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, as Governor of North Carolina, et al.,

Defendants-Appellants,

and

FRIENDS OF QUEEN ANNE'S REVENGE, a non-profit corporation,

Defendant.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Case No. 5:15-cv-00627-BO, Hon. Terrence W. Boyle

BRIEF OF RALPH OMAN AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES FREDERICK L. ALLEN AND NAUTILUS PRODUCTIONS, LLC AND AFFIRMANCE OF THE ORDER BELOW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES AND RULES

Page(s)

OTHER AUTHORITIES

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Ralph Oman served as the Register of Copyrights—the head of the U.S. Copyright Office—from 1985 to 1993, and is currently the Pravel, Hewitt, Kimball and Kreigher Professorial Lecturer in Intellectual Property and Patent Law at The George Washington University Law School. Before Congress passed the Copyright Remedy Clarification Act in 1990 ("CRCA"), Pub. L. No. 101-553, 104 Stat. 2749 (1990), in order to clarify its intent to abrogate states' Eleventh Amendment immunity from federal copyright infringement claims, it asked Mr. Oman for "assistance with respect to the interplay between copyright infringement and the Eleventh Amendment" and to investigate the "practical problems relative to the enforcement of copyright against state governments." *See* Letter from Representatives Robert W. Kastenmeier & Carlos Moorhead, House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, to Ralph Oman, Register of Copyrights (Aug. 3, 1987) ("1987 Letter to Oman"), at United States Copyright Office, *A Report of the Register of Copyrights: Copyright Liability of States and the Eleventh Amendment* (June 1988) ("*Register's Report*"), http://files.eric.ed.gov/fulltext/ED306963.pdf.

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[1] Both parties to this appeal have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than *amicus* or his counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

In response to that request, Mr. Oman and his staff at the Copyright Office solicited and reviewed dozens of public comments in late 1987 and early 1988. After completing that review, Mr. Oman reported to Congress the "dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits," and documented the recent surge of cases finding states immune to copyright damages. *Register's Report* at ii-iii.

Congress enacted the CRCA in large part on the basis of Mr. Oman's report and his subsequent testimony on the need for such legislation. In considering the constitutionality of the resulting law, the Court is, in many respects, evaluating the record that Mr. Oman created. Mr. Oman files this *amicus* brief to describe and explain the evidence he collected and reviewed.

INTRODUCTION

In 1987, when Congress began to consider whether to clarify its intention to abrogate state immunity for federal copyright infringements, it turned first to the U.S. Copyright Office to assess the need. That was no accident. One of the Office's principal responsibilities is to help Congress navigate a path through the immensely complicated issues presented by federal copyright law and policy. *See* 17 U.S.C. § 701(b). Consistent with its statutory mandate, the Office set out to do

just that on the important Eleventh Amendment-related issues Congress charged it with investigating.

Over the course of a year or so, Mr. Oman solicited and reviewed nearly 50 public comments from a range of stakeholders on the extent of the problem posed by state immunity to copyright infringement claims. He ultimately provided Congress with a 150-page report documenting the clear and growing problems presented by copyright infringement committed by states and state agencies, and the ineffectiveness of remedies available to private actors to protect their intellectual property.

DISCUSSION

I. THE COPYRIGHT OFFICE SERVES A UNIQUE ROLE IN FORMULATING COPYRIGHT POLICY FOR THE UNITED STATES

Copyright law is a specialized subject matter. As countless courts have recognized, the federal copyright regime creates a "complex system" of property protections, limits, and exceptions "designed to benefit not just the holders of copyright but society as a whole." *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 765, 785 (E.D. Pa. 2001), *aff'd*, 347 F.3d 485 (3d Cir. 2003); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994). As such, it presents "notoriously difficult" questions for courts and policymakers. *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 290-91 (3d Cir. 2004). At times, the contours of

the law have been described as "hard to fathom," David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. Copyright Soc'y U.S.A. 401, 405 (1999), with certain applications "like assembling a jigsaw puzzle whose pieces do not quite fit," *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

The Copyright Office is the expert agency charged with administering that complex system. Established as "an arm of Congress," *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 182 n.6 (1985) (White, J. dissenting), one of the agency's principal statutory mandates is to "[a]dvise Congress on national and international issues relating to copyright." 17 U.S.C. § 701(b)(1). With its "100 year experience in copyright issues," *Nat'l Ass'n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 913 (D.C. Cir. 1998), it plays a central role in completing the "massive work necessary" for Congress to revise federal copyright law, *Snyder*, 469 U.S. at 159-60. Congress itself has acknowledged that it "relies extensively on the Copyright Office to provide its technical expertise in the legislative process." S. Rep. No. 101-268, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 237, 241; *accord* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.26 (online ed. 2016).

