Overview

On September 27, the House Judiciary Committee held a hearing which presented witness testimony on the Copyright Alternative in Small-Claims Enforcement Act of 2017 (CASE), H.R. 3945. Representative Hakeem Jeffries (D-NY) sponsored the bill, which is meant to establish an alternative dispute resolution program for copyright small claims. The hearing was the most recent action taken on the Bill.

Chairman Bob Goodlatte (R-VA) started the hearing by explaining problems of intellectual property (IP) theft, and how small IP creators have a hard time holding infringers accountable. This, he said, is an important issue for small creators and thus, he appreciates proposed changes in resolving small value copyright claims.

Jerrold Nadler (D-NY), the Ranking Member, also acknowledged the damages in small creator claims and the importance of protecting small creators. He believes a small claims court would provide a more conducive forum for small creators to file suit.

Representative Jeffries then spoke about the bill, saying that musicians and photographers depend on their work for a living. But many who have small infringement claims do not have the means to vindicate their rights and protect those rights from infringement. The median cost to pursue copyright infringement lawsuit with damages less than a million dollars is about $350,000. The CASE Act would provide a remedy for people whose claims do not exceed $30,000. It would also establish a voluntary alternative form for small copyright owners that allows them to protect their work in a fair and timely manner. The personal appearance of either party in the proceeding would not even be required.

After the opening statements, the five witnesses went on to present their viewpoints on the bill:

**David Trust**, CEO of the Professional Photographers of America (PPA);

**Matthew Schruers**, Vice President of Computer and Communications Industry Association (CCIA);

**Jenna Close**, Director of Photography at Buck the Cubicle.

**Jonathan Berroya**, Senior Vice President of the Internet Association (IA);

**Keith Kupferschmid**, CEO of the Copyright Alliance.
Discussion

Mr. Trust began by saying that he was asked to speak on behalf of professional photographers. He noted that the problem with copyright in America is in the remedies that it offers: small creators only have one relief: filing a lawsuit in the US federal court. But nobody will do it because the result is just not worth it for small creators, since it is too expensive. With the CASE Act, small creators can be afforded protection. Many do not register because there is no viable remedy, which means 95% of the largest class of copyright holders in America never pay a dime into the copyright system. Mr. Trust stated that if we do not stand by small creators, they will disappear, one by one.

Mr. Schruers said that a new remedy for copyright plaintiffs should be considered in the context of existing remedies available. He referred to research, which found that serial litigants filing shotgun style multi-party claims accounted for half of all US copyright litigation, which is a lot of lawsuits against many wrongfully accused defendants. Mr. Schruers also stated that Title 17 remedies are available to all. While CCIA is not in a position to support H.R. 3945, they would like to discuss the proposal further. CCIA believes that educational resources like venture assistance center, and a lower overall cost of registration, would facilitate better outcomes for copyright plaintiffs.

Ms. Close, a commercial photographer herself, supports the bill, and said that many like her are unable to enforce their rights because of the cost and complexities of bringing a lawsuit in federal court. She did an experiment in which she conducted a reverse image search on one of her most frequently infringed images. In this search, she discovered an image of hers being used without permission on 41 different websites, 18 of those sites were large companies. Profit margins are often slim, and her business needs to bring in $4000 a month simply to stay afloat. As a result, one infringement makes a huge difference for them. Large entities are aware that small creators are unlikely to sue, and if they do, they use up all their resources. Federal court litigation is too expensive and burdensome, which is why Ms. Close is an advocate for the bill.

Mr. Berroya started with giving a brief overview of IA, which represents over 40 of the world’s leading internet companies. IA supports policies that promote and enable internet innovation. Berroya offered some recommendations to the bill due to some concerns IA had with it. First, he said, due process and fairness are fundamental to any legal process, and the bill’s opt out process is concerning, since it could have the unintended consequence of helping right 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 it protects all relevant interests, Berroya suggested that the text be amended to require both parties to agree to adjudication by the Copyright Claims Board, the tribunal created in the bill, and to provide a more robust appeals process. Second, Mr. Berroya believes that the current balance established in section 512 of the Copyright Act plays an important role in allowing platforms to respond to claims of infringement without forcing them to play the de facto role of the adjudicator of those claims. There is a risk that some right holders would exploit that lack of clarity and use the low cost quasi-judicial process to extend the
amount of time that allegedly infringing material remains unavailable. Mr. Berroya recommended amending the bill to clarify that the proposed small claims process does not interfere with the operation of section 512. Third, Mr. Berroya stated that allowing those who have not registered their work in a timely manner to seek statutory damages deviates from copyright policy. IA is worried that the bill would discourage registration of works.

