October 3, 2019

The Honorable Nancy Pelosi
Speaker, United States House of Representatives
1236 Longworth House Office Building
Washington, D.C. 20515

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Kamala Harris
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

Dear Speaker Pelosi, Senator Feinstein, and Senator Harris:

We write to express concerns regarding the pending Copyright Alternatives in Small-Claims Enforcement Act of 2019 ("CASE Act"), S.1273 and H.R.2426. We are small technology companies founded within the past fifteen years, and we provide platforms for and services to a diversity of internet users who engage with and create online content in unique ways. We are not opposed to the general idea of a small-claims copyright process, and are sympathetic to certain concerns motivating this legislative effort. But we have significant concerns that the CASE Act—as currently drafted—will be fundamentally unfair to and create substantial confusion for our users and customers. We are further concerned about the pace at which these bills are moving through this Congress, without the opportunity for Members to hear the concerns of companies like us and our users.

As drafted, the CASE Act tips the scales of copyright law in favor of certain copyright owners and against rightful users of that content. Many of our users are creators themselves, and they rely on the protections afforded by the doctrine of fair use, as well as licenses, such as open source licenses, from a large number of third parties. Fair use is critical and high-stakes: it reflects our country's policy that certain uses of copyrighted material are protected activities that should be encouraged, rather than infringing activity that can be punished. Users of our services regularly adapt and transform copyrighted material for purposes of, e.g., commenting, criticizing, educating, and reporting. Those are activities that copyright law seeks to encourage and that the First Amendment protects. Because the CASE Act limits the rights of accused infringers, it will unduly constrict those fair uses and stifle the voices of communities we serve.

Under the status quo, accused infringers can develop a fair use defense in the court system. Fair use is a highly fact-specific, case-by-case inquiry, and any meaningful defense requires evidence, legal advice, and research on analogous case law. However, the CASE Act procedures tip the scales against creators and users who would rely on a fair use defense because they limit discovery and access to attorneys—two things one needs to assemble such a defense.

This inability to develop a critical defense is particularly concerning because the CASE Act allows copyright owners to request statutory damages. At a minimum of $750 and maximum of $15,000 per work infringed,

these damages do not bear any apparent connection to the financial harm incurred or benefit gained by, e.g., posting a photo online. And the per-case maximum of $30,000 is not a small claim for our users; it is an enormous amount of money. When the stakes are this high, Congress should be especially careful that accused infringers are afforded a full and fair process.

The CASE Act's opt-out provision does not resolve our concerns. Accused infringers—who may (and likely will) be ordinary people with no experience with copyright law or the court system—will be defaulted into a procedure that limits their rights unless they understand enough to opt-out. They will be in a confusing and burdensome position upon receiving a notice from an entity they have never heard of. And their important procedural rights, e.g., rights to appeal, rights to request a jury trial, and rights to full discovery, will be automatically waived unless they affirmatively opt-out. A supposed benefit of the procedure (i.e, the cost-savings associated with proceeding without an attorney) will encourage many people to make this significant and nuanced decision without the advice of an attorney. Ultimately, this process is likely to result in many unappealable default judgments.

While the CASE Act is motivated by good intentions, the chosen approach for copyright small-claims will open doors to abuse, and our users and customers will bear the brunt of it. Many of us know, firsthand, how intellectual property rights can be abused. We receive demand letters from patent owners seeking nuisance value settlements in exchange for us avoiding the cost of litigation and the risk of patent damages, even over frivolous infringement claims. The CASE Act will open doors to bad actors who can obtain ownership of some copyrights then sending demand letters directly to our users, seeking a few thousand dollars to avoid the uncertainty, confusion, and statutory damages of the CASE Act's process. And the CASE Act lacks any real checks on this sort of abuse. Instead, as drafted, the bill would hand bad actors a cost-effective way to extract substantial sums of money from large numbers of ordinary people based on even fair uses of content or modest, non-commercial uses that cause no actual harm.

Finally, we are concerned with how the CASE Act has moved through this Congress. While ideas for small-claims copyright proceedings have been proposed before, the CASE Act was introduced in the Senate for the first time this year, and it went straight to committee vote without a hearing. Not only have our concerns not been vetted, but members of the various committees have not had the opportunity to hear diverse perspectives which could inform amendments to improve the bill.

Instead of passing the CASE Act, we encourage Congress to consider small-claims alternatives that would be fair to both copyright owners and content users. A more balanced approach could promote all types of creation, preserve First Amendment rights, and foster continued technological innovation. We welcome the opportunity to contribute to that dialogue.

Sincerely,

Automattic Inc.

GitHub, Inc.

Patreon, Inc.

Pinterest, Inc.

Reddit, Inc.