

The CASE for Small Claims in America

Testimony Submitted to

The House Judiciary Committee
on H.R. 3945, the Copyright Alternative in Small-Claims Enforcement Act of 2017” or the
“CASE Act of 2017”

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on behalf of

A COALITION OF VISUAL ARTISTS

American Photographic Artists
American Society for Collective Right Licensing
American Society of Media Photographers
Digital Media Licensing Association
Graphic Artists Guild
National Press Photographers Association
North American Nature Photography Association
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INTRODUCTION

Mr. Chairman, as visual artists, and the organizations that represent them, we are grateful for this opportunity to talk about copyright in America, and in particular, the proposed creation of a long-overdue small claims process to hear copyright claims, in general and H.R. 3945, the “Copyright Alternative in Small-Claims Enforcement Act of 2017” or the “CASE Act of 2017”, in

particular. We applaud the leadership of the House Judiciary Committee for its decision to shine a bright light on the issue, bringing into clear view an inequity that has existed for decades. We recognize there are other significant discussions across the copyright spectrum that need to take place; however, we believe there is no discussion that will affect more small businesses—more mom-and-pop creators—than that of establishing a small claims system. Furthermore, there is no issue that will have a greater long-term effect on the health and well-being of America's copyright system.

The universe of visual artists and other small creators includes hundreds of thousands of small businesses including photographers, illustrators, graphic designers, authors, song writers, journalists, videographers, and many more. They create, provide, and license their creative works to the general public, the news media, magazines, advertising, books and other publications, consumer products, digital platforms, multimedia presentations, and broadcast. Our members are typically one or two-person businesses and small family enterprises that function as both creator and support staff who are responsible for running all facets of their business. In most cases these individuals create works, schedule the jobs, make client contacts, prepare the marketing, keep the books and pay the bills¹.

Most of them work extraordinarily long hours and earn (using professional photographers as an example) on average just \$34,000 a year². We depend on these creators—we need them. Almost every minute of our day is filled with their works. We see the results of their efforts almost from the moment we open our eyes in the morning, until we close them again at the end of the day. They enrich our lives, and bring color to our world and our businesses. They help record historical events for posterity. Small creators make up the largest classes of copyright holders in America. Collectively, they represent the majority of the U.S. copyright community.

¹ Comments submitted by The Coalition of Visual Artists to Chairman Goodlatte and Ranking Member Conyers entitled "Creating A USCO Capable of Succeeding in a Changing World. (January 30, 2017), pg.2.

² United States Department of Labor- Bureau Of Labor Statistics. Accessed September 21st, 2018 <https://www.bls.gov/oes/current/oes274021.htm#nat>.

THE REALITY OF COPYRIGHT IN AMERICA

With so much at stake, it is surprising to most people to learn that, as a practical matter, America's system of copyright protections does not work for the majority of its creators. For decades these smaller creators have looked longingly from the outside at America's copyright system, wishing that it provided them the same protections it affords other creators.

Unfortunately, the laws designed to protect creators, and to incentivize them to create even more, do anything but for most visual artists. The problem is centered in the remedy process for copyright infringement provided in the statute. As it stands now, small creators who have seen their work used without permission (or just outright stolen), or compensation have had one path for relief; filing a lawsuit in U.S. Federal Court. For practical purposes, however, that path is no path at all because the cost of federal court puts the option out of reach for small creators.

FEDERAL COURT: NO REMEDY FOR SMALL CREATORS

Research shows that 70 percent of professional photographers have suffered multiple infringements over the last few years, and that 75 percent of those infringements were typically valued at \$3,000 or less.³ In contrast, the cost of litigation in federal courts is tens of thousands of dollars, sometimes hundreds of thousands of dollars. The math simply works against most small creators.

From a real-world perspective, there is no copyright protection for many smaller creators.

These numbers dramatically illustrate why we so ardently support small claims legislation. For the members of the visual arts community, the overriding purpose of a copyright small claims proposal is narrow and straightforward; to end a longstanding inequity in our copyright system and finally provide photographers, illustrators, graphic artists, other visual artists and their

³ Survey conducted by Professional Photographers of America, The Importance of Copyright to Everyday Photographers. October 16, 2015; Questions 2 and 4.

licensing representatives with a fair, cost-effective and streamlined venue in which they can seek relief for relatively modest copyright infringement claims.

Under current law, too many legitimate copyright claimants are unable to pursue a copyright infringement action in federal court. This is due primarily to the prohibitive cost of retaining counsel and maintaining the litigation for some of these relatively low value claims brought by visual artists—a situation exacerbated by the fact that “they are often opposed by large corporations with limitless resources and the resolve to complicate and protract a case in hopes that the plaintiff runs out of patience, money or both.” In sum, “[a]s a practical matter, except for large corporate copyright owners, our current copyright laws are virtually unenforceable when it comes to the infringement of visual works,” — a view that was echoed forcefully during the Committee’s November 2015 session in Los Angeles devoted to the challenges facing photographers in today’s marketplace.

For visual artists and their licensing representatives, copyright violations are a pernicious problem. Copyright infringement reduces dramatically the economic incentive for creators to produce creative works, which in turn limits the works available for licensing. Visual artists create original intellectual property for licensing. Copyright infringement of this material has contributed to a devastating economic loss for our members and the companies that license their works. The burden of policing infringements stretches the resources of artists and business owners and their representatives, who must create, deliver and distribute relevant visual content in a market that only functions when images are properly licensed. At the same time creators are also seeking and fulfilling assignments, working on self-initiated projects and maintaining all of the tasks of running a business, dealing with clients 24 hours a day, 7 days a week. Moreover, copyright violations such as the removal of copyright management information can disassociate a work from an artist and result in uncontrolled viral distribution of a work with no compensation to the artist. Overall, for many, losses due to infringements and violations have been overwhelming.

The Copyright Office’s 2013 study on copyright small claims indicates that the cost of bringing an infringement case is far beyond the reach of most visual artists and even most companies that license the works on their behalf.⁴ The cost of litigating a copyright case through appeal averages \$350,000 and the cost of discovery in federal court alone can easily dwarf any potential recovery for infringements of typically high volume, low-value creative works. Nor are the costs of copyright infringement litigation limited to money — “years of investing time and energy in a single case are crippling to people whose sole source of income is their ability to create and market their work.”⁵

Even finding a willing lawyer can prove daunting. It is reported that most copyright lawyers believe that it is not worth it to bring an infringement suit worth less than \$30,000.⁶ In addition, the cost and burden of registering works, especially for individual photographers who may create as many as 70,000 individual photographs per year, causes many visual artists to forgo registration, and with it the ability to pursue infringers in federal court.⁷

Where there is no remedy, there is no protection.

This is particularly true when a typical infringement may only be valued at less than \$3,000; an amount well below the threshold for bringing a federal action. For a business with thin margins, this represents a significant and devastating loss of income to the visual artists and their representatives. For individual artists, many of whom only earn approximately \$34,000 per year, \$3,000 is a significant part of their monthly budget, and may make the difference between remaining in business or closing.

While these types of enforcement challenges have plagued individual copyright

⁴ United States Copyright Office. (2013). *Copyright Small Claims- A Report of the Register of Copyrights*.

⁵ American Bar Association’s Comments on Remedies for Small Copyright Claims: Response to notice of Inquiry (77 F.R. 51068) (Docket No. 2011-10) (October 19,2012), pg.5.

⁶ *Ibid.*, pg. 7

⁷ Comments submitted by The Coalition of Visual Artists to Chairman Goodlatte and Ranking Member Conyers entitled “Creating A USCO Capable of Succeeding in a Changing World. (January 30 ,2017), pgs. 7-8.

owners for years, the uncontrolled, unauthorized reproduction and distribution resulting from the advent of the Internet and the World Wide Web has been a truly negative game changer. Today, photographers and other visual artists see their creative efforts distributed without authorization, credit or compensation on myriad online sites while being virtually powerless to intervene. Within seconds of its creation an image may be downloaded and re-posted going “viral” in short order. It is easy for a digital image to be stripped of its copyright management information and other metadata, preventing law abiding publishers from identifying the rights holder and often frustrating attempts to legally license the work. To succeed in today’s electronic age, photographers often have little choice but to actively post their work to the internet and to social media, often within hours or days from the time of creation. This leaves them at the mercy of those providers who strip out identifying metadata, and to infringers who copy, distribute, and profit from their work, without permission. More than one generation has come to believe that uninhibited access to online visual images is not only the norm, but their rightful entitlement. H.R. 3945 presents Congress with a tremendous opportunity to enact a viable small claims copyright process and thus ensure that individual creators have both rights and viable remedies under the copyright law.

SMALL CLAIMS AS A USCO FUNDING SOURCE

Small creators include copyright protection among the issues they consider most critical to the success of their business. Yet, less than three percent regularly register their work.⁸ The disconnect is caused by the absence of a practical remedy when an infringement takes place. But there is a practical component that reaches beyond the financial success of their small business and directly into the coffers of the United States Copyright Office.

⁸ Survey conducted by Professional Photographers of America, The Importance of Copyright to Everyday Photographers. October 16, 2015; Question 5.

If less than 3 percent of those creators regularly register their works, then conversely, more than 97 percent of those creators never pay into the U.S. copyright registration system. The multiplier on the lost revenue is significant.

Consider, for example, just one sub-category of a single class of copyright holder; wedding photographers. 2.5 million couples were married in 2017.⁹ If wedding photographers finally had a reason to register their works, which is to say there was a practical remedy were they infringed, and conservatively 3 in 10 of those photographers registered their work, the increase in copyright registration revenue would jump to more than \$41 million. Of course, those numbers don't reflect the myriad of other creators who would likewise be incentivized to register their works. For example, the CASE Act further recommends the creation of a filing fee required to bring a small claim action, creating another category of revenue into the Copyright Office.

As of the date of this hearing, the United States Copyright Office is looking for ways to increase revenues into the office, including the possibility of drastically increasing fees on small creators, most of who don't participate in the system for all of the reasons cited above. Raising fees without first addressing the lack of a remedy simply underscores the need to drive new revenue streams into the U.S. copyright system. The CASE Act addresses that in a realistic way.

H.R. 3945 closely tracks recommendations made by the Copyright Office in its 2013 study that was drafted in response to a request by the House Judiciary Chairman Lamar Smith (R-TX). The study was a major undertaking by the Copyright Office. The Office conducted four days of public hearings, held three public comment periods, and received written comments from individual authors, industry associations, public interest groups, technology companies, publishers, and scholars.

⁹ Wedding Wire. "2018 Newlywed Report". <https://go.weddingwire.com/newlywed-report>. (Accessed September 20, 2018.)

Mr. Chairman, the fruits of the Copyright Office's comprehensive and landmark study are found in the legislation before you and your colleagues.

H.R. 3945 offers individual creators and small business owners a fair, cost-effective and streamlined process that provides meaningful relief for relatively modest copyright infringement claims. The bill:

- Creates a Copyright Small Claims Board (CCB) with authority to award statutory damages of up to \$15,000 per work but no more than \$30,000 in total damages. Additionally, it does not have the authority to issue injunctions;
- Is 100% optional whereby a prospective plaintiff has the option of pursuing his or her claim in federal court or initiating a claim before the CCB and where alleged infringers have the right to opt-out of the process;
- Instructs that cases before the Board are heard by 3 Officers appointed by the Librarian of Congress;
- "Provides that 2 of the 3 Officers must have represented or presided over a diversity of copyright interests, *including* those of both owners and users of copyrighted works." Additionally, one of the three Officers must have experience in alternate dispute resolution (ADR);
- Provides a less formal, streamlined process where (1) in-person appearances before the CCB are not required as proceedings are conducted electronically; (2) legal representation is optional, (3) law students can represent parties before the CCB on a pro bono basis; and (4) discovery is limited;
- Requires the "Officers to be bound by judicial precedent in deciding a case, but that their decision do not establish such judicial precedent;
- Tracks the judicial review provisions of the Federal Arbitration Act by permitting a party to challenge the enforceability of the CCB decision due to: fraud, misconduct, or on similar grounds; and
- Authorizes the Copyright Office to adopt a two-tier system with even more-streamlined rules for claims of \$5,000 or less.

H.R. 3945 is fair to parties who may appear before the CCB. For example, the bill:

- Allows respondents to opt-out of the small claims process;

- Dramatically limits a respondent's financial exposure by capping potential damages and insulating them from attorney fee awards (unless they act in bad faith);
- Permits respondents to raise all defenses available in federal court, including fair use;

Mr. Chairman, we believe the current bill is well-crafted and responsive to the interests of both small creators and potential respondents. It is worthy of enactment in its current form.

We recognize, however, that some in the private sector have expressed concerns about certain aspect of the pending bill. Earlier this year those concerns led Mr. Jeffries, the chief sponsor of H.R. 3945, to call interested parties, including the Internet Association (IA) and the Computer and Communications Industry Association (CCIA), together so those concerns could be flushed out and addressed in the legislation, if such action were deemed appropriate. Based on those discussions and in response to questions raised by concerned parties, Mr. Jeffries circulated a revised proposal, dubbed the CASE Act Discussion Draft.

The Discussion Draft proposes several changes to H.R. 3945. Some are improvements and deserve to be added to H.R. 3945 and any future claims legislation. For example, we support changes that:

- Strengthen deterrents against bad faith and frivolous claims by: (1) allowing the CCB to award attorney fees and costs in excess of \$5,000 in exceptional cases (§1405(x)(2), page 17); and (2) requiring dismissal of all pending cases filed by an individual when the CCB concludes that the individual previously filed cases in bad faith, except where the other party objects; (§1405(x)(3), page 17-18);
- Respond to concerns that defaults might occur if a claimant were to send a notice to the wrong person at an organization. The discussion draft allows organizations to designate an agent with the Copyright Office to receive service from a small

claims claimant and for the Office to post the agent’s name on a publicly available designated agent list for claimants to reference (§1405(g)(5), page 11);

- Bolster the protections found in the opt-out process by requiring the Copyright Office to send a second notice to a respondent who has not yet opted-out within a prescribed time period. (§1405(h); and
- Instruct the Copyright Office to issue regulations allowing for the Office to review “small claim” registrations on an expedited basis (§1404(d).

Other changes proposed in the Discussion Draft are far more significant. For example, the Discussion Draft:

- Allows parties, to secure across the board, blanket opt-out status for a time to be set by the Copyright Office (§1405(h)(1); and
- Drops the provision authorizing the Copyright Claims Board (CCB) to issue a subpoena to a service provider for identification of an alleged infringer of claimant’s copyrighted work. As originally introduced, H.R. 3945 allowed the CCB to issue subpoenas to service providers to identify alleged online infringers.

These latter changes provoked far more controversy among members of the Coalition of Visual Artists. In fact, some of our members question whether these “major changes” were a bridge too far and represented such fundamental alterations to the bill as to make the overall proposal unacceptable—a concern voiced by others outside the Coalition. Ultimately and with some reluctance, the Coalition did not object to the inclusion of the provisions. Let us be clear as to why we did so. *We took that position to facilitate the movement of the CASE Act through Congress.* We agreed, again with some reluctance, that given the relative resources and strength of those critics who joined in the discussions

under the auspices of Mr. Jeffries' Office, that chances of passage of the legislation were, hopefully, improved significantly if these aforementioned concessions. We would prefer H.R. 3945 without these concessions, but agreed to them because they help address the concerns voiced by IA and CCIA. Of course, but we like to think of ourselves as political realists. Our political instincts told us that this was a reasonable path to break the logjam that the Discussion Draft was far better than no bill and the current, long-term, unacceptable legal quagmire that we find ourselves stuck in.

Mr. Chairman, about four more months have gone by since the Discussion Draft was circulated by Mr. Jeffries. Yet, we still have no real sense about where CCIA and IA stand on the CASE Act. Hopefully, today's hearing will provide us with much-needed clarifications from IA and CCIA and help the members of this Committee to decide the best path forward. For these reasons, we urge the passage of H.R. 3945.

Respectfully submitted,

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