



AUTHORS  
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September 29, 2020

The Honorable Lindsey Graham  
Chairman, Committee on the Judiciary  
U.S. Senate  
290 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member, Committee on the Judiciary  
U.S. Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510

**RE: Online Content Policy Modernization Act, S. 4632 (116)**

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

Authors Alliance writes to express concerns with the copyright small claims dispute provisions in the current draft of S. 4632, the Online Content Policy Modernization Act. Authors Alliance is a nonprofit organization representing the interests of authors who want to take advantage of opportunities of the digital age to share their creations with readers, promote the ongoing progress of knowledge, and advance the public good.<sup>1</sup>

Authors Alliance supports reducing barriers to copyright enforcement for those with limited financial resources by providing a faster and cheaper avenue to remedies. Today, the high cost of litigation keeps many independent authors and other creators from enforcing their copyrights. A well-designed copyright small claims process could fix this but, unfortunately, the copyright small claims dispute provisions in the current draft of S. 4632 are flawed and may well harm the independent creators they are intended to benefit. The deficiencies with the current draft are problematic not only for authors as claimants in the proposed tribunal who need access to an uncluttered and fair forum equipped to address their claims, but also for authors as respondents who need adequate protections to defend their lawful uses of copyrighted works. To address these issues, we respectfully urge the committee to improve S. 4632 as follows:

*Limit statutory damages to cases where it is impossible or cost prohibitive to prove actual damages and develop principles to guide awards of statutory damages.*

There may be a role for a reasonable statutory damages framework in a small claims tribunal when damages from infringement are difficult or impossible to prove, especially if the Copyright Office develops principles to guide the award of statutory damages. However, while substantially lower than the statutory damages available in federal court, the statutory damages provisions in S. 4632 are still excessively high and are available in all cases.<sup>2</sup> In federal court, awards of

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<sup>1</sup> For more information about Authors Alliance, see Authors Alliance, *About Us*, [www.authorsalliance.org/about/](http://www.authorsalliance.org/about/).

<sup>2</sup> Under S. 4632, claimants who timely registered their works can request up to \$15,000 per work infringed, with a total limit of \$30,000 per proceeding.

statutory damages are frequently arbitrary and sometimes grossly excessive,<sup>3</sup> incentivizing unscrupulous plaintiffs to intimidate and extract settlements from individuals accused of infringement. Faced with the risk of a high statutory award, many defendants opt to settle, even when they have a valid defense. With lower barriers for claimants and a disproportionate statutory damages framework, S. 4632 could make these problems even worse for authors accused of infringement who may feel pressured to settle rather than defend their lawful uses of copyrighted works.

*Remove restrictions on the grounds for judicial review of the tribunal's decisions.*

Independent judicial review is essential to ensuring that any tribunal operates fairly and arrives at the correct result. The copyright small claims dispute provisions in S. 4632, however, narrowly restrict the ability of either party to seek review of the tribunal's decisions in federal court. Under S. 4632, parties can ask the tribunal to reconsider a determination, and, with an additional fee, parties can ask the Register of Copyrights to review the tribunal's refusal to reconsider on abuse of discretion grounds. Independent review by a court is available only on the grounds of "fraud, corruption, misrepresentation, or other misconduct," or if the tribunal exceeded its authority or failed to render a final decision. Default judgments are reviewable only on grounds of excusable neglect. By restricting the grounds for appeal, S. 4632 would leave erroneous tribunal decisions essentially unreviewable and unjustly wronged parties with nowhere to turn for relief.

*Include additional safeguards to deter copyright trolls and preserve the utility of the small claims tribunal for independent authors and creators.*

The copyright holders who most need, and would most benefit from, a small claims process are independent authors and creators who cannot afford to enforce their copyrights in federal court. Unfortunately, the small claims tribunal provisions in S. 4632 are vulnerable to abuse by entities that buy up others' copyright claims and profit from litigation, making it even easier for these entities to get quick default judgments and disproportionately high damages awards. Absent enough protections for accused infringers and reasonable limits on damages, S. 4632 could invite abusive litigation tactics by copyright trolls while cluttering up the docket with cases that should be resolved elsewhere. As noted above, limiting statutory damages and providing principles to guide their award would help to mitigate this issue, as would requiring the Register of Copyrights to establish regulations limiting the permitted number of proceedings each year by the same claimant.<sup>4</sup>

*Require potential respondents to affirmatively opt-in to the small claims process.*

The opt-out provision in S. 4632 doesn't provide authors accused of infringement with enough protection. Under S. 4632, if a respondent fails to opt-out of the small claims process within 60 days of receiving notice of the claim, the small claims tribunal can enter a default judgment in

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<sup>3</sup> See, e.g. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480-491 (2009).

<sup>4</sup> The current draft of S. 4632 permits but does not require the Register of Copyrights to establish regulations relating to the permitted number of proceedings each year by the same claimant.

favor of the claimant and award her damages. While this opt-out procedure is intended to provide some protection for the accused, there's a strong likelihood that authors, educators, and independent creators without sophisticated legal knowledge or representation will not fully understand the implications and will ignore the notice. As a result, they could be held liable for substantial damages awards without a meaningful opportunity to defend their cases.

*Narrow the jurisdiction of the small claims tribunal.*

Some areas of copyright law are too complicated, fact specific, and unsettled to be decided by a small claims process. As set out in S. 4632, the tribunal's accelerated process and limited discovery mean that it is only equipped to handle simple, straightforward infringement claims in settled areas of law.<sup>5</sup> Despite this, the tribunal would have expansive authority to hear all types of copyright infringement claims, including those that involve highly complex issues and uncertain areas of law.<sup>6</sup> These complicated cases belong in a federal court with the expertise and resources to more competently address the factual and legal issues involved. Leaving these cases with the small claims tribunal hurts those creators trying to enforce their copyrights and those trying to defend their rights to use copyrighted works, as the tribunal may be ill-equipped to adequately resolve the issues involved.

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Independent authors and creators should have access to a low cost way to enforce their copyrights and vindicate their right to use others' copyrighted works in lawful ways. Unfortunately, the copyright small claims dispute provisions in S. 4632 invite abuse and pose a high likelihood of harm to authors as both claimants and respondents in the proposed tribunal. We hope our comments are helpful as you consider the current draft of S. 4632.

Respectfully submitted,



Brianna Schofield  
*Executive Director, Authors Alliance*

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<sup>5</sup> See, e.g., Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 607 (2018); Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711, 730 (2018).

<sup>6</sup> While S. 4632 does include a provision providing that the tribunal shall dismiss a claim or counterclaim if the tribunal concludes that the determination of a relevant issue of law or fact exceeds either the number of proceedings the tribunal could reasonably administer or its subject matter competence, it does so without providing any guidance on the limitations of the tribunal's jurisdiction.