



**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Sovereign Immunity Study Reply Comments**

**Docket No. 2020-9**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance appreciates the opportunity to respond to comments filed during the initial comment period regarding the U.S. Copyright Office's [Notice of Inquiry](#) (NOI) on its study to determine the extent to which copyright owners are experiencing infringement by states without adequate remedies under state law.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

**I. Introduction**

In our initial comments, we concluded that a sufficient record of harm exists for the Copyright Office to recommend that Congress abrogate state sovereign immunity pursuant to

Section 5 of the Fourteenth Amendment.<sup>1</sup> Our findings were based on empirical evidence drawn from our survey, interviews with copyright owners, research on state entity copyright ownership, and infringement data gathered by Copyright Alliance members. Despite the numerous organizations and individuals who joined the Copyright Alliance in presenting compelling evidence that remedies against infringement are inadequate or non-existent and that state copyright infringement is a frequent and damaging occurrence, some respondents to the NOI claim that infringement by state entities is rare and that the abrogation of state sovereign immunity is unnecessary. Yet few of these comments provide evidence to support their claims, and many are submitted by the very state entities that have consistently been identified as the most egregious infringers shielded by state sovereign immunity.

## **II. Determining the Scope of the Problem**

As our initial comments detail, survey responses, creator interviews, and background research reveal that an overwhelming majority of state entity infringement that copyright owners encounter is by state educational institutions—particularly universities and institutions of higher learning.<sup>2</sup> It is perhaps then not surprising that nearly all of the comments in opposition of abrogating sovereign immunity were submitted by associations representing state universities, state university research libraries, or by individual universities themselves.

A recurring theme throughout the comments of these organizations and universities is that infringement by state entities is neither common nor increasing in regularity, and yet very little, if any, evidence is provided in support of their claims. For instance, comments submitted by copyright librarians on behalf of their universities describe only a handful of infringement allegations per year, and comments by university associations say copyrights are only violated in “rare instances.”<sup>3</sup> But missing from these comments is empirical evidence or data to support the

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<sup>1</sup> Copyright Alliance, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (Sept. 3, 2020).

<sup>2</sup> *Id.* at 8.

<sup>3</sup> University of Michigan, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (Sept. 3, 2020); University of Massachusetts, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (Sept. 3, 2020); Association of American Universities & Association of American Public Land-Grant Universities, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (Sept. 3, 2020).

claims that allegations of infringement by institutions of higher learning (or other state entities) is in fact as infrequent as they suggest. It's also unclear whether copyright librarians are in a position to always be aware of the potential infringement, as legal matters are often directed to and handled by universities' general counsel offices.

On the contrary, respondents to the Copyright Alliance survey identified state universities or institutions of higher learning as the type of state actor responsible for infringement in over 50% of reported cases, and interviews with creators revealed that they are constantly confronted with infringement by state universities.<sup>4</sup> Specific instances of infringement by state universities and short-term data showing recent increases in university infringement were also provided in initial comments submitted by SoundExchange.<sup>5</sup> This evidence of widespread infringement by state universities, combined with data showing an exponential increase in infringement by state entities over the past twenty years, casts serious doubt on the accuracy of university and university association assessments.

While comments submitted in opposition of abrogating sovereign immunity insist infringement is rare, some claim that “meritless” allegations are already a problem and that without sovereign immunity, “states will face a greater number of complaints from people who are primarily looking for a quick windfall.”<sup>6</sup> But the commentators offer no explanation of how they determine—or who determines—what constitutes a “meritless” allegation and little evidence is offered showing that meritless complaints are currently a problem. More significantly, they provide no support for the notion that abrogating sovereign immunity will result in an increase in bad actors seeking “unjustified windfalls” against state universities.<sup>7</sup>

Another claim repeated throughout the comments of those opposed to abrogation is that instances of state university infringement are inadvertent and ultimately innocuous because they are dealt with swiftly. But the evidence gathered by the Copyright Alliance through survey responses and creator interviews tells a different story. Of the survey respondents who said that they had encountered infringement by a state entity, 58% said that they felt the infringement was

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<sup>4</sup> Copyright Alliance, *supra* note 1.

