



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

Sovereign Immunity Study

Docket No. 2020-9

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [Notice of Inquiry](#) (NOI) published by the U.S. Copyright Office in the Federal Register on June 3, 2020, regarding 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

The Eleventh Amendment of the U.S. Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.”¹ While the amendment seems to be aimed at preventing suits against states in federal court by non-residents, the text has been broadly interpreted to include immunity from claims by the states’ own citizens and immunity from federal law claims within a state’s own court system.² The true meaning and scope of state sovereign immunity has been subject to much discussion over the years, but as former Register of Copyrights Marybeth Peters testified twenty years ago, “[f]or most of our history, it has been assumed that the States enjoyed no special immunity from suits for infringement of intellectual property rights.”³

Despite this longstanding recognition that state entities should be held accountable for infringement, the past thirty-five years have seen courts revive questions surrounding state immunity to intellectual property claims. The Copyright Remedies Clarification Act (CRCA) of 1990 attempted to settle these questions by abrogating state immunity to copyright claims, but a pair of cases at the turn of the century challenged the validity of the CRCA and effectively opened the door to a new era of unchecked state infringement.⁴ The evidence gathered by the Copyright Alliance shows that instances of state infringement have increased exponentially over the twenty years since the validity of the CRCA was thrown into question, and copyright owners now find themselves navigating an uncertain system comprised of inadequate remedies that deprive them of the exclusive rights guaranteed to them under Section 106 and Section 1201 of the Copyright Act.

II. Background

a. The CRCA’s Enactment and Demise

In 1987, members of the House Judiciary Committee Subcommittee on Courts, Civil Liberties and the Administration of Justice, led by Chairman Robert Kastenmeier (D-WI) and Ranking Member Carlos Moorhead (R-CA), requested that the Copyright Office examine the

¹ U.S. CONST. amend. XI

² See Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 514, 534 (2012).

³ *State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. on Courts and Intell. Prop. of the S. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights), <https://www.copyright.gov/docs/regstat72700.html>.

⁴ Copyright Remedy Clarification Act (P.L. 101-553, enacted Nov. 15, 1990).

practical problems relative to enforcement of copyright law against state entities.⁵ The inquiry into the harm to copyright owners caused by state sovereign immunity was set in motion by the Supreme Court’s 1985 decision in *Atascadero State Hospital v. Scanlon*, which held that Congress must use unequivocal language in order to abrogate state sovereign immunity under the Fourteenth Amendment.⁶ In 1988, after receiving numerous responses to its request for public comment, the Copyright Office issued a report concluding that copyright proprietors had demonstrated they would suffer immediate harm if they were unable to sue infringing states in federal court and recommending that Congress amend the Copyright Act “to ensure that copyright owners have an effective remedy against infringing states.”⁷ In 1990, Congress successfully passed the Copyright Remedy Clarification Act (CRCA), relying on its constitutionally enumerated powers under the Copyright Clause of Article I, Section 8, Clause 8 of the United States Constitution.⁸

Throughout most of the 1990s, it was generally recognized that the CRCA had abrogated state sovereign immunity with regard to copyright infringement claims. It wasn’t until 1999 that Congress’s power to abrogate state sovereign immunity was challenged in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, which struck down a companion law abrogating states’ immunity to patent infringement claims.⁹ Soon after the decision in *Florida Prepaid*, the CRCA was found unconstitutional by the Fifth Circuit in *Chavez v. Arte Publico Press* in light of the Supreme Court’s voiding of the Patent Remedy Act (PRA) in *Florida Prepaid*.¹⁰

Congress took note of these developments, and not long after *Chavez*, Senator Orrin Hatch (R-UT) requested a study by the Government Accountability Office (GAO) to (1) determine the extent to which states have been accused of intellectual property infringement, and (2) identify the other remedies available to protect intellectual property owners.¹¹ The GAO study found that “few alternatives or remedies appear to remain after *Florida Prepaid* for intellectual property owners who believe that a state has infringed their property.”¹² Eventually, Congress debated, but failed to

⁵ Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, H. Subcomm. on Courts, Civil Liberties, and the Administration of Justice, to Ralph Oman, Register of Copyrights (Aug. 3, 1987).

⁶ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)

⁷ THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT (1988), available at: <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>

⁸ Copyright Remedy Clarification Act, *supra* note 4.

⁹ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

¹⁰ *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

¹¹ U.S. Gen. Accounting Office, GAO-01- 811, *Intellectual Property: State Immunity in Infringement Actions* (Sept. 2001), available at: <https://www.gao.gov/assets/240/232603.pdf>

¹² *Id.* at 13.

enact H.R. 2344, the Intellectual Property Protection Restoration Act of 2003, which would have conditioned a state entity's ability to obtain monetary awards (in actions brought by the state to enforce its own intellectual property) on its waiver of sovereign immunity in federal court for infringement of intellectual property, abrogated state sovereign immunity for unconstitutional violations of intellectual property rights, and codified the *Ex parte Young* doctrine, which permits injunctions against state officials.¹³

Nevertheless, for much of the period between the enactment of the Copyright Act of 1976 and *Florida Prepaid/Chavez*, it was understood that states were not immune from copyright infringement claims.¹⁴ It was not until the *Florida Prepaid* and *Chavez* decisions that the constitutionality of the CRCA was thrown into serious doubt. Since then, instances of state copyright infringement have been on the rise, causing harm to copyright owners and threatening the Constitutionally defined goal of copyright to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

b. Allen v. Cooper

For most of the two decades since the *Chavez* case was decided, litigation over the CRCA's constitutionality was exceedingly rare and insignificant. Then, on March 23, 2020, the Supreme Court issued its decision in *Allen v. Cooper*, unanimously holding that Congress lacked the authority to abrogate state sovereign immunity from copyright infringement suits under the CRCA.¹⁵ Despite the outcome, Justice Kagan's opinion recognized that the state sovereign immunity doctrine may be in need of adjustment and made clear that the Court's decision "need not prevent Congress from passing a valid copyright abrogation law in the future."¹⁶ In laying out a path for legislative action, the Supreme Court suggested that if Congress can develop a legislative record that demonstrates the necessary evidence of unconstitutional state conduct and link the

¹³ H.R. 2344, 108th Cong. (2003).

¹⁴ As mentioned above, until the Supreme Court's 1985 decision in *Atascadero*, it was widely understood that when Congress passed the 1976 Copyright Act, it intended states to be liable for their acts of infringement. This understanding was not drawn into question until after *Atascadero* when federal courts started reaching the contrary result. This change from full state liability to immunity ended in 1990 when the CRCA became law. Between late 1990 and the Supreme Court's 1999 decisions, states were once again subject to the full panoply of remedies available under the Copyright Act. In sum, from 1976 until 1985, and from 1990 until at least 1999, states operated under the assumption that they were fully liable for copyright infringements.

¹⁵ *Allen v. Cooper*, No. 18-877 (U.S. Mar. 23, 2020).

¹⁶ *Id.* at 19.

scope of its abrogation to the redress or prevention of unconstitutional injuries, abrogation of state sovereign immunity would be appropriate pursuant to Section 5 of the Fourteenth Amendment.

In *Allen*, the Supreme Court explained that the CRCA fails the “congruence and proportionality” test set forth in *Florida Prepaid*.¹⁷ That test requires that evidence of Fourteenth Amendment injury must be congruent and proportional to the statutory remedy, and in *Florida Prepaid*, which considered abrogation of state sovereign immunity under the Patent Remedy Act, the evidence was found to be slight.¹⁸ The Court in *Allen* found the scope of the CRCA and the Patent Remedy Act to be identical—particularly with regard to the fact that they applied to *all* state infringements of copyright and patents respectively—and as a result held “the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew.”¹⁹

In sum, the Court found that the CRCA cannot be sustained under either Article I, Section 8, Clause 8 or Section 5 of the Fourteenth Amendment of the United States Constitution.²⁰ Given the *Florida Prepaid* precedent, the Supreme Court’s hands were tied, despite finding that “something is amiss” with the current sovereign immunity framework and suggesting that Congress pass further legislation to prevent “States from behaving as copyright pirates.”²¹

c. The Copyright Office Sovereign Immunity Study

In the wake of the Supreme Court’s recommendations in *Allen*, Senator Thom Tillis (R-NC), Chairman of the Senate Judiciary Committee Subcommittee on Intellectual Property and Sen. Patrick Leahy (D-VT) sent a letter to the Copyright Office requesting a study to determine whether there is sufficient evidence for federal legislation abrogating state sovereign immunity for copyright infringement.²² The joint letter asked that the Copyright Office research the extent to which copyright owners are experiencing infringements by states without adequate remedies so that Congress can evaluate whether legislative action is needed to amend the state sovereign immunity doctrine. Shortly thereafter, the Copyright Office issued a Notice of Inquiry (NOI) requesting

¹⁷ *Id.* at 3.