Numerous federal copyright policies have originated from the Copyright Office's expertise and recommendations. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354-55, 360 (1991) (clarification of the "originality"

requirement for copyrighted works); *Brumley v. Albert E. Brumley & Sons, Inc.*, 822 F.3d 926, 928-29 (6th Cir. 2016) (the 1976 Act's revamping of the copyright renewal provision). Indeed, the currently prevailing copyright law—the 1976 Copyright Act, as amended—"was the product of two decades of negotiation by representatives of creators and copyright-using industries, *supervised by the Copyright Office* and, to a lesser extent, by Congress." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (emphasis added). And that process, itself, was the continuation of a tradition started at the turn of the 20th century, when the Copyright Office called for and guided Congress on the preceding overhaul of U.S. copyright law, culminating in the adoption of the 1909 Copyright Act. *See* William F. Patry, *Copyright Law and Practice* 56-58 (2000), http://digital-law-online.info/patry/patry6.html (describing the leading role played by the Register of Copyrights in the statutory revision process from 1901-1909).

II. THE COPYRIGHT OFFICE CAREFULLY STUDIED THE NEED TO ABROGATE STATE IMMUNITY FOR COPYRIGHT INFRINGEMENT

It was therefore natural for Congress to turn to Mr. Oman when it began to consider the (newly revealed) need to clearly abrogate state immunity from federal copyright claims, in the wake of the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Supreme Court held that a "general authorization for suit in federal court is not the kind of unequivocal

statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246. This holding was seen immediately as a marked departure from the Court's prior decisions, which had sanctioned a more flexible analysis of Congress's intent to abrogate state immunity, and Congress recognized that the implications for copyright policy warranted further study.

Before *Atascadero*, the Ninth Circuit, for example, had little trouble concluding that the Copyright Act of 1909 authorized individuals to seek damages for copyright infringement by states. *See Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1284 (9th Cir. 1979). And the last time Congress engaged in a major revision of the Copyright Act in 1976, it intended to maintain that status quo. *See* H.R. Rep. No. 101-282, at 2 (1989). Indeed, a district court in this Circuit reached precisely that conclusion in March of 1985—just three months before the Supreme Court decided *Atascadero*—and held that Congress validly abrogated the states' Eleventh Amendment immunity for copyright infringement claims when it enacted the Copyright Act of 1976. *See Johnson v. Univ. of Va.*, 606 F. Supp. 321, 323-24 (W.D. Va. 1985) (following the Ninth Circuit's "thorough and well-reasoned opinion" in *Mills Music*). But because the law as amended contained no statutory provision expressly abrogating immunity, *Atascadero* raised the danger that going forward, courts would be compelled to conclude that states could effectively infringe copyrights willy-nilly—or at least free of the fear of money damages.

And that is precisely what happened. Just three years after the *Atascadero* decision, in *Richard Anderson Photography v. Brown*, this Court held that the Copyright Act lacked the unequivocal, unmistakable, and specific language to abrogate state sovereign immunity required by the "most stringent test" laid out in *Atascadero*. *See* 852 F.2d 114, 117-20 (4th Cir. 1988). Judge Boyle sitting by designation dissented, countering that "[i]f Congress had the benefit of *Atascadero* . . . in 1976 when it rewrote the [Copyright] Act, it may be that it would not have taken for granted what appears to be so obvious—that is that the states may be held accountable for their violations of copyright as secured under the Constitution." *Id.* at 129 (Boyle, J. dissenting).

In the same vein, the Ninth Circuit in *BV Engineering v. University of California* expressly overruled its prior decision in *Mills Music* under the new *Atascadero* standard. *See* 858 F.2d 1394, 1397-98 & n.1 (9th Cir. 1988). The Ninth Circuit acknowledged its decision left plaintiffs with "*no* forum" to seek a remedy for copyright infringement by states, and recognized that its "holding will allow states to violate the federal copyright laws with virtual impunity." *Id.* at 1400. But *Atascadero* bound the Court, so only Congress could remedy the resulting public policy problem. *Id.*

More broadly, courts across the country came to the same conclusion. *See Lane v. First Nat'l Bank*, 687 F. Supp. 11, 14 (D. Mass. 1988) ("[B]ased on the

