a single image of mine was being used without permission on 41 different websites. Of those 41 websites, 18 were large companies. And that does not include any print infringements that may be out there.

Copyright infringement cost visual artists revenues needed to keep their businesses in the black, and to provide for their families. Our profit margins are often slim.

To give you some perspective, my business needs to bring in \$4,000 a month simply to be in the black. We typically bring in from \$5,000 to \$8,500 a month or \$60,000 to \$100,000 a year.

From this, come the salaries of two owners and our many expenses, which in the photography industry are not small.

Each year, our income fluctuates, and you can see how the profit loss from just one infringement worth a few thousand dollars makes a big difference in our bottom line.

I am convinced that copyright violations, and the inability to reasonably pursue them, have bred frustration and ultimately disregard for intellectual property rights.

Large entities are well aware that small creators like myself are unlikely to sue, and if they do, that they are easily bled dry of resources. It is evident in the cease and desist letters that are ignored, in the emails requesting a license fee that are never answered.

Why do visual artists so often forego legal action? The answer is simple. Federal court litigation is too burdensome and too expensive. The cost of bringing the suit alone would likely dwarf any potential favorable verdict.

The reality of the system today makes infringement losses a cost of doing business, and not one that many creators can afford. The time to end this historic inequity is now.

As I see it, the CASE Act is our best shot at ensuring that visual artists, for the first time, will be full participants in the copyright marketplace.

I believe that if Congress enacts a small claims bill, individual creators and small business people will participate in great numbers. I know that I would.

The sponsors of H.R. 3945 and the Copyright Office deserves much credit for their hard work developing this legislation and bringing it to this critical juncture.

It is refreshing and inspiring to see that after identifying a real world problem, Congress is addressing the issue and considering this legislative remedy.

For those organizations that oppose or criticize this legislation, I ask that you put yourself in my place. I have a statutory right to protect my intellectual property, but no effective mechanism for doing so.

How would you feel if you were in the same position?

This bill will directly benefit a class of people who are crucial to your members' future business success.

Why would you oppose it? Thank you.

Chairman GOODLATTE. Thank you, Ms. Close.

Mr. Berroya, welcome.

TESTIMONY OF JONATHAN BERROYA

Mr. BERROYA. Thank you, Chairman Goodlatte, Ranking Member Nadler, and distinguished members of the committee.

I appreciate the opportunity to appear before you today to discuss the Copyright Alternative and Small-Claims Enforcement Act of 2017.

My name is John Berroya, and I am Senior Vice President and General Counsel at Internet Association, or IA.

IA represents over 40 of the world's leading internet companies, and we support policies that promote and enable internet innovation, and are dedicated to advancing public policy solutions that strengthen and protect internet freedom, foster innovation and economic growth, and empower people.

In this and other contexts, IA strives to advance the interests not only of its member companies, but also the billions of individuals and small businesses that benefit from our member companies services and products.

Importantly, the people who rely on our member services include countless individuals and micro businesses, who are creators and users of copyrighted works that will be potentially impacted by the proposed legislation.

We recognize the benefits that would accrue to these communities from the ability to resolve small claims in a more efficient and effective manner.

However, we are also mindful that bad actors will seek to abuse any process created to achieve those benefits.

With that in mind, our goal today is to advocate for changes that we believe would help ensure that the bill minimizes opportunities for misuse and truly benefits individuals, small businesses and entrepreneurs across all industries in their roles, both as creators and as users of copyrighted works.

To begin with, I would like to thank the bill sponsors, the committee leadership, and their staffs, for the diligent work that they performed on this bill.

I would also like to commend the Copyright Office for its detailed analysis and report that have supported and informed this legislative process.

The goals of the CASE Act are laudable, and to that end, IA has demonstrated its support by engaging in detailed conversations with committee staff and the bill sponsors over the past 6 months.

We appreciate both the ongoing opportunities to share our feedback with the committee, the changes that have already been made to improve the draft text as well.

IA remains convinced that crafting a bill that is effective and workable for all parties is an important goal, and we and our member companies will continue to seek common ground with other stakeholders on this important issue.

My testimony identifies a handful of remaining concerns with the legislative draft that we look forward to working with the committee to address.

Our three core recommendations can be summarized as follows:

First, due process and fairness are fundamental to the success of any legal process, and we have concerns about the bill's opt-out process. We worry that it could, more often than not, have the unintended consequence of helping rights holders secure monetary damages against people who are just as small and legally unsophisticated as the people the bill is designed to protect.

To ensure that the bill protects all of the relevant interests, we respectfully suggest that the text be amended to require both parties to agree to adjudication by the CCB and to provide a more robust appeals process.

Second, we believe that the current balance established by Section 512 of the Copyright Act plays an essential role in allowing platforms to respond to claims of infringement without forcing them to play the de facto role of adjudicator of those claims.

If the bill remains silent as to whether initiating a claim through the CCB can be used to prevent online platforms from restoring access to allegedly infringing material, there is a risk that some rights holders will exploit that lack of clarity and use this low cost, quasi-judicial process, to substantially extend the amount of time that allegedly infringing material remains unavailable.

Accordingly, we will suggest amending the bill to clarify that the proposed small claims process does not interfere with the operation of Section 512.

Third, and finally, allowing claimants who have not registered their works in a timely manner to seek statutory damages deviates from the longstanding copyright policy and would give rise to unintended consequences.

As the Copyright Office has previously concluded, encouraging registration advances several policy goals, by making statutory damages available to all businesses regardless of size, the current version of the bill can disincentivize the registration of works, and inadvertently encourages parties to bring cases before the CCB that would have been too risky to file in an Article III court due to the unavailability of statutory damages.

In prior discussions with the committee, IA offered additional recommendations that would bring the proposed small copyright

claims adjudication process more closely in line with other small claims courts.

Eliminating discovery and reducing the maximum of monetary damage awards are two issues that we had raised. But for the sake of brevity, my testimony focuses on the three core points that I mentioned a moment ago.

In sum, IA believes that adopting these recommendations would not only ensure the basic fairness of the process, but would also make for a more workable regime for all of the parties involved.

I hope that my testimony today will offer a useful perspective, and I look forward to your questions.

Thank you.

Chairman GOODLATTE. Thank you, Mr. Berroya. Mr. Kupferschmid—I am sorry I am not getting your name right. Please forgive me—welcome.

TESTIMONY OF KEITH KUPFERSCHMID

Mr. KUPFERSCHMID. Chairman Goodlatte, Ranking Member Nadler, and members of the committee, thank you for holding this hearing and for the opportunity to testify before you today to discuss the importance of H.R. 3945, the Copyright Alternative and Small-Claims Enforcement Act, or the CASE Act.