¹⁸ *Florida Prepaid*, *supra* note 9.

¹⁹ *Allen*, *supra* note 15 at 19.

²⁰ *Id.*

²¹ *Id.* at 21, 25.

²² Letter from Sens. Thom Tillis & Patrick Leahy, S. Subcomm. on Intellectual Property, to Maria Strong, Acting Register of Copyrights (Apr. 28, 2020); available at <https://www.copyright.gov/policy/state-sovereign-immunity/letter.pdf>

public comment on the extent to which copyright owners experience infringement of their works by states or state entities that are largely immune from copyright claims.²³

In response to the Copyright Office's NOI, the Copyright Alliance launched a public survey soliciting feedback from copyright owners on their experiences with copyright infringement by states and states' claims of sovereign immunity. In addition to the survey, the Copyright Alliance conducted interviews with a number of Copyright Alliance members and individual creators who have experienced infringement by state entities and have been unable to or dissuaded from exercising their rights under the copyright law due to state sovereign immunity concerns. These interviews, along with additional research, also examined the inadequacy of remedies at the state level. Finally, the Copyright Alliance conducted research on the extent to which states and state entities are registering their own copyrights to expose the double standard that allows them to realize the benefits of copyright while infringing the works of other.

As a result of the state sovereign immunity research, the Copyright Alliance compiled compelling evidence showing that remedies against infringement are inadequate or non-existent and that state copyright infringement is a frequent and damaging occurrence that will increasingly threaten the goals of the copyright system unless corrected. Therefore, based on these findings and information that other commentators will provide to the Copyright Office, the Copyright Alliance believes there is sufficient evidence to support legislation following the Court's guidance in *Allen v. Cooper* that would abrogate state sovereign immunity in copyright infringement cases.

III. Information Compiled by The Copyright Alliance

a. Survey on State Copyright Infringement

To assist the Copyright Office in its study, the Copyright Alliance created a survey incorporating many of the questions listed in the Notice of Inquiry.²⁴ For example, the survey's first questions asked whether the respondent has ever had a state government entity (e.g., state agency, state university, etc.) copy, distribute or otherwise use their copyrighted work without permission in

²³ Copyright Office Sovereign Immunity Study, *Notice and Request for Public Comment*, 85 FR 34252, 34256 (June 3, 2020).

²⁴ Copyright Alliance, *Survey on State Copyright Infringement* (2020).

a manner that they believed to constitute copyright infringement. If the respondent answered “yes,” the survey then asked a series of follow up questions regarding the type of work infringed, the year the infringement was discovered, the type of state entity engaged in infringement, etc. The survey also asked whether the respondent brought copyright infringement claims against the state entity, whether the state entity claimed sovereign immunity, and whether the respondent lost revenue or opportunities because of the infringement.

While the Copyright Alliance survey featured many of the same questions listed in the Copyright Office NOI, we designed our survey in a way that we believed would solicit the most accurate responses from creators and copyright owners who may not have a legal background. When responses to our survey correspond to the specific inquires enumerated by the Copyright Office, we identify them in the sections below.

i. The Scope of Infringement by States

Responses to the Copyright Alliance survey revealed that creators and copyright owners have encountered thousands of instances of infringement by state entities, resulting in lost revenue of countless millions of dollars. Over the brief time that the survey was open, 115 respondents answered that they had experienced infringement by a state or state entity—with the vast majority experiencing multiple infringements. Of those respondents, 32 (29%) said that they suffered infringement only once, while 21 (19%) said they had suffered infringement twice. 58 (52%) responded “other,” and when asked to specify, the respondents described multiple instances of state infringement, using words such as “countless,” “at least a dozen,” “thousands,” and “infinitely many.” The states in which alleged infringement was most frequently reported were Texas, New York, California, and Illinois, but instances of infringement were reported in all fifty states.

Question 1(a) of the Copyright Office NOI asks respondents to identify the work(s) infringed, and the Copyright Alliance survey asked respondents to choose from as many categories as appropriate from a list of 14.²⁵ 40 of the respondents selected “photographs,” 31 selected “books/poems/blogs/articles,” 13 selected “audio/sound recordings,” and 12 chose “movie/tv shows/videos.” Many other categories of works were also identified—such as “sculptures,”

²⁵ Survey respondents were able to select as many categories as applicable from a list that included: (1) audio/sound recordings (including recordings of songs), (2) books/poems/blogs/articles, (3) choreography, (4) databases, (5) jewelry/fashion designs, (6) magazines/newsletters/newspapers/periodicals, (7) movies/tv shows/videos, (8) musical compositions/song lyrics, (9) paintings/illustrations, graphic designs, (10) photographs, (11) scripts/screenplays, (12) sculptures, (13) software/codes/video games/apps, and (14) other (please specify).

“databases,” “choreography,” and “musical compositions”—but those works represent fewer than 10 responses each. Because respondents could select multiple categories, calculated percentages have been omitted.

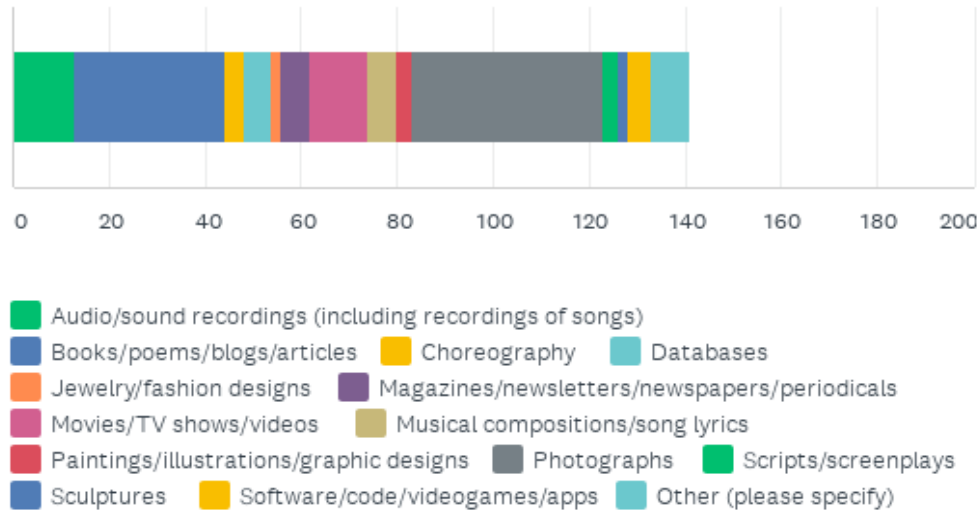


Figure 1

The Copyright Office NOI goes on to ask (in Question 1(d)) respondents to identify the state actor(s) who committed the infringement. In response to the Copyright Alliance’s same survey question, 84 people described various state entities that had infringed, with an overwhelming majority (48) identifying state universities or institutions of higher learning. Other state entities identified by respondents included state tourism boards, departments of natural resources, and museums.

The survey asked respondents to select the year (between 1976 and 2020) that they discovered infringement by state entities—similar to Question 1(c) of the Notice of Inquiry asking when the infringement occurred—and although infringement was reported as far back as 1978, a trend of increased infringements is apparent, starting in the mid-to-late 90s and increasing yearly through the 2000s and 2010s, with the most instances occurring in 2019 (32 instances or 40% of responses). The consistent rise over the last twenty years corresponds not only to the rise of the internet, but with the *Florida Prepaid* and *Chavez* cases that threw the validity of the CRCA into doubt and likely resulted in state entities taking a more liberal approach to unauthorized use of copyright protected works. The chart below shows the steady increase over the past twenty years of alleged infringement by state entities as reported by respondents to the survey and directly answers the Copyright Office’s Question 5(a), which asks for evidence of increased state infringement in recent years.