Atascadero decision . . . *Mills Music* is no longer controlling law."), *aff'd*, 871 F.2d 166 (1st Cir. 1989); *Lane v. First Nat'l Bank*, 871 F.2d 166, 168-69 (1st Cir. 1989) ("[I]n the post-*Atascadero* era, no court to our knowledge has held the Copyright Act passes the reformulated test for abrogation of Eleventh Amendment protection."); *Cardinal Indus., Inc. v. Anderson Parrish Assocs.*, No. 83-1038-Civ-T-13, 1986 WL 32732, at *1 (M.D. Fla. May 7, 1986) (referring to an unpublished order dated September 6, 1985, dismissing copyright infringement claims against public university officials on Eleventh Amendment grounds), *aff'd*, 811 F.2d 609 (11th Cir. 1987) (unpublished); *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 504 (N.D. Ill. 1985) ("Under *Atascadero* . . . [the Copyright Act's language] is not enough to abrogate sovereign immunity."). The implications were clear: after *Atascadero*, states could engage in copyright infringement with virtual impunity.

It was in the midst of this troubling surge of post-*Atascadero* cases that Congress reached out to Mr. Oman, then-Register of Copyrights, for help. On August 3, 1987, Representatives Robert Kastenmeier and Carlos Moorhead wrote to Mr. Oman. Representatives Kastenmeier and Moorhead served, respectively, as Chairman and ranking minority member of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the subcommittee with jurisdiction over intellectual property issues. In their letter, they requested Mr.

Oman's "assistance with respect to the interplay between copyright infringement and the Eleventh Amendment." *See* 1987 Letter to Oman at 1. The correspondence noted that "there [had] been a number of court cases in recent years which [had] addressed this question." *Id.* And it charged Mr. Oman and the Copyright Office with three tasks.

First, it asked Mr. Oman "to conduct an inquiry concerning the practical problems relative to the enforcement of copyright against state governments." *See Id.* at 1. Second, it asked him "to conduct an inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state government with respect to copyright issues." *Id.* Third, it asked him "to produce a 'green paper' on the current state of the law in this area," including a 50-state survey of the statutes and regulations governing waiver of immunity, "and an assessment of what constitutional limitations there are, if any, with respect to Congressional action in this area." *Id.*

III. THE COPYRIGHT OFFICE COMPILED SUBSTANTIAL EVIDENCE OF THE NEED TO ABROGATE STATE IMMUNITY FOR COPYRIGHT INFRINGEMENT

Mr. Oman promptly began working to fulfill Congress's request. On November 2, 1987, the Copyright Office published a Request for Information in the Federal Register seeking public comment on the important issues Congress had asked him to investigate. 52 Fed. Reg. 42,045, 42,045 (Nov. 2, 1987). The

Request for Information stressed that the shifting precedential landscape "might influence states to change their practices of recognizing the rights of copyright owners." *Id.* at 42,046. It solicited public comments on "(1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers, and (2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials." *Id.* at 42,045.

For the next several months, responses flowed into the U.S. Copyright Office on these issues. In total, more than 40 comments were submitted from textbook publishers, motion picture producers, composers, software companies, financial advisors, trade groups, and various state agencies. *Register's Report* at Appendix A, Commentators in Copyright Office Request for Information. Mr. Oman carefully reviewed and analyzed each submission.

A. The Register's Report Documented A Pattern Of Copyright Infringement By The States And A Lack Of Effective State Remedies

After nearly a year's work, on June 27, 1988, Mr. Oman submitted to Representatives Kastenmeier and Moorhead *A Report of the Register of Copyrights: Copyright Liability of States and the Eleventh Amendment*. In Mr. Oman's transmittal letter, he explained the Report's contents, which included "a factual

inquiry about enforcement of copyright licensing practices, if any, with respect to state government use of copyrighted works," "an in-depth analysis of the current state of Eleventh Amendment law and the decisions relating to copyright liability of states," and a "50 state survey of the statutes and case law concerning waiver of state sovereign immunity," prepared by the American Law Division of the Congressional Research Service. Letter from Ralph Oman, Register of Copyrights to Representatives Robert W. Kastenmeier & Carlos Moorhead, House Subcommittee on Courts, Civil Liberties, and the Administration of Justice (June 27, 1988), http://files.eric.ed.gov/fulltext/ED306963.pdf. All told, the Register's Report spanned over 150 pages. It clearly established an emerging pattern of copyright infringement by states and state agencies, along with a total absence of effective remedies to stem such abuse.