Mr. Kupferschmid offered his support for the bill. He said that the bill would make targeted and modest changes to the copyright law in order to address inequity and give Americans the tools to protect the fruits of their creativity. The CASE Act is based on legislation recommended by the Copyright Office, and would create a claims tribunal within the Office, called the Copyright Claims Board (CCB), which would hear claims of infringement and declarations of both counterclaims and fair use defenses. The bill also makes clear that the CCB cannot hear claims brought against section 512 compliant internet platforms for the infringing acts of their users. Under the CASE Act use of attorneys is optional, and the process is simplified. Proceedings are conducted electronically so that parties can participate remotely, and discovery would be very limited. The fact that participation is optional should address most concerns, which Mr. Kupferschmid firmly stated. The CASE Act also caps damages and prohibits attorney fee awards. Statutory damages for infringement of one work cannot exceed $15,000. The CCB would also not be able to award a total of more than $30,000 in damages in any one case, which is different from federal law, where there is no cap at all.

Questions/Discussion

Chairman Goodlatte opened the question period by asking about the opt-in v. opt-out mechanism. Mr. Kupferschmid noted that “opt-in” is the status quo, since it meant that alleged infringers could just ignore any notices received with no incentive to participate in the system, similar to how most section 512 take-down notices are processed as well. Rep. Lofgren (D-CA) agreed on the need for a small claims court but noted the need to ensure that fair-use issues were dealt with appropriately in any tribunal. Mr. Johnson (D-GA) continued probing on the need for “opt-in” v. “opt-out” and queried whether there was a need to have more mandatory participation, ending his time with the admonition that “a right without a remedy is an illusion.” Mr. Collins (R-GA) pressed Mr. Schruers on whether his concerns about abuse of the process had been addressed, and Mr. Schruers noted the need to clarify “real party in interest.” After a hypothetical about a grandmother in Boca Raton who sold embroidered pillows of copyrighted images, Mr. Collins admonished Mr. Berroya about the fact that hypothetics should not block progress, especially in light of the real problems faced by Ms. Close and her colleagues. Mr. Jeffries (D-NY) pressed Mr. Schruers as to whether or not his stated concerns had been taken into account in the compromise “discussion draft” that had been revised by the Committee staff. R. Schruers agreed that they had. With respect to the need for opt-out provisions in order to protect users of platforms, Mr. Jeffries noted the hypocrisy of the platforms given that their terms of service (referred to by Mr. Jeffries as “contracts of adhesion”) included mandatory arbitration clauses. Mr. Gohmert (R-TX) asked Mr. Kupferschmid whether provisions had been included to deal with potential “copyright trolls,” and Mr. Kupferschmid pointed out several provisions,
including penalties for bad faith cases, limits on the numbers of cases that could be brought each year, and the cap on damages, among others. Mr. Schruers again pressed on the need to have clarity with respect to real parties-in-interest. Ms. Demings (D-FL) asked each panelist their “wish list” for improving the bill: Mr. Trusts noted he would prefer no cap on the number of cases that could be brought, compulsory participation by all parties, and the availability of injunctive relief; Ms. Close echoed the preference for no cap on the number of cases; Mr. Kupferschmid echoed Mr. Trust and Ms. Close’s responses and in vivid language extolled the need for a more compulsory participation requirement; and lastly Mr. Berroya noted that IA would prefer an “opt-in” regime for participation, clarity with respect to the fact that this would not impact section 512 of the Copyright Act, and reservation of statutory damages for works that had been registered.

In closing, Rep. Issa (D-CA) expressed frustration that the Copyright Office has not made it possible to have an easier, modern way to display that someone such as Ms. Close has in fact registered. When Ms. Close argued that registration was not the problem, the remedies available were, Rep. Issa sympathized, but also said that the reality is internet associations need constructive notice and those in Congress also need to find that constructive notice.

Testimony:

David Trust, CEO of the Professional Photographers of America (PPA):


The video of the hearing can be found at: