March 23, 2018

Honorable Robert W. Goodlatte  
Chairman, Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Honorable Jerry Nadler  
Ranking Member, Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Nadler:

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. 3945, the Copyright Alternative in Small-Claims Enforcement Act of 2017 (the “CASE Act”), which was referred to the House Committee on the Judiciary on October 4, 2017. 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.

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 Act strives to create a streamlined, low-cost system whereby parties can voluntarily enroll and swiftly adjudicate their disputes before judges trained in copyright law. Such a program has the potential to resolve many of the aforementioned problems.
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.

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. As the CASE Act may be on the floor soon, however, there are a few additional points that the Section urges the Committee 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 dangerous 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 the Committee 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,

Scott F. Partridge
Chair, ABA Section of Intellectual Property Law