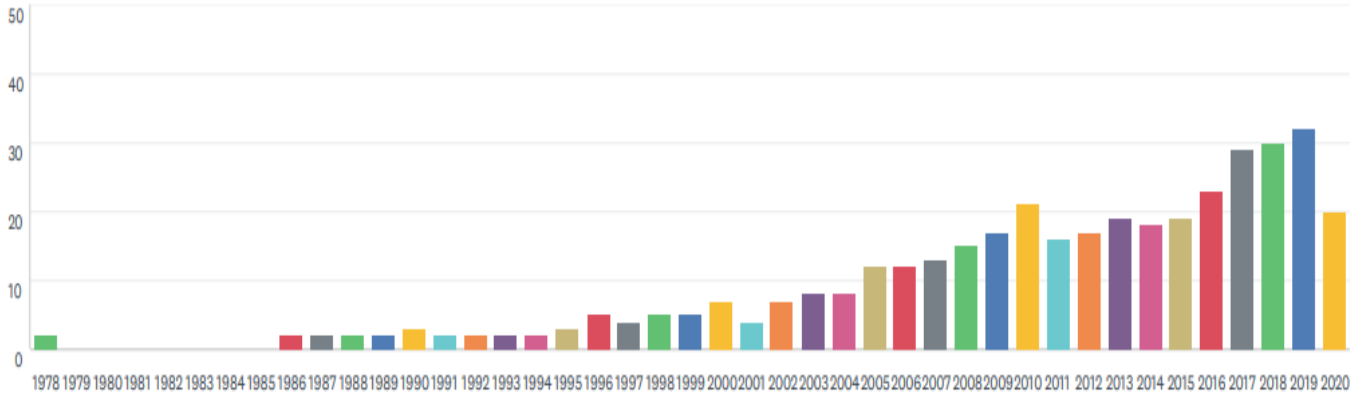


Figure 2

Question 1(e) of the Copyright Office NOI asks whether the infringement was intentional or reckless and the basis for that conclusion. In response to our same survey question, 42 (58%) answered that they believed the infringement to be intentional, while only 8 (11%) answered that, in their view, it was inadvertent. 22 (31%) answered that they were unsure.

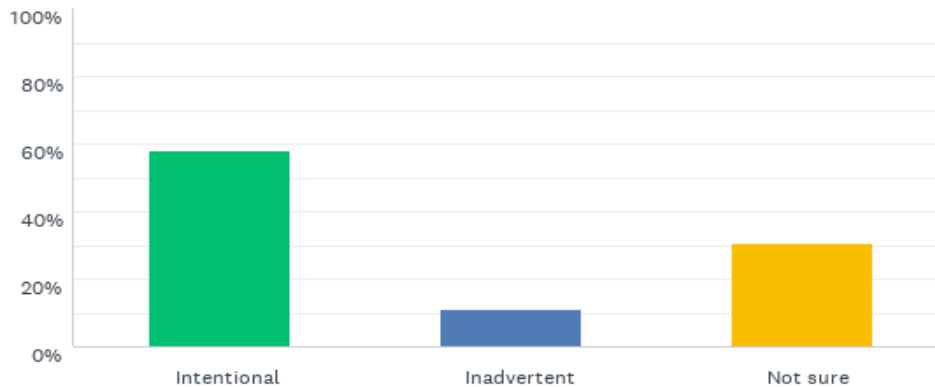


Figure 3

All 42 respondents who viewed the infringement as intentional provided additional information, describing situations in which an attorney’s warnings were ignored, copyright management information (CMI) on the works was ignored or removed, or use of the works continued when an entity was aware that a license had expired. Some recounted situations where permission was asked by the state entity, and when permission was denied, the entity went on to make unauthorized use of the work anyway.

Another inquiry (Question 2) in the Copyright Office NOI also asked as part of the Copyright Alliance’s survey is whether sovereign immunity affects copyright owners’ licensing or sales opportunities to state entities. 49 (68%) copyright owners responded that they believe they’ve

lost revenue or licensing opportunities due to state infringement. Only 7 (10%) responded that they did not believe they lost revenue or licensing opportunities, and 16 (22%) were unsure.

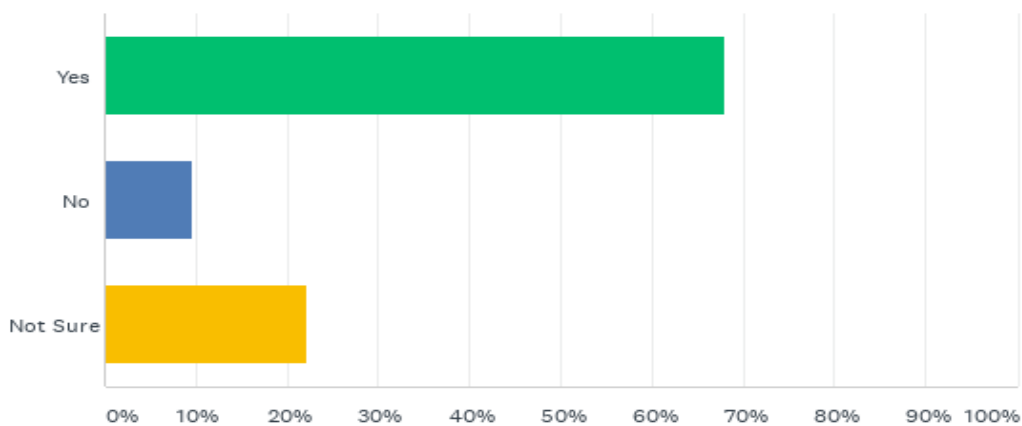


Figure 4

Many of the respondents who answered “yes” went on to describe the losses they incurred, including lost book sales, lost subscription and licensing fees for photographs and video footage, and also more intangible losses, such as careers cut short due to lost revenue and time spent trying to stop the infringement.

In addition, some Copyright Alliance members reported information to us outside of the survey that is responsive to the Copyright Office NOI. One member reported that, based on a preliminary review, state universities in at least 30 states have frequently infringed sound recordings, with many such infringements still ongoing. These infringements often occur in connection with commercial videos on university athletic websites or social media that promote (i.e., advertise) some aspect of the university. Often, the infringements are in connection with videos promoting the state university’s sports teams and, in one case, the infringement occurs in connection with a campaign seeking donations to the university. In one instance, over 50 infringements were identified in connection with just one university sports team.

Like other commercial actors, these state universities are copying and synching music to videos to promote their revenue-generating offerings on various online platforms, but, unlike those commercial actors, they are not doing so with authorization from or paying any compensation to the copyright owners. Some of these members report that, when they brought the infringements to the attention of at least two state universities, those universities refused to license the music or take down the infringing videos, claiming, among other things, that their use was unactionable due to sovereign immunity.

Other Copyright Alliance members reported instances of state infringement related to news publishing, identifying examples of wholesale copying of articles by state agency websites. Perhaps the most egregious example, which was detailed by Dow Jones & Company in its amicus brief filed in support of Rick Allen in *Allen v. Cooper*, involved the California Public Employees' Retirement System (CalPERS), a California state agency that administers the nation's largest pension fund.²⁶ CalPERS maintained a publicly accessible website which featured daily reproductions of articles from Dow Jones publications, such as *The Wall Street Journal*, *Barron's*, *MarketWatch*, and *Dow Jones Newswires*.²⁷ The unauthorized reproductions occurred over a number of years, from 2009 to 2017, and included approximately 9,000 copied Dow Jones articles.²⁸

In addition to the infringement of Dow Jones' copyright protected materials, CalPERS was also found to have copied approximately 6,700 articles from *The New York Times*, 5,400 from the *Los Angeles Times*, over 3,100 from *The Sacramento Bee*, and over 1,500 from *The Washington Post*.²⁹ The economic harm caused by CalPERS misappropriation of Dow Jones' and the newspaper publishers' works was significant, as CalPERS directly competed with the authorized publishers and diverted business and licensing opportunities from them. Despite clear evidence of infringement, CalPERS asserted that sovereign immunity exempted it from any liability, and Dow Jones was only able to secure a substantially inadequate settlement.

Importantly, some members of the Copyright Alliance are also concerned with the assertion of tribal sovereign immunity in the copyright infringement context and that reliance on tribal immunity in such situations is detrimental to the rights of copyright owners. We recognize that the impact of tribal immunity is not the focus of the current inquiry, and also that assertions of tribal immunity raise some critical issues separate and distinct from those that arise in the state sovereign immunity context.³⁰ Nonetheless, the Copyright Alliance believes that the tribal immunity and infringement issues are of sufficient importance that it should be reviewed separately by the Copyright Office and Congress.

²⁶ Brief for Dow Jones & Company, Inc. as Amicus Curiae Supporting Petitioners, p. 4-6, *Allen v. Cooper*, No. 18-877 (U.S. Mar. 23, 2020).

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ *Id.* at 5.

