

# CONGRESS SHOULDN'T TURN THE COPYRIGHT OFFICE INTO A COPYRIGHT COURT

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While most people are focused on net neutrality, surveillance, and tax reform, a few legislators are quietly mulling over a different problem: copyright reform.

Five years ago, Representative Bob Goodlatte, chair of the House Judiciary Committee, launched a series of hearings and studies that he said would lead to comprehensive copyright reform. EFF and many others testified on the merits and problems in virtually every facet of copyright law, and then we all waited expectantly for the “[Next Great Copyright Act](#).” For better or worse, that dramatic reform never happened. Instead, we got the [CASE Act](#), a modest effort to create a small claims process for copyright. The impetus behind this bill comes largely from photographers and other visual artists, who want a way to bring small-value copyright claims with lower expenses. They are legitimately concerned that the cost of litigation puts real copyright protection out of reach for many artists.

But the CASE Act is not the right solution. First, it would create a new quasi-court within the Copyright Office. Aside from the constitutional questions that raises, the Copyright Office is not known for its neutrality on copyright issues. Second, the powers given to this new tribunal would invite gamesmanship and abuse. Third, it would magnify the existing problem of copyright’s unpredictable civil penalties. Finally, it would put this new tribunal in charge of punishing DMCA abuse, but sharply limit the punishment available, undermining what little deterrent effect still exists in the statute.

Let’s break it down.

## **The CASE Act Would Turn the Copyright Office into a Copyright Court**

The current bill, the “CASE Act of 2017” ([H.R. 3945](#)), would set up a “Copyright Claims Board” within the Copyright Office, staffed by three “Claims Officers” and empowered to hear copyright complaints from all over the country. Proceedings at the Claims Board would be voluntary, but if a respondent fails to opt out, the proceedings become binding, and the outcome can be enforced in federal court. The Board can issue damages awards of up to \$15,000 per work infringed, or \$30,000 per proceeding. If the parties consent, it can also issue “agreements to cease infringing activity” that become binding injunctions.

Unfortunately, the Copyright Office has a history of putting copyright holders’ interests ahead of other important legal rights and policy concerns. Given this history, we fear that a quasi-court within the Copyright Office will tend to elevate copyright holders’ interests above all others.

The CASE Act’s “opt-out” approach doesn’t help. If the process required respondents to give affirmative consent, or “opt-in,” the Copyright Office would have greater incentive to design proceedings that safeguard the respondents’ interests.

## **More Automatic Civil Penalties, No Proof of Harm Required**

The bill would make copyright’s already unfair and unpredictable civil penalty regime even worse. Current law lets courts award civil penalties, known as [statutory damages](#), of up to \$150,000 for each copyrighted work infringed. These penalties go to the copyright holder, but aren’t tied to any measure

of actual harm. In fact, copyright holders don't have to introduce any evidence at all to show that they were harmed by an infringement (or that the infringer profited). Statutory damage awards vary wildly from one case to the next, making copyright lawsuits a game of financial Russian roulette for defendants.

Under current law, statutory damages do have a small safety measure attached: they're not available for works that weren't registered with the Copyright Office in a timely way. That rule is important because copyright applies automatically to creative works the moment they're fixed in a tangible form. The timely registration rule limits the universe of works that are eligible for statutory damages. The CASE Act would throw that safety away. While the Act limits the damages available in a single proceeding, it allows statutory damages of up to \$7,500 for works that were *not timely registered*. That makes countless millions more works eligible for automatic, no-proof-required civil penalties. It's worth noting that a majority of U.S. states and the District of Columbia limit small claims to \$6,000 or less.

Congress needs to address copyright's broken civil penalty regime. Indeed, both the former U.S. Register of Copyrights and a Department of Commerce task force have called this a priority. But instead of making statutory damages more fair and predictable, the CASE Act simply multiplies the problem.

### **Subpoenas to Unmask Anonymous Speakers**

The CASE Act would also give the new "Copyright Claims Officers" the power to issue subpoenas to service providers for the "identification of an alleged infringer." While backers of this legislation will likely claim that this provision simply replicates what's already available in federal court, there are dangerous differences here. In federal court, civil subpoenas can normally only be issued after a plaintiff has demonstrated that they have a viable case. The federal courts have decades of experience crafting appropriately limited subpoenas, and supervising their use. In copyright cases, courts have begun to take extra care before issuing subpoenas to service providers to unmask an accused infringer, when circumstances suggest the information will be used to harass, or to coerce settlements of dubious infringement claims.

Under the CASE Act, it's not clear that the careful limitations and safeguards established by the federal courts that apply to every kind of legal claim will apply to the Copyright Claims Board. Instead, the bill seems to give the Copyright Office broad power to shape how these subpoenas will work, and how broad they can be. The Copyright Office would be empowered to decide how subpoenas can be issued, what they can contain, and "the obligations of a service provider who is issued a subpoena" — without following federal court procedures and protections. The bill doesn't even clearly require that a copyright holder state a plausible claim of copyright infringement before requesting a subpoena—a basic requirement in federal court. Without that requirement, even a specious accusation of copyright infringement could be used to unmask anonymous speakers.

It's certainly possible that the Copyright Office could create a completely new set of subpoena rules that protect anonymous speech—or import the appropriate federal court precedent. But given the Copyright Office's persistent stance of elevating copyright holders' interests over other speech interests, granting the Office such broad authority would be reckless. The right to speak anonymously on the Internet is one of the most important speech protections we have, and the CASE Act would jeopardize it.

### **Copyright “Parking Tickets” — Due Process Optional**

While the CASE Act establishes some court-like procedures, it also gives the Copyright Office permission to disregard those procedures as long as the amount of damages being sought is \$5,000 or less. For those claims, the Copyright Office would be empowered to make new procedural rules, potentially with little or no protections for people accused of infringement. Proceedings under this “small small claims” regime could be a boon for copyright trolls who pursue thousands of low-value settlements based on dubious claims of infringement, as it would give their efforts the imprimatur of a government body.

It’s true that federal litigation for small-dollar-value disputes generally isn’t practical. The federal courts impose costly, sometimes unnecessary burdens on nearly all who use them. But much of that expense comes from procedures that promote fairness, established and refined through years of use in all kinds of cases. Creating a parallel track that allows copyright holders to dispense with those procedures just doesn’t make sense.

### **Sidelining Section 512(f)**

The bill would also authorize the tribunal to decide Section 512(f) claims. The DMCA’s takedown procedure provides a quick, cheap, extrajudicial way to censor online speech. As we’ve written many, many times before, this makes it a tempting tool for those who wish to remove speech they happen to dislike. To prevent such abuse, Section 512(f) of the DMCA provides victims of wrongful takedowns with a remedy, allowing them to file a lawsuit for misrepresentation and, if they succeed, recover damages – including attorneys’ fees.

There are at least two problems with putting the Copyright Office in charge of policing DMCA abuse. First, the courts have so far interpreted Section 512(f) to turn on whether there is evidence that the notice sender subjectively knew the targeted use was actually lawful. That issue will often be too complicated for the small claims process, and shouldn’t be decided by a historically biased agency. Second, damages are limited to what is otherwise available under the CASE Act, undermining Section 512(f)’s deterrent effect (this is the flip side of the damages issue discussed above).

The CASE Act’s flaws are fundamental, and with all that Congress is or could be doing to fix copyright law and safeguard the open Internet, this bill is the wrong move at the wrong time.