



September 30, 2020

The Honorable Lindsey Graham
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
United States Senate
Committee on the Judiciary
Washington, DC 20510

Re: Concerns with S. 4632

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

CCIA has concerns with both the copyright and Section 230 language in S. 4632 (the Online Content Policy Modernization Act), which combines S. 1273 (the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019) and S. 4534 (the Online Freedom and Viewpoint Diversity Act). We respectfully request that you not vote the bill out of Committee at this week's Executive Business Meeting and look forward to working with members of the Senate to address our concerns.

I. Title I: Copyright (S. 1273)

CCIA has concerns with Title I of S. 4632, which is based on S. 1273, the CASE Act. As CCIA has testified before,¹ CCIA would support a small claims framework that provides individual rightsholders inexpensive relief from infringement while not enabling abusive litigants to circumvent the existing safeguards provided by the federal judiciary. Unfortunately, the way that the CASE Act, and by incorporation S. 4632, is structured has problems.

As the Copyright Office noted in its 2013 report, parties' consent to a small claims proceeding is likely necessary to survive subsequent legal challenges, since litigants must affirmatively waive constitutionally guaranteed rights of trial by jury and appellate relief.² It is unclear whether a 'negative option' opt-out from jury trial and appellate rights is in fact 'voluntary' for constitutional purposes. In any event, opt-in is more appropriate for administering a voluntary dispute resolution process. A May 2018 discussion draft of a similar bill last Congress proposed a 'blanket' opt-out: paying a one-time fee to permanently opt-out of all small claims proceedings. While this could address the concerns of some larger online services accustomed to

¹ *Copyright Alternative in Small-Claims Enforcement Act of 2017: Hearing Before the H. Comm. on the Judiciary* (Sept. 27, 2018) (statement of Matt Schruers, Vice President for Law & Policy, Computer & Commc'ns Indus. Ass'n).

² U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* (Sept. 2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>, at 28 n.172 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)).

legal compliance obligations, it would provide little relief to individual non-commercial users who are unaware of the option.

In addition to the core issue of whether such a procedure is voluntary, CCIA has a number of other concerns with this legislation, including but not limited to the following:

1. Because shell entities are a common feature of copyright “troll” litigation, the cap on the number of proceedings that a small claims plaintiff may bring before the small claims tribunal should be strengthened to ensure that it binds all real parties in interest, to prevent circumvention of the cap through assignees, proxies, or shell entities.
2. Any copyright small claims proceeding must not interfere with the established notice-and-takedown regime. In particular, § 512(g) must be preserved, so that it is clear that a small claims action would not trigger the bar on restoring content, preventing plaintiffs from turning the takedown process into injunctive relief.
3. Providing the Copyright Office rulemaking authority to increase small claims penalties would raise the risk that awards could be increased significantly, and statutory damages under this copyright small claims proposal are already substantial.
4. Conditioning the availability of statutory awards under 17 U.S.C. § 504(c) upon timely registration under § 412 is sound policy, and this bill should not depart from that.
5. Any small claims tribunal must provide traditional appellate recourse. This avenue could be similar to the appellate recourse available from agency determinations regarding patents and trademarks.

II. Title II: Section 230 (S. 4534)

CCIA also has serious concerns with Title II of this bill, based on S. 4534, the Online Freedom and Viewpoint Diversity Act. The language in Title II would, among other things, replace “otherwise objectionable” with a much narrower list: “promoting self-harm, promoting terrorism, or unlawful.” Narrowing the “otherwise objectionable” provision and requiring digital services to host all content that is not unlawful or related to self-harm or terrorism would open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech, as well as public health-related misinformation, and election-related disinformation by foreign agents.³ Today, digital services tend to moderate this content quickly, consistent with their terms of service.

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are “otherwise objectionable” and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Under a narrower definition, digital services would be discouraged from acting against a considerable

³ Matt Schruers, *What Is Section 230’s “Otherwise Objectionable” Provision?*, Disruptive Competition Project (July 29, 2020), <https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/>. See also Twitter thread by Daphne Keller, @daphnehk (Sept. 22, 2020), <https://twitter.com/daphnehk/status/1308411121439772674> (thread by Stanford Law School scholar Daphne Keller explaining that this language would limit platforms’ ability to take down “racist, misogynistic, anti-gay, and other kinds of hateful speech online.”).

amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.⁴

The term “otherwise objectionable” foresaw problematic content that may not be illegal but nevertheless would violate some online communities’ standards and norms. Congress’s decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of “otherwise objectionable” content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)’s “otherwise objectionable” acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

By protecting intermediary decisions whether content is removed or not, Section 230 encourages services to fight misconduct and protect users from online harms by removing disincentives to moderate. This helps combat online content and misbehavior that is abusive, inappropriate, or otherwise objectionable, though lawful. Narrowing this protection would have the perverse result of impeding online services’ and websites’ efforts to police bad actors and misconduct. Policymakers should want to strengthen the law that empowers Internet services to take down harmful content rather than weaken it. As demonstrated in the 1995 *Stratton Oakmont* decision that Section 230 overturned, removing 99% of inappropriate content could create the appearance of endorsing the 1% that an online service overlooked. Cautious sites and services, wary of anything that could lead to risk, may only give a platform to establishment viewpoints. Marginalized communities would suffer the most, being subject to increased scrutiny by litigation-wary lawyers hoping to avoid controversy.

We respectfully request that you not vote in favor of S. 4632, the Online Content Policy Modernization Act. We welcome the opportunity to work with members of the Committee on these important issues.

Sincerely,

Arthur Sidney
Vice President, Public Policy
Computer & Communications Industry Association

Cc: Members of the Senate Judiciary Committee

⁴ H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, “the existing legal system provides a massive disincentive” and the Cox-Wyden amendment “will protect them from taking on liability such as occurred in the *Prodigy* case in New York”).