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May 7, 2019

Honorable Hakeem Jeffries
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20015

Dear Representative Jeffries:

This letter is sent on behalf of the Section of Intellectual Property Law of the American Bar Association (the "Section") to express its views on H.R. 2426, the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the "CASE Act"), which was introduced on May 1, 2019. The views expressed herein are presented on behalf of the Section of Intellectual Property Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA-IPL Section, which was established in 1894, is the oldest substantive section of the ABA. The Section membership includes lawyers and others representing a wide array of business and other interests, and thus it reflects a broad perspective of the important issues our country faces in developing, improving, and enforcing intellectual property rights for the overall benefit of the United States economy.

The CASE Act was drafted to provide an alternative forum to federal court for low-value copyright disputes. The copyright community has noted the need for such a tribunal, as the high cost of legal counsel, time-consuming nature of discovery, and significant likelihood of loss when proceeding *pro se* have all made federal copyright infringement litigation effectively unavailable for parties with limited resources. As a result, copyright holders who cannot

afford to bring claims essentially must acquiesce to infringement, thus deprived of the protections copyright is meant to afford. Moreover, copyright defendants are often burdened with significant legal costs and long-lasting suits, even where their use is a fair use or otherwise lawful. Overall, these risks hinder copyright law from fulfilling its primary function of incentivizing the creation of new, expressive works.

If enacted, the CASE Act would establish a Copyright Claims Board (the "Board") within the United States Copyright Office (the "Office") to resolve copyright claims seeking a maximum of \$30,000 in damages. The Section has long supported the creation of a low-cost small claims procedure for civil copyright disputes. Moreover, the Section believes that an alternative small claims forum within the Copyright Office limited to claims seeking up to \$30,000 in damages, staffed by lawyers well-versed in copyright and alternative dispute resolution, and open to consenting parties proceeding *pro se* or with legal representation is well worth pursuing. The CASE Act accords with many of these needs and has the potential to resolve many of the aforementioned problems.

Having reviewed and discussed the CASE Act over the last several months, the Section writes to express its support for this legislation. We agree with many of the Act's provisions and believe that it would greatly benefit the copyright community at large; however, there are a few additional points that the Section urges the you to consider.

Specifically, the Section recommends amending the CASE Act to increase the opportunities for dialogue between the Register of Copyrights and the Board on novel legal questions that arise in small claims proceedings. While the CASE Act gives the Board some opportunities for guidance from the Register, the only opportunities currently provided for are

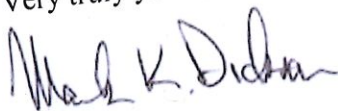
(1) allowing the Board to consult the Register on "general issues of law" and (2) permitting a party denied reconsideration by the Board to appeal to the Register for review of whether reconsideration should be granted. The Register may not weigh in on issues of law *sua sponte*, correct the Board's interpretation of the law, or intervene in a small claim litigant's appeal to federal district court. These restraints will inhibit the efficiency and success of a small claims tribunal, as well as potentially lead to the unnecessary and potentially confusing result that the Board and the Register will adopt different interpretations of the same legal principles.

To avoid this possibility, the Section suggests that the CASE Act be amended in three respects. **First**, the Board should be permitted to seek guidance on novel questions of law when they arise. **Second**, litigants should be able to seek mid-proceeding review from the Register by paying a small fee and submitting short questions of law akin to those found in the "questions presented" sections of appellate briefs, but without additional briefing by the parties. This would help ensure that the Board and the Copyright Office apply the same legal principles, while mitigating concerns about the expense of seeking such review. **Third**, the Register should have the authority to review Board decisions to correct legal errors with regard to such novel legal principles (but not

on the application of those principles). Such reviewability will ensure uniform application of the law and provide clarity for future litigants. A system analogous to that which the Section envisions already exists for the Copyright Royalty Board, and we recommend that the Committee amend the CASE Act's reviewability procedures to track those used under existing law for that tribunal.

Accordingly, the Section supports the CASE Act, but urges you to consider the revisions proposed above. Passing the CASE Act will bring positive change to the copyright system by better enabling copyright holders to protect their works, thus enhancing the public discourse. We thank you for your time and attention. We would be happy to be involved in future discussions as this legislation continues to be considered.

Very truly yours,



Mark K. Dickson
Chair, ABA Section of Intellectual Property Law

cc: Rep. Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives

Rep. Hank Johnson, Chairman, Subcommittee on Courts, Intellectual Property
and the Internet, Committee on the Judiciary, U.S. House of Representatives

Rep. Martha Roby, Ranking Member, Subcommittee on Courts, Intellectual Property
and the Internet, Committee on the Judiciary, U.S. House of Representatives

Rep. Doug Collins, Ranking Member, Committee on the Judiciary,
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