



POSITION PAPER

Abrogating State Sovereign Immunity for Copyright Infringement

The Eleventh Amendment to the U.S. Constitution limits states' accountability by restricting the ability of individuals to bring suits against them in federal court. While Congress can revoke states' immunity in certain circumstances, in 2020 the Supreme Court ruled in *Allen v. Cooper* that Congress lacked authority to abrogate the states' sovereign immunity from copyright infringement suits under the Copyright Remedy Clarification Act (CRCA). Even before the *Allen* decision, instances of copyright infringement by state actors had been on the rise. But the *Allen* holding will embolden state entities, leaving copyright owners and creators with little recourse or remedy when confronted with harmful violations of their rights. It is more essential than ever that Congress remedy this imbalance by enacting legislation that passes Constitutional muster and abrogates state sovereign immunity in copyright infringement cases.

Evidence Supports Congressional Action

While the Supreme Court's decision in *Allen v. Cooper* was unfortunate for copyright owners, the Court recognized that "something is amiss" with the current sovereign immunity framework and laid out a path for legislative correction. It advised that if Congress can develop a legislative record that demonstrates unconstitutional state conduct and abrogation is designed to redress or prevent such conduct, repeal of state sovereign immunity would be appropriate pursuant to Section 5 of the Fourteenth Amendment.

To help establish a record of injurious state conduct, the Copyright Alliance conducted a survey that shows compelling evidence that remedies against state infringement are inadequate or non-existent, and that state infringement is a frequent and harmful occurrence that will increasingly threaten the copyright system unless corrected. Some of the survey's key takeaways include:

- State infringement has risen steadily, starting in the mid-to-late 1990s and increasing yearly through the 2000s and 2010s.
- Of the 115 respondents who answered that they had experienced infringement

by a state or state entity, 52% described multiple instances of state infringement, using words such as “countless,” “at least a dozen,” “thousands,” and “infinitely many.”

- An overwhelming majority of respondents identified state universities and institutions of higher learning as the type of state entity most commonly responsible for infringement.
- 68% of respondents who had encountered state infringement reported that they believe it caused a loss in revenue or licensing opportunities.

Importantly, the amount of state infringement is likely much more substantial than that reported in our survey. Many copyright owners simply do not have the time or resources to constantly monitor for infringement, and they are even less likely to pursue copyright infringement lawsuits against states when they know meaningful remedies will be blocked by sovereign immunity.

Copyright Owners Lack Adequate Remedies Against States

The remedies available to copyright owners at the state level are limited for a number of reasons, including federal preemption of state claims, the absence of tested causes of action under state law, and immunity from suits that states enjoy in their own courts as a result of state statutory or constitutional provisions. The patchwork of varying state laws also reflects the inability of states to provide the type of uniform protection traditionally afforded copyright owners under federal law. While injunctions are theoretically available to copyright owners when confronted with state infringement, they are neither an adequate remedy nor an effective deterrent.

It is Manifestly Unjust that States Benefit from the Copyright System While Avoiding Liability for Infringement

State entities continuously reap the benefits of the copyright system (by registering and enforcing their own copyrights) while simultaneously enjoying immunity from monetary damages for infringement claims. Large state entities, specifically universities and institutes of higher learning, register and own thousands of copyrights and enforce their rights when infringement occurs – but they cannot be held to account when they infringe the rights of others. When states are able to skirt liability and infringe without meaningful consequence, it creates an unlevel playing field and upends the balance at the heart of copyright law.

Congress should follow the path laid out by the Supreme Court in *Allen* to abrogate state sovereign immunity in cases involving constitutional deprivations of intellectual property. Doing so would guarantee that copyright owners are able to exercise the rights granted to them under the Copyright Act, and that state actors are not above the law.