³⁰ There are notable differences between the scope of state sovereign immunity and that of tribal immunity. Most critically, if Congress decides to abrogate tribal immunity in a given context, it does not face any of the constitutional hurdles that it does when it seeks to affirmatively negate state sovereign immunity. All it must do is speak unambiguously and exercise its Indian Commerce Clause powers. Issues of critical importance with regard to state immunity—such as whether Congress can abrogate state immunity in a given case pursuant to Section 5 of the Fourteenth Amendment—are irrelevant in the tribal immunity context.

ii. Actions Against States

Question 1(g) of the Copyright Office NOI asks whether the state was contacted by or on behalf of the copyright owner in response to the infringement. 48 (69%) survey respondents said that they tried to notify the state entity, while 17 (24%) said they did not, and 5 (7%) were unsure. When those who answered “yes” were then asked how the state entity responded, some said that the entity ceased the infringing activity or a settlement was reached, but a majority described situations in which they were not taken seriously, their concerns were ignored, and the infringement continued. Some respondents said that the entity made general claims about having the “right” to use the work. As a follow up, the next survey question asked whether the state entity made specific assertions that it was not liable for infringement due to the fact that states are generally immune from being sued under the Eleventh Amendment of the Constitution. 21 (44%) responded that the state entity invoked state sovereign immunity under the Eleventh Amendment, while 16 (33%) said “no,” and 11 (23%) did not recall.

Question 1(h) of the Copyright Office NOI asks whether a lawsuit was filed as a result of the infringement. 57 (81%) survey respondents said “no,” while 13 (19%) said “yes.” For those who sued, 3 brought claims in Texas, 2 in California, and single cases were brought in 26 other states, U.S. territories, and the District of Columbia. All but one case was filed between 2014 and 2020.

Eleven respondents described the type of claims that they brought regarding the infringement by a state entity. In addition to copyright infringement claims, respondents reported bringing contract violation, unjust enrichment, and takings claims. Four respondents said that their case is still pending, while eight said that the case had been resolved. When the respondents who said that their case had been resolved were asked what happened, two respondents made references to settlement agreements, one abandoned the case due to expected state sovereign immunity defenses, while others said that a final ruling was made in favor of the state entity defendant due to state sovereign immunity.

iii. Injunctions

Question 3(b) of the Copyright Office NOI asks whether the availability of an injunction against a state official provides an adequate remedy to address the needs of copyright owners in response to instances of state infringement. To gauge copyright owners' satisfaction with injunctions, the Copyright Alliance survey asked respondents whether, if they found out that state entity was infringing their work and they could not obtain money damages against the state entity but could get an injunction to prevent future infringements of that work by the state, they would be willing to sue the state for infringement anyway. 288 (50%) of respondents answered that they would be willing to sue, while 55 (9%) said that they would not, and 237 (41%) did not know.

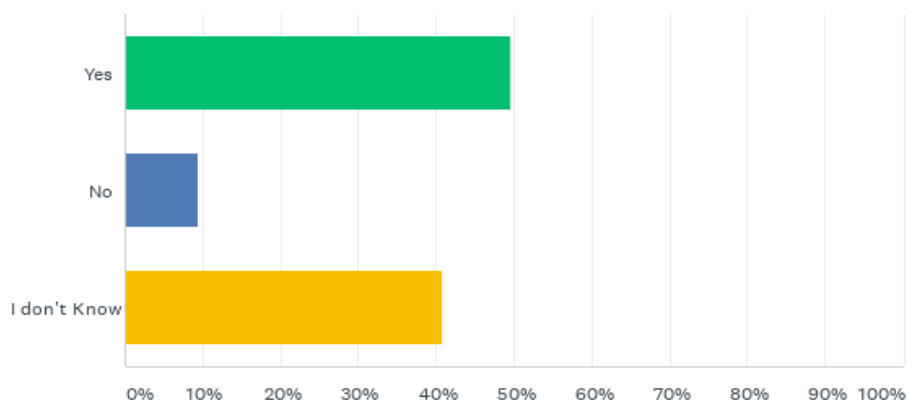


Figure 5

When those who responded that they would not be willing to sue to get an injunction were then asked why, a common theme emerged speaking to the futility and inadequacy of injunctions. Many cited the high cost, stress, and time associated with bringing a suit that would ultimately provide little recourse. One respondent lamented, “[t]here is no point in suing if there is no compensation, it’s just a big waste of your time and energy.” Another said there is little point, given that “they know they are likely to get away with it.”

iv. Licensing

To better understand how state sovereign immunity affects copyright owners' licensing practices and to assist the Copyright Office gather information in response to Question 2 of its NOI, the Copyright Alliance survey asked whether respondents currently license works to state entities.

79 (14%) said that they license to state entities, while 435 (74%) said that they did not, and 67 (12%) said that they did not know. Question 2(a) of the Copyright Office NOI asks whether copyright owners provide different payment or licensing terms in transactions with state entities than are provided in transactions with other parties. In response to our survey question on this issue, 18 (23%) answered “yes,” while 43 (56%) answered “no,” and 16 (21%) were unsure.

Question 2(b) of the Copyright Office NOI asks whether respondents have changed aspects of their sales or licensing practices as a result of states being immune to claims of copyright infringement. In response to our survey question, 18 (24%) responded that they have changed their licensing practices, while 58 (76%) said that they had not. Pursuant to Question 2(c) of the Copyright Office NOI, our survey asked whether, in their experience, respondents found that different states or state entities take different approaches to working with copyrighted material. 28 (37%) said “yes,” while only 2 (3%) said “no,” and 46 (60%) said that they were unsure. Finally, respondents were asked whether a state entity has ever asserted immunity to claims of copyright infringement in the context of a contract negotiation with the respondent, to which 9 (12%) answered “yes,” and 67 (88%) answered “no.”

v. Monitoring for Infringement

To gather information on the extent to which copyright owners are aware of infringement by state or state entities, the survey asked respondents whether they monitor for infringement. 217 (43%) copyright owners responded that they did, while 283 (57%) said that they did not.

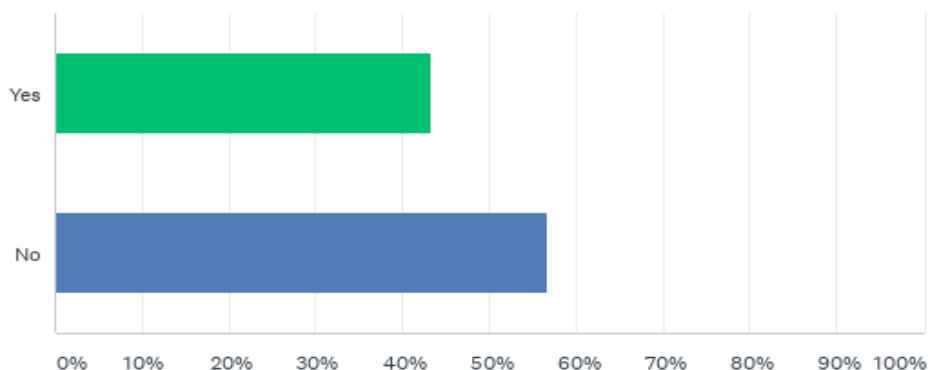


Figure 6

As a follow up, the survey then asked respondents whether they believe that monitoring efforts would detect a state infringement. 54 (19%) answered “yes,” 44 (16%) said “no,” and 182 (65%) were not sure. With such a large number of respondents not monitoring for infringement, it’s

likely both that many state infringements are not discovered and that a majority of copyright owners are unaware of the extent of lost revenue, licensing opportunities, and other harms associated with state infringement.

The reality is that many copyright owners simply do not have the time or resources to constantly monitor for infringement, especially when the infringement is undertaken by a state against whom the copyright owner would have no recourse. One respondent said he “found out by accident,” while another pointed out that “since we are not informed of the use of the intellectual property—we often find out about it too late, either after something has already been published or is well on its way.” Summing up the sentiments of many who completed the survey was one respondent who said that “[i]t’s too difficult and time-consuming (and depressing) to monitor for copyright infringement, so I just hope it doesn’t happen.”

b. State Copyright Ownership

One of the glaring injustices related to state sovereign immunity is the fact that state entities continuously reap the benefits of the copyright system by registering and enforcing their own copyrights while at the same time enjoying immunity from monetary damages in infringement claims. This double standard has been recognized over the years by Congress and the Copyright Office, with the 2001 GAO study specifically identifying state universities and institutions of higher learning “among the most significant state entities in terms of ownership and use of patents, trademarks, and copyrights.”³¹ To help show the extent to which state entities own copyrights, the Copyright Alliance conducted keyword searches using the Copyright Office’s public catalog of registrations. Searches were run using the “Name Claimant” option that combined keywords, such as “university,” “department,” “hospital,” “commission,” and many others, with the names of large and heavily populated states, such as New York, Texas, and California.³²

³¹ U.S. Gen. Accounting Office Report, *supra* note 11 at 8.