<sup>5</sup> See SoundExchange, Comment on Notice of Inquiry on the U.S. Copyright Office's Sovereign Immunity Study at 11 (Sept. 3, 2020).

<sup>6</sup> See Association of American Universities, *supra* note 3 at 3; University of Michigan, *supra* note 3 at 2.

<sup>7</sup> *Id.* at 4; An area of further research that may be useful to evaluate the claim that state entities would be subject to an increase in frivolous lawsuits if sovereign immunity was abrogated would be to look into the extent to which private universities, which do not enjoy sovereign immunity, currently experience allegations by opportunistic actors.

intentional, compared to 11% who believed it was inadvertent.<sup>8</sup> When asked why they felt the infringement was intentional, respondents described situations in which an attorney’s warnings were ignored, copyright management information (CMI) associated with the works was ignored or removed, or use of the works continued even when an entity was aware that a license had expired. Initial comments submitted by the News Media Alliance, the National Press Photographers Association, Frederick Allen, Patricia Ward Kelly, and many other individuals provide further evidence that infringement by state entities is often intentional or non-negligent.<sup>9</sup>

Finally, it should be noted that the state universities—and organizations representing state universities—that filed comments in opposition of abrogation represent only a small fraction of the overall number of state universities and public institutions of higher learning in the United States. While the Association of American Universities represents 33 public colleges and the Association of Public and Land-Grant Universities represents 198, the total number of state universities and institutions of higher learning in the U.S. in 2019 was 1,626.<sup>10</sup> The universities represented in the initial round of comments account for less than 15% of all state universities in the U.S., and if abrogating state sovereign immunity has the potential to result in the extensive harm and unintended consequences some of the comments claim, one would expect to hear from a much broader consensus of state universities.

### **III. Adequacy of Existing Remedies**

One of the key questions in the Copyright Office’s NOI was whether there are adequate existing remedies to address the needs of copyright owners in response to instances of state infringement. Despite the extensive evidence detailed in our initial comments and the comments of others showing that remedies against state infringement are inadequate or non-existent, some comments argue that the remedies currently available are sufficient.

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<sup>8</sup> Copyright Alliance, *supra* note 1 at 9.

<sup>9</sup> It should also be noted that negligent or inadvertent infringement can be just as harmful to a copyright owner as non-negligent or willful infringement, and that denying a copyright owner the right to sue for damages restricts their ability to be made whole and does little to deter against future infringement.

<sup>10</sup> Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. NEWS (Feb. 15, 2019), available at: <https://www.usnews.com/education/best-colleges/articles/2019-02-15/how-many-universities-are-in-the-us-and-why-that-number-is-changing?rec-type=usn>

Comments arguing that abrogation is not necessary repeatedly insist that injunctive relief, including injunctions against state actors under the *Ex parte Young* doctrine, provides copyright owners the means to vindicate their rights. But the comments provide little support as to why they believe injunctions alone are sufficient, and as copyright owners themselves, these organizations should understand that injunctions only provide limited recourse when confronted with infringement. The inadequacy of injunctions is not a new criticism, nor is it something only argued by copyright owners. As our initial comments detail, injunctions were identified as an incomplete remedy by the Copyright Office in its 1988 report and legislative history by the House and Senate leading up to the enactment of the Copyright Remedy Clarification Act (CRCA), as well as the Government Accountability Office’s 2001 report, which found injunctions to be insufficient in that they do not provide damages.<sup>11</sup> Additionally, responses to the Copyright Alliance survey and creator interviews confirm that copyright owners are hesitant to bring costly, time-consuming infringement suits against state entities that they realize may only result in putting an end to one specific instance of infringement, do nothing to compensate for the harm caused, and do little to deter against future infringement. We urge the Copyright Office and Congress to recognize that injunctions must be coupled with all remedies otherwise provided for under the Copyright Act in order for copyright owners to obtain complete relief.

