Nos. 17-1522(L), 17-1602

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FREDERICK L. ALLEN ET AL.,
***Plaintiffs-Appellees*,**

v.

ROY A. COOPER, III ET AL.,
Defendants-Appellants

On Appeal from the United States District Court for the Eastern District of North Carolina
Case No. 5:15-CV-627-BO
The Honorable Terrence W. Boyle, United States District Judge

BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* SUPPORTING APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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If yes, identify all such owners:

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If yes, identify entity and nature of interest:

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If yes, identify any trustee and the members of any creditors' committee:

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

With the consent of all parties, Fed. R. App. P. 29(a)(2), *amicus curiae* The Copyright Alliance respectfully submits this brief in support of Appellees in this appeal from the district court's order holding that the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) ("CRCA"), validly abrogated the States' Eleventh Amendment immunity from suits for copyright infringement.[1]

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization dedicated to promoting and protecting the ability of creators and innovators to earn a living from their creativity. The Copyright Alliance represents thousands of creators and innovators across the spectrum of creative disciplines, including for example, graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers—as well as the small businesses that are affected by the unauthorized use of copyright owners' works. The Copyright Alliance's membership encompasses these individual creators and innovators, creative union workers, and small businesses in the copyright industry, as well as the organizations and corporations that support and invest in them.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that (i) no counsel for a party has written this brief in whole or in part and (ii) no person or entity other than *amicus* has made a monetary contribution that was intended to fund the preparation or submission of this brief.

The Copyright Alliance has an interest in ensuring that all members of the creative community have the opportunity to receive just remuneration when their copyrighted works are used by others. The Copyright Alliance has an interest in ensuring that creators also have the ability to seek redress in court when other parties infringe their rights—and that creators have that ability regardless of whether the infringer is affiliated with state government or is part of the private sector. The Copyright Alliance thus has a significant interest in ensuring that CRCA is properly upheld against the State's constitutional attack.

SUMMARY OF ARGUMENT

Appellees' brief shows why the Court should hold that CRCA validly abrogates the States' Eleventh Amendment immunity in copyright infringement actions. CRCA satisfies all of the considerations the Supreme Court has deemed relevant to the question whether Congressional abrogation of Eleventh Amendment immunity validly enforces the guarantees of the Fourteenth Amendment. *See* Appellees' Br. at 16-33. Among other considerations, Congress enacted CRCA based on substantial evidence showing a pattern of States making unauthorized use of copyright owners' federally protected copyrights.

States' conduct following CRCA's enactment—especially following judicial decisions casting a cloud of uncertainty over CRCA's validity—confirms that Congressional abrogation was and remains necessary to safeguard copyright

owners' rights. Nine years after Congress passed CRCA, the Supreme Court held in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), that Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for *patent* infringement. In the wake of that decision, States have infringed *copyrights* and have cited the belief that they are immune from damages suits as a basis for denying compensation for their prior unauthorized uses of copyrighted works. The evidence of States' actions post-CRCA and post-*Florida Prepaid* confirms the correctness of Congress's conclusion that CRCA was necessary to remedy State deprivation of copyright owners' rights. Moreover, Congress properly and appropriately tailored CRCA to remedy this unjustified deprivation and promote respect for copyright. These considerations further support Appellees' argument that CRCA represents a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

ARGUMENT

I. The Record Before And After CRCA Demonstrates A Need For Congressional Action To Redress A Pattern Of State Infringement Of Copyright Owners' Rights

Congress may abrogate the States' Eleventh Amendment immunity pursuant to the valid exercise of its power under Section 5 of the Fourteenth Amendment. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003). In analyzing whether Congress validly exercised its Section 5 powers, an important

inquiry is "whether Congress had evidence of a pattern of constitutional violations on the part of the States in [the particular] area" under consideration, *id*. at 729, here, copyright infringement, which deprives copyright owners of their property.

The record before Congress when it enacted CRCA showed that States had engaged in a pattern of disrespecting copyright owners' rights. Numerous witnesses testified to the need for Congress to act to prevent continued infringement by state entities. *See* Appellees' Br. at 21-26.

The post-CRCA record confirms that Congress accurately identified and attempted to remedy a significant problem when it passed CRCA. In 1999, the Supreme Court held that Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for patent infringement. *Florida Prepaid*, 527 U.S. at 647-48. The following year, the Fifth Circuit held that *Florida Prepaid* compelled the conclusion that CRCA was unconstitutional. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 607-08 (5th Cir. 2000).

Following *Chavez's* extension of *Florida Prepaid* to copyright suits, States again disregarded copyright owners' rights and entitlement to full compensation based on States' belief that they would not have to face liability suits under the Copyright Act.

Evidence of States' actions in this regard is found in Congress's study of these issues in 2001 and 2002. In 2001, Senator Hatch asked the General

Accounting Office ("GAO") to conduct a study of Eleventh Amendment immunity assertions in intellectual property actions. *See* General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm.* 1-2 (Sept. 2001). The Software & Information Industry Association ("SIIA"), an association of software companies that helps to protect its members' intellectual property rights, reported to GAO on a survey of SIIA's records concerning intellectual property matters involving state entities. In its report to GAO, SIIA indicated that it had identified 77 matters involving possible infringement of copyrighted software by state entities. *Id*. at 13.

SIIA provided the same data to the Senate Judiciary Committee in 2002. *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong., 2d Sess. 91 (2002). SIIA noted that the large majority of the 77 matters that it identified had not resulted in filed cases because SIIA and the state entities were able to resolve the matters short of litigation. This fact was significant, according to SIIA, because it showed the difficulty of obtaining complete information regarding incidents of state infringement. As SIIA explained in its submission, reports of States infringing copyright that are based solely on filed lawsuits or reported court decisions almost

certainly understate the level of state entities making unauthorized use of copyrighted works. *Id*. at 92.

Importantly, SIIA's statement that many of the matters it identified were consensually resolved did not indicate that copyright owners were able to obtain compensation for States' unauthorized use of copyright owners' works. On the contrary, SIIA reported incidents in which States refused to pay compensation for their past unauthorized use of copyrighted works based on the States' assertion of Eleventh Amendment from damages suits. For example, SIIA described the case of a government-run hospital in Baltimore that was discovered to have used unlicensed software with significant market value. SIIA said that although it had attempted to negotiate a monetary settlement, the hospital refused to pay compensation for its prior use of the copyrighted works. According to SIIA, the hospital cited *Florida Prepaid* for the proposition that it would be immune from a suit for damages in federal court. *Id*. SIIA also reported that a New Hampshire state entity threatened SIIA with legal sanctions if SIIA filed a legal action based on that entity's unauthorized use of copyrighted software. *Id*. SIIA explained that examples such as these demonstrated the inequity of allowing state-affiliated entities to claim immunity from damages suits. As SIIA said, it was "precisely this kind of inequity that Congress attempted to remedy when it passed the CRCA in 1990." *Id*.

Unauthorized uses of copyrighted works by state entities—and those entities' reliance on Eleventh Amendment immunity as a response to infringements when copyright owners discover them—have continued. Getty Images is an agency that distributes photographs and film footage created by many thousands of individual creators and also assists photographers in redressing unauthorized use of their works. Getty Images identified in its database of infringement matters more than 50 different instances in which State entities have claimed that the Eleventh Amendment shielded them from suit in federal court. Sixteen of these matters arose within the last three years alone.

Getty Images' standard procedure upon discovering unauthorized use of its works is to send a cease-and-desist letter to the party making such use. Getty Images also generally makes a settlement demand to recover the license fee that the party should have been paid for its use of the copyrighted work. States' reliance on Eleventh Amendment immunity from a suit for damages, however, has made it difficult for Getty Images to obtain compensation for past infringement. Some state-agency recipients of Getty Image's cease-and-desist notices have responded by agreeing to halt further infringing use of the underlying copyrighted work but have asserted Eleventh Amendment immunity in refusing to pay any amounts for past use.

