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## Copyright and State Sovereign Immunity: A Report of the Register of Copyrights

Shira Perlmutter

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# **COPYRIGHT AND STATE SOVEREIGN IMMUNITY**

A REPORT OF THE REGISTER OF COPYRIGHTS

AUGUST 2021





# **COPYRIGHT AND STATE SOVEREIGN IMMUNITY**

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A REPORT OF THE REGISTER OF COPYRIGHTS

AUGUST 2021



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

The Honorable Patrick Leahy  
Chair  
Subcommittee on Intellectual Property  
United States Senate  
437 Russell Senate Building  
Washington, D.C. 20510

The Honorable Thom Tillis  
Ranking Member  
Subcommittee on Intellectual Property  
United States Senate  
113 Dirksen Senate Office Building  
Washington, D.C. 20510

August 31, 2021

Dear Chairman Leahy and Ranking Member Tillis:

On behalf of the United States Copyright Office, I am pleased to deliver a copy of a report entitled *Copyright and State Sovereign Immunity*, which is available to the public on the Office's website.

Following the Supreme Court's decision in *Allen v. Cooper*, you requested that the Copyright Office undertake a study to determine whether, consistent with the Court's analysis, Congress could legislatively abrogate state sovereign immunity to suits in federal court for damages for copyright infringement.

In response to your request, the Office solicited the views of interested stakeholders and held roundtables to amplify the record. The Office received comments from many copyright owners who believed that their works had been infringed by state entities. A number of state entities provided information about their policies on copyright, and views regarding allegations of infringement and the possible effect of abrogation on their operations. The Office also conducted extensive research into the legal standards governing abrogation in the context of copyright infringement.

After carefully evaluating the information provided, the Office can report that the number of allegations of state infringement provided in the course of this study is substantially greater than the number Congress considered when it adopted its prior abrogation legislation, and greater than the evidence found insufficient in prior intellectual property cases. Although few of the infringement allegations provided to the Office were adjudicated on the merits, the evidence indicates that state infringement represents a legitimate concern for copyright owners. Given the demands of the current legal standard, however, and some ambiguity in its application, we cannot conclude with certainty that even the current more robust record would be found sufficient to meet the constitutional test for abrogation.

The Office nevertheless continues to believe that infringement by state entities is an issue worthy of congressional action. While many such entities take care to respect copyright, and engage in activities likely to fall under copyright exceptions, others may use copyrighted works for a variety of market-substituting purposes. There would seem to be little justification for immunizing these types of entities from damages if they intentionally engage in the same conduct for which a private party could be held liable. Therefore, if Congress decides not to proceed with abrogation legislation, the Office would support consideration of alternative approaches to address this issue.

Please do not hesitate to let me know if you have any questions regarding the report or its findings and conclusions.

Respectfully,

A handwritten signature in black ink that reads "Shira Perlmutter". The signature is written in a cursive, flowing style.

Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office

Enclosure

## ACKNOWLEDGEMENTS

This report reflects the dedication and expertise of the Office of the General Counsel at the U.S. Copyright Office, in particular the team who served as principal authors: Acting General Counsel and Associate Register of Copyrights Kevin Amer, Assistant General Counsel Jordana Rubel, Attorney-Advisors Mark Gray, Jalyce Mangum, and David Welkowitz, and Barbara A. Ringer Copyright Honors Program Fellow Melinda Kern. Without their considerable efforts in managing the complex research and writing needed to tackle this subject, and their keen understanding of the record, this report would not have been possible.

I am also grateful to the Arts & Entertainment Advocacy Clinic at the Antonin Scalia Law School. Led by Sandra Aistars, Director of Copyright Research and Policy and a Senior Scholar at the Law School's Center for Intellectual Property x Innovation Policy, and adjunct professor Stephanie Semler, law students Michaela Cloutier, Jacob Hopkins, Kyle Maxey, Gina McKlveen, Laura Quesada, and Austin Shaffer worked diligently to review evidence of state infringement submitted by parties in furtherance of this report. I appreciate their thoughtful contributions.

I also extend my gratitude to former General Counsel and Associate Register of Copyrights Regan Smith for her leadership during the early stages of this project, including the public roundtables.

Helpful proofing and citation assistance was provided by Paralegal Specialist Rachel Counts, and Law Clerk Austin Shaffer contributed valuable research assistance. Assistant to the General Counsel Meg Efthimiadis, Visual Information Specialist Stanley Murgolo, and Outreach and Education Specialist Steve Andreadis facilitated the production of the report.

Finally, let me thank the many interested parties who provided written comments and participated in the public roundtables. Their broad-ranging and knowledgeable submissions were crucial to the formulation of the Office's recommendations.

Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office

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## EXECUTIVE SUMMARY

In March 2020, the Supreme Court held in *Allen v. Cooper* that Congress had exceeded its constitutional authority when it enacted legislation authorizing copyright infringement suits for damages against states.<sup>1</sup> The Court based its decision on the legal doctrine of sovereign immunity, which generally precludes a federal court from hearing a suit against a state without the state's consent. The Court noted that Congress has the power to abrogate state immunity, including to prevent or remedy deprivations of property without due process in violation of the Constitution. To do so, however, Congress generally must develop a legislative record demonstrating a pattern of unconstitutional conduct by states for which there are no adequate state remedies. Following the decision, Senators Thom Tillis and Patrick Leahy requested that the Copyright Office study the extent to which copyright owners are experiencing infringement by state entities without adequate remedies under state law. Over the past year, the Office has solicited public comments, held public roundtables, and conducted legal research on this issue. This report presents the Office's findings and conclusions.

Part I of the report describes the history of this study, and Part II summarizes the relevant legal background. The text of the Eleventh Amendment prohibits federal suits against states by non-residents, and courts have interpreted the Amendment to also bar suits filed by residents of the state being sued. The Supreme Court nevertheless permits federal suits for damages against nonconsenting states where Congress has validly abrogated state immunity under the Fourteenth Amendment. In doing so, Congress must ensure that there is congruence and proportionality between the constitutional injury and the means adopted to prevent or remedy it. Abrogation provisions that fail to meet this standard have been struck down by the Court.

For most of American history, copyright law did not expressly address the liability of states, and courts were divided as to whether they could be subject to infringement suits for damages.<sup>2</sup> In 1990, Congress amended the Copyright Act to provide that states could be liable for infringement to the same extent as nongovernmental entities. In *Allen*, however, the Court struck down that legislation, holding that it failed to satisfy the congruence-and-proportionality standard because Congress had not identified a pattern of state copyright infringements that rose to the level of a constitutional violation. To rise to that level, an infringement must be committed intentionally or at least recklessly; a negligent act does not suffice.

Part III of this report discusses the evidence of state infringement submitted in connection with this study. Copyright owners provided comments and testimony

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<sup>1</sup> 140 S. Ct. 994 (2020).

<sup>2</sup> As discussed in this report, suits seeking only injunctive relief can be brought against state officials in federal court under the *Ex parte Young* doctrine.

alleging that states have infringed a variety of copyrighted works, including photographs, books, and news articles. Two commenters provided lists totaling over 130 copyright lawsuits filed against state entities. A copyright advocacy group submitted the results of a survey in which copyright owners were asked about their experience with infringement by states. Out of 657 survey respondents, 115 stated that their works had been used by state entities in a way that constituted copyright infringement, and many provided additional information identifying the relevant states and the frequency of the alleged infringement. In addition, the Office received comments from approximately a dozen copyright owners describing specific instances of alleged infringement by state entities. Commenters representing state entities questioned the reliability of the submitted evidence and noted that the allegations of infringement did not account for potential defenses such as fair use. These commenters also argued that the allegations, even if true, were insufficient to establish a pattern of unconstitutional conduct sufficient to warrant abrogation of sovereign immunity.

Part IV describes information provided by representatives of state entities regarding their policies for preventing and responding to copyright infringement. These commenters, mostly from educational institutions, reported that many state entities have adopted a variety of policies, practices, and cultural norms to minimize the risk of infringement by state actors. For example, commenters noted that a number of state institutions have established dedicated offices to provide guidelines and educational resources on compliance with copyright law.