Some comments also argue that in addition to injunctive relief, the DMCA, through its notice and takedown system, provides copyright owners with an effective remedy and “particularly powerful tools” to deter infringement.<sup>12</sup> But as the Copyright Office’s recent 512 Report and continuing DMCA-focused hearings before Congress have made abundantly clear, the notice and takedown system is not an effective mechanism for copyright owners to combat infringement. In reality, the notice and takedown system represents a constant uphill battle for copyright owners against consistent and recurring infringement, and it is not an effective deterrent against future infringement. In the specific case of infringement by a university or other state entity, where any number of actors are involved in a host of online activities that implicate copyright issues, it’s difficult to see how responding to a takedown notice would truly deter future instances of infringement. Relatedly, some comments point out that infringement allegations have resulted in universities adopting more “rigorous” fair use policies that ensure

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<sup>11</sup> Copyright Alliance, *supra* note 1 at 30-31.

<sup>12</sup> University of Michigan, *supra* note 3.

compliance with the law.<sup>13</sup> But while these and other copyright education efforts are welcome, they ultimately do little to make copyright owners whole when infringement does occur, and they should not be presented as reasonable substitutes for the remedies otherwise provided for under the Copyright Act.

#### **IV. Other Pertinent Issues**

Many of the comments submitted by state universities and the associations representing them made the similar claim that, as purchasers and licensees of massive amounts of copyright protected works, they could not seriously be considered bad actors in the copyright ecosystem.<sup>14</sup> Some comments also argue that because institutions of higher learning are “engines” of creativity and invention, they are among the most supportive and respectful of copyright owners’ interests.<sup>15</sup> But simply because an entity enters into licensing agreements, produces its own intellectual property, or otherwise complies with copyright law in some instances does not mean it should not be held accountable when infringement occurs. There exist thousands of private organizations—specifically private institutions of higher learning—that purchase and license copyright protected material and act as engines of creativity and innovation but enjoy no immunity when acts of infringement occur. To hold these institutions to different standards not only harms copyright owners, but it creates a unlevel playing field and gives state universities an unfair advantage over those who must play by the rules.

Some comments also attempted to connect the preservation of state sovereign immunity to the protection of taxpayer resources, arguing that the public will ultimately foot the bill for defending against meritless lawsuits that the comments claim will increase in the event sovereign immunity is abrogated.<sup>16</sup> But in addition to providing scant evidence that abrogation will result in a boon for opportunistic plaintiffs, the argument disregards the long-term benefits to the public that grow from copyright laws that respect and appropriately protect copyright owners and creators. The foundations of copyright law are rooted in incentivizing the creation of new works

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<sup>13</sup> Library Copyright Alliance, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study at 3 (Sept. 3, 2020).

<sup>14</sup> Association of American Universities, *supra* note 3 at 2-3.

<sup>15</sup> University of Massachusetts, *supra* note 3 at 3.

<sup>16</sup> University of Michigan, *supra* note 3 at 2.

by guaranteeing to creators and copyright owners rights that allow them to commercialize and control their works. But when those rights are compromised by infringement that is effectively sanctioned through the state sovereign immunity doctrine, it threatens the creation of new works and thereby the very institution of copyright. Our initial comments detail the harm state sovereign immunity has already had on the creation of new works and ultimately society by causing creators to abandoned artistic endeavors, and these immeasurable losses must be considered alongside any claims that abrogation of state sovereign immunity will harm the taxpaying public.

The comments also ignore the fact that it is ultimately the taxpaying public who fund state entities' efforts to enforce their own intellectual property. As we detailed in our initial comments, state universities own thousands of copyrights—in addition to patents and trademarks—and they vigorously enforce their rights against infringers.<sup>17</sup> Just this year, there have been many examples of state universities sending cease and desist letters and filing lawsuits against individuals and businesses they accuse of infringing trademarks and copyrights associated with school logos.<sup>18</sup> As taxpayer money helps fund these enforcement lawsuits, universities cannot claim that it's inappropriate for taxpayers to “foot the bill” when they are accused on infringement.

