THE TRUTH ABOUT THE CASE ACT, H.R. 2426 and S. 1273
LEGISLATION TO CREATE A COPYRIGHT SMALL CLAIMS PROCESS

Fact*: *Participation in the small claims process is 100% optional

Some critics of the CASE Act suggest that large companies will use the threat of federal court as leverage to coerce people to consent to the small claims process.

The process is entirely optional, which makes it impossible for a troll to "coerce" someone into court or to bring "frivolous claims" against them. If someone thinks the claimant is a copyright troll or trying to bring a frivolous claim, they can simply choose to opt out of the case, and the case disappears.

Rep. Jeffries, the lead sponsor of H.R. 2426, the Copyright Alternative in Small-Claims Enforcement Act of 2017 (CASE Act), said it best when he said that the small claims tribunal's purpose is to help "the creative middle class who deserve to benefit from the fruits of their labor" but often lack the financial resources to enforce their rights in federal court, leaving them with a right with no remedy. It is not designed to encourage large companies to bring suit against "the little guy"—they *already* have the ability to do so in federal court if they so choose. What this legislation does is even the playing field by providing the creative middle class with options they haven't had in the past. Today, these creators have no practical option for enforcing their rights and protecting their work against infringement. If passed, this bill would change that. Today, if a large company wanted to bring suit against an individual infringer, that person would have no choice but to bear the expense of defending him or herself in federal court. This legislation offers a cheaper, more convenient alternative that otherwise wouldn't exist.

It is important to reiterate that under the CASE Act a respondent has the choice to participate in the small claims process, or not to participate and potentially defend themself in federal court, if the claimant brings a case in federal court. Today, the alleged infringer/respondent has no choice. That's not coercion; that's choice.

Fact: Participation in the small claims process is completely remote. Participants will not be required to go to D.C.

Despite eplicit, unambiguous language to the contrary, some critics of the CASE erroneously state that participation in the small claims process will require a "trip to D.C." This is totally false. The bill explicitly states that each party will make its case "by means of written submissions, hearings, and conferences carried out through internet-based applications and

other telecommunications facilities."

Fact**: **Copyright small claims court legislation contains safeguards to prevent the bringing of frivolous claims

Some critics of the CASE Act suggest that copyright owners will bring frivolous claims under the CASE Act. However, the CASE Act includes a number of safeguards to prevent instances of abuse should they occur.

For example, the CASE Act provides that:

- the Copyright Office may limit the number of cases that a claimant can bring in a calendar year. This limitation will help ensure that claimants are selective in asserting only those claims with a strong factual basis and that the bill does not create a so-called copyright trolling problem.

- the Copyright Claims Board (CCB) has the unbridled discretion to dismiss a claim if it finds that the claim is "unsuitable for determination" by the Board.

- the CCB is permitted to award attorneys' fees of up to $5,000 to an aggrieved party in the event that a claim is initiated in bad faith (*i.e.*, "for a harassing or other improper purpose, or without reasonable basis in law or fact"). The CCB is also permitted to award attorneys' fees in excess of $5,000 in extraordinary circumstances of bad faith conduct, and if a party is found to have initiated claims in bad faith on more than one occasion during a 12-month period, that party will be barred from bringing additional claims before the CCB for a year and all pending cases will be dismissed. And, if these cases are dismissed, the offending party cannot recover the filing fees it submitted to initiate those cases.

Importantly, these safeguards do not exist under existing federal law.

Finally, one of the most prominent and important features of the copyright small claims legislation is that it provides for an *optional* tribunal. If a respondent believes that a frivolous claim has been initiated against them, all they need to do is simply to opt out of the proceeding. When coupled with the fact that a claimant must pay a non-refundable fee to file a claim which they lose of the respondent opts out, the bills contain sufficient safeguards to prevent the bringing of frivolous claims. Therefore, there is simply no merit to the argument that the small claims process will encourage or facilitate frivolous claims or trolling.