³² Keywords were identified by searching existing state entities listed on state government websites. The keywords include: Agency, college, commission, court, corrections, criminal justice, department, hospital, institute, library, lottery, museum, state, and university. While some of the keywords were found in non-state entity registrations, they were chosen for their likelihood to be featured in the named claimant of state entity registrations.

Public Catalog

Copyright Catalog (1978 to present)

Basic Search

Other Search Options

Search for: **Search by:**

AND **OR** **NOT**

Search for: **Search by:**

25 records per page

Begin Search

Reset

The keyword search that returned the most results in each case was the state name combined with “university.” For the state of Texas, there were 6,095 registered works, with a variety of entities associated with the University of Texas, Texas A&M University, Texas Tech University, and other public institutions of higher education listed as the copyright claimant. Running the same search for the state of New York returned 9,994 registered works, and a state of California search returned over 10,000 registered works. While searching universities and institutions of higher learning returned the highest number of registered works, searches for the combination of “department” and the state name came in second, with hundreds for each of the three states. Departments of education, transportation, natural resources, criminal justice, and health are just a few of the many state entities identified as copyright claimants in the search results. Keywords such as “museum”, “institute,” “library,” “hospital,” and “agency” combined with the state names also returned a significant amount of registrations, providing further evidence that a wide range of state entities rely on copyright to protect works.

It must be noted that these searches also captured some registrations for private entities that have no state affiliation. For example, Texas Christian University is a private institution with registered works that came up in search results using the terms “Texas” and “university.” It was not possible to conduct more focused research to filter out all non-state entities given the timeline to submit these comments, but a preliminary review of the search results showed an overwhelming majority of registrations by state entities. While additional research should be done to arrive at more exact numbers, the results are indicative of states’ reliance on the copyright system to register and protect works. Given the clear record of state entity ownership of intellectual property, Congress should look further into whether states and state entities should be required to waive

sovereign immunity in order to register and enforce their own copyrights. Additionally, allowing state universities and institutions of higher learning to make unauthorized use of copyright protected works without meaningful consequence gives them a significant advantage over their private counterparts who must license and pay for the use of the same works. It's seems unlikely that this imbalance was intended by the state sovereign immunity doctrine, and Congress should further investigate the effects these differing standards have on universities and institutions of higher learning.

c. Creator Stories: Putting A Human Face on the Problem

The Copyright Alliance reached out to over 100 plaintiffs who have brought copyright infringement claims against state entities since the year 2000 when decisions in *Florida Prepaid* and *Chavez* effectively invalidated the CRCA and gave new life to state sovereign immunity defenses.³³ These individuals were encouraged to complete the Copyright Alliance survey, as well as respond directly to the Copyright Office's NOI. Additionally, phone interviews were conducted with a number of Copyright Alliance members and individual creators whose stories provide insights into increasingly harmful instances of state infringement and the inadequacy of available remedies.

i. Jim Olive

Jim Olive is a Houston-based photographer who has been involved in professional photography for over 50 years. Describing photography as both his "profession and passion," Mr. Olive has traveled to over 90 countries to capture images that have been featured in publications and boardrooms all over the world. His company, Stockyard Photos, provides his exceptional high-quality images for print and digital media, and his list of clients include Time-Life, NASA, Halliburton, Memorial Hermann Hospital, and many others.

One of Mr. Olive's specialties is capturing breathtaking aerial images, a process that finds him in difficult and sometimes dangerous positions hanging out of hovering helicopters. It's a

³³ A list of over 150 cases brought against state entities was provided by Michael Bynum, who spent hundreds of hours searching websites such as dockets.justia.com and conducting general Google searches. Mr. Bynum also conferred with attorneys involved in cases against state entities and law firms that had previously identified cases for inclusion in amicus briefs filed in *Allen v. Cooper*.

practice that's a testament to his adventurous nature and artistic vision, which often finds him going great lengths—lengths others aren't willing to go—in order to get the perfect shot. Mr. Olive's images of the Houston skyline are recognized for their unmatched perspective and beauty, and many organizations enter into licenses with Jim's company for use of the photos online and in print materials.

Unfortunately, Mr. Olive has also encountered substantial infringement of his photographs. One of his most impressive and difficult-to-capture images of the Houston skyline was used without authorization by the University of Houston System for three years before he realized it and subsequently took legal action. In 2017, he sued The University of Houston System and claimed unlawful takings under the Texas Constitution.³⁴ The University of Houston argued that Mr. Olive's takings claims were unenforceable, and on appeal, the Court of Appeals for the First District of Texas held that although copyright is considered property, infringement by a state entity does not constitute a taking under either constitution.³⁵ He has since sought review by the Texas Supreme Court, which has agreed to hear the case, but he has yet to be compensated for the infringement of his copyrighted photograph.

ii. Dr. Keith Bell

Dr. Keith Bell is considered the father of swimming psychology and a leading expert on sports performance enhancement in the United States and abroad. His experiences as a championship swimmer and collegiate coach led him to a career in sports psychology, and his best-selling books on performance and motivation have reached audiences around the world. The author of 11 books, including *Winning Isn't Normal* and *The Nuts and Bolts of Psychology for Swimmers*, Dr. Bell has also written over 80 articles and contributed columns to several national swimming publications such as *Swimmers*, *Swimmers Coach*, and *Swim Texas Magazine*.

His personal dedication to swimming excellence and devotion to developing others has directly influenced tens of thousands of athletes, coaches, artists, and business professions on approximately 500 different teams worldwide. His work spans over 40 of the United States as well

³⁴ Jim Olive Photography d/b/a Photolive, Inc. vs. The Univ. of Houston Sys., 2017-84942 (Court 295, Harris Cnty., Dec. 22, 2017).

³⁵ Univ. of Houston Sys. v. Jim Olive Photography, 01-18- 00534-CV, 2019 WL 2426301 (Tex. App.–Houston [1st Dist.] June 11, 2019, pet. filed).

as Olympic and National teams in the United States, Canada, Australia, Hong Kong, Fiji, New Zealand, and the Cayman Islands.

Just as widespread as Dr. Bell's work is the pervasive infringement he's encountered. He has identified infringement by a variety of individuals and organizations, ranging from small businesses to Fortune 500 companies. But the most common and damaging infringement Dr. Bell comes across has been by states entities, specifically by public schools, universities, and colleges. Despite having separately registered the copyright in both the full text of his *Winning Isn't Normal* book and passages with the same title with the U.S. Copyright Office, the illicit use of his work by state entities continues as a result of sovereign immunity claims. Dr. Bell has personally sent cease and desist letters to at least nine universities and colleges as well more than 100 public school districts.

Yet, Dr. Bell has also not pursued copyright infringement claims against roughly 120 other universities and colleges and many hundreds of public schools because of likely sovereign immunity defenses. State agencies like the Tennessee Board of Probation and Iowa Department of Public Health are examples of the types of infringers Dr. Bell has encountered that leave him without an opportunity to fairly litigate his case or recover any adequate remedies for the infringement of his written works.

In a recent interview with the Copyright Alliance, Dr. Bell spoke of an inequitable sovereign immunity doctrine that allows states and state entities to register and enforce copyrights while infringing the works of others with impunity. He expressed frustration with a double standard that results in states operating in a consequence-free environment to the detriment of those whose works are used without permission or compensation.

The infringements encountered by Dr. Bell have caused tremendous harm to him. He estimates that all told, the misappropriation of his works has deprived him of approximately \$100 million in sales or licensing opportunities. Just as vexing is the sense of defeat Dr. Bell has felt by the loss of control over his creative expression and lack of attribution that often accompanies the infringement of his work.

But for Dr. Bell—and for all of society—the most profound harm is in a creative career cut short due to frustration with a system that devalues his work and leaves him with little recourse in the face of rampant infringement. Dr. Bell explained that the realization that state entities could take his intellectual property and use it without any meaningful consequences led directly to his decision to stop writing. While it's impossible to measure the cultural losses incurred as a result of

those who have abandoned creative pursuits due to overwhelming state infringement, these losses are completely counter to the goals of the copyright system to incentivize the creation of new works.

iii. Michael Bynum

Michael Bynum is a widely published author and editor specializing in historical accounts of the most memorable moments in sports. His writing career began over forty years ago with the publication of *High Tide*, which profiled the University of Alabama's 1977 national championship football team led by the legendary coach, Paul (Bear) Bryant. Since then, Bynum has written, edited, and published approximately 125 other books profiling college and professional sports teams and figures, and he owns and operates Canada Hockey LLC, and its publishing imprint, Epic Sports.

Mr. Bynum's books have been well received, with many titles selling over 50,000 copies. He invests countless hours and resources conducting extensive research and editing, particularly for his biography of Texas A&M University football legend E. King Gill. After spending over ten years researching the project and sending a draft to members of the Texas A&M Athletic Department for help locating additional photos for the book, in 2014 Mr. Bynum became aware that the University had reprinted word-for-word portions of the unpublished biography and distributed them to thousands of people over the internet through its newsletter and through social media.

In 2017, Mr. Bynum filed a copyright infringement and DMCA action against Texas A&M University for the unlawful taking, copying, and publishing of his yet-to-be-published biography, which Texas A&M sent to more than 350,000 of its alumni, fans and donors.³⁶ Despite presenting clear evidence of the infringement, the Southern District of Texas granted a motion to dismiss all claims for all except one defendant.³⁷ Claims against the Texas A&M Athletic Department were dismissed because the department is not a separate legal entity and lacks capacity to be sued.³⁸ The ability to substitute the University itself as the proper defendant failed because it is a state entity and protected by sovereign immunity.³⁹

³⁶ Bynum v. Texas A&M Univ. Athletic Dept., No. 17-cv-00181 (S.D. Tex. filed Jan. 19, 2017).

³⁷ Order Granting Partial Dismissal, Canada Hockey LLC; d/b/a Epic Sports, et al. v. Texas A&M Univ. Athletic Dept., No. 17-cv-00181 (S.D. Tex. filed Mar. 29, 2019).

³⁸ *Id.* at 12.

³⁹ *Id.* at 14-18.

Mr. Bynum’s state takings claims were dismissed as barred by sovereign immunity, and his federal takings claims were dismissed for not being ripe because plaintiffs failed to allege that he pursued claims in state court under Texas’s inverse condemnation procedure, which is required before alleging a federal takings claim.⁴⁰ While his takings case against Texas A&M has recently been brought back to life in light of the Supreme Court’s June 2019 decision in *Knick v. Township of Scott, Pa.*, which overruled a 1980s decision that takings cases could not be prosecuted in federal court, the prospect of being made whole for the harmful infringement he has encountered is slim.⁴¹

In a recent interview with the Copyright Alliance, Mr. Bynum described the enormous amount of time and money that he has dedicated to attempting to combat state infringement. He estimates that he has spent upwards of \$1.35 million in legal fees to date and expects this amount to rise as his case continues to wind its way through the courts. He describes the tough choices that result from pursuing lengthy and expensive litigation:

Several times I have had to make a decision on whether I pay my car insurance or my medical insurance, or do I pay my legal fees to my attorneys. And many times, my lawyers got paid first.

Mr. Bynum believes firmly that states should never be able to take someone’s property without meaningful consequence, and he has fought for over six years to hold states accountable. Despite the frustrations and financial strain, Mr. Bynum is committed to affecting change that will return a sense of balance to copyright law and ensure that future creators will be able to protect their works.

iv. Patricia Ward Kelly

Patricia Ward Kelly is the widow of Gene Kelly, an actor, singer, director, producer, screenwriter, and choreographer whose legendary career spanned over fifty years in the entertainment industry. She is a film historian, official Gene Kelly biographer, and the trustee of The Gene Kelly Image Trust, an entity Mr. Kelly established during his lifetime to govern the use of his name, likeness, and persona. Mrs. Kelly is also the copyright owner of a variety of Gene Kelly’s works.

⁴⁰ *Id.* at 21.

⁴¹ *Knick v. Township of Scott, Pennsylvania*, No. 17-647, 588 U.S. ____ (2019).

In 2016, Mrs. Kelly learned by happenstance that an author intended to edit a collection of Gene Kelly’s copyright protected materials to be published by the University Press of Mississippi without obtaining the necessary permissions. When her attorneys contacted the author and the University Press of Mississippi to inform them that the materials were protected by copyright and that they needed permission, neither was forthcoming, and neither would identify the intended contents of the book or the publication date.

What followed was a very expensive and time-consuming legal battle to preserve control over Gene Kelly’s life’s work and Mrs. Kelly’s rights as the designated custodian of his intellectual property.⁴² Mrs. Kelly explained her motivation in an interview and statement provided to the Copyright Alliance:

I did not pursue my legal action against The University Press of Mississippi because I thought it would lead to a large financial settlement. I did it because I felt I had no choice. I would much rather have put the time and money that I was forced to spend into something positive that promoted Gene’s fine legacy instead of channeling it into a very draining and public confrontation to preserve what was rightfully his.

Mrs. Kelly finds it appalling that a state entity would behave in such a manner, especially when university presses present themselves and their works as “scholarly” and “credible”—which gives an imprimatur of authenticity to their publications. She added that “their behavior represents not only bad faith but thievery and runs counter to the laws protecting intellectual property that they purport to uphold.”

Recently, Mrs. Kelly learned that the University Press of Kansas has embarked on a similar endeavor to make unauthorized use of Gene Kelly’s copyright protected works. And although she would rather spend her time and resources perpetuating her late husband’s legacy in more positive ways, she feels she must again undertake another expensive and time-consuming legal battle to protect her rights and, by extension, “Gene’s right to his own words.”

When interviewed by the Copyright Alliance, Mrs. Kelly explained how important control over intellectual property was to Gene Kelly during his lifetime. He deliberately worked to retain control of his works, and that responsibility for stewardship passed to her by inheritance at his death. She expressed her frustration with state infringement and the need for reform:

⁴² Kelly v. Univ. Press of Miss., 16-cv-2960 (C.D. Cal. filed Aug. 17, 2016).

Clearly, this is a wrong that must be righted, if only to force state entities in the form of university presses to perform with integrity and to respect the intellectual property rights of others, including Gene—one of the most articulate and erudite figures of the twentieth century. For the presses, and the authors associated with them, to deliberately withhold information, fail to obtain necessary permissions and to assume a “sue me” stance regarding copyright infringement surely runs counter to the trust invested in these institutions.

v. Walter Whittle, Ph.D.

For the past twenty-four years, Walter Whittle, Ph.D. has worked to develop unique competency-based job descriptions for over one third of all school districts in Ohio. His completed products include book-length compilations of job descriptions for all employment positions within an organization. As an independent contractor, Dr. Whittle owns the copyright and other intellectual property rights in the proprietary materials provided to each school client. The materials he creates are not considered works made for hire, and the school districts affirm that understanding in a legally binding agreements prior to the contractual engagement.

In 2010, Dr. Whittle said he was dumbfounded to discover that a South Carolina high school teacher had posted part of his materials on the internet. He alerted the district superintendent, as well as the principal of the high school, neither of whom felt the issue was worthy of a response. Concerned that similar infringement may be occurring, Dr. Whittle started monitoring for infringement by running simple internet searches based on sentences and paragraphs he had written, and he soon documented 137 violations by separate school districts. He is certain that these research methods revealed only a small percent of actual infringements.

At that time, Dr. Whittle’s average client fee was about \$4,600 making his calculated minimum loss based on the infringements he was able to identify in excess of \$685,000. The misappropriation of his intellectual property also jeopardized his ability to sell his business – an additional financial loss. While recent searches using advanced plagiarism software have revealed more instances of infringements by schools without a valid contract, Dr. Whittle confesses that legal action against the state entities that are infringing his works is not a realistic option. Cost, time and emotional factors are prohibitive, and the case he did bring in 2014 he describes as “enlightening.” In that case, the judge considered his claim to be frivolous and unworthy of his

time, strongly suggesting that the matter be settled out of court.⁴³ To Dr. Whittle, copyright infringement—while not always understood—is a serious systemic problem, and the lack of judicial concern was demoralizing.

Ultimately, of the 137 violations cited above, 27 school districts settled out of court, but 110 cases remain unresolved. Dr. Whittle made clear that the settlements received fell well short of compensating him for his loss and expenses. Adding to his frustration is the fact that taxpayers provide school districts with deep pockets, which further deters him from pursuing claims. As he recently wrote, “viable options to stop school employees from stealing copyright protected material appear to be nonexistent.”

Dr. Whittle also explained how incredibly time-consuming monitoring for infringement has been, estimating that he spent well over 500 hours collecting information in 2010 after first discovering the infringement of his work in South Carolina. He devoted 25% of his work week to trying to put a stop to state infringement, which takes away from his ability to create new works and run his business.

vi. David K. Langford

David K. Langford began a 50-year professional photography career in 1970, and over that time he amassed a vast catalogue of western-themed works that reflect his unique vision of cowboys, livestock, ranches, and nature. His clients included some of the biggest ranches in Texas, wildlife magazines, and Texas Highways—the official travel magazine of Texas published by the state’s Department of Transportation. Mr. Langford’s work is recognized internationally, and he’s received numerous awards and grants, including the prestigious “People’s Choice” award from the Outdoor Writers Association.

In 2010, Mr. Langford discovered that one of his most iconic images—a silhouette of a saddle-toting cowboy—had been used without his permission as the background on roughly 4.5 million state vehicle registration stickers. After further investigation, he found out that the image had been scanned by a state prison inmate and reproduced under a Texas Department of Criminal Justice contract with the Department of Public Safety. He contacted the state agencies in an attempt to resolve the matter but was rebuffed and rerouted in a frustrating series of communications that

⁴³ Whittle Consulting Group, Ltd. v. West Geauga Local School District, 14-cv-01261 (N.D. Ohio filed June 11, 2014).

spanned years. In 2010, he filed a lawsuit against the agencies, his longtime clients, saying "[w]e've tried everything we can to settle this in a businesslike, professional manner between photographer and client, but we can't hardly get them to return a phone call."

When Mr. Langford finally decided to file a suit, it was for the theft of his personal property under Texas's Private Property Rights Protection Act and not for copyright infringement. His experience in the years leading up to the lawsuit made him aware that if he brought a copyright infringement suit, the state entities would simply raise a sovereign immunity defense, and his claims would be dismissed. And while Mr. Langford ultimately reached a settlement agreement on the claims related to the Property Rights Protection Act, he feels that his rights as a copyright owner had been rendered useless in his fight against infringement.

vii. Rick Allen

Rick Allen is a videographer, broadcast video producer, and co-founder of Nautilus Productions, a North Carolina-based video production company. With over thirty five years of experience as a director, producer, and videographer, he is a recognized expert in his field and his works have been featured on major networks like ABC, A&E, BBC, CBS, Discovery, ESPN, the Learning Channel, Lifetime, National Geographic, and Turner, as well as programs like "48 Hours," "60 Minutes," and many others. For the past twenty years, Mr. Allen has focused his work predominately on documentary production, freelance videography and underwater video services, commercializing his work through licensing agreements with broadcast clients.

In 1998, Mr. Allen was hired by UNC-TV in association with Intersal and the state of North Carolina to document and film underwater footage of the shipwreck site of Blackbeard's Queen Anne's Revenge. Mr. Allen entered into an agreement whereby Intersal and the state of North Carolina kept its media rights to the footage Mr. Allen created, but he retained all copyright and intellectual property rights. In 2013, Mr. Allen discovered North Carolina had infringed his copyrights by uploading his work on to a state website without his permission. In this instance, after it was confronted with the infringement, the state agreed to pay Mr. Allen \$15,000 and redefined portions of their contractual agreement.

However, in 2015, North Carolina enacted a provision, known as "Blackbeard's Law," that specifically permitted the state to convert Mr. Allen's work, and many other copyright owners'

works, into a public record and thereby immunize the state against claims of infringement.⁴⁴ Soon after, Mr. Allen discovered several of his videos had been infringed by the state and filed suit against the state of North Carolina in Federal District Court.⁴⁵ Although the District Court ruled in favor of Mr. Allen, the Fourth Circuit, and eventually the Supreme Court, disagreed, finding the Copyright Remedy Clarification Act that had abrogated state sovereign immunity was in fact invalid.⁴⁶

Mr. Allen expressed frustration with the intentional nature of the state's behavior. Not only did the state of North Carolina, at the request of the Department of Natural and Cultural Resources, devise a statute that effectively stripped him of his rights as a copyright owner, it also repeated its infringing behavior after resolving the earlier infringements.

It is outrageous that the agency charged with promoting the arts in North Carolina does so through the misuse of its citizens' property. Blackbeard's Law affects every artist, writer, photographer, producer, historian and donor in N.C. and sets a dangerous precedent for N.C. government overreach.

He described the feeling as being “stuck in a purgatory” in which the state has taken control of his work. Adding to the harm caused by the loss of control is the extreme financial burden Mr. Allen has incurred attempting to enforce his rights and secure appropriate compensation for the unauthorized use. He estimates that he has spent upwards of \$300,000 of his own money in his legal battles with North Carolina. But just as harmful is the time taken away from his work and passion of filmmaking and videography. In the end, Mr. Allen says that he “just simply would like the states to follow the same copyright law that I have to follow.”

i. PicRights

In addition to conducting interviews with individual creators, the Copyright Alliance spoke with representatives from PicRights, which is an international organization that monitors for copyright infringement involving photographs and assists with enforcement and claims resolution. Its clients range from individual creators to news organizations to stock photography companies, all

⁴⁴ N.C. HB 184 (Section 121-125(b)) (2015).

⁴⁵ Allen v. Cooper, 244 F. Supp. 3d 525 (E.D.N.C 2017)

⁴⁶ Allen, *supra* note 15.

of which use its services to help them identify and combat online infringement through the use of advanced internet searches and matching technologies. When PicRights’ analysts crawl the web looking for unauthorized uses of images, they frequently come across state entity websites that have reproduced copyright protected works of their clients. PicRights is familiar with the state sovereign immunity doctrine and the uncertainty surrounding state remedies, and therefore it does not prioritize tracking or responding to instances of potential state infringement.

At the request of the Copyright Alliance, PicRights recently conducted targeted searches aimed at uncovering specific instances of state copyright infringements. It used state names and a list of keywords that were likely to be incorporated in the name of a state entity.⁴⁷ The searches looked into matches for copyright protected images over the last three years (2017 through 2020), searching for websites that include words like “university,” “commission,” “bureau,” “hospital,” and many others. The searches returned 110 instances of potential infringement, with the most hits identifying websites for institutions of higher learning in large and heavily populated states such as Texas, New York, California, and Florida. California State University, University of Georgia, and Southern Illinois University are just a few of the many institutions of higher learning that were flagged for featuring unauthorized works. Other state entity websites that turned up matches included state bar associations, visitors’ bureaus, departments of transportation, and hospitals.

These results are likely only the tip of the iceberg and are another indication that state entities continue to make unauthorized use of copyright protected works online. And this evidence, while not comprehensive, can be relied upon by Congress as it uses its legislative power to make predictive judgments. In *Turner Broadcasting v. FCC* (“Turner II”), the Supreme Court held that courts must accord deference to Congress’s findings “as to the harm to be avoided and to the remedial measures adopted for that end, lest the traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy be infringed.”⁴⁸ The evidence offered in these and other comments submitted to the Copyright Office create a record supportive of a decision by Congress to make a predictive judgement on the extent of state copyright infringement.

⁴⁷ List of keywords, *supra* note 13.

⁴⁸ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 181 (1997).

IV. Key Legal Issues Raised in the Copyright Office NOI

A. Lack of Adequate State Remedies

Question 3 of Copyright Office NOI asks what remedies are available when states infringe copyright protected works, with follow up questions 3(b)-(e) asking about the adequacy of injunctions and other remedies to address the needs of copyright owners. While some remedies are theoretically available to copyright owners at the state level, including those related to takings and *Ex parte Young* claims, experts consistently describe them as inadequate when compared to the remedies based on federal statutory damages.⁴⁹ These alternative remedies rarely make aggrieved parties whole from their injuries and mostly represent a symbolic vindication of their intellectual property rights.

The GAO stated in its 2001 report that “[i]ntellectual property owners appear to have few proven alternatives or remedies against state infringement available if they cannot sue the states for damages in federal court.”⁵⁰ The findings of the GAO report were reinforced two years later during a hearing on the Intellectual Property Protection Restoration Act of 2003, in which Professor Paul Bender testified that alternative state remedies are truly inadequate.⁵¹ He explained that the availability of state remedies is limited due to a number of issues, including (1) federal preemption of state claims, (2) exclusive federal jurisdiction over federal patent and copyright claims, (3) the absence of recognized, tested causes of action under state laws, and (4) that, in addition to their Eleventh Amendment immunity, states typically enjoy immunity from suit in their own courts via statutory or constitutional provisions.⁵²

The creator stories and survey responses collected as part of the Copyright Alliance’s study support these claims, providing clear examples of the non-existent, untested, or inadequate nature of state remedies. Many copyright owners have chosen to pursue takings claims in response to infringement, but the experiences of creators such as Rick Allen and Jim Olive show that state courts are often unwilling to find copyright infringement an unconstitutional taking of property in

⁴⁹ Statement of Marybeth Peters, *supra* note 3.