1. With respect to copyright infringement by states, Mr. Oman explained that "the comments almost uniformly chronicled dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits." *Register's Report* at iii, 5-6. As one comment starkly framed the issue: Eleventh Amendment immunity for states represents nothing less than "a compulsory license to exercise all of a copyright owner's rights, gratis." *Id.* at 6; *see* U.S. Copyright Office, RM 87-5 Comment Letter No. 27 at 19 (Jan. 29, 1988) (comment letter of Information Industry

Association) ("[A]bsent a detected infringement, states would have what amounts to a compulsory license . . . [with] no payment to the copyright owner.") (all comments are hereinafter referred to as "Comment Letter No. ___").[2]

Nearly half of the comments expressed the fear that, if Congress did not act, states would engage in "widespread, uncontrollable copying of their works without remuneration." *Register's Report* at 6. Consistent with the Ninth Circuit's observations in *BV Engineering*, the responders explained that "with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them." *Id.*; *see, e.g.*, Comment Letter No. 5 at 1-2 (Jan. 27, 1988) (comment letter of The Foundation Press, Inc.) ("If such decisions are upheld, it would enable a State, with practical impunity, to purchase one copy of one of our books and then produce its own copies thereof for all State funded law libraries and for distributions to students at State funded law schools . . . .").[3]

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[2] Excerpts from comments are included in the Addendum attached to Mr. Oman's motion for leave to supplement his brief filed concurrently herewith.

[3] By contrast, not a single comment among the 44 received suggested that copyright owners took advantage of states or imposed unfair business practices on them. *See Register's Report* at 5-6. To the contrary, the comments showed that states leveraged their significant bargaining power and exacted concessions beyond those ordinarily granted. *Id.* at 6. As one comment explained, "state agencies are able to extract from or even impose on publishers substantial concessions of basic rights under the Copyright Act that . . . go far beyond the borders of fair use, educational exemptions, or the educational guidelines incorporated in the legislative history." *Id.* at 11; *see also* Comment Letter No. 17 at 3 (Feb. 1, 1988) (comment letter of Harcourt Brace Jovanovich, Inc.) ("Schools expect permission

Critically, the Register's Report documented numerous examples of blatant copyright infringement that had already occurred. *See Register's Report* at 7-10. Complaints about infringement by state actors came from individuals, small businesses, and large, seemingly powerful organizations; and from companies and other organizations in the healthcare, education, music, motion picture, and financial data industries. *See id.* The Motion Picture Association of America, for example, explained that it frequently encountered state correctional institutions publicly performing motion pictures without authorization from the copyright owners. *See id.* at 7-8. When caught and confronted, some states agreed to obtain a license; but others brashly persisted in nakedly infringing conduct, and at least two states—North Carolina and Wisconsin—did so expressly based on their assertion of Eleventh Amendment immunity. *Id.* at 8. In fact, in North Carolina, the Special Deputy Attorney General categorically concluded in 1987 that "[t]he showing of video tapes to prison inmates will not subject the State to liability under the federal copyright laws." Comment Letter No. 16 at 6 (Feb. 1, 1988) (comment letter of Motion Picture Association of America).

Similarly, the American Journal of Nursing Company recounted the story of a Minnesota state-run nursing home that was operating an "information center,"

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to create literally thousands of copies of translations or thousands of audio cassettes or derivative works and they expect publishers to grant these permissions at no charge.").

where it copied the company's (and its competitors') educational materials and offered them for sale without permission. *See Register's Report* at 8. The Journal's comment confirmed that similar infringements were being committed by state agencies in California, and, the Company suspected, across the country. *See* Comment Letter No. 26 at 1-2 (Jan. 28, 1988) (comment letter of American Journal of Nursing Company) ("Clearly the pattern is repeating itself.").

Mr. Oman believes that these episodes and the others described in the Report were just the tip of the iceberg for several reasons. First, the Office did not have (and therefore could not exploit) subpoena power, or anything like it, to gather a truly comprehensive catalogue of state copyright infringements. Instead, Mr. Oman and his team relied on a modest request for information directed to the relatively small group of individuals and organizations savvy enough to be aware of the notice, and sufficiently sophisticated to prepare and submit responsive comments.