In total, Getty Images has been able to negotiate a settlement payment in only two cases in which state entities claimed they would be immune from a damages suit under the Eleventh Amendment. Because of the uncertainty created by States' claims of immunity and the prohibitive costs of litigation, Getty Images closed the other matters without recovering any license fees.

The above-described reports of States disregarding copyright owners' rights based on Eleventh Amendment immunity are stark but they are by no means isolated. On the contrary, it is likely that the reports discussed here represent the tip of a much larger iceberg of States denying remuneration for their unauthorized uses of copyrighted works. Disregard by States for copyright owners' rights will disproportionately affect small content creators. Individuals or small businesses engaged in content creation will frequently lack the resources to monitor infringement. Smaller copyright owners are especially unlikely to risk the costs and uncertainties of litigation when state entities respond to discovered instances of unauthorized use by asserting Eleventh Amendment immunity. And, smaller copyright owners also are unlikely to maintain comprehensive records of States infringing their works or refusing to provide compensation for past unauthorized use.

These realities mean that it is difficult to compile robust statistics on the extent to which States have infringed copyright or refused to pay fees for prior use

of copyright. But state infringement of copyright owners' rights does exist. Even after CRCA, States have disrespected copyright owners' rights and refused to provide compensation for their unauthorized use. All of this confirms that in CRCA, Congress responded to an important and pressing need to protect copyright owners' rights from States' deprivations of those rights.

II. Congress Appropriately Tailored CRCA To Provide Remedies For Infringement And Maintain Respect For Copyright

Congress appropriately tailored CRCA to address the problem of States' disregarding copyright. *See Hibbs*, 538 U.S. at 737-38. CRCA simply mandates that state entities are subject to liability actions if they infringe copyright. This is the same consequence that private entities face if they infringe copyright. Most state entities that use copyrighted works—and that are the entities most likely to make unauthorized uses of such works—are not materially different than their private counterparts with respect to the interests that copyright promotes and secures.

There is no reason why a public university, for example, should be relieved from liability for making unauthorized uses of copyrighted works when the private universities they compete with must respect copyright. In both cases, the copyright interest in ensuring that the creator is compensated for the use of his or her creative work is the same. The case for parity among public and private entities is the same

across the wide range of institutions that use copyright, whether those entities are medical centers, scientific laboratories, or administrative facilities.

Congress's decision to provide parity across the defendants subject to suit was properly tailored to promote respect for copyright. Barbara Ringer, the Register of Copyrights from 1973-1980 and one of the chief architects of the Copyright Act of 1976, testified to the acute need for Congressional action when Congress was considering CRCA in 1989. As former Register Ringer explained:

> When one group, whether rightly or wrongly, thinks it has found a loophole that gives its members a free copyright ride, and embarks upon a systematic enterprise that many people will call piracy, the result inevitably is a miasmic atmosphere of disorder and lawlessness that tears the fabric not only of the copyright law but of the disciplines and enterprises involved. And, of course, the longer the situation continues the worse it gets and the harder it is to change.

Hearings on H.R. 1131 Before the Subcomm. On Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Comm., 101st Cong., 1st Sess. 96 (1989).

These words cogently summarized the importance of Congressional action in 1990, and they ring true today. The harm that infringing activity inflicts on copyright owners, and the cost that such activity exacts from public respect for copyright, is the same regardless of the nature of the entity doing the infringing. Indeed, as former Register Ringer explained, allowing one class of copyright users

to exploit a loophole without consequence is harmful to copyright law generally and to "the disciplines and enterprises involved." *Id.* In achieving its goal through a tailored system of public-private parity, CRCA ensures that the creative disciplines and enterprises will be justly compensated for the use of their creative output.

CONCLUSION

The Copyright Alliance respectfully submits that the Court should affirm the district court's order that CRCA validly abrogates the State's Eleventh Amendment immunity from suit for copyright infringement.

DATED: October 20, 2017

Respectfully submitted,

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No. 17-1522 **Caption:** Allen v. Cooper

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(s) Kelly M. Klaus

Party Name Copyright Alliance

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DATED: October 20, 2017 MUNGER, TOLLES & OLSON LLP

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