⁵⁰ U.S. Gen. Accounting Office Report, *supra* note 11 at 2.

⁵¹ *Intellectual Property Protection Restoration Act: Hearing Before the Subcomm. on Courts and Intell. Prop. of the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Paul Bender), http://commdocs.house.gov/committees/judiciary/hju87815.000/hju87815_0f.htm.

⁵² *Id.*

violation of either a state constitution or the Fifth Amendment. Despite the fact that some see *Allen v. Cooper* as a clean cut instance of a taking, others note the confusion in determining which actions of state infringement actually amount to a taking.⁵³ While intellectual property qualifies as property for the purposes of the Fifth and Fourteenth Amendments, takings jurisprudence often only allow takings claims in instances in which an owner is deprived of virtually all of the property's value.⁵⁴

Even if an instance of state copyright infringement is determined to be a taking, the “just compensation” available to copyright owners would be limited only to the fair market value of the property taken, leaving out several key points of economic relief contemplated by federal intellectual property.⁵⁵ For example, disgorgement of profits from infringing activity (unjust enrichment), attorney's fees, and statutory damages are not available for a party pursuing takings claim against an infringing state actor.⁵⁶ Though perhaps *constitutionally* adequate, this remedy still falls far short of the *practically* adequate remedies available under federal copyright law.

The varied experiences of creators and copyright owners depending on the state in which they encountered infringement is also a testament to the incapability of states to provide the type of uniform protection traditionally afforded copyright owners under federal law. Even if a state-law claim can survive the application of federal preemption, copyright owners must pursue untested legal theories to protect their works, and, in the case of widespread infringement, copyright owners are faced with navigating the disparate laws of separate jurisdictions. Finally, in addition to immunity invoked pursuant to the Eleventh Amendment, states typically enjoy immunity from suit in their own courts via statutory or constitutional provisions. Differing state approaches to sovereign immunity were detailed in a 1988 Congressional Research Service (CRS) survey on sovereign immunity, which reported that some states “expressly direct that nothing contained in their statutes is to be construed as a waiver of Eleventh Amendment immunity.”⁵⁷ States today continue to limit their exposure to copyright infringement claims through statutory or constitutional provisions, even going as far as enacting immunity laws specifically in response infringement suits,

⁵³ Tyler T. Ochoa, *Copyright and Underwater Cultural Heritage*, 49 J. MAR. L. & COM. 441 (2018), Available at: <https://digitalcommons.law.scu.edu/facpubs/964>.

⁵⁴ T. F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?* 50 FLA. L. REV. 529, 565 (1998).

⁵⁵ Mitchell N. Berman, R. Anthony Reese, and Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (and How Not to)*, 79 TEX. L. REV. 1037, 1093 (2001).

⁵⁶ *Id.* at 1094.

⁵⁷ U.S. Congressional Research Service, *Waiver of Eleventh Amendment Immunity from Suit: State Survey Relating to Copyright Infringement Claims* (June 22, 1988), by Kirk D. Nemer.

as was done by the state of North Carolina in response to Rick Allen's lawsuit.

The resulting uncertainty and inconsistency with which state copyright laws are applied leads to endless frustration for copyright owners, and this ambiguous framework of law and claims of immunity have caused creators such as Dr. Keith Bell to lose faith in a system designed to incentivize and reward them. In light of these severe limitations, any future sovereign immunity legislation should place on states and their entities the burden of demonstrating an adequate state remedy to redress a constitutional deprivation.

B. Injunctions

In 1990, when it passed the CRCA, Congress called injunctions an incomplete remedy and affirmatively rejected the suggestion that the availability of injunctions against state entities standing alone is adequate to protect private parties.⁵⁸ Congress's finding was based in part on the Copyright Office's 1988 report, which explained that copyright owners overwhelmingly consider injunctions neither an adequate remedy nor a deterrent to infringement.⁵⁹ The 2001 GAO report also addressed injunctions, noting that intellectual property owners appear to have few proven alternatives or remedies against state infringement available and that injunctions are insufficient in that they do not provide damages.⁶⁰ It reported that even an injunction against a state entity in federal court is limited, explaining that "[b]ecause there would be no separate federal action for damages if the state had immunity, the plaintiff might still have to go through an expensive and protracted lawsuit to obtain the injunction without any expectation that damages would be paid."⁶¹

The sentiments of creators and copyright owners seem to align not only with past Copyright Office reports and responses to Congressional inquiries, but also the views of scholars and other commentators who have studied the issue. In a 2012 law review article, Professor Michael Landau questioned the adequacy of state injunctions, explaining that they are prohibitively expensive, offer only prospective relief, and do nothing to remedy the past injury that initially justified the injunction.⁶² Professor Landau also noted that injunctions provide no remuneration for lost market share or lost licensing opportunities, and they require ongoing monitoring to ensure compliance.⁶³

⁵⁸ See S. Rep. 101-305, at 12 (1990) ("Injunctions only prohibit future infringements and cannot provide compensation for violations that have already occurred.").

⁵⁹ Copyright Office Report, *supra* note 7 at 6.

⁶⁰ U.S. Gen. Accounting Office Report, *supra* note 11 at 13.

⁶¹ *Id.* at 16.

⁶² Landau, *supra* note 2 at 543.

⁶³ *Id.*

As to *Ex parte Young* scenarios, Landau’s article explains that while an injunction may stop infringement by an individual actor, it does nothing toward preventing another state official from engaging in the same infringement.⁶⁴ Professor Landau concludes that “all said, an injunction is a poor substitute for recovery of monetary damages against a state that infringes a copyright or patent.”⁶⁵

As former Register of Copyrights Marybeth Peters appropriately pointed out in her testimony during consideration of the Intellectual Property Protection Restoration Act of 2003, “[t]he ability of copyright owners to protect their property and to obtain *complete relief* when their rights are violated is central to the balance of interests in the Copyright Act.”⁶⁶(emphasis added). When asked specifically about injunctions, Peters expressed concern with their limited, prospective relief.

*It basically deals with past infringements. If there is a pattern of infringements that goes on for a long time, getting an injunction does nothing to help. It is really not a deterrent to infringement in any way.*⁶⁷

These inadequate and inconsistent remedies currently available at the state level betray this central balance of the Copyright Act, and legislative action is needed to ensure that copyright owners are made whole when they encounter infringement by state entities. The Copyright Alliance urges the Copyright Office and Congress to recognize injunctions and other existing remedies in copyright infringement cases against states for what they are: incomplete remedies that must be coupled with all remedies otherwise provided for under the Copyright Act.

C. Recommendation for Abrogating State Sovereign Immunity

The Copyright Alliance strongly urges that the Copyright Office recommend, and that Congress enact, legislation that is consistent with both the Supreme Court’s decision in *Allen v. Cooper* respecting Section 5 of the Fourteenth Amendment and codifies the Court’s pronouncement in *Ex parte Young*.⁶⁸ To address the inherent inequity in states playing by two sets of rules,

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Intellectual Property Protection Restoration Act: Hearing Before the Subcomm. on Courts and Intell. Prop. of the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Marybeth Peters), http://commdocs.house.gov/committees/judiciary/hju87815.000/hju87815_of.htm

⁶⁷ *Id.* at 99.

⁶⁸ 209 U.S. 123 (1908).

Congress should follow the path laid out in *Allen* to abrogate state sovereign immunity in cases involving constitutional deprivations of intellectual property. Based on the record compiled by Congress and the Copyright Office, state immunity can be properly abrogated pursuant to Section 5 of the Fourteenth Amendment. Doing so would guarantee that copyright owners are able to exercise their rights under Section 106 and Section 1201 of the Copyright Act. We also encourage the Copyright Office and Congress to look further into comparable sovereign immunity issues that harm copyright owners, specifically those related to tribal and Native American sovereign immunity.

In addition to abrogating state sovereign immunity for copyright claims, the Copyright Alliance recommends codifying the *Ex parte Young* doctrine so that injunctions against officials acting on behalf of states can proceed despite sovereign immunity. While, as noted above, injunctions standing alone are no substitute for money relief, we believe it is important to ensure the continued availability of injunctions in copyright infringement cases against state officials. To guarantee this result, we urge that the legislation codify the doctrine of *Ex parte Young*.