Part V examines the extent to which copyright owners may have other legal remedies against infringing states if they are unable to bring suits for damages in federal courts. Where a state has waived immunity from tort or contract claims, copyright owners may seek to recover under those causes of action in state court. The availability of such remedies, however, is limited by language in the Copyright Act preempting state-law claims involving rights that are the “equivalent” of those protected by federal copyright law. Alternatively, some courts have suggested that copyright owners may be able to assert that state infringement amounts to a taking of property without compensation, in violation of the federal or state constitutions. This theory, however, has rarely been tested and was recently rejected by the Texas Supreme Court. In addition, copyright owners may bring suits for injunctive relief against state officers in federal court, but this does not provide an avenue to recover money damages. Finally, copyright owners may bring suit against individual state officials in their personal capacity, but such officials are protected by qualified immunity and, even if found liable, may be unable to satisfy a damages award.

Part VI sets out the Office’s evaluation of the submitted evidence under the Supreme Court’s standards for legislation abrogating state immunity. At the outset, the Office notes that the record of alleged state infringements provided in the course of this study is substantially greater than the record before Congress when it enacted its prior

abrogation legislation. Moreover, while many state institutions have taken significant steps to ensure respect for copyright, it seems clear that state infringements do in fact occur and that states' immunity from damages leaves copyright owners with inadequate remedies in many such cases. Further, the Office is aware that the existence of sovereign immunity itself hampers the development of a more conclusive evidentiary record, as it often prevents claims from being brought or assessed on the merits.

It is unclear, however, whether the evidence gathered in this study would be found sufficient to abrogate state immunity under the Supreme Court's precedents. Although the Court has said little regarding the nature and volume of evidence that is needed, the case law indicates that the violations by states must be sufficiently numerous and serious to constitute a pattern of unconstitutional conduct. While the infringement allegations provided to the Office are substantial in number, few have been corroborated or substantively analyzed by a court. Among the litigated cases cited by commenters, only about half resulted in written decisions, and the majority of those were dismissed on sovereign immunity grounds without addressing the merits. The Office itself cannot assess the validity of the examples of infringement in the submitted survey responses.

Given that the evidence gathered here far exceeds that underlying the CRCA, Congress may still choose to proceed with adopting new abrogation legislation. In light of the foregoing concerns, however, there is a material risk that a court could find even this more robust record insufficient to meet the constitutional abrogation standard. The Office nevertheless continues to believe that the ability of copyright owners to obtain adequate relief when their rights are violated—including by state entities—is important to the balance of interests struck by the Copyright Act. While many such entities take care to respect copyright, and engage in activities likely to fall under copyright exceptions, others may use copyrighted works for a variety of market-substituting purposes. If Congress decides not to proceed with new abrogation legislation, the Office therefore would support consideration of alternative approaches to address this issue.

## I. INTRODUCTION AND STUDY HISTORY

On March 23, 2020, the Supreme Court issued its decision in *Allen v. Cooper*,<sup>3</sup> which struck down as unconstitutional the Copyright Remedy Clarification Act of 1990 (“CRCA”). The CRCA subjected states to liability for copyright infringement to the same extent as other parties. The Court held that the law was an invalid exercise of Congress’s power to abrogate states’ sovereign immunity against suit in federal court. The Court reaffirmed that under the Fourteenth Amendment to the Constitution, Congress may abrogate states’ immunity in order to redress unconstitutional conduct.<sup>4</sup> But it concluded that the legislative record at the time of the CRCA’s enactment was insufficient to support abrogation.<sup>5</sup> The Court noted, however, that its decision “need not prevent Congress from passing a valid copyright abrogation law in the future.”<sup>6</sup> It observed that, in adopting the CRCA, “Congress likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection.”<sup>7</sup> The Court thus made clear that Congress may validly abrogate sovereign immunity if it has a sufficient record of unconstitutional infringement by states.<sup>8</sup>

Senators Thom Tillis and Patrick Leahy subsequently sent a letter to the Copyright Office noting that the *Allen* decision has “created a situation in which copyright owners are without remedy if a State infringes their copyright and claims State sovereign immunity,” and expressing concern about the “impact this may have on American creators and innovators.”<sup>9</sup> The letter asked the Office to study the issue “to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”<sup>10</sup> In conducting its analysis, the Office was asked to “study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law,” and to “consider the extent to which such infringements appear to be based on intentional or reckless conduct.”<sup>11</sup> The

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<sup>3</sup> 140 S. Ct. 994.

<sup>4</sup> *Id.* at 1003.

<sup>5</sup> *Id.* at 1006–07.

<sup>6</sup> *Id.* at 1007.

<sup>7</sup> *Id.*

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

<sup>9</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), <https://www.copyright.gov/rulemaking/state-sovereign-immunity/letter.pdf> (“Request Letter”). The letter requesting the study is provided in Appendix A.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2.

Senators asked that the Office “provide a public report summarizing the findings of this study, as well as the facts and analyses upon which those findings are based.”<sup>12</sup>

On June 3, 2020, the Office issued a notice of inquiry inviting written comments and empirical research on (1) specific instances of infringing conduct committed by a state government entity, officer, or employee; (2) the extent to which state sovereign immunity affects the licensing or sale of copies of copyrighted works to state entities; (3) the remedies available for copyright owners when states infringe their works; (4) the metrics Congress should use to determine whether infringement by state entities is common or infrequent; (5) whether the prevalence of infringement by state entities has increased in recent years; (6) how different state entities handle claims of infringement; and (7) any other pertinent issues the Office should consider when conducting the study.<sup>13</sup> On June 24, 2020, the Office invited a second round of written comments and any additional empirical research.<sup>14</sup> In response, the Office received forty-eight responsive comments from individuals, copyright practitioners, organizations, and state entities.<sup>15</sup>

On November 5, 2020, the Office announced that it would conduct public roundtables via Zoom, addressing the following topics: (1) evidence of actual or threatened copyright infringement by states; (2) state policies and practices for minimizing copyright infringement and addressing infringement claims; and (3) alternative remedies under state law for copyright infringement.<sup>16</sup> Members of the public were invited to submit requests to participate in sessions on each topic. The roundtables were held on December 11, 2020. Participants included copyright owners, as well as representatives of state universities, large and small businesses, industry organizations, and offices of state attorneys general.<sup>17</sup> The roundtables included an audience participation session, during which members of the public were able to provide additional comments for the record. The Office also provided certain individuals with

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<sup>12</sup> Request Letter at 1. Senators Tillis and Leahy also requested that the Patent and Trademark Office complete a study on the issue of patent and trademark infringement by state entities.

<sup>13</sup> Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 34,252 (June 3, 2020) (“NOI”). The *Federal Register* notices in this study are collected in Appendix B.

<sup>14</sup> Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 37,961 (June 24, 2020).

<sup>15</sup> Comments received in response to the notices of inquiry, as well as other background material on the Study, are available at <https://www.copyright.gov/policy/state-sovereign-immunity/>. References to these comments are by party name (abbreviated where appropriate) followed by either “Initial Comments” or “Renewal Comments.” A list of the parties who responded to the Office’s notices is provided in Appendix C.

<sup>16</sup> Sovereign Immunity Study: Announcement of Public Roundtables, 85 Fed. Reg. 70,654 (Nov. 5, 2020).

<sup>17</sup> Recordings of the public roundtables are available at <https://www.copyright.gov/policy/state-sovereign-immunity/recordings/>, and a transcript of the public roundtables is available at <https://www.copyright.gov/policy/state-sovereign-immunity/2020.12.11-roundtable-transcript.pdf>. A copy of the agenda for the roundtables is provided in Appendix D.

the opportunity to submit *ex parte* letters, due to technical difficulties during the open mic session or to ensure a more comprehensive record.