Fact: Copyright small claims court legislation includes incentives to encourage parties to use the process

Some critics of the CASE Act suggest that the opt-out process is so easy to use that all respondents will opt out and no one will use the new tribunal. While the small claims court proposed by the CASE Act is completely optional, the bill provides several incentives to encourage parties to participate in proceedings before the small claims tribunal. Those incentives include:

- a streamlined process for faster resolution of the dispute;
- a significant cost reduction by avoiding federal filing fees and the need to hire an attorney;
- a cap on damages which dramatically reduces the infringer's potential liability;
- a bar on the award of attorneys' fees, except in cases of bad faith;
- subject matter expertise among the Copyright Claims Officers; and
- the ability to resolve the matter without having to appear in person.

Therefore, although a respondent can always opt out of the proceedings, it may be in their best interest not to.

Fact: The copyright small claims process would satisfy all due process requirements

Some critics have alleged due process concerns with the CASE Act. Due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. The CASE Act provides for a tribunal that meets the requirements of due process.

Notice: To initiate a claim, the claimant "must cause notice of the proceeding and a copy of the claim to be served on the respondent, either by personal service or pursuant to a waiver of personal service" and file proof of service with the Copyright Claims Board. The bill also provides for written notification to be sent from the Copyright Claims Board to the respondent. Additionally, a business entity can elect to designate a service agent to receive notice of a claim against it to ensure that entities with multiple facilities have notice served at the proper location and to the proper representative.

Some opponents of the legislation argue that the provision which states that a respondent's non-response to a notice of the proceeding can result in entry of a default judgment against them in federal court raises due process concerns. This is incorrect because (1) after the initial

60 day response period has expired, the Copyright Claims Board may, "extend such 60-day period in the interests of justice," (2) prior to issuance of a default determination by the Board, the respondent is notified about "the pendency of a default determination by the Copyright Claims Board and the legal significance of such determination" and given "30 days from the date of the notice to submit any evidence or other information in opposition to the proposed default determination," and (3) following the issuance of a default determination by the Board, the respondent has 90 days to submit an application challenging the determination in federal court and "the United States District Court for the District of Columbia may issue an order vacating, modifying or correcting a determination . . . where it is established that the default or failure was due to excusable neglect." Thus, the respondent is given FOUR opportunities to respond before a default judgment is entered.

Opportunity to be heard: A copyright small claims tribunal does not obstruct an individual's right to be heard, as it is an *optional* tribunal. The copyright claimant would not be obliged to bring a claim in the small claims tribunal—instead, a claimant would have an option that presently does not exist: the option to choose between federal court, and a less expensive alternative. Further, the small claims tribunal itself provides a proper opportunity to be heard, including discovery, and the submission of both documentary and testimonial evidence. The small claims tribunal allows for discovery of "relevant information and documents, written interrogatories, and written requests for admission" and permits the Board to "approve additional limited discovery in particular matters." Parties may submit "statements of the parties and nonexpert witnesses, that is relevant to the claims, counterclaims and defenses in a proceeding" and in some cases "expert witness testimony or other types of testimony may be permitted." At the request of either party, or upon its own initiative, the Board is also empowered to "conduct a hearing . . . to receive oral presentations on issues of fact or law from parties and witnesses to a proceeding, including oral testimony." Further, the legislation allows a party to raise legal or equitable defenses in response to a claim or counterclaim, including a fair use defense.

Fact**: **Small claims legislation sets forth unambiguous and fair rules to determine which court precedent to follow when there is conflicting judicial precedent

The CASE Act directly and clearly addresses the issue of determining which court precedent to follow when there is conflicting judicial precedent. It explicitly states "to the extent it appears there may be conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction where the action could have been brought if filed in Federal district court, or, if it could have been brought in more than one jurisdiction, the jurisdiction that the Copyright Claims Board determines has the most significant ties to the parties and conduct at issue." Consequently, there is no basis for any claims that the CASE Act raises questions about which precedent the Copyright Claims Board should follow.