Second, because the Supreme Court had not yet adopted (as it later would in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)) the prevailing test for determining the constitutionality of federal legislative attempts to abrogate states' Eleventh Amendment immunity, the Request for Information did not actually seek public comments on *every* known instance of copyright infringement by states. Instead, it focused more broadly on "practical problems relative to the enforcement

of copyrights against state governments"—and accordingly received a set of responses that was illustrative rather than exhaustive. 52 Fed. Reg. at 42,046.

Third, it was already clear at the time that copyright infringement cases against states were increasingly abundant. In fact, the very prevalence of the post-*Atascadero* cases discussed above (all of which concluded that there was no valid abrogation of State immunity in the then-prevailing version of the Copyright Act) was the impetus for Congress's request to Mr. Oman to document the severity of the trend. The resulting comments were thus more than adequate to substantiate the pre-existing fear that states and state agencies may quickly have been becoming aware—and, at least occasionally, taking advantage—of their newfound ability "to violate the federal copyright laws with virtual *impunity*." *BV Eng'g*, 858 F.2d at 1400 (emphasis added); *cf. Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 358 (4th Cir. 2001) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J.))); *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 856-57 (9th Cir. 2001) (cautioning that a requirement for Congress to "gather and document sufficient evidence to support the exercise of its constitutionally granted powers, would raise fundamental separation of powers concerns—the courts treating Congress more like an administrative agency than a co-equal branch of the

federal government"), *aff'd sub nom. Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

2. With respect to possible remedies for this pattern of infringement, the Report made clear that, in the absence of congressional action, there were none. The Report's comprehensive, 50-state survey revealed that without abrogation of state immunity, damages for copyright infringement were not available. *See Register's Report* at Appendix C. "[N]one of the fifty states in their state constitution, state laws, or state court decisions, expressly waive[d] Eleventh Amendment immunity from suit for damages in federal court in copyright infringement cases." *Id.* at xi.

The Survey did note a handful of state attorney general opinions, some of which indicated a willingness to comply with federal copyright law. But, as the Report noted, attorneys general usually lacked authority to waive a state's immunity. *Id.* at Appendix C, Summary, CRS-9. And, in any event, almost all of these opinions predated *Atascadero* and thus provided "small comfort." Comment Letter No. 12 at 3-4 (Feb. 1, 1988) (comment letter of Association of American Publishers, Inc.). Following *Atascadero*, the Report noted, the Texas Attorney General concluded unequivocally "that the [E]leventh [A]mendment would bar any damage action in federal court against the state, and to sue the State of Texas in

state court would require permission to sue to be granted by the legislature." *Register's Report* at CRS-21.

The comments overwhelmingly rejected the idea that injunctive relief alone could serve as an adequate remedy or effective deterrent against state infringements. *See id.* at 13-15. Small companies could not afford to bring suits for equitable relief alone with no prospect of recovering money damages to offset litigation expenses. Comment Letter No. 26 at 2 (explaining that the American Journal of Nursing Company dropped a claim for injunctive relief for this reason); Comment Letter No. 10 at 1 (Jan. 28, 1988) (comment letter of Data Retrieval Corporation) ("The availability of injunctive relief is simply not enough of a remedy to provide practical protection for a small company such as ours from States with relatively unlimited legal resources who may wish to use our software products without paying license fees."). Other comments reported that it would be quite difficult to detect or stop infringement of certain copyrighted works before it occurred, so injunctive relief would be of little use. *See* Comment Letter No. 27 at 19 ("The difficulty [in seeking an injunction] is compounded by the fact that computer software and databases are particularly susceptible to copying and other infringing uses which are difficult to detect."); Comment Letter No. 23 at 7 (Feb. 1, 1988) (comment letter of American Society of Composers, Authors and Publishers) ("The only meaningful remedy available to the copyright owner of the performing

right [in musical compositions] is the after-the-fact infringement action for monetary damages.").

* * *

In sum, the Register's Report explained that the Copyright Office was "convinced that Congress intended to hold states responsible under the federal copyright law and the copyright proprietors ha[d] demonstrated they w[ould] suffer immediate harm if they are unable to sue infringing states in federal court." *Register's Report* at 103. Accordingly, the Report urged Congress to use the available constitutional authority to "act quickly to amend the [Copyright] Act" to provide copyright owners "an effective remedy against infringing states" and "to ensure that states comply with the requirements of the copyright law." *Id.* at 103-04. To the extent that courts—including the U.S. Court of Appeals for the Fifth Circuit in *Chavez v. Arte Publico Press*, 204 F.3d 601, 605-607 (5th Cir. 2000)—and Appellants in this case have suggested that the Report concluded that state copyright infringements were not a legitimate, significant problem, or that Congress did not have ample justification for adopting the version of the CRCA that it ultimately ratified, they have simply misinterpreted Mr. Oman's findings.