I am Keith Kupferschmid, CEO of the Copyright Alliance, a non-profit, nonpartisan organization dedicated to advocating policies that promote and preserve the value of copyright.

I testify here today in support of the CASE Act. For over a decade, individual creators and small businesses have been advocating for a change in the copyright law to address an inequity that has routinely provided them with rights but no remedies.

The CASE Act would make very targeted, very modest changes to the copyright law to address this inequity, and give America's creators the tools to protect the fruits of their creativity.

The CASE Act is based on legislation recommended by the Copyright Office. It would create a small claims tribunal within the Copyright Office called a Copyright Claims Board, or CCB, that can hear not only claims of infringement, but also declarations of non-infringement, as well as counterclaims and defenses like fair use.

The bill makes clear that what the CCB cannot hear are claims brought against DMCA-compliant internet platforms for the infringing acts of their users.

The CASE Act creates a much less formal, cost effective, and streamlined process, than exists in Federal court. The use of attorneys is optional and the process is so simplified that it is unnecessary to retain counsel.

Proceedings will usually be conducted electronically so the parties can participate remotely, and discovery will be extremely limited.

The most important feature of the bill is that it is completely optional. That is right, optional.

If a party doesn't want to initiate or to defend the copyright case before the CCB, she can opt not to participate in the process.

To the extent that anyone has any concerns with the bill, the fact that participation is optional should address most, if not all of them.

Another very important feature of the bill is that the CASE Act dramatically limits an alleged infringer's financial exposure by capping damages and prohibiting attorney fee awards.

The bill provides that statutory damages for infringement of one work cannot exceed \$15,000, a limit for infringers that is exponentially lower than the \$150,000 recovery that is permitted under existing law.

The bill also provides that the CCB cannot award a total of more than \$30,000 in damages in any one case, which is very different than Federal law where there is no cap at all.

The availability of the statutory damages is essential, given the difficulties of proving actual damages to limited discovery rules, and the fact that most parties will not be represented by counsel.

While some level of judicial review of CCB decisions is appropriate, allowing these decisions to be subject to extensive, overly broad judicial review in Federal court would undermine the very purpose of the bill and destroy the effectiveness of the CASE Act.

It would enable respondents to relitigate their case in the very same Federal courts that they could not afford in the first place.

The bill also contains a number of provisions designed to help minimize the chance of judgments, and to ensure that the CCB proceedings are not subject to abuse.

I would be happy to discuss each of these in more detail as necessary. In an effort to get the bill passed this year, we participated in negotiated sessions with the internet Association and CCIA that was presided over by Representative Jeffries and his staff earlier this year.

We listened to their concerns and drafted language with them to address virtually all of them, even though we thought most of the concerns were unfounded and changes to the bill were unnecessary.

The only changes we did not incorporate were the ones we thought were counter to the fundamental premise of the bill, and that would destroy its effectiveness.

The resulting draft, which is referred to as the discussion draft, incorporates numerous changes intended to address these groups' concerns with the understanding that if we agreed to these changes, IA and CCIA would be supportive of the CASE Act, or at the very least, neutral. We are still waiting for them to live up to their side of the bargain.

The CASE Act is a legislative priority for hundreds of thousands of photographers, illustrators, graphic artists, songwriters and authors, as well as a new generation of creators including bloggers and YouTubers across the country. Today, they have rights but no remedies.

The CASE Act will go a long way to restoring their faith in the copyright system. We urge to you pass the CASE Act, and look forward to continuing to work with the committee as the bill moves forward.

I am happy to answer any questions.

Chairman GOODLATTE. Thank you. We will now proceed under the 5-minute rule with questions. And I will begin by recognizing myself for 5 minutes.

Mr. Schruers, Ms. Close's testimony gives an example of corporate infringement of a photograph at a trade show, what is the concern there about opt-in versus opt-out?

Why should a corporate infringer effectively have free use of a work by not opting in leaving an artist with no effective remedy?

Mr. SCHRUERS. Mr. Chairman, thank you for the question.

As I mentioned in my statement, remedies are going to be available to all plaintiffs, and so while the presence of an opt-out framework might be noncontroversial in one particular context, we can't necessarily be certain that they would not be problematic in all particular contexts.

And so, for example, some of CCIA's larger members probably could relatively easily manage an opt-out process because we already have a variety of copyright regulation compliance obligations, and one more is not particularly difficult.

That doesn't necessarily go for noncommercial internet users and small businesses who may well be engaging in lawful uses of work, but are insufficiently familiar with the process. It is worth noting that the general practice with DMCA notices, which are fairly common now, is that users who are subject to a notice frequently simply don't respond to the notice, their content comes down, the rights holder, a putative rights holder, gets a de facto injunction and the parties move on. This actually changes the affected default action which is that a party must respond.

And so, we are concerned that end users on the internet may be unprepared for that kind of process, and not actually be acting voluntarily in waiving a response.

And it might also have a knock-on effect on how parties respond to DMCA notices, which arguably would not be a desired outcome.

Chairman GOODLATTE. Ms. Close, you want to respond to that?

Ms. CLOSE. Parties already don't respond to DMCA notices, and I just—basically, what I would like to say is I think that there needs to be a coming together in a common ground to determine infringement or not, that is fair for both parties. So I believe that that would require somebody to come and participate. That is all I have to say on that.

Chairman GOODLATTE. Mr. Trust.

Mr. TRUST. Yes. Mr. Chairman, I have to admit that I get confused by the opt-in/opt-out discussion, by the concern with opt-out. By definition, opt-out is optional. It is optional. And so the discussion about opt-out and opt-in, to me, is a little difficult when we have hundreds of thousands of creators who are not protected under the current system. But the concern seems to be that we are given infringers a responsibility—and let's be honest, we are talking mostly about infringers here—the responsibility for participating in some way. That is, to acknowledge that there is an issue. To have just opt-in, someone who is guilty of an infringement, who has taken someone's work and used it—

Chairman GOODLATTE. You would never hear a word from them, right?

Mr. TRUST. You would never hear anything from them. I mean, they would just ignore it. Which, by the way, is exactly where we are right now, right?

And so the only thing that actually makes this useful is that opt-out provision.

Chairman GOODLATTE. Come back to you, Ms. Close. Do you feel that those who have infringed your works would ever opt-in to litigation with you when they have already stolen your images?

Ms. CLOSE. Actually, yeah, I do think that they would. I mean, I would hope that they would. I know that—

Chairman GOODLATTE. Mr. Trust is suggesting that they have ignored your right in the first place. They are also going to ignore the notice, if they have to opt-in.