Fact: Small claims court legislation contains safeguards to prevent bias and ensure fairness

The CASE Act contains provisions to ensure fairness and safeguard against bias. For example, in addition to the previously mentioned "bad faith" provisions, the proposals require that two of the three Copyright Claims Officers "shall have represented or presided over *a diversity of copyright interests*, including those of both owners *and users* of copyrighted works" (emphasis added). In addition, these Officers are bound by judicial precedent in deciding a case.

In fact, there are many provisions in the small claims legislation that are favorable to the responding party. Compared to the uncapped *total* damage ceiling, higher *per claim* statutory damage ceiling, possible attorneys fee award, and expensive discovery proceedings in federal court, the small claims process gives defendants a lowered ceiling on their *total* liability, a lowered *per claim* ceiling on statutory damages, a bar to an attorneys' fees fee award, and a more cost-efficient proceeding. Thus, despite claims by some that the small claims court will be biased in favor of copyright owners, that simply is not the case.

Fact: Statutory damages ceilings provided for in small claims legislation are not too high and in fact are significantly lower than what is presently provided for under federal copyright law

In federal court, a successful plaintiff may be awarded damages of up to $150,000 in statutory damages *per work* infringed. In small claims court, a successful claimant may only be awarded up to $15,000 in statutory damages per work infringed—10% of the damages presently available in federal court. The CASE Act also limits total amount of damages that can awarded in each case to no more than $30,000, as compared to federal court, which has no limit whatsoever. Therefore, there is no basis for the assertion that the damages proposed in the CASE Act are too high.

FACT: Damages will be awarded on a reasonable basis commensurate with the harm to the copyright owner.

Some critics are attempting to stoke fear among the public by claiming that people could be subject to damages of "$30,000 or more" for retweeting a meme, or posting a photograph online. The highest amount that could be obtained for one copyright infringement claim is $15,000, not $ 30,000. The $ 30,000 limit applies only where there are multiple infringements, and in no case could the person be subject to damages of "more" than $30,000. By comparison, if the infringer were sued in federal court today, the damages could be up to $150,000 per work infringed for willful infringement, and there is no cap on the total damage award. Like in federal court, an award of statutory damages does not mean that the prevailing party will get the maximum allowable award. Instead, as is the case in federal court, damages will be awarded commensurate with the harm to the copyright owner. Many of the claims will be valued in the hundreds or low thousands of dollars. In reality, the copyright owner would need

endless resources to even consider chasing retweets or everyone who posted a photo and thus few, if any, cases of such low dollar value will go ever be brought before the small claims tribunal.

Importantly, nothing in the CASE Act expands (or limits) the scope of rights under copyright law. The bill only addresses remedies. Therefore, no one will be held liable in the tribunal created via the CASE Act unless they have infringed a copyrighted work under existing law—something that already makes them subject to suit in federal court. If the use is a fair use (as is the case generally with memes) or *de minimis*, the poster or re-tweeter will not be liable.

Fact: The CASE Act's small claims process is easier, less expensive, and more streamlined than any federal court procedure, including ones involving magistrate judges

Suggestions that a small claims tribunal is unnecessary because there is already a procedure in place for streamlining copyright small claims are incorrect. Although there is a procedure employing federal magistrate judges that copyright owners could use in theory, in reality that process is much more expensive and complex than the small claims process proposed in the CASE Act. For example, this process would require the copyright plaintiff to first file a complaint for infringement in federal court—thereby incurring a more expensive filing fee than the one set out in H.R. 2426 and S. 1273—followed by a set of motions to join defendants and refer the case to a Special Master, and "if necessary, seek leave to take early discovery to identify John Does."

As compared to the process set forth in the CASE Act, this method is neither streamlined nor accessible without hiring an attorney. Not only does it involve a degree of expertise and familiarity with motions practice and the Federal Rules of Civil Procedure that would require the assistance of an attorney, it is also significantly more complex, more expensive, and does not guarantee the copyright expertise that the Copyright Claims Board would.