The Honorable Robert Goodlatte
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

April 23, 2018

The Honorable Jerrold Nadler
Ranking Member
House Committee on the Judiciary
2109 Rayburn House Office Building
Washington, DC 20515

Members of the House Committee on the Judiciary
VIA EMAIL

Dear Chairman Goodlatte, Ranking Member Nadler, and Members of the Committee,

We are attorneys, academics, technologists, and activists who defend Internet users—thousands of your constituents who use the Internet at home and work every day—against abusive legal threats. We write to express our grave concerns about the "Copyright Alternative in Small Claims Enforcement Act," H.R. 3945 (the CASE Act). Though it's well-intentioned, this bill would re-ignite the nationwide problem of copyright trolling, just as the federal courts are beginning to address this abusive practice.

Copyright trolls are plaintiffs who, in the words of a U.S. Magistrate Judge, file infringement lawsuits "as a profit-making scheme rather than as a deterrent."[1] These suits typically involve pornography or poorly-performing independent films. They "rely on poorly substantiated form pleading and are ***targeted indiscriminately at non-infringers as well as infringers.***" They use "the threat of statutory damages of up to $150,000 for a single download, tough talk, and technological doublespeak . . . to intimidate even innocent defendants into settling."[2] Some also use the stigma of being publicly associated with pornography downloads to coerce settlements. By targeting thousands of defendants and demanding cash settlements priced below the cost of defending oneself, copyright trolls turn a significant profit with little regard for the accuracy of their claims.

The scope of this problem is staggering. Between 2014 and 2016, copyright troll lawsuits constituted just under half of all copyright cases on the federal dockets. These cases dominated the copyright dockets of judicial districts in eighteen states.[3] Overall, since 2010, researchers have conservatively estimated the number of people targeted at over 170,000.[4]

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[1] *Malibu Media, LLC v. John Doe*, No. 8:15-cv-3185, ECF No. 36, Report and Recommendation (D. Md. Jan. 5, 2018).
[2] Matthew Sag and Jake Haskell, Defense Against the Dark Arts of Copyright Trolling, 103 Iowa L. Rev. 571, 573 (2018).
[3] *Id.* at 573 n.1.
[4] *Id.* at 578 n.17.

Copyright trolling has a human cost. Many targets of this scheme have included elderly retirees who don't use the Internet, who are often coerced into paying settlements. Others are documented immigrants with a green card or work visa, who must pay to avoid litigation that could imperil their immigration status.

Still others are homeowners, apartment managers, and leaseholders—the person whose name is on the Internet service bill. Copyright trolls force them to choose between paying a settlement or becoming part of the shakedown by interrogating their tenants, family members, or houseguests about their Internet use, despite having no legal responsibility to police that use.

The federal courts are beginning to rein in these abuses by demanding specific and reliable evidence of infringement—more than boilerplate allegations—before issuing subpoenas for the identity of an alleged infringer. Some federal courts have also undertaken reviews of copyright troll plaintiffs' communications with their targets with an eye to preventing coercion and intimidation. These reforms have reduced the financial incentive for the abusive business model of copyright trolling while preserving the ability to bring legitimate infringement claims.

The CASE Act threatens to derail this progress by creating an alternative forum where these carefully crafted protections will not apply. Under the CASE Act's provisions, legally unsophisticated defendants—the kind most often targeted by copyright trolls—are likely to find themselves bound by the rulings of a non-judicial body in faraway Washington, D.C., with little or no avenues for appeal. The statutory damages of up to $30,000 proposed in the CASE Act, while less than the $150,000 maximum in federal court, are still a daunting amount for many people in the U.S., more than high enough to coerce Internet users into paying settlements of $2,000–$8,000. Under the Act, a plaintiff engaged in copyright trolling would not need to show any evidence of actual harm in order to recover statutory damages. And unlike in the federal courts, statutory damages could be awarded under the CASE Act even for copyrights that are not registered with the Copyright Office before the alleged infringement began. This means that copyright trolls will be able to threaten home Internet users with significant, life-altering damages—and profit from those threats—based on works with no commercial value whatsoever.

The CASE Act also **gives the Copyright Office the authority to issue subpoenas** for information about Internet subscribers. The safeguards for Internet users' privacy established in the federal courts will not apply. In fact, the bill doesn't even require that a copyright holder state a plausible claim of copyright infringement before requesting a subpoena—a basic requirement in federal court. Given that the Copyright Office views copyright holders as its "customers,"[5] we fear that the Office will not protect the privacy of home and business Internet subscribers against invasion by copyright trolls, including those who threaten public accusations of pornography use.

Another troubling provision of the CASE Act would permit the Copyright Office to dispense with even the minimal procedural protections established in the bill for claims of $5,000 or less. These "smaller claims" — which are still at or above the largest claims allowed in small claims courts in 21 states — could be decided by a single "Claims Officer" in a **summary procedure on the**

[5] https://www.copyright.gov/about/office-register/meyer-lecture.pdf.

slimmest of evidence, yet still produce judgments enforceable in federal court with no meaningful right of appeal.

Finally, the federal courts grant default judgments only reluctantly, and regularly set them aside to avoid injustice to unsophisticated defendants. **Nothing in the CASE Act requires the Copyright Office to show the same concern for the rights of defendants.** At minimum, a requirement that defendants affirmatively opt in to a small claims process, rather than being hauled into that process by default, would give the Copyright Office an incentive to ensure that defendants' procedural and substantive rights are upheld.

We recognize that federal litigation can be expensive, making the pursuit of many small-dollar-value claims impractical for copyright holders. But we believe that much of that expense results from procedures that promote fairness, established and refined through decades of use. Creating a new, parallel system that allows copyright holders to dispense with those procedures invites abuse, especially given the Copyright Office's institutional bias.

In attempting to solve a problem for some copyright holders, Congress must not create new incentives for the abuse and exploitation of individual Internet users by unscrupulous litigation businesses. As advocates for your constituents, we ask you to oppose the CASE Act.

Respectfully submitted,

Mitchell L. Stoltz
Electronic Frontier Foundation

[OTHER SIGNATURES]