## II. LEGAL BACKGROUND

### *A. Eleventh Amendment and Its Origins*

The doctrine of state sovereign immunity is rooted in the Eleventh Amendment to the Constitution, which states:

The 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.<sup>18</sup>

The Amendment was drafted in response to the Supreme Court's decision in *Chisholm v. Georgia*, holding that the U.S. Constitution permits a state to be sued in federal court by a citizen of another state.<sup>19</sup> The text explicitly prevents states from being sued in federal court only by citizens of other states or of another country.<sup>20</sup> In *Hans v. Louisiana*, however, the Supreme Court interpreted it to prevent states from being sued in federal court by their own citizens as well, even for claims arising under federal law.<sup>21</sup> The Court's subsequent Eleventh Amendment jurisprudence has adhered to that interpretation.<sup>22</sup>

While the text of the Amendment references "any suit," in *Ex parte Young* the Court held that suits seeking injunctive relief against state officers in their official capacity may be brought in federal court.<sup>23</sup> This means that a plaintiff may obtain an injunction against a state official to "end a continuing violation of federal law" by a state entity even when the state cannot be sued directly.<sup>24</sup>

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<sup>18</sup> U.S. CONST., amend. XI.

<sup>19</sup> 2 U.S. 419, 451 (1793) (the "Constitution most certainly contemplates . . . the maintaining a jurisdiction against a State, as Defendant").

<sup>20</sup> In *Cohens v. Virginia*, the Supreme Court stated in *dicta* that a suit brought by citizens of Virginia against the state of Virginia was not "within the [Eleventh] Amendment," which only prohibited suits in federal court against states by citizens of other states or other countries. 19 U.S. 264, 412 (1821).

<sup>21</sup> 134 U.S. 1, 15 (1890).

<sup>22</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 186 (1964); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944); *Duhne v. New Jersey*, 251 U.S. 311, 313–14 (1920).

<sup>23</sup> 209 U.S. 123, 155–56 (1908). Part V of this report discusses *Ex parte Young* suits in greater detail.

<sup>24</sup> *Seminole Tribe*, 517 U.S. at 73 (citation omitted).

## *B. Bases for Suits against States*

The first step in evaluating the case law regarding state sovereign immunity with respect to copyright infringement claims is understanding the development of state sovereign immunity jurisprudence generally. Since the ratification of the Eleventh Amendment, plaintiffs have advanced a number of legal theories in an effort to overcome state sovereign immunity and bring claims for damages against states in federal court. These theories range from purported waivers of sovereign immunity by the state to assertions that Congress has abrogated states' immunity. This section discusses the Supreme Court's analysis of these varied arguments over time.

### **1. Waiver of Sovereign Immunity**

A state can be sued for damages in federal court if it waives or abandons its sovereign immunity under the Eleventh Amendment. A state can waive its immunity through its constitution or legislation, or by entering into a consensual agreement with one or more other states under the Compact Clause of the U.S. Constitution.<sup>25</sup> Actions by properly authorized state officials may also constitute waiver, including appearing in federal litigation, removing a case from state court to federal court, or agreeing in a contract to have disputes resolved in federal court.<sup>26</sup>

In the absence of an express waiver or an action signifying waiver, plaintiffs have argued that states constructively waived their immunity. In *Edelman v. Jordan*, the Supreme Court rejected the theory that a state could constructively waive its immunity simply by participating in a federal program. The Court explained:

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications

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<sup>25</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (stating that a state statute or constitutional provision that specifies the state's intention to subject itself to suit in federal court would constitute waiver); *Petty v. Tennessee-Missouri Bridge Co.*, 359 U.S. 275, 789-790 (1959) (compact entered into by two states under the Compact Clause giving states right to be sued waived sovereign immunity).

<sup>26</sup> *Lapides v. Bd. of Regents of Univ. System of Ga.*, 535 U.S. 613, 624 (2002) (state's removal of case from state court to federal court waives sovereign immunity); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-69 (1945) (stating that state legislature or a properly authorized executive or administrative officer of the state could waive state immunity); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (general appearance by state in federal litigation waives sovereign immunity).

from the text as (will) leave no room for any other reasonable construction."<sup>27</sup>

For some time, the Court recognized constructive waiver in a narrow set of circumstances in which Congress had clearly expressed an intent to create a private right of action against states engaged in a certain activity and a state then engaged in that activity.<sup>28</sup> The Court ultimately rejected the concept of constructive waiver of sovereign immunity in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.<sup>29</sup> The plaintiffs argued that Florida Prepaid (an agency of the state of Florida) had constructively waived its immunity by marketing and administering its college tuition prepayment program after the Trademark Remedy Clarification Act ("TRCA") made clear that such activity could subject states to suit.<sup>30</sup> A majority of the Court held that the doctrine of constructive waiver "stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law."<sup>31</sup> The Court explained:

The whole point of requiring a "clear declaration" by the State of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity.<sup>32</sup>

Thus, under the current jurisprudence, a plaintiff who seeks to bring a suit for damages against a state can rely on a theory of waiver of sovereign immunity only if the state has expressly waived its immunity or taken an official action that signifies waiver (*e.g.*, an appearance in federal litigation).

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<sup>27</sup> 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171(1909)).

<sup>28</sup> See, *e.g.*, *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 192 (1964) (holding that by operating a railroad in interstate commerce after Congress had conditioned that right upon amenability to suit in federal court, Alabama must have accepted the condition and consented to suit in federal court).

<sup>29</sup> 527 U.S. 666, 680 (1999).

<sup>30</sup> *Id.* at 670–72.

<sup>31</sup> *Id.* at 679–80.

<sup>32</sup> *Id.* at 680–81 (emphasis in original). The Court noted that Congress, in the exercise of its power under the Spending Clause, could continue to make waiver of sovereign immunity an express condition of eligibility to receive federal funding. *Id.* at 686–87.

## 2. Congressional Abrogation of Sovereign Immunity

Another way a state can be sued for damages in federal court is if Congress has abrogated states' sovereign immunity. The Court has considered the circumstances under which Congress may abrogate states' immunity, focusing on two potential sources of congressional authority: Article I of the Constitution and Section 5 of the Fourteenth Amendment.

### a. Article I

Early cases rested on the theory that Congress has the authority to abrogate states' Eleventh Amendment immunity under Article I of the Constitution. The theory was that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."<sup>33</sup> The Court embraced this theory in *Parden*, holding that because Congress enacted legislation that included a private right of action against state-run railroads pursuant to its authority to regulate commerce, "it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity."<sup>34</sup> Therefore, the Court held, a state that chooses to act within "the realm of congressional regulation" consents to any conditions that Congress was authorized by the Constitution to impose, including a private right of action against the state.<sup>35</sup>

This approach, which is reminiscent of the constructive waiver arguments that were ultimately rejected in *Florida Prepaid*, showed signs of splintering in *Pennsylvania v. Union Gas Co.*<sup>36</sup> In an opinion by Justice Brennan, four Justices concluded that Congress may abrogate sovereign immunity pursuant to its authority under the Commerce Clause, relying on substantially the same rationale articulated in *Parden*.<sup>37</sup> The plurality concluded that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."<sup>38</sup> In a separate opinion, Justice White agreed that Congress has the authority under Article I to abrogate states' immunity, but disagreed with "much of [Justice Brennan's] reasoning."<sup>39</sup> Four dissenters would have held that Article I is not a basis for abrogation because "state immunity from suit in

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<sup>33</sup> 377 U.S. at 191–92.

<sup>34</sup> *Id.* at 192.

<sup>35</sup> *Id.* at 196.

<sup>36</sup> 491 U.S. 1 (1989).

<sup>37</sup> *Id.* at 19–20.

<sup>38</sup> *Id.* at 19–20.

<sup>39</sup> *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part).

federal courts is a structural component of federalism, and not merely a default disposition that can be altered by action of Congress pursuant to its Article I powers.”<sup>40</sup>

The Court ultimately overruled both *Union Gas* and *Parden in Seminole Tribe of Florida v. Florida*, in which it held that “[e]ven when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”<sup>41</sup> The Court concluded that Justice Brennan’s opinion to the contrary in *Union Gas* “deviated sharply” from established federalism jurisprudence and “eviscerated” the *Hans* decision by eroding the bedrock principle that sovereign immunity is a limitation on the judicial authority conferred on federal courts in Article III.<sup>42</sup> The Court accordingly held that “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction” by sovereign immunity.<sup>43</sup> Thus, after 1996, the general rule has been that Congress may not abrogate state sovereign immunity based on its Article I powers.

In *Central Virginia Community College v. Katz*, the Court was asked to decide whether a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies was barred by sovereign immunity.<sup>44</sup> The Court held that the unique history of the Bankruptcy Clause and legislation enacted shortly after ratification showed that the Clause “was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.”<sup>45</sup> Specifically, the Court determined that the drafters of the Constitution were aware of the important role of federal courts as the country replaced “the patchwork of insolvency and bankruptcy laws” with a federal bankruptcy system.<sup>46</sup> The Court held that “those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property” from states that laid claim to it.<sup>47</sup> Thus, states agreed in the plan of the Convention not to assert immunity in bankruptcy proceedings relating

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<sup>40</sup> *Id.* at 38 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>41</sup> 517 U.S. 44, 72 (1996). The statute at issue, the Indian Gaming Regulatory Act, was enacted pursuant to the Indian Commerce Clause of Article I, but the Court held there was “no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause,” and its holding was with respect to Article I generally. *Id.* at 63.

<sup>42</sup> *Id.* at 64.

<sup>43</sup> *Id.* at 72–73.

<sup>44</sup> 546 U.S. 356 (2006).

<sup>45</sup> *Id.* at 362–63.

<sup>46</sup> *Id.* at 366.

<sup>47</sup> *Id.* at 372.

to the turnover of such transfers.<sup>48</sup> Legislation enacted shortly after ratification of the Constitution also explicitly granted federal courts the authority to issue writs of habeas corpus to release debtors from state prisons.<sup>49</sup> In the particular context of the Bankruptcy Clause, therefore, the Court has recognized an exception to the “general rule that Article I cannot justify haling a State into federal court.”<sup>50</sup>

### b. Section 5 of the Fourteenth Amendment

Plaintiffs also have sought to invoke the Fourteenth Amendment as a basis for congressional abrogation of state immunity. Section 1 of the Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>51</sup> To secure this guarantee, section 5 provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>52</sup> The Supreme Court has interpreted these provisions to permit Congress to abrogate sovereign immunity to remedy deprivations of constitutional rights by states, subject to two requirements.

The first requirement, articulated in the Court’s 1985 decision in *Atascadero State Hospital v. Scanlon*,<sup>53</sup> is that Congress must use an “unequivocal expression” of intent to abrogate state immunity in the statutory text. The Court had previously required such “an unequivocal expression of congressional intent,”<sup>54</sup> but had not made explicit that the expression must appear in the statutory text.<sup>55</sup> In *Atascadero*, the statute provided that no person with a disability shall be “subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>56</sup> The Court held that this general authorization to sue did not abrogate state immunity because “States are not like any

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 374.

<sup>50</sup> *Allen*, 140 S. Ct. at 1002.

<sup>51</sup> U.S. CONST. amend. XIV § 1.

<sup>52</sup> U.S. CONST. amend. XIV § 5.

<sup>53</sup> 473 U.S. 234 (1985).

<sup>54</sup> *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (“although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, we have required an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States”) (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)).

<sup>55</sup> See *Atascadero*, 473 U.S. at 243 (finding requirement that Congress use “unmistakable language in the statute itself” “consistent with” past precedent).

<sup>56</sup> 29 U.S.C. § 794.

other class of recipients of federal aid,” and Congress must “express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.”<sup>57</sup>

The second requirement for abrogation under the Fourteenth Amendment is that the remedy must be sufficiently “congruent and proportional” to the constitutional harm Congress seeks to prevent. This requirement originated with *City of Boerne v. Flores*,<sup>58</sup> where the Court considered whether the Religious Freedom Restoration Act (“RFRA”) was a proper exercise of Congress’s power under section 5. RFRA created a cause of action against state actors if a state law substantially burdened religious exercise.<sup>59</sup> The Court held that Congress’s Fourteenth Amendment enforcement powers authorized only remedial or preventative measures.<sup>60</sup> As such, there “must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>61</sup>

Applying that standard to RFRA, the Court held that the statute was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”<sup>62</sup> The Court specifically pointed to the statute’s breadth and the lack of historical evidence of state hostility to the exercise of religion. RFRA applied to all laws of all agencies and employees of federal, state and local governments, with no geographic limitations or termination date or mechanism.<sup>63</sup> This broad application was not supported by the record before Congress, which was devoid of any examples of state legislation enacted “due to animus or hostility to the burdened religious practices” that would rise to the level of a constitutional violation.<sup>64</sup> As a result, the Court held that RFRA exceeded Congress’s powers under section 5.<sup>65</sup>

Since *City of Boerne* was decided, the Court has applied the “congruence and proportionality” test to uphold abrogation under the Fourteenth Amendment on two occasions. In *Tennessee v. Lane*, the Court applied the test to Title II of the Americans with Disabilities Act and concluded that the statutory remedy was congruent and

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<sup>57</sup> *Atascadero*, 473 U.S. at 243, 246.

<sup>58</sup> 521 U.S. 507 (1997).

<sup>59</sup> *Id.* at 515–16 (citing 42 U.S.C. § 2000bb(b)(2), which stated that law’s purpose is “to provide a claim or defense to persons whose religious exercise is substantially burdened by government”).

<sup>60</sup> *Id.* at 524–29.

<sup>61</sup> *Id.* at 519–20.

<sup>62</sup> *Id.* at 532.

<sup>63</sup> *Id.* at 533.

<sup>64</sup> *Id.* at 530–31.

<sup>65</sup> *Id.* at 536.

proportional to the harm being addressed: discriminatory access to the courts.<sup>66</sup> And in *Nevada Department of Human Resources v. Hibbs*, the Court found the family leave provisions of the Family and Medical Leave Act congruent and proportional to the goal of preventing gender discrimination in the workplace.<sup>67</sup>

As in *City of Boerne*, the Court's analysis in these cases focused both on the evidence before Congress of a pattern of constitutional violations by states and on the scope of the remedial scheme to address those violations. In *Lane*, the Court noted that Congress held thirteen hearings, assembled a task force "that gathered evidence from every State in the Union," and found "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions," the overwhelming majority of which occurred in the administration of public programs and services.<sup>68</sup> Based on this evidence, as well as a report showing that "76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities," the Court found Congress had ample evidence of widespread unconstitutional disability discrimination by the states.<sup>69</sup>

Similarly, in *Hibbs*, the record before Congress included an array of evidence showing widespread sex discrimination by states. For example, nineteen states had laws limiting how many hours women could work, and many states offered their employees different durations of parental leave depending on the sex of the parent.<sup>70</sup> Additional evidence in congressional reports and hearings demonstrated that "even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways."<sup>71</sup> Based on this combination of evidence, the Court found that Congress had amassed significant evidence of widespread sex discrimination by states.<sup>72</sup>

In contrast, the Court has found that Congress did not have a sufficient record when it enacted the abrogating legislation without evidence of pervasive unconstitutional conduct by states. In *Board of Trustees v. Garrett*, the Court struck the abrogation provisions in Title I of the Americans with Disabilities Act because "the great majority"

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<sup>66</sup> 541 U.S. 509, 531 (2004) (finding "Title II's requirement of program accessibility[] is congruent and proportional to its object of enforcing the right of access to the courts").

<sup>67</sup> 538 U.S. 721, 729–31 (2003) (noting a record of states participating in and contributing to gender-based discrimination in connection with providing leave benefits).

<sup>68</sup> *Lane*, 541 U.S. at 516, 526 (internal citations omitted).

<sup>69</sup> *Lane*, 541 U.S. at 527.

<sup>70</sup> *Hibbs*, 538 U.S. at 729–31 (noting that "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work").

<sup>71</sup> *Id.* at 732.

<sup>72</sup> *Id.*

of the record before Congress related to discrimination by private employers, not by states.<sup>73</sup> The “half a dozen examples” that involved state discrimination “f[e]ll far short of even suggesting [a] pattern of unconstitutional discrimination,” particularly in light of the estimated 43 million Americans with disabilities.<sup>74</sup> Similarly, in *Kimel v. Florida Board of Regents*, the Court struck down the abrogation provisions in the Age Discrimination in Employment Act because the evidence before Congress “almost entirely consist[ed] of isolated sentences clipped from floor debates and legislative reports.”<sup>75</sup> The Court accordingly concluded that Congress “never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”<sup>76</sup>

### ***C. Abrogation of Sovereign Immunity from Copyright Infringement Claims***

This section discusses how courts, Congress, and the Copyright Office have analyzed over time whether states are immune from suits for damages for copyright infringement specifically. It first describes how courts historically analyzed sovereign immunity in the context of copyright cases. It then details Congress’s attempt to abrogate sovereign immunity through the Copyright Remedy Clarification Act after receiving a report from the Copyright Office describing the scope of copyright infringement by state entities. Finally, it discusses the Court’s recent decision in *Allen v. Cooper*, which held that Congress’s attempt at abrogation was invalid and that states therefore are currently immune from suits for copyright infringement damages in federal court.

#### **1. Early Treatment of State Infringement**

For most of American history, copyright law did not expressly address the liability of states. Instead, the law provided that “anyone” or “any person” who infringed a copyright was subject to liability. For example, the 1909 Act stated that “if any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable” for an injunction or damages.<sup>77</sup> And when Congress enacted the 1976 Act, the text stated that “[a]nyone who violates any of the

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<sup>73</sup> 531 U.S. 356, 369–72 (2001).

<sup>74</sup> *Id.* at 369–72.

<sup>75</sup> 528 U.S. 62, 89 (2000). The Court found that evidence of discrimination in the private sector was insufficient to establish that states committed the same conduct, and it also rejected a California state report on age discrimination in its public agencies as an insufficient basis for imposing liability on “every State of the Union.” *Id.* at 90–91.

<sup>76</sup> *Id.* at 89.

<sup>77</sup> 1909 Copyright Act, Pub. L. No. 60–349, § 25, 35 Stat. 1075, 1081 (1909).

exclusive rights of the copyright owner . . . is an infringer of copyright” subject to remedies.<sup>78</sup>

In the absence of statutory guidance, courts looked to the Supreme Court’s abrogation jurisprudence to determine whether states could be subject to infringement claims. The early cases—which preceded the ruling in *Seminole Tribe* that Article I is not a valid basis for abrogation for most claims—came to inconsistent conclusions. In a 1962 case, *Wihtol v. Crow*,<sup>79</sup> the Eighth Circuit dismissed a copyright claim against a school district because the district was “an instrumentality of the State of Iowa, constituting a part of its educational system and engaged in performing a state governmental function under state law and at state expense,” and Eleventh Amendment case law provided that “a state could not be sued without its consent.”<sup>80</sup> The court did not discuss the basis for the abrogation or whether the Congress had made its intent to abrogate sufficiently clear in the statutory text.<sup>81</sup>

The Ninth Circuit took a different approach in *Mills Music, Inc. v. Arizona*,<sup>82</sup> where it affirmed an award of copyright damages under the 1909 Act. The court reasoned that the “sweeping and without apparent limitation” language in the statute subjecting to damages “any person [who] shall infringe” should be broadly construed.<sup>83</sup> In the court’s view, that broad language provided “sufficient indication of the intent to include states within the class of defendants,” which was enough to abrogate state immunity.<sup>84</sup> The court considered abrogation authority to be “inherent” in Congress’s power under Article I, section 8 (the “Intellectual Property Clause”) to legislate in the area of copyrights and patents,<sup>85</sup> and concluded that “a state may neither abrogate nor in any way diminish the federally granted and protected rights of a copyright holder.”<sup>86</sup>

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<sup>78</sup> 1976 Copyright Act, Pub. L. No. 94-553, § 501(a), 90 Stat. 2541, 2584 (1976).

<sup>79</sup> 309 F.2d 777 (8th Cir. 1962).

<sup>80</sup> *Id.* at 781–82.

<sup>81</sup> *See id.* at 782 (concluding without analysis that plaintiffs could not “obtain a judgment against the School District for damages payable out of public funds” and citing several cases that did not consider whether Congress had abrogated state immunity).

<sup>82</sup> 591 F.2d 1278 (9th Cir. 1979).

<sup>83</sup> *Id.* at 1284–85.

<sup>84</sup> *Id.* at 1285.

<sup>85</sup> *Id.*; *see* U.S. CONST. art I, § 8, cl. 8 (authorizing Congress “[t]o 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”).

<sup>86</sup> *Mills Music, Inc.*, 591 F.2d at 1285 (quoting *Goldstein v. California*, 412 U.S. 546, 552 (1973) (applying copyright preemption to a state criminal statute because states “cannot exercise a sovereign power which, under the Constitution, they have relinquished to the Federal Government for its exclusive exercise”).

A few years later, a district court in Virginia was faced with reconciling these two approaches. In *Johnson v. University of Virginia*,<sup>87</sup> the court had to determine whether the 1976 Copyright Act permitted suits for damages against states. The court concluded that the reasoning of *Mills Music* was more persuasive, noting that *Wihtol* “provides little more than a conclusory statement that the Eleventh Amendment bars suits against the states,” while *Mills Music* “includes a thoughtful examination of the 1909 Act and the recent Supreme Court opinions concerning the Eleventh Amendment, particularly *Edelman v. Jordan*.”<sup>88</sup> The court then found that the *Mills Music* holding was “equally compelling, if not more compelling with respect to the 1976 Act” because whereas the 1909 Act applied to “any person” infringing a copyright, the 1976 Act applied to “anyone” infringing a copyright—language “at least as sweeping, and probably more sweeping, than the language of the 1909 Act in identifying the class of defendants subject to copyright infringement suits.”<sup>89</sup> Thus, the court permitted a claim for damages to go forward against a state university.

## 2. The Oman Report

While the language in the 1976 Copyright Act was deemed sufficient to abrogate sovereign immunity by two courts, in 1985, the *Atascadero* Court held that abrogation of state sovereign immunity under the Fourteenth Amendment requires “unequivocal” language making that intention explicit.<sup>90</sup> In 1987, the House Judiciary Committee, concerned that the 1976 Act’s “anyone” language was insufficiently clear, asked the Copyright Office, led by then-Register Ralph Oman, to study and issue a report on “the interplay between copyright infringement and the Eleventh Amendment.”<sup>91</sup> Thus, the Office was asked to examine “the practical problems relative to the enforcement of copyright against state governments” and produce a green paper on the state of the law and any limits on congressional action.<sup>92</sup>

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<sup>87</sup> 606 F. Supp. 321 (W.D. Va. 1985).

<sup>88</sup> *Id.* at 323.

<sup>89</sup> *Id.* at 324.

<sup>90</sup> 473 U.S. at 246–47.

<sup>91</sup> Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, to Ralph Oman, Register of Copyrights, U.S. Copyright Office 1 (Aug. 3, 1987).

<sup>92</sup> *Id.*

The Copyright Office issued a Request for Information seeking public comment<sup>93</sup> and received over 600 pages of submissions.<sup>94</sup> Most public comments expressed concern about potential infringement by state actors in the future if Congress failed to clarify that states were subject to suits for damages for copyright infringement,<sup>95</sup> but a few mentioned instances in the past where states had committed copyright infringement and relied on their Eleventh Amendment immunity to avoid being sued. For example, the American Journal of Nursing Company submitted a comment stating that after a nursing home run by Minnesota copied the journal's publications and resold them for a fee, the journal sought legal counsel and was advised that nothing could be done because the nursing home "would be considered a state agency and hence be immune from suit under the Eleventh Amendment."<sup>96</sup> And a company that made training videos for equipment maintenance commented that when it found a Texas prison copying videos provided for marketing purposes, the prison stated that "they normally make copies of such tapes [and] they were permitted by law to do so."<sup>97</sup>

A handful of state entities also submitted comments expressing the position that states were immune from suits for damages for copyright infringement under the Eleventh Amendment. The Virginia Attorney General wrote that he "strongly feels that recent Eleventh Amendment precedent compels the conclusion that the states are immune from claims for money damages for copyright infringement,"<sup>98</sup> and the Massachusetts Attorney General wrote that the "weight of current case law supports the position that a state retains its Eleventh Amendment immunity from a suit commenced under the Copyright Act."<sup>99</sup>

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<sup>93</sup> Request for Information: Eleventh Amendment, 52 Fed. Reg. 42,045 (Nov. 2, 1987).

<sup>94</sup> The Office's report is available at: <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>. A scan of the comments was uploaded to the Internet Archive at <https://archive.org/details/Copyright11thAmendmentStudyComments>.

<sup>95</sup> See, e.g., McGraw-Hill, Inc. Comments at 1–2, Comment No. 11 (Jan. 27, 1988) (stating that, because over 40% of its School Division's textbook sales and 75% of its College Division's textbook sales are to state agencies, state immunity from copyright infringement would be "crippling" to its business); The American Society of Composers, Authors, and Publishers ("ASCAP") Comments at 5, 10 (Feb. 1, 1988) (stating that ASCAP had approximately 870 licenses with state universities and in its experience "the availability of monetary damages in an infringement action is a necessary condition for successful licensing"); Holt, Rinehart, and Winston, Inc. Comments at 1 (Feb. 1, 1988) (stating that the publisher receives 70% in total revenue from state institutions and asking "[i]f state agencies are free to copy material at will, how will the authors of the copied works be compensated?").

<sup>96</sup> Am. J. of Nursing Co. Comments at 1–2 (Jan. 28, 1988).

<sup>97</sup> Law Offices of Alan Ruderman Comments at 1 (Dec. 21, 1987).

<sup>98</sup> Va. Attorney Gen. Comments at 1, Comment No. 7 (Jan. 7, 1988).

<sup>99</sup> Mass. Attorney Gen. Comments at 1, Comment No. 40 (Feb. 4, 1988).

In June 1988, the Copyright Office published its final report (the “Oman Report”) addressing the House Judiciary Committee’s questions. The Oman Report reviewed the public comments, provided a lengthy analysis of Eleventh Amendment case law, and attached a 50-state survey by the Congressional Research Service (“CRS”) examining state waivers of sovereign immunity.<sup>100</sup> Summarizing the comments, the Report noted that only “five copyright proprietors document actual problems faced in attempting to enforce their claims against state government infringers.”<sup>101</sup>

The bulk of the Oman Report summarized relevant Eleventh Amendment case law and concluded that the Copyright Act’s text was not sufficiently clear in expressing an intent to subject states to suits for damages. As a result, the Report recommended that Congress amend the Act “to clarify its intent to abrogate states’ Eleventh Amendment immunity.”<sup>102</sup> In reaching this conclusion, the Report noted that the Supreme Court had recently granted certiorari in *Union Gas* after the Third Circuit held that Congress could abrogate state sovereign immunity based on its Article I powers.<sup>103</sup> If *Union Gas* were reversed and the Court were to find that state immunity could not be abrogated under Article I, the Report suggested that Congress consider amending 28 U.S.C. § 1338(a), which grants federal courts exclusive jurisdiction to hear copyright cases, to permit copyright suits against states to be brought in state court.<sup>104</sup> The Oman Report did not make specific recommendations as to how Congress could abrogate state immunity based on the Fourteenth Amendment, because it had not yet been established that abrogation under the Fourteenth Amendment involved a different standard than abrogation under Article I.<sup>105</sup>

### 3. The Copyright Remedy Clarification Act

Following the Oman Report, the CRCA was introduced in Congress in February 1989. Initially, the bill proposed to amend section 501(a) of the Copyright Act to clarify that the

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<sup>100</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT: A REPORT OF THE REGISTER OF COPYRIGHTS (June 1988) (“Oman Report”).

<sup>101</sup> Oman Report at 7.

<sup>102</sup> Oman Report at 104.

<sup>103</sup> *U.S. v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987).

<sup>104</sup> Oman Report at 104–05. Though bringing a copyright suit in state court would likely still require the consent of the state, permitting suits in state court would remove the Eleventh Amendment barrier for copyright owners.

<sup>105</sup> The Oman Report preceded by nearly ten years the decision in *City of Boerne v. Flores*, where the Court held for the first time that the Fourteenth Amendment may provide a basis for abrogation only when the law passed by Congress is sufficiently “congruent and proportional” to the constitutional harm Congress seeks to prevent. See Oman Report at 76 (citing *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 315–16 (7th Cir. 1987) (considering whether “there is some constitutionally significant way of distinguishing Congress’ Fourteenth Amendment power from its Article I powers,” and concluding there was none).

term “anyone” included states and state instrumentalities. It provided: “As used in this subsection, the term ‘anyone’ includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.”<sup>106</sup>

The bill was introduced while *Union Gas* was pending, and within a few months, the Supreme Court issued its plurality opinion in that case, which called into question whether Article I would be deemed a valid basis for abrogation in the future.<sup>107</sup> Register Oman then submitted a supplemental statement to Congress, recommending that additional language be added to the bill, in light of the “fragile” holding in *Union Gas*, to make clear that States are subject to the money damages and attorney’s fees provisions of the Copyright Act.<sup>108</sup> Though Register Oman believed the initial draft of the bill satisfied the *Atascadero* requirement that Congress use an “unequivocal expression” of intent to abrogate, he suggested the new language would strengthen the bill in light of other recent Supreme Court cases involving the Eleventh Amendment.<sup>109</sup>

Following Register Oman’s invitation, the CRCA was amended to add section 511 to the Copyright Act, titled “Liability of States, instrumentalities of States, and State officials for infringement of copyright.” Section 511 states that such actors “shall not be immune under the Eleventh Amendment” and would be liable for remedies “to the same extent” as private actors.<sup>110</sup> Congress modeled this language on a previous law that the Supreme Court had “twice cited as an example of Congress’s ability to abrogate the Eleventh Amendment when it wanted to do so.”<sup>111</sup> The final version of the CRCA,

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<sup>106</sup> *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 3 (1989) (“House Hearings”).

<sup>107</sup> 491 U.S. 1 (1989).

<sup>108</sup> House Hearings at 46 (statement of Ralph Oman, Register of Copyrights).

<sup>109</sup> *Id.* at 40–46. In the same month it decided *Union Gas*, the Court issued three additional opinions interpreting *Atascadero*. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65–66 (1989) (citing *Atascadero* and holding state officials acting in their official capacity are not “persons” for purposes of 42 U.S.C. § 1983 because Congress had not used sufficiently clear language); *Dellmuth v. Muth*, 491 U.S. 223, 230–31 (1989) (holding that federal law requiring tuition reimbursement by state was invalid under *Atascadero* because statute did not “address abrogation in even oblique terms, much less with the clarity *Atascadero* requires,” and holding that legislative history is irrelevant to the analysis); *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 101 (1989) (plurality opinion) (holding that statutory language was insufficiently clear to abrogate under *Atascadero*).

<sup>110</sup> Pub. L. No. 101–553, sec. 2(a)(2), 101 Stat. 2749 (1990).

<sup>111</sup> H.R. REP. 101-282 at 12.

containing both the clarification of the term “anyone” in section 501(a) and the new section 511, was signed into law on November 15, 1990.

#### 4. *Florida Prepaid v. College Savings Bank*

Nine years after enactment of the CRCA, the Supreme Court issued an opinion in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>112</sup> a case challenging the abrogation provisions in the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”), which are similar to those of the CRCA. The Court noted at the outset that *Seminole Tribe* had held that Article I could not be a basis for abrogation and that the petitioner and the United States “d[id] not contend otherwise.”<sup>113</sup> Thus, the question was whether Congress had abrogated state immunity under section 5 of the Fourteenth Amendment.

The Court’s Fourteenth Amendment analysis applied the intent test from *Atascadero* and the “congruence and proportionality” test from *City of Boerne*. The Court found the first test satisfied, agreeing that Congress had made its intent to abrogate unmistakably clear through the Patent Act’s language that “[a]ny State . . . shall not be immune . . . for infringement of a patent.”<sup>114</sup> It held, however, that the statute was not congruent and proportional to the constitutional violations Congress sought to remedy.<sup>115</sup>

The Court determined that in enacting the Patent Remedy Act, Congress had not identified a pattern of unconstitutional infringement and tailored its abrogation to that pattern. The Court pointed to the statute’s legislative history, finding that (1) Congress had “little evidence of infringing conduct” by state actors;<sup>116</sup> (2) Congress had “barely considered” the adequacy of state-law remedies for patent infringement by the state;<sup>117</sup> (3) the legislative record did not reflect a pattern of intentional or reckless infringements, but instead consisted only of “a handful of instances of state patent infringement that do not necessarily violate the Constitution”;<sup>118</sup> and (4) the legislation was not limited to “cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy,” or cases where the infringement was not negligent or was

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<sup>112</sup> 527 U.S. 627 (1999).

<sup>113</sup> *Id.* at 635–36 (“Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the [Intellectual Property] Clause.”).

<sup>114</sup> *Id.* at 635 (discussing 35 U.S.C. § 296(a)).

<sup>115</sup> *Id.* at 639.

<sup>116</sup> *Id.* at 640.

<sup>117</sup> *Id.* at 643–44 (noting that witnesses did not testify as to inadequacy of state remedies, but only inconvenience).

<sup>118</sup> *Id.* at 645–66.

authorized pursuant to state policy.<sup>119</sup> Thus, Congress's effort to abrogate was not sufficiently congruent and proportional to a constitutional harm to be a valid exercise of its power under the Fourteenth Amendment. This holding called into question whether Congress had enacted the CRCA based on a sufficient record of unconstitutional conduct by states, and, therefore, whether state entities could be sued for damages in federal court for copyright infringement.

### 5. *Chavez v. Arte Publico Press*

During the mid-1990s, Texas challenged the constitutionality of the CRCA in a case involving the University of Houston's printing of unauthorized copies of a set of short stories. The Department of Justice intervened in the case to defend the constitutionality of the abrogation provisions. In 1995, a Fifth Circuit panel held that the CRCA was a valid abrogation under Congress's Article I powers. The court concluded that "the University had notice that its continued participation in the publishing business for profit was conditioned by Congress upon a waiver of its immunity from suit in federal court for violations of the Copyright Act."<sup>120</sup>

Texas petitioned the Supreme Court for certiorari. After *Seminole Tribe* was decided in 1996, the Court remanded *Chavez* for further consideration in light of the new decision.<sup>121</sup> The Fifth Circuit then issued a new panel opinion holding that a "fair reading" of *Seminole Tribe* meant that abrogating state immunity was "outside of Congress's power under Article I."<sup>122</sup> The panel rejected the possibility that Congress abrogated state immunity under section 5 of the Fourteenth Amendment, reasoning that if property rights created under Congress's Article I powers could be "property" for due process purposes, Congress would have "a direct end-run around *Seminole's* holding that Article I powers may not be employed to avoid the Eleventh Amendment's limit on the federal judicial power."<sup>123</sup> The copyright owner petitioned for, and was granted, *en banc* review.<sup>124</sup>

Prior to oral argument, the Supreme Court issued its decision in *Florida Prepaid*. After reviewing the decision, the Department of Justice sent a letter advising Congress that it would no longer defend the CRCA's constitutionality because it believed the legislative history of the CRCA "is not materially better than was the record in the *Florida Prepaid*

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<sup>119</sup> *Id.* at 646–47.

<sup>120</sup> *Chavez v. Arte Publico Press*, 59 F.3d 539, 547 (5th Cir. 1995), *vacated and remanded sub nom. University of Houston v. Chavez*, 517 U.S. 1184 (1996).

<sup>121</sup> *University of Houston v. Chavez*, 517 U.S. 1184 (1996).

<sup>122</sup> *Chavez v. Arte Publico Press*, 157 F.3d 282, 287 (5th Cir. 1998).

<sup>123</sup> *Id.* at 289.

<sup>124</sup> 178 F.3d 281 (5th Cir. 1998).

case.”<sup>125</sup> Following the Supreme Court’s decision in *Florida Prepaid*, the *en banc* Fifth Circuit remanded the case back to the panel for reconsideration.<sup>126</sup> On remand, the panel held that the CRCA was not a valid abrogation of state immunity under the Fourteenth Amendment.<sup>127</sup> The court’s analysis tracked that of *Florida Prepaid* and concluded that the CRCA failed the congruence and proportionality test because “the record does not indicate that Congress was responding to the kind of massive constitutional violations that have prompted proper remedial legislation, that it considered the adequacy of state remedies that might have provided the required due process of law, or that it sought to limit the coverage to arguably constitutional violations.”<sup>128</sup>

Following *Chavez*, the Department declined to defend the CRCA in subsequent cases, advising Congress that “the current legislative record does not support a defense of the constitutionality of that statute in its current breadth.”<sup>129</sup>

## 6. *Allen v. Cooper*

The constitutionality of Congress’s effort to abrogate state sovereign immunity through the CRCA ultimately reached the Supreme Court in *Allen v. Cooper*,<sup>130</sup> which involved allegations that North Carolina published copyrighted videos and photographs of the recovery of the pirate Blackbeard’s ship without authorization. The district court held that the CRCA was an effective abrogation of state immunity because “Congress was clearly responding to a pattern of current and anticipated abuse by the states of the copyrights held by their citizens.”<sup>131</sup> The Fourth Circuit reversed, holding that Congress had not invoked its Fourteenth Amendment powers to abrogate in enacting the CRCA, and even if it had, the abrogation was ineffective because the CRCA had “a similar

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<sup>125</sup> Letter from Janet Reno, U.S. Attorney General, to Dennis Hastert, Speaker, U.S. House of Representatives 4 (Oct. 13, 1999), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/10-13-1999.pdf>.

<sup>126</sup> *Chavez v. Arte Publico Press*, 180 F.3d 674 (5th Cir. 1999) (*en banc*).

<sup>127</sup> *Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir. 2000).

<sup>128</sup> *Id.* at 607. The court declined to adopt the previous holding that copyrights are not “property” under the Fourteenth Amendment, noting that under *Florida Prepaid*, “patent is a form of property protectable against the states, [and] copyright would seem to be so too.” *Id.* at 605 n.6.

<sup>129</sup> Letter from Loretta Lynch, U.S. Attorney General, to Paul D. Ryan, Speaker, U.S. House of Representatives 1 (Nov. 21, 2016), [https://www.justice.gov/oip/foia-library/osg-530d-letters/11\\_21\\_2016/download](https://www.justice.gov/oip/foia-library/osg-530d-letters/11_21_2016/download) (regarding *Wolf v. Oakland University Board of Trustees, et al.*, No.2:15-cv-13560 (E.D. Mich., filed Oct. 9, 2015)); Letter from Jeffrey B. Wall, Acting U.S. Solicitor General, to Paul D. Ryan, Speaker, U.S. House of Representatives 1 (May 5, 2017), [https://www.justice.gov/oip/foia-library/osg\\_530d\\_letters\\_5\\_5\\_2017/download](https://www.justice.gov/oip/foia-library/osg_530d_letters_5_5_2017/download) (regarding *TC Reiner v. Saginaw Valley State University, et al.*, No. 2:16-cv-11728 (E.D. Mich., filed May 16, 2016)).

<sup>130</sup> 140 S. Ct. 994 (2020).

<sup>131</sup> *Allen v. Cooper*, 244 F. Supp. 3d 525, 535 (E.D.N.C. 2017).

legislative record and an equally broad enactment” as the patent abrogation provision struck down in *Florida Prepaid*.<sup>132</sup>

Before the Supreme Court, the petitioner argued two bases for abrogation of state immunity. First, he argued that Congress had the power to abrogate under Article I because, like the Bankruptcy Clause discussed in *Katz*, the Intellectual Property Clause allowed for abrogation as part of the constitutional scheme.<sup>133</sup> The Court rejected this argument, holding that *Seminole Tribe* established that Congress could not abrogate state sovereign immunity under Article I, despite Congress’s goal of providing uniform remedies for intellectual property infringement.<sup>134</sup> The Court limited the holding in *Katz* to the Bankruptcy Clause, which was the product of a “unique history” and “emerged from a felt need to curb the States’ authority” at the time of the country’s founding.<sup>135</sup>

Second, the petitioner argued that the statutory text and legislative record of the CRCA demonstrated the requisite intent to abrogate and satisfied the congruence and proportionality test, so that the abrogation was a proper exercise of Congress’s Fourteenth Amendment powers. The Court applied a similar analysis to that of *Florida Prepaid* and reached the same conclusion. Focusing on the legislative record, the Court found the evidence of copyright infringement supporting the CRCA to be “scarcely more impressive than what the *Florida Prepaid* Court saw,” amounting to “only a dozen possible examples of state infringement.”<sup>136</sup> The Court also pointed to congressional testimony and Member statements suggesting that copyright infringement by states was not a widespread problem.<sup>137</sup>

The Court further held that Congress had failed to make a sufficient showing of *unconstitutional* infringement by states, finding the record of such conduct to be “exceedingly slight.”<sup>138</sup> It noted that only two of the infringements cited in the legislative record appeared to be intentional, “as they must be to raise a constitutional issue.”<sup>139</sup> Because the Court had not determined in prior cases whether intentional conduct includes reckless acts, it stated that for purposes of the legislative record, “an infringement must be intentional, or at least reckless, to come within the reach of the

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<sup>132</sup> *Allen v. Cooper*, 895 F.3d 337, 350–52 (4th Cir. 2018).

<sup>133</sup> As discussed, *Katz* had held that the Bankruptcy Clause enables Congress to subject nonconsenting States to bankruptcy proceedings. *Katz*, 546 U.S. at 377–78.

<sup>134</sup> *Allen*, 140 S. Ct. at 1001–02.

<sup>135</sup> *Id.* at 1002 (quoting *Katz*, 546 U.S. at 369 n.9).

<sup>136</sup> *Id.* at 1006.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1007.

<sup>139</sup> *Id.* at 1006.

Due Process Clause.”<sup>140</sup> Moreover, the record contained “no information about the availability of state-law remedies for copyright infringement (such as contract or unjust enrichment suits)—even though they might themselves satisfy due process.”<sup>141</sup> The Court also found it problematic that the statute extended to “every infringement case against a State,” concluding that its “‘indiscriminate scope’ [was] ‘out of proportion’ to any due process problem.”<sup>142</sup>

The Court closed its opinion by noting that Congress had enacted the CRCA before the Court created the ‘congruence and proportionality’ test, and therefore it “likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection.”<sup>143</sup> With the standard now more clear, the Court suggested that Congress could pass future legislation that complied with the constitutional requirements and properly abrogated state immunity.<sup>144</sup>

### III. RECORD WITH RESPECT TO STATE UNCONSTITUTIONAL CONDUCT

Following the Court’s decision in *Allen*, the Office issued an NOI requesting public comments and soliciting examples of copyright infringement by state government entities, officers, or employees. The sections below summarize the information submitted in response to the NOI.

#### *A. Evidentiary Standard*

As discussed above, the Court in *Allen* held that the legislative record underlying the CRCA was insufficient for abrogation because “Congress did not identify a pattern of unconstitutional . . . infringement.”<sup>145</sup> While a merely negligent act does not constitute an unconstitutional deprivation of property, the Court has reserved deciding whether reckless conduct suffices.<sup>146</sup> Depending on future guidance from the Court, the relevant evidence of state infringement “must be intentional, or at least reckless, to come within the reach of the Due Process Clause.”<sup>147</sup> In accordance with that standard, the NOI

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<sup>140</sup> *Id.* at 1004 (citing *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986) and noting that *Daniels* “reserve[ed] whether reckless conduct suffices”).

<sup>141</sup> *Id.* at 1006–07.

<sup>142</sup> *Id.* at 1007 (quoting *Florida Prepaid*, 527 U.S. at 646–47).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 140 S. Ct. at 1005.

<sup>146</sup> *Id.* at 1004 (citing *Daniels*, 474 U.S. at 334 n.3).

<sup>147</sup> *Id.*

requested not only information relating to the frequency of alleged infringements by states, but also any evidence that such actions were taken intentionally or recklessly.<sup>148</sup>

Commenters disagreed as to the showing necessary to meet the intentionality standard articulated by the Court. The American Intellectual Property Law Association (“AIPLA”) argued that the standard merely requires “something beyond negligence” on the part of the state.<sup>149</sup> It contrasted that showing with the standard for establishing willful infringement under section 504 of the Copyright Act. In AIPLA’s view, the latter involves a higher burden of proof, requiring the plaintiff to establish that the defendant had actual or constructive knowledge that the activity constituted infringement.<sup>150</sup> Noting that such intent “is difficult to prove,” AIPLA urged the Office to consider to consider “whether some non-willful acts of infringement may also unconstitutionally deprive copyright owners of their property without due process of law.”<sup>151</sup>

The National Press Photographers Association (“NPPA”) argued that the intentionality standard generally turns on whether the state investigated a work’s copyright status prior to use. It pointed to case law holding that “a party may act recklessly by refusing, as a matter of policy, to even investigate or attempt to determine whether particular [works] are subject to copyright protections.”<sup>152</sup> As a result, NPPA argued that “absent other factors, copyright infringement that occurs without inquiry as to the copyrightable status of a work is an intentional infringement, or at least ‘reckless.’”<sup>153</sup>

During the roundtables, representatives of state entities advocated for a higher standard, under which there must be evidence that a state official had knowledge that the conduct was infringing.<sup>154</sup> A representative of the University of Illinois suggested focusing on affirmative conduct by state actors, such as “removing protective watermarks and copyright notices,” that could demonstrate whether the infringement was intentional.<sup>155</sup>

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<sup>148</sup> See, e.g., NOI at 34,255 (requesting information about whether state infringement “was intentional or reckless, and the basis for that conclusion,” as well as how Congress can determine “whether copyright infringement by a state is common or infrequent”).

<sup>149</sup> AIPLA Initial Comments at 6.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 7.

<sup>152</sup> NPPA Initial Comments at 10 (quoting *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017)) (alteration in original).

<sup>153</sup> NPPA Initial Comments at 11.

<sup>154</sup> Roundtable Tr. at 113:07–114:01 (Dec. 11, 2020) (Molnar, Ohio Attorney General’s Office) (generally agreeing with statement that “the state actor has to know what they’re doing is unlawful and . . . do it anyway”).

<sup>155</sup> Roundtable Tr. at 55:01–21 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign). *But see id.* at 115:11–18 (Laiho, Colorado Attorney General’s Office) (“even in instances like that where it may appear on its face that there was intent because copyright information had been removed from an image, that it’s

Others argued that the analysis should focus on official acts and policies of the state entity as an institution, rather than the unratified acts of an individual employee.<sup>156</sup>

Because the Court has yet to determine whether reckless conduct can violate the Due Process Clause, this study takes no position on the question. In discussing the record evidence, the Office has attempted, where possible, