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Hearing on the Copyright Alternative in Small-Claims Enforcement Act of 2017
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Chairman Goodlatte, Ranking Member Nadler, and distinguished members of the Committee, thank you for the opportunity to appear before you today to discuss the Copyright Alternative in Small-Claims Enforcement Act of 2017. My name is Jonathan Berroya, and I am the Senior Vice President and General Counsel at Internet Association.

Internet Association (IA) represents over 40 of the world's leading internet companies.¹ 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 users. In this and other contexts, IA strives to advance the interests not only of its member companies, but also the billions of users and small business partners who benefit from our member companies' services and products.

Importantly, these user and partner communities include countless individuals and microbusinesses who are both 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. We are also mindful that a small number of bad actors will seek to abuse any process created to achieve those benefits. Our goal today is to advocate for changes that we believe would help ensure 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's sponsors, the Committee leadership, and their staffs for their diligent work on this legislation. I would also like to commend the U.S. Copyright Office for its detailed analysis and report that have supported and informed this legislative process.² The goals of the CASE Act are commendable, and to that end, IA has engaged in conversations with Committee staff and the bill's sponsors over the past six months to provide feedback. We appreciate the opportunity to work with the Committee to craft a bill that is effective and workable for all parties, and we and our member companies will continue to work to seek common ground on this important issue.

¹ A full list of our members can be found at <https://internetassociation.org/our-members>.

² U.S. Copyright Office, *Copyright Small Claims: A Report of The Register of Copyrights* (2013) (hereinafter Copyright Office Report) (available at <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>).



We support the bill's goals and sincerely appreciate the changes already made to improve it. My testimony identifies a handful of remaining concerns with the legislative draft that we look forward to working with the Committee to address. Our recommendations can be summarized as follows:

- *Due process and fairness are fundamental to success of any legal process:* The bill should be amended to require both parties to agree to adjudication by the Copyright Claims Board and to provide a more robust appeals process.
- *Maintaining the current balance provided by Section 512 of the DMCA is essential:* The bill should be amended to ensure that it does not interfere with the operation of Section 512 of the Copyright Act.
- *Unintended consequences that would create incentives against registration of works or provide unwarranted opportunities for frivolous litigants, must be avoided:* The bill's damages provisions should be amended to avoid undermining incentives to timely register works.

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 – including eliminating discovery and reducing the maximum monetary damage awards – but for the sake of brevity, we have not addressed them in this testimony. IA believes that adopting these recommendations would not only ensure basic fairness, but also would make for a workable regime for all parties involved. Our three principal suggestions are discussed in greater detail below.

1. *Due process and fairness are fundamental to success of any legal process:* The bill should be amended to require both parties to agree to adjudication by the Copyright Claims Board and to provide a more robust appeals process.

Recognizing the need for any small copyright claims adjudication to be voluntary, section 1405(h) of the discussion draft gives a respondent against whom a claim is made 60 days to opt out of the process. If the respondent opts out, the proceeding is dismissed without prejudice. However, if the respondent fails to opt out “the proceeding shall be deemed an active proceeding and the respondent shall be bound by the result.” The discussion draft also contains a new “blanket opt-out” provision that allows anyone who does not wish to participate in any adjudication before the Copyright Claims Board (“CCB”) to preemptively opt out of any such proceedings.

While we appreciate the improvements that have been made to the opt-out process – namely the extension of the time period, the provision of a second notice, and the new blanket opt-out – IA continues to believe that it would be better to replace this with an opt-in process that requires both parties to affirmatively consent to adjudication by the CCB. We understand that many other stakeholders strongly oppose this position, but we believe an opt-in approach would be preferable for reasons of both constitutional prudence and practical fairness.

As the Copyright Office concluded in its 2013 report – and as has been acknowledged by both the bill's sponsors and the stakeholders involved in the legislative process – all parties involved in a small claims litigation must consent to adjudication by the CCB in order to satisfy the constitutional rights to due



process, to a jury trial, and to adjudication by an Article III tribunal.³ Given these concerns, it is also not certain that this procedure would be upheld if challenged on due process grounds.⁴ This creates a cloud of uncertainty and invites the possibility of protracted and unnecessary litigation over the validity of CCB proceedings.

Moreover, from a practical fairness perspective, it is important to recognize that many – perhaps most – of the low dollar value claims intended to be addressed by this bill are likely to be directed at respondents who are individuals or small businesses.⁵ An opt-out approach could lead to a significant number of default judgments against unsophisticated respondents who do not have meaningful access to legal advice and do not understand fully the implications of receiving the notice of a copyright claim.

These concerns could be easily addressed by employing an approach that requires affirmative consent of all parties to a proceeding.

