



May 15, 2020

The Honorable Ronald Wyden
United States Senate
221 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Wyden:

We write to express concerns regarding the pending Copyright Alternatives in Small-Claims Enforcement Act of 2019 (“CASE Act”), S.1273. We are smaller 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. Collectively we serve several tens of thousands of active users and creators in Oregon, including bloggers, developers, innovators, small businesses, podcasters, visual artists, musicians, gamers, and fans. Our users are part of an emerging creative class in Oregon able to connect with fans and monetize creations through our platforms. They are the entrepreneurs in your state who use our platforms to create websites, market products, and collaborate on projects. And they are everyday users in Oregon looking to connect with others who share their interests.

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 in Oregon and across the country. 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 small creators and 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, stifle the voices, and harm the creative businesses of the 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. Without the right to appeal, such judgments may put small creators out of business by forcing them to take their legitimate goods off the market.

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—including those in Oregon—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. We receive overly-broad takedown notices from large rightsholders against small creators. 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 and aggressive rightsholders 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 last 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 hope the Senate will 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

Etsy

GitHub

Patreon

Pinterest

Reddit

Automattic. Automattic is best known as the company behind the popular online publishing platforms WordPress.com and Tumblr. Automattic is a fully distributed company with nearly 1,200 employees working remotely, worldwide - this includes 29 Oregonians, many whom live and work outside of the Portland metro area. The WordPress publishing platform is also widely popular in Oregon, with thousands of registered users and three WordPress Chapter Meetup groups, with over 3,700 members in total.

Etsy. Etsy is a two-sided online marketplace that connects creative entrepreneurs with thoughtful consumers looking for items that are intended to be special, reflect their sense of style, or represent a meaningful occasion. Our mission is to “Keep Commerce Human,” and we’re committed to using the power of business and technology to strengthen communities and empower people around the world. Our sellers are the heart and soul of Etsy, and our technology platform allows our sellers to turn their creative passions into economic opportunity. In 2018, Etsy sellers living in Oregon contributed \$169,450,000 to the U.S. economy.

GitHub. GitHub is the developer company. As the home to the world's largest community of developers with more than 40 million developers from across the globe, including Oregonians, we make it easier for developers to be developers: to work together, to solve challenging problems, to create the world’s most important technologies. We foster a collaborative community that can come together—as individuals and in teams—to create the future of software and make a difference in the world.

Patreon. Patreon is a membership platform that makes it easy for creators to get paid by their fans. Patreon is home to over 2,800 Oregonian creators earning money each month by creating videos, podcasts, music, games, visual arts, writing, building communities and websites, and more than 130 of them are making more than \$1000 a month.

Pinterest. Pinterest is where 335 million people around the world go to get inspiration for their lives. We call these people Pinner. Pinner in Oregon include a shop in Portland that simplifies shopping for sustainable and ethically made goods and uses Pinterest as a customer acquisition channel; a retiree who started a program to teach art to senior citizens in nursing homes and uses Pinterest to find all of his ideas; and an entrepreneur/dad who built a playset, outdoor kitchen, and vertical garden modeled after Pins.

Reddit. Reddit provides an online network of communities where over 430 million people every month find experiences built around their interests, hobbies and passions. A number of active Reddit communities are dedicated to Oregon, including cities, attractions, and/or institutions within Oregon. Merely by way of example, r/Oregon (www.reddit.com/r/oregon/), the most active of these communities, has approximately 50,000 subscribers.