B. Mr. Oman's Congressional Testimony Further Showed The Need For The CRCA

Following the submission of the Report, Mr. Oman was the first witness called at both the House and Senate hearings on the CRCA. *See Copyright*

Remedy Clarification Act and Copyright Office Report on Copyright Liability States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong. III (1989), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/Copyright%20Remedy%20Clarification%20Act%20and%20Copyright%20Office%20Report%20%28April%2012%20and%20July%2011,%201989%29.pdf (Ralph Oman listed as first witness) (hereinafter "House Hearing"); *The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. III (1989), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/S.%20Hrg.%20101-757,%20Copyright%20Clarification%20Act,%20Subcomm.%20%28May%2017,%201989%29.pdf (same). Like the Register's Report, both hearings focused on the pressing need for the CRCA after *Atascadero*. *See, e.g.*, *House Hearing* at 4.

Mr. Oman emphasized the "great dilemma" Congress faced. *Id.* at 5. Because federal copyright law preempted state law, Eleventh Amendment immunity meant that copyright owners would have no compensatory remedies at all if states could not be sued for damages in federal court. *Id.* In his testimony, Mr. Oman made clear that the "major concern" among copyright owners "is the widespread, uncontrollable copying of their works without payment," which would

cause "dire financial consequences" for both copyright owners and others. *See id.* at 6. Mr. Oman acknowledged that based on the evidence he had collected via the Federal Register announcement alone, he could not conclude that such abuses were yet "widespread," *id.* at 53, or that states were on the verge of "launch[ing] a massive conspiracy to rip off publishers across-the-board," *id.* at 8. But he explained that the public comments the Copyright Office had received demonstrated the dangers of congressional inaction to be very real, with significant attendant problems under the *status quo* in which states were not "held accountable in damages for the[ir] infringement of copyrighted works." *Id.* at 7.

Mr. Oman reported his findings that states were asserting their Eleventh Amendment immunity in *pending* litigation. *Id.* at 51. And he told Congress he did not believe that states would take responsibility for their actions in copyright disputes "unless there is the larger possibility of liability" for monetary c

Id. at 48. Accordingly, Mr. Oman testified that the CRCA was "of such in

and direct importance" that Congress should expeditiously take legislative action. *Id.* at 50.[4]

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[4] Testimony from Mr. Oman's predecessor as Register of Copyrights, the late Barbara Ringer, who had been instrumental in Congress's adoption of the 1976 Copyright Act, echoed Mr. Oman's recommendations. Ms. Ringer testified that Congress should enact the CRCA "as soon as possible" because the Register's Report showed real problems caused by copyright infringement by states in the past that "were likely to get worse." *House Hearing* at 81-83, 92 (explaining that

CONCLUSION

Mr. Oman respectfully urges the Court, in evaluating the constitutionality of the CRCA, to consider the Register's Report (and related information) that convinced Congress of the need to enact the law, to recognize the year of work the Report entailed, and to acknowledge the role that the Copyright Office has historically played—and played in this instance—in advising Congress on critical matters of copyright law and policy.

"the record probably refutes" the statements of the public universities that there were no current problems with copyright infringement by states). Ms. Ringer further noted that she knew of "plenty of instances . . . where there is a crunch between budgetary considerations and copyright, and in these cases copyright gives way." *Id.* at 83. And Ms. Ringer thought there was "no question" the problem would only get worse because "[a]ll the good faith in the world is not going to override the reality that people will not pay for something they can get for free." *Id.* at 83, 94.

Dated: October 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Andrew M. Gass, hereby certify that on this 20th day of October the foregoing *Amicus Brief* of Ralph Oman complies with type-volume limits because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 4,800 words, and is proportionately spaced using a roman style typeface of 14-point.

s/ Andrew M. Gass
Andrew M. Gass

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I, Andrew M. Gass, hereby certify that I electronically filed the foregoing **Brief of Ralph Oman As *Amicus Curiae* In Support of Plaintiffs-Appellees Frederick L. Allen and Nautilus Productions, LLC** with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on October 20, 2017, which will send notice of such filing to all registered CM/ECF users.

s/ Andrew M. Gass
Andrew M. Gass

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: Ralph Oman

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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I certify that on October 20, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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