Potential due process concerns are also raised by the narrow grounds for appeal provided under the proposal. Subsection 1407(c) would limit the grounds upon which a district court could set aside a decision by the CCB to cases where the decision resulted from misconduct or exceeded the CCB’s authority, or where a default judgment was due to excusable neglect. Such limited opportunities for review by an Article III court could raise due process concerns and undermine practical fairness.⁶ To preserve parties’ ability to have their concerns fully heard by an Article III court, IA would recommend significantly broadening the available grounds for appeal by eliminating subsection 1407(c) and also clarifying that district courts are to review CCB decisions *de novo*.

³ See, e.g., *Copyright Office Report* at 28-29 (recognizing that “the Supreme Court’s holding in *Feltner* confirms the Seventh Amendment right to a jury trial” and that this precludes “the creation of a mandatory forum for small copyright claims that does not include juries” but “would not appear to bar a voluntary system where parties consented”); and *id.* at 41 (concluding that because of “*Feltner*’s holding that copyright litigants are entitled under the Seventh Amendment to a jury trial” a “mandatory approach without juries would appear to present a seemingly insuperable obstacle”).

⁴ For obvious reasons, the failure to object to CCB adjudication is not the same as affirmatively consenting. See *id.* at 99 (acknowledging that, from a due process perspective, an opt-out model is “more ambitious than an opt-in model because consent would be premised not on a written agreement or affirmative conduct, but instead on the failure to respond to a properly served notice”); see also Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, at 5 (relating “concern [among intellectual property scholars] that the opt-out system would, in practice, not be as voluntary as necessary to pass constitutional muster”) (available at <http://btlj.org/wp-content/uploads/2017/11/Samuelson-Hashimoto-Scholarly-Concerns-CROPPED.pdf>) (hereinafter “Scholarly Concerns”).

⁵ See *Comments of Professor Rochelle C. Dreyfuss*, at 1 (expressing concerns that “the main beneficiaries of the [Copyright Office] proposal may well be large entities with the resources to police the marketplace diligently” and that “individuals will not often enjoy the benefits of a system, but large firms would be able to sue them cheaply”) (available at https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/rochelle_dreyfuss.pdf).

⁶ See e.g., *id.* at 41 (noting that even with a fully voluntary system it would be necessary to “avoid undue encroachment on Article III courts” to ensure constitutionality); and *Scholarly Concerns*, at 9 (reporting scholars’ view that the appeals provision in the Copyright Office proposal – which limited the bases of appeal in essentially the same way – would “unduly limit the grounds on which appeals could be made, both to the Register and also to a District Court, when a successful Tribunal claimant seeks a court order to enforce the Tribunal’s award”).



2. *Maintaining the current balance provided by Section 512 of the DMCA is essential: The bill should be amended to ensure that it does not interfere with the operation of Section 512 of the Copyright Act.*

Section 512 appropriately balances the interests of users, service providers, and rights-holders. IA member companies have strong concerns about any legislation that would disturb the sensible allocation of responsibilities that it provides. Proposed subsection 1406(c) of H.R. 3945 (as introduced) would have interfered with the operation of Section 512 of the DMCA⁷ by precluding replacement of allegedly infringing material by a service provider pursuant to section 512(g).

The initiation of a small claims proceeding should not impede a service provider from replacing or restoring access to content following a 512-compliant counter-notification and that any dispute that interprets the application or availability of the Section 512 safe harbor should be outside the scope of the small claims process.

While we appreciate the deletion of subsection 1406(c) in the discussion draft, we would prefer it if this provision were retained and modified to clarify that the commencement of a proceeding by a claimant before the Copyright Claims Board does *not* qualify as an action seeking an order to restrain a subscriber from engaging in infringing activity under the Copyright Act Section 512(g)(2)(C).

3. *Unintended consequences that would create incentives against registration of works or provide unwarranted opportunities for frivolous litigants, must be avoided: The bill's damages provisions should be amended to avoid undermining incentives to timely register works.*

In taking the unprecedented step of authorizing statutory damages for works not timely registered, the bill interrupts long-standing incentives to register works. Current copyright law reflects the important and well-founded policy judgment that registration should be encouraged.⁸ As the Copyright Office has noted, "registration is important to our copyright system because it enhances the public record, encourages licensing opportunities, and provides baseline information for courts and others to use in assessing a copyright owner's claims."⁹ Because the proposed approach would erode a policy that was designed to promote the public interest in registration, we respectfully suggest amending the bill to delete the subclause authorizing limited statutory damages for works not timely registered.

4. Conclusion

In conclusion, I would like to reiterate Internet Association's gratitude for being included in the legislative discussions regarding this bill and for the opportunity to testify here today. We appreciate the diligent work of the bill's sponsors, the committee leadership, and their respective staffs to reach a balanced, consensus solution to the problem of enforcing small copyright claims. IA believes this is a worthy goal, and we – and our members – stand ready to help the committee succeed. Thank you.

⁷ 17 U.S.C. § 512.

⁸ See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, Stanford Law Review, Vol. 57, p. 485 (2004) (discussing importance and origins of copyright formalities).

⁹ *Copyright Office Report*, at 108.