Ms. CLOSE. Oh, if they have to opt-in. Oh, yes—excuse me—yes, I don't think they would opt-in. I think that they have to be held—I think they would have to opt-out.

If they opt-in, which is already where we are, it is crickets. It is crickets out there. The DMCA notices have no teeth. I can email people, and I get no response. I don't see that changing.

Chairman GOODLATTE. Mr. Kupferschmid?

Mr. KUPFERSCHMID. If I may just quickly respond here?

Chairman GOODLATTE. Sure.

Mr. KUPFERSCHMID. So I mean, the difference between opt-out and opt-in is all about getting a response. Having someone pay attention. That is all the difference is, right?

So if we think if they pay attention, if they are required to actually just look at it and read it and understand the consequences of it, then we think they will participate in the system. The problem is they don't do that. They look at it and they go, I am an infringer. I am just going to toss this to the side.

We think the cap on damages, the no-attorney fee awards, the streamline proceedings, and a bunch of other benefits that this process has to offer are sufficient that they would participate in the system, if they review. But right now, they just ignore it. And that will continue if this is opt-in.

Chairman GOODLATTE. Okay. Well, my time is expired.

The chair recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you very much. This is a very helpful hearing, and I appreciate that we are having it.

Obviously, there are some people who have written to us that are not panelists. It is impossible to include everybody, so I am not criticizing that, but I would like to ask that the letters from Engine, from the Consumer Technology Association, and a letter signed by the American Library Association, the American Research Libraries, The Association of College and Research Libraries, the Authors Alliance, Engine, and several others be submitted to the record. If I may, without objection, Mr. Chairman.

Mr. ISSA [presiding]. Without objection, they will all be placed into the record.

Ms. LOFGREN. I will note, the questions posed I think are thoughtful ones and need to be addressed in these letters.

I will note that the libraries point out, and they are probably correct, that Rule 53(a)(1)(A) of the Federal Rules of Civil Procedure would allow for a special master that would actually serve the same function.

I would just note that that hasn't happened, which is why the authors have moved forward with this. And I don't think that is actually a realistic substitute for what is being discussed here, although, I am sure the librarians advanced it in good faith. I love librarians.

I do think there is value in having a small claims type of proceeding, but I am also struck by the concerns expressed about the amount of statutory damages and whether—I mean, listening to your testimony, Ms. Close, which was compelling, by the way—good for you—it wouldn't take very many damages to equal your entire revenue stream for a year.

And so would that really be a disincentive for a firm your size to actually register. And I think that is something that needs—you know, a bill is the beginning of a process, not the end of a process. I think that needs more discussion and to flesh out.

I am concerned about the issues that have been raised with trolls. And we have seen that in the patent environment, where you can actually go in with not much of a case, and just keep hitting people. And it is not the legitimate people, like you. It is people who take advantage of it as a business model. And I think we need to scrub this with that point of view, not the legitimate people such as you, but how can this system be abused. Because if you set up a system, somebody is going to try and game it, and how are we going to prevent that from happening?

I also am concerned, and maybe there is the—maybe we can deal with this in defining how the opt-out is crafted. I mean, you talked about some corporation stealing your stuff. Presumably, you know, they are run by grownups. They have a responsibility to respond. That is a different environment than, you know, a teenager—I am not saying it is proper—but on Facebook using an image.

The level of information, profit and abuse is completely different. And how do you, you know, accommodate innocent use—wrongful—but relatively innocent use by small parties in a way that doesn't fuel the trolls that have been expressed. I also—there is fair use issues, and I am concerned about how that will be addressed in the proposed board.

And I will just give a personal example. My daughter has twins. And the twins and my son-in-law were at a restaurant, and music came on, and—they were 18 months old. They were dancing to the music. It was really cute. And my daughter posted it, because it was adorable. And Facebook took it down because the music was in the background.

Well, that was fair use. I mean, it was a 15-second little thing with cute babies and my son-in-law, but that is fair use, and there is a rule for fair use. How are we going to ensure that those findings in the board without an appellate provision is consistent with what is being—what has—fair use is a judicial doctrine. How do we keep the fair use judicial doctrine in play with the copyright board when it hasn't actually—there is no appeal from it?

So those are some of the questions that I have. I don't think they can be answered today, but I think as we move forward, perhaps we can have discussion with the authors, all of you, and the other people who were not able to be witnesses today, to see how those legitimate questions can be addressed while still preserving the

very, I think, very useful goal of having a remedy that is accessible to artists—especially small artists—to get compensation.

So I thank you all for your testimony and for letting me throw my questions that there is now no time to answer out into the public arena. And I know that Mr. Jeffries and I will have a chance to discuss them further as well.

And I yield back, Mr. Chairman.

Mr. ISSA. In the prerogative of the chair, Ms. Close, if you had any response you wanted briefly, please.

Ms. CLOSE. Yes, thank you. Briefly, I am not going to address the legal stuff, but I would just like to remind every that photographers, the ones that I know, myself included, the ones that I have worked with at ASMP, we are not interested in spending a ton of time dealing with this.

We are in this business because we love making images. And certainly not—they say, if there is anything else you can handle doing, you like doing, do that. It is not an easy industry.

So I just want you guys to remember that in the context of what we are looking at here. I honestly, and I am speaking for myself personally, if you have shared something of mine on the Facebook and you are just an innocent person, I am okay with that. I am not—I don't have the time, interest, or inclination to go after every tiny infringement.

I am talking about larger companies, larger people. I am talking about major theft of my work. So I just want to put that out there as you continue to discuss—and I appreciate that you will continue to discuss this—that really what we want to do is get back to our jobs.

Ms. LOFGREN. Mr. Chairman, if I may ask for 30 seconds, please.

Mr. ISSA. Without objection.

Ms. LOFGREN. I appreciate that, and I actually completely believe you. It is just that when we devise these systems, we have got to think about not you, but a schemer. How do we prevent that? And, you know, unfortunately anything you build, if it can be scammed, it will be scammed, so we need to think in advance about that.

And I just want to make sure you know I wasn't questioning your good faith in any way.

Mr. ISSA. 10 seconds.

Mr. KUPFERSCHMID. Just 10 seconds. Right now, if your daughter wants to challenge that she has no remedy. She is not going to go to Federal court for that. We create the CCB, she could. She wouldn't need an attorney. She could say, Hey, wait, this is fair use.

Ms. LOFGREN. Actually, she is an attorney, but—

Mr. ISSA. I would like to thank all of the attorneys in the room.

I will note that currently, it does not opt-out noncommercial use, so Facebook would be subject. So notwithstanding the gentlelady's view that she wouldn't go after it, I will say for one, there would be somebody who would.

I am now going to take the prerogative and stay on this side and go to the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Speaker.

Mr. ISSA. Doug, do you mind? I didn't see you. I apologize.

No? Mr. Johnson. Go ahead.

Mr. JOHNSON of Georgia. Thank you. I will gladly yield to my friend from——

Mr. COLLINS. I will go after my friend from Georgia. You can go right ahead. I will be the next Georgia.

All I got to say is, Go Dogs.

Mr. JOHNSON of Georgia. Ms. Jenna Close, thank you for taking your time and expending your resources, which is time and money to come here and to testify on this very important issue of concern to many people, small business owners like yourself. You are really at the heart of our communities. Small businesses collectively constitute the heart of our communities in terms of commerce. And I appreciate what you are doing. And I understand the struggles of being in a small business.

Is the image of your work that you talked about you saw posted on those 41 websites, 13 or 11 of which were major corporations, I think I heard you say.

Ms. CLOSE. Eighteen.

Mr. JOHNSON of Georgia. How many?

Ms. CLOSE. Eighteen.

Mr. JOHNSON of Georgia. Eighteen of the 41 are major companies using your images for some commercial purpose, and making money based upon exploiting your work.

Have you ever considered seeking redress in court for the infringement of that particular piece of work?

Ms. CLOSE. Honestly, I have not done that. And I will tell you why. Ever since I started my business, I have been involved with ASMP, so I have been a member of the national board for 6 years, 7th as an ex-officio, and 2 years as chair.

And during that time, I went to many board meetings where we discussed the issues with copyright registration and infringement.

And then as my time as chair, this was the number one question that I fielded from members and had discussions with members.

So I was aware of the limitations of what I could do——

Mr. JOHNSON of Georgia. In terms of how much it is going to cost you?

Ms. CLOSE. I can't afford it. It would bankrupt me.

Mr. JOHNSON of Georgia. Do you have any idea how much it would cost to pursue one of these cases in court?

Ms. CLOSE. In Federal court?

Mr. JOHNSON of Georgia. Yes.

Ms. CLOSE. I have heard anywhere from \$100,000 to a half a million.

Mr. JOHNSON of Georgia. Now, the CASE Act would enable a creator who did not register their work to obtain statutory awards. Some suggests that this might enable abuse of the Copyright Claims Board.

What reason might you or your fellow creators have for choosing not to register a work with the Copyright Office?

Ms. CLOSE. What reason would I choose not to?

Mr. JOHNSON of Georgia. Yes.

Ms. CLOSE. Because registering my copyright is an investment in time and money.

Mr. JOHNSON of Georgia. How much does it cost?

Ms. CLOSE. Yes. And as a business person, I have to look at whether this investment is worth my time and money based on the return. And right now, it is not the case.

If I had an avenue where I could reasonably expect the process, what was going to happen, I get to understand where that investment was, I would register more frequently.

I am basically considering myself to register on principle, because I want to believe that it is right and that it works. But in all honesty, for me, it does not.

Mr. JOHNSON of Georgia. Thank you. Mr. Trust, what is the average annual income of the artists that you represent, and how does that compare to the cost of litigating a copyright case in Federal court?

Mr. TRUST. Well, for our members, it is \$34,000 a year. They work on average more than 50 hours a week. They earn about \$34,000 a year. And the idea, quite honestly, Congressman, of litigating is something that they would think about but very, very rarely actually undergo, undertake. And simply because, and forgive me for the analogy, you know, we at PPA, and all the associations, we sort of have our hands in the chest cavities of these businesses, these small businesses. And they are the chief production officer, chief marketing officer, chief technology officer, chief executive officer, the chief handyman, and the housekeeper at their various studios. They are swimming as hard they can to keep their heads above water.

So the idea of stopping and, first of all, looking for every infringement that is out there, and then trying to bring those to Federal court in some way is just—they have the opportunity to shoot and make money or to try to litigate. And so the average cost is tens of thousands of dollars for attorneys' fees, and then bringing that to fruition very often averages more than \$300,000 to \$350,000 in Federal court.

Mr. JOHNSON of Georgia. How often are the artists that you represent infringed upon, their work?

Mr. TRUST. Well, I mean, I think that is the right question, to be honest. Ninety-five percent say that copyright is important to their success. Ninety percent say that they have been infringed multiple times over the last 5 years, 90 percent. I mean, it is not something that they don't experience. And this is one of the things that keeps them awake at night. They put this right at the top of their list, Congressman, in terms of what worries them.

Mr. JOHNSON of Georgia. How frequently do these artists that you represent go to court to actually seek redress?

Mr. TRUST. You know, forgive me for not having a specific number. I can tell you very, very rarely. Well, first of all, about 3 percent register their copyright. So you have to do that before you are going to Federal court. And so it is extremely rare when a photographer is able to go to court. They don't not register because they don't value their work; they don't register because, if they do, there is no way for them to actually pursue it anyway. They basically would have to stop business. They would have to stop shooting. They stop marketing. Stop production. Stop everything to try to pursue this one case. It is just too much to ask of small creators, we think.

Mr. JOHNSON of Georgia. So a right without a remedy is like an illusion?

Mr. TRUST. The right without—I mean, I think that there is a right without a remedy. I am sorry, is that what you are asking?

Mr. JOHNSON of Georgia. Yeah. A right without a remedy is like an illusion.

Mr. TRUST. There is no protection there, you are right, Congressman, and that is the problem.

Mr. JOHNSON of Georgia. I yield back.

Mr. ISSA [presiding]. The gentleman's time has expired. But on that note, we close with a high note on a right without a remedy.

And now we go to the other gentleman from Georgia, another go dawg.

Mr. COLLINS. There we go.

And there are some of us in here who want to find a remedy. So this is something that I appreciate being an original co-sponsor of the CASE Act, and I think it is very important for small creators to have this level playing field.

My friend, Hakeem, and I have—we have sort of taken up this cause a little bit over time, and I appreciate him bringing this forward. Along with Reps Marino and Chu and Smith, we have been working on this bill, and I do believe there is a path forward. And I believe there is a path forward that all sides can come to an agreement on. And this is some of the things that I want to focus on just for a moment, and especially Mr. Berroya and Mr. Schruers, if you could help from the computer side and from the internet side.

We have been working on this. The discussion draft makes a lot of changes or makes many changes to address issues that were flagged that you all have flagged because there was a concern. One I have is what do you think of the provision that would limit the number of claims filed in 1 year? Mr. Schruers?

Mr. SCHRUEERS. I am happy to take that first.

Mr. COLLINS. Yeah, you first, and then—

Mr. SCHRUEERS. Thank you for the question. As my written statement explains in greater detail, that is a valuable step forward. It was not a change that CCIA recommended, but it was put forward in an attempt to respond to concerns about trolls that had been raised.

One of the characteristics of IP troll litigation is the extensive use of proxies, assignees, and other shell entities to avoid identifying the real party in interest. And so while we think that is a step forward, some provision that would strengthen that—the prohibition so that the real party interest cannot be disguised so that the cap could not be circumvented by assignment or other use of proxies would be an important change.

Mr. COLLINS. Mr. Berroya.

Mr. BERROYA. Thank you, Mr. Congressman. I would echo Mr. Schruers' response, and in addition to that, while the provision that you referenced is helpful in addressing trolling-type behavior, one of the key concerns that I outlined in its testimony is the importance of protecting small players on both sides of the V, if you will.

So imagine, if you will, a grandmother who is, you know, living in Boca Raton and she supplements her retirement income by embroidering versions of iconic photos onto pillows, and she sells them, and that is the business that she uses, again, to supplement her retirement income. If the bill is opt-out, as it is currently drafted, the provision that you are referring to doesn't help her if through the opt-out process she doesn't understand what is being put in front of her.

She gets a letter from a board that she has never heard off in Washington, D.C., she thinks maybe it is a scam or just ignores it altogether. She ignores the second notice. And then months later, she finds herself on the wrong end of a \$30,000 judgment against her that she doesn't have an adequate way of appealing in a Title III court. So that is the person and the type of respondent that we are worried about in this—

Mr. COLLINS. Okay. And I get that for a little bit, but I am going to stop here because I want to ask this question. There are a lot of other questions we are going to ask here, but I think what we are hearing here is what really concerns me, and Ms. Close and all of you as we have been working this from, is when it comes to this bill, what I have heard a lot in my office and I have heard from sort of both sides, but also the side, frankly, saying that it is maybe not needed, is I hear a lot of hypotheticals. Well, hypothetical—and I don't disagree with your hypothetical, they could be—well, for those of us who went to law school, we suffered 3 years of hypotheticals. And, you know, some of us are really just tired of hypotheticals. Because in this room today there is not a hypothetical. There is Ms. Close.

How many of you in here are creators in this room, who come here to support it? These are not hypotheticals. These are real people who have real issues with real infringement on their work. And for us to come back and to find a solution so that they can have a place, that they can have a regress, where they can have a remedy, where they can have something, we are always going to find—and one of the things that is great in Washington, D.C., is we will always find the hypothetical that says you can't. I am about finding hypotheticals that says those that create mean something and those that create have value and have infinite worth. And we need to make sure that we protect all sides. But also, if we ever get to the time to where the hypothetical wins out over the creator, then the creator is dead. And that is what we got to fight about.

So I appreciate everybody coming to the table today. I am looking forward to moving this. I think this is a great legislation that Mr. Jeffries and I have worked on. He has been champion on it. I appreciate so much his passion on this. But at the end of the day, for those who know me and know Mr. Jeffries and know others on this bill, we are looking for solutions. And if a hypothetical gets us to a solution, wonderful hypothetical. If a hypothetical is simply a roadblock in the way, it is time for a bull-dozer.

Mr. Chairman, I yield back.

Mr. ISSA. The gentleman yields back.

We now go to the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. I thank my colleague, Mr. Collins, for his tremendous leadership on a whole variety of issues we have worked on together, and certainly as it relates to the CASE Act.

Mr. SCHRUERS. I wanted to start by trying to just explore some of your concerns and get an understanding about your view on the progress that has been made. I noted that there was an expression of concern as it relates to copyright trolls. And in the original version of the bill, there was no limit on the number of cases that can be filed by a single party, true?

Mr. SCHRUERS. I believe that is the case, yes.

Mr. JEFFRIES. And in the current discussion draft, there is a limit of 10 cases that a claimant can file per year, which directly addresses the copyright troll issue, correct?

Mr. SCHRUERS. I understand that that is the intention. It may not, insofar as I explained in the previous answer, that the limit could be circumvented as we have seen in the patent context.

Mr. JEFFRIES. It represents meaningful progress, true?

Mr. SCHRUERS. I think it is a step in the right direction, yes.

Mr. JEFFRIES. Okay. The original version of the bill included a provision to award attorney's fees of up to \$5,000 when claims are brought in bad faith, correct?

Mr. SCHRUERS. I would have to review the original version, but I am willing to take your word for it.

Mr. JEFFRIES. Okay. Now, the discussion draft changes that bad-faith penalty so that there is no ceiling on the cost in attorney's fees that can be awarded under extraordinary circumstances. Does that meaningfully address a concern relative to copyright trolls?

Mr. SCHRUERS. Thank you for the question. I think that is a very valid observation, which is that in extraordinary circumstances, a defendant can receive more than either 2,500 or 5,000 for bad faith. I think it is notable that that statutory limit is significantly lower than what plaintiffs get without any proof of injury for statutory words—

Mr. JEFFRIES. Well, reclaiming my time, just because I have limited time. Is it a step in the right direction, to use your language?

Mr. SCHRUERS. I think it would be if it were properly framed. I do think there are some changes there that should be considered for equitable purposes, both for victims of abuse as well as victims of infringement.

Mr. JEFFRIES. Now, with respect to the opt-out regime versus the opt-in regime, in the original version of the bill, a party had to opt out every single time he or she was served with a notice, pursuant to the small claims system, true?

Mr. SCHRUERS. I believe that is the case. I will take your word for it.

Mr. JEFFRIES. Okay. But the discussion draft now provides for a blanket opt-out that would allow parties to preemptively opt out by filing with the Copyright Office a singular notice that they do not wish to participate. Is that correct?

Mr. SCHRUERS. Yes, it is.

Mr. JEFFRIES. Do you think that that singular notice is a step in the right direction?

Mr. SCHRUERS. I believe it is something that would be used by larger and business entities who were aware of this. I don't think

that would find particular uptake among the individual users that we have been discussing in parts of this.

Mr. JEFFRIES. Okay. But your trade organization, as I understand it—and I respect your organization and respect those companies, the Internet Association, represent Amazon, Pinterest, Facebook, Google, e-Bay, Twitter. I understand that we are talking about hypothetical possibilities related to a grandmother in Boca Raton, but I would rather deal with the real world. And the real world is, I think, your companies clearly have the capacity to opt out in a singular notice without that presenting any real burden, true?

Mr. SCHRUEERS. As my written statement says in greater detail, yes. That is something that larger business entities could likely take advantage of.

Mr. JEFFRIES. Okay.

Mr. SCHRUEERS. The individual internet user constituency, which is not here today, for whom I am unwilling to speak, other than indirectly as providing them services, are unlikely to do that, and indeed, may not be in a capacity to take advantage of that framework.

Mr. JEFFRIES. Okay. But you are saying you don't have the capacity to take advantage of that, but I think many of the companies—again, companies that I respect, Pinterest, for instance, as an example, you know, has what will be called by some a contract of adhesion, right. To participate in Pinterest, you basically have to acknowledge that if you are unable to resolve a dispute informally, we agree to resolve any claim, dispute, or controversy arising out of or in connection with, related to the terms, through binding arbitration.

And so I guess what I am concerned about is, I get all of this due process language, and it sounds flowery and it is beautiful. But with respect to many of the companies that you represent, you have these contracts of adhesion where the same internet users that you are saying you are here before the committee to defend are waiving their rights to participate in the Article III Federal court system. So it becomes a little difficult, I think, for many of us to take some of these concerns as seriously as they are being projected. Because at the end of the day, what we are really fundamentally talking about is that you have a situation that has been set up, consistent with the United States Constitution, Article I, section 8, clause 8, which talks about promoting the progress of science and useful arts, which includes visual artists and photographers and authors and others, who the Founders understood was important for them to have a right to vindicate that should be allowing them to benefit from the fruits of their labor and, therefore, share it.

I would just ask the gentleman for 30 seconds.

Mr. ISSA. I am afraid they are going to call votes in just a moment. If you could wrap it up in 10, I would appreciate it.

Mr. JEFFRIES. Okay. So let me just simply say that all we are trying to do here is you have a notice and take-down remedy that is inefficient that is not working on the one hand and you have an Article III court system that is out of reach. And we are just trying to provide the creative middle class, small business, women and

men throughout America, consistent with the United States Constitution, the ability to pursue the rights that they have been granted.

I yield back.

Mr. ISSA. I thank the gentleman.

We now go to the gentleman from Texas, Mr. Gohmert. Please stay within your time.

Mr. GOHMERT. Have I offended by going over my time?

Mr. ISSA. I love you, Louie. I just want to get to my time before the vote. Go, please.

Mr. GOHMERT. Okay. I know we have got some differing opinions with regard to copyright trolls and the potential abuse. And the word “troll” seems to be a popular one when it came to patent and was used to push through legislation a couple of times, it didn’t really affect the patent trolls. But I am curious, Mr. Kupferschmid, give me your opinion about how we stop copyright trolling but allow people to defend their own copyrights.

Mr. KUPFERSCHMID. Thank you very much for the question. Let’s assume that there is a copyright troll problem for the purpose of the question. There are, in the bill, numerous safeguards to prevent copyright trolling. I will go through them.

One, it is optional. The whole system is optional. You either can opt out on a case-by-case basis or blankets of—

Mr. GOHMERT. When you say you, the second person—

Mr. KUPFERSCHMID. The respondent. Sorry. The respondent can—they think this is a copyright troll, they go, no, thank you, and the case goes away. They opt out.

Number two, there are penalties for bad faith and frivolous claims that are severe. Attorney’s fees, not only up to 5,000, but in extraordinary circumstances can exceed \$5,000. You can get banned from use—sorry, the claimant, the copyright troll, can be banned for 1 year from using the CCB if, in fact, they have been found—for trolling. Not only that, every case that they have pending before the CCB would be dismissed. That is a lot of money that they would lose.

There is a cap on damages, perhaps most importantly. That prevents trolls from making threats of massive unpredicted copyright damages in an effort to extort cash settlements. That is five by my count so far.

Number six, there are limits on the number of cases that can be brought. You can’t bring more than 10 cases in a year, a particular claimant.

None of these restrictions exist in Federal court. Why they would go to the CCB and not go to Federal court is beyond me. Also, trolls would lose money. If people opt out, they lose to filing fee. They don’t have that problem in Federal court. This bill will actually help prevent trolling because what it does is it allows creators to go and use the CCB without having to use attorneys that are on contingency fee cases.

Mr. GOHMERT. Let me here from Mr. Schruers. You have a differing opinion?

Mr. SCHRUEERS. As I think I explained in my written statement and previously—

Mr. GOHMERT. Right.

Mr. SCHRUEERS [continuing]. The use of shell entities, proxies, and other constructs to avoid identifying a real party in interest and other civil—Federal civil procedure caps as is common in Federal troll litigation. And so we suggest tightening the cap and also not allowing it to be adjustable by the Copyright Office in order to avoid these problems.

We do think the imposition of a cap is a step in the right direction in trying—in acknowledging that the presence of abusive litigant problem and trying to impose some meaningful constraints on it.

Mr. GOHMERT. Okay. Well, thank you.

Ms. CLOSE, there is a burden on a copyright holder to protect the copyright. But when we are talking internet, we now have the capability, people with the platform can take it down just as easily if, you know, they have access, they could take it down as easily or perhaps more so than to wait to be notified.

What is your position on not just the copyright holder having a burden of taking something down when it is in violation of copyright?

Ms. CLOSE. I am not sure I understand your question.

Mr. GOHMERT. Well, you know, the internet, you have got a lot of platforms there. If there is a platform wherein somebody's infringing on a copyright, why couldn't you have the provider of that platform take it down without having to wait—I know it is not currently the law, I am just asking—

Ms. CLOSE. I don't even know how I would go about that. Having to provide—

Mr. GOHMERT. You are familiar with the internet, though, right? You use the internet tons of times. Okay.

Ms. CLOSE. Yes, I use the internet daily.

Mr. GOHMERT. And you know there are platforms and, in fact, we have had people from different platforms here in your very chairs, and I am just, as my time is expired now, but I would encourage you to think about the possibility, because the platform providers do have the ability to take things down without being told to do so. And, in fact, it could be to where they are even infringing when they allow their platform to be used as an infringing platform.

Thank you. I yield back.

Mr. ISSA. I thank the gentleman for yielding back.

We now go to the gentlelady from Florida for 5 minutes.

Mrs. DEMINGS. Thank you so much, Mr. Chairman. And thank you to our witnesses here today.

I have no doubt that the CASE Act is a much needed piece of legislation that is truly going to help protect the creativity of the persons in this room and many others who are not here. So I am delighted to see us get to this point.

Mr. Schruers, you started talking about some of the concerns that you had or some of the issues that you had, but I would also like to hear from all of you, while this legislation is going to make a big difference, I would like to hear—because, you know, we frequently hear the legislation is great, but it doesn't quite go far enough, or there may be some unintended consequences.

If you have any concerns or anything that you would like to add in this particular draft that has not been added, I would like to

hear from all of you in that area. And we will start with you, Mr. Trust.

Mr. TRUST. I thank you, Congresswoman. So you are asking what we might want to add into it that is not in it presently?

Mrs. DEMINGS. That is absolutely correct.

Mr. TRUST. Wow, that is a tall order. I will say this. We made quite a number of concessions, if you are familiar with the history of this legislation. We made quite a number of concessions that were painful, that were difficult for us to make.

Mrs. DEMINGS. So one area that you didn't quite get to, though, that you wish was—you would have.

Mr. TRUST. Well, we would probably like to remove a few things. One, the cap on 10 would be one of them. We are certainly concerned about that. We would probably include just stronger wording so that it—so that people felt the need to actually participate. We would, I think, like just additional, I guess, protections in it that included things like injunctive relief and others, but I hesitate to say that because we early on recognized that injunctive relief would be a hurdle that we would not be able to overcome, and so we immediately took that out.

So there were a number of things that we, out of good faith, removed from this, or that we were willing to see removed from this, simply because we felt like this was our one shot at the table. Honestly, creators never get this shot at the table. Small creators never get this opportunity, and we were nervous that we maybe wouldn't be able to get this through so—

Mrs. DEMINGS. Thank you so much.

I am going to go to Ms. Close.

Ms. CLOSE. As I mentioned before, I am not a lawyer, so I don't want to speak out of turn on some of the specifics, but I will say, from my perspective, I feel like an unintended consequence. And I know that the law did not mean to turn out this way, but it is seriously affecting myself and my colleagues' ability to survive in this world. Imagine what it would be like if everything we provided was gone. It affects everybody. It affects small businesses, large businesses. I believe that we provide a service to humanity, really, if you want to go that large with it.

I would love to see the cap on 10 removed just because I have 41 infringements in one image, not that I would take all of those people to court.

Mrs. DEMINGS. Eighteen of those were large companies.

Ms. CLOSE. Eighteen of those were large companies. I will take the 10 because 10 is better than zero. But I would prefer to see more.

Mrs. DEMINGS. Thank you.

Ms. CLOSE. One step at a time.

Mrs. DEMINGS. Mr. Berroya.

Mr. BERROYA. Thank you, Congresswoman. I will keep it short. The three things that Internet Association believes would drastically improve the bill would be switching from an opt-out process to an opt-in process to ensure that small creative entities that are building their businesses online and offline are protected adequately and have due process and fairness in the overall process. Clarifying that the bill does not impact the operation of section 512

is also critically important from our perspective. And, finally, amending the draft to reserve statutory damages to those who have timely registered.

Mrs. DEMINGS. Thank you.

Mr. Kupferschmid.

Mr. KUPFERSCHMID. Thank you. So as you heard, we have—I am just going to echo David's comments without repeating them, but I will point out that, you know, what we have seen in the testimony from CCIA and IA is basically more of the status quo. They are asking for opt-in, which is the status quo. We have opt-in right now right. You send somebody a letter, they either respond or they don't respond. That is opt-in. Same with ADR, right. De novo review, that destroys—that destroys the value of the bill. We are creating this bill because these small creators cannot afford to go to Federal court. This would require them to go to Federal court de novo review and get attorneys and complicated process.

So it has been very, very frustrating. We know, we are little guys, we are coming to Capitol Hill trying to get this bill passed. We have got these internet giants representing huge companies that we are going against who easily and routinely kind of stomp us to the ground. And every time we give something, they push the goalpost further. It is like that scene in Animal House where you bend over and you go, thank you, sir, may I have another. That is what is going on here.

Mrs. DEMINGS. Thank you for that image.

Mr. ISSA. That one is going to be with us.

Mrs. DEMINGS. Thank you so much, Mr. Chairman. I gladly yield back to you.

Mr. ISSA. I thank the gentlelady.

You know, going last usually makes it easy. I recognize myself. But I will, at great peril, I will pick up where the gentlelady left off.

You know, I appreciate the little guy, big guy. You heard today, I think, from several people—several members their concern about trolls. It is one of the key items, I think, that needs to be resolved as this bill progresses. And so if I can spend a little time kind of querying that.

Ms. Close, you said you had no intention of going after Facebook, as a potential user, beneficiary, and currently, as you said, victim. If this bill exempted noncommercial use so that we wouldn't be dealing with these people who are not sophisticated and who, by definition, you know, really don't know what they are supposed to say or do, and without advice of counsel, if possible, what would your view on that be? And I am talking about an individual view for a moment.

Ms. CLOSE. My individual view would be I would take it if that is the only way to get this thing through, the rest of it, but I would prefer not to have it in there. And that is me only not knowing legalese.

Mr. ISSA. No, I understand. I understand. The follow-up question, of course, on that would be, if takedown were considered to be an opt-out so that if someone receives notice—and let's presume for a moment, and I will tell you a story in a just a second before the vote. If somebody gets a notice of a picture, whether it is a big cor-

poration or a little one, and they thought it was clip art and they take it down, we are presuming website for a moment, to you, and again it is to you individually, is that a remedy? Assuming that, you know, this isn't a pervasive user but, you know, you went out, you did your search, you have got a picture that you uploaded, they have got it on their site, you send them the notice and it comes off. Is that, in fact, in your view, a remedy, or do you still want a piece of their hide?

Ms. CLOSE. I would say it is a step toward a remedy, but it is not a remedy, because it is still my work and it still got used, and it is my not my fault that that person didn't understand the law and the rules.

Mr. ISSA. Remember, this was not a registered—this was not registered—

Ms. CLOSE. Right. Okay. If it is not registered, then fine. If it is not registered, done. If it is registered—

Mr. ISSA. Right. But the current bill allows for you to run in, register it, and then file. So the question is, was it posted, as it very likely would be in many cases under the bill as I read it, if it was—if, in fact, you have an unregistered work and you either go and register it after it is already posted and then give notice, or if, in fact, you haven't even yet registered it and you are just sending them the notice, that is the question.

Because one of the things about this bill as it progresses is good people on both sides are going to try and find common ground.

Ms. CLOSE. Of course.

Mr. ISSA. And one of the nice things about us, since we don't have outside income, is we tend not to be on either of your sides. So that is why I am asking that question of, you know, if it is not registered, if there isn't yet a database where somebody can clear things, what do they do?

Because I have been—you probably have too. You have been up at the Getty Museum. They are frustrated as all get out trying to clear works that they can just put on because, in fact, they have a team of lawyers to try to make sure they never violate, and it is tough, particularly in the case of what one might call orphan works. But I would like your view on that.

Ms. CLOSE. I mean, I guess I would say—and, again, not as a lawyer and not knowing the super in depths of this particular bill, but if it is too complicated, it needs to be simplified. And I think this is a way to simplify it. However, copyright, I know, is afforded to me when I make a piece of art. When I register it, I am afforded other benefits, I guess I would say.

Mr. ISSA. You gain statutory—

Ms. CLOSE. Right. So I would want—

Mr. ISSA. You have to do it in order to gain access to this court.

Ms. CLOSE. So as the copyright owner of that work, I would want to enter a level playing field with somebody, regardless of whether I had registered my copyright before they infringed on it or not. However, a secondary thing that I appreciate and that I hope that this bill would do is that ultimately I would like everybody to register their copyrights. And I would like also the people who may non-willfully infringe, people who innocently do it, because those people are out there, to be educated about what that means, be-

cause ultimately the bigger picture of this is that there is a cultural shift. And image theft and not respecting a creator's property and work is a much larger issue than just the internet it is free, it is a whole cultural thing.

So I can't directly answer your question, but I would say that as of right now, yeah, I would want to be able—I would want to be able to enter a level playing field with that person and let it be hashed out one on one, regardless of whether my copyright was registered before or after.

Mr. ISSA. Now, I told you I would tell you a story, and I will be brief. Back in the nineties, that is the 1990s, not the 1890s for people that look at my age, I was manufacturing, among other things, the Viper car alarms. And I had had an artist paint a fanciful, as it was called in the litigation, snake, that became known as the image of the Viper.

And one day I became aware in the St. Louis newspaper that a Dodge dealer said, the Viper is coming, and what a surprise, he had my snake. I sent a letter to Lee Iacocca telling him that these kinds of things could be a problem. He filed a DJ and hundreds of thousands of dollars on his side and hundreds of thousands of dollars later on my side, we had our first meeting to try to resolve this. His ego, my image.

I am acutely aware that everybody thinks somebody else's image is clip art, which by the way was the defense of the car dealer. Oh, that was clip art. My sales, you know, the ad agency just pulled it. Of course, it was a unique image, in many ways more unique than a photograph because it was a reproduction from an original painting, and that snake never existed so you couldn't just snap a picture and get something similar.

No such court or capability existed, and in my case, it probably wouldn't have been used. But it certainly then, if you were to go out and look at that image today, you will find thousands and thousands of copy of the Viper snakes of various trademarks. It is almost hopeless to protect because of proliferation.

Now, we are a commercial—my former company is a commercial product, so we are hurt only in one way, not the way you are hurt, since your artwork is truly your product. So I am going to address my closing to the gentlemen on your left and right.

I heard you say today—and I have great sympathy for you, maybe even empathy. I heard you say, as they were talking about great concessions, which by the way, just so you understand, you are not making a painful concession from your original ask; you are making a compromise from a list of everything you wanted.

But having said that, I only heard you say what would make it better. I never heard either of you commit that if you got certain things, you could be for this bill. And that would be the challenge that I would hope that, in a few minutes before we have to leave, you would lay out if that exist and how we get there. Because although there are deal killers and you may understand them, including a de novo review with no heightened penalty, these sort of things you and I can know, that you can do better than that.

So my question to you is, what does it take to get you to yes on a bill that could protect people reasonably from trolls but could provide a real opportunity for short, quick, and relatively painless set-

tlement of disputes, particularly when somebody believes that they have a fair use and they might be wrong? I know you came here prepared to get to yes, so that is why I am asking.

Mr. BERROYA. Absolutely. And, Mr. Congressman, I am somebody who spent the last 7 years enforcing copyrighted works online, so I understand the challenges.

Mr. ISSA. Always good to have been both the plaintiff and the defendant.

Mr. BERROYA. Absolutely, Mr. Congressman. The three issues that we laid out and the two additional issues that I referenced and are included in my written testimony, are the only issues that I am aware of that IA and its members have with the bill. We are 100 percent committed to working with the committee in making sure that the goals of this bill are accomplished.

Mr. ISSA. Mr. Schruers.

Mr. SCHRUEERS. Thank you, Congressman. In the spring, CCIA actually did submit an extensive red line to committee staff identifying the issues that we regarded as critical, embodying all of them and providing explanatory text to explain why particular changes were being made. Those changes were almost uniformly rejected, and what is reflected in the discussion draft is what is represented to be efforts to address the concerns that we identified.

Unfortunately, that view isn't universally held, but I think we have been fairly clear about what the issues are, and they are represented in a more concise form in the written statement and very similar to the issues raised by IA. You know, I agree, I think that we have a desire to get to yes on this.

I also think it is worth noting that there seems to be a consensus that the root cause of the problem is a general disuse of the registration system, which we know is inconsistent with Congress' intent about promoting registration. And so I would suggest that even as we are trying to work to get to yes on this solution, we should look at the actual root cause, which is that creators are saying we are disincentivized from using the registration system. And I say that as a representative of consumers of the registration system, which is to say, digital services who want to make works available at scale need information to know who to pay. They want to put money in artists' pockets, and the system that the government has to enable that is not working. And that is something that we should also give attention to.

Mr. ISSA. Okay. I am going to let you close in just a moment, Ms. Close. But I am going to say to both of you, and to all the parties here, if you would like to revise and extend your best written example of what you believe the legislation would look like, not general ideas, but several of you are very good at draft legislation, so that we could see sort of your best offer of language you believe would enable, and as you said, you have been on both sides, that would work for you as a plaintiff, that would be helpful.

Ms. Close, I said I would let you close. I want to leave you with one thing though, as both a constituent and now testifying. We have been frustrated for a long time here that the Copyright Office has not made it possible to have sort of an easier, more modern way to display that you have in fact registered, and we are particularly talking about works of photography.

It is my view that in the foreseeable future, since I know they are not going to get to you simply upload and they maintain it, that we will get to—thank you—to linkable databases where you will be able to, in my opinion, post your work essentially on your own site, link it to the Copyright Office, and be, under the law, considered to have informed the Copyright Office.

This form of modernized registration that allows you to have terabytes of information linked in some official way to the Copyright Office so that we are on public notice, they are on public notice, and allowing those Google searches, if you will, to be easily done. That, in fact, is in our future; it is not here today.

And I have been told that I can give you 30 seconds, then I got to run. Please.

Ms. CLOSE. I think that is great. I think that that would help, but I also want to say that registration is not the root cause of the problem. The root cause of the problem is not being able to enforce the registration and the rights that we are provided. So that would be a step in the right direction, but it is not a solution.

Thank you.

Mr. ISSA. And I said I was closing, but I will close with a patent reminder. If I place the number of my patent on my product, I have given constructive notice. The reality is, for the internet, they need constructive notice, and we in Congress need to define what that constructive notice.

I am sorry that I cannot do a second round for the many people here to ask. With that, we stand adjourned.

[Whereupon, at 3:57 p.m., the committee was adjourned.]