Another important issue raised by organizations that submitted comments in favor of abrogating state sovereign immunity is the effect sovereign immunity has on U.S. treaty obligations. As a party to the Berne Convention (and companion WIPO Copyright Treaty), the U.S. guarantees certain minimum protections to copyright owners in all countries that are parties to the Convention. But, as the National Press Photographers Association (NPPA) explains in its comments, state sovereign immunity effectively creates a royalty-free compulsory license for government entity use of copyright protected works. Unlike U.S. copyright owners who collect royalties through compulsory licenses administered by reprographic rights organizations (RROs) in other countries, foreign copyright owners face the risk of earning nothing if a state entity misappropriates their work and shields itself behind state sovereign immunity. Additionally, state

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<sup>17</sup> Copyright Alliance, *supra* note 1 at 15-17.

<sup>18</sup> See Erin Hogge, *Business owner sued by Penn State for trademark infringement ordered to pay nearly \$10K*, DAILY COLLEGIAN (May 21, 2020); see also Christina Tabacco, *University Sues After COVID-19 Party Instagram Account Uses Trademarks*, LAW STREET MEDIA (Aug. 24, 2020); see also Josh Smith & Slater Teague, *University of Texas asks Johnson County to change longhorn logo*, WJHL.COM (May 21, 2020).

sovereign immunity appears to conflict with the three-step test enumerated in Article 9 of the Berne Convention, which created an international framework for possible limitations and exceptions to copyright owners' exclusive rights.<sup>19</sup> Specifically, the second and third prongs of the three-step test permit member countries to allow for exceptions to copyright owners' reproduction rights "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Infringement by state entities would certainly seem to conflict with the normal exploitation of copyright protected works, and as our initial comments show, the inadequacy of remedies available to copyright owners when confronted with infringement by state entities unreasonably prejudices the legitimate interests of authors.<sup>20</sup> It's plausible that these incongruities put the United States in violation of the Berne Convention's three-step test and guarantee of certain minimum levels of protection related to the reproduction of literary and artistic works, and we believe that international treaty obligations must be more carefully considered by the Copyright Office and Congress as they evaluate the validity of state sovereign immunity.

Finally, we believe that the First Amendment rights of creators and copyright owners who will continue to be victims of infringement by state entities if sovereign immunity is not abrogated must be weighed more heavily. Too often, questions surrounding copyright law's balance of protecting copyright owners while ensuring access to creative works focus overwhelmingly on the First Amendment rights of those who wish to make use of copyright protected works. But as comments submitted in the initial round of this study make clear, central to the First Amendment is its protection against compelled government speech. The creation of original works of expression is undoubtedly an exercise in free speech, and fundamental to copyright law is a creator's ability to control their work—which in some circumstances means deciding to refrain from speaking at all. When a state entity is able to use a copyright protected work without permission in a way the copyright owners disagrees with, it is a clear violation of

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<sup>19</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221

<sup>20</sup> See P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Amsterdam Law School Legal Studies Research Paper No. 2012-43 (Mar. 6, 2008) ("Any exercise of sovereign discretion that introduces a limitation or exception to the reproduction right is automatically subject to appraisal under the three-step test.")



the right against compelled government speech. And when no remedy is available save an injunction that does little to make the copyright owner whole or deter from future violations, creators and copyright owners are stripped of their right to combat unconstitutional forced speech.

## **V. Conclusion**

The Copyright Alliance is grateful for the opportunity to submit additional comments in response to the Copyright Office's ongoing study to evaluate the degree to which copyright owners are experiencing infringement by state entities without adequate remedies under state law. We believe that the previous round of comments has provided sufficient evidence to support the abrogation of state sovereign immunity and that the comments opposed to abrogation are neither persuasive nor supported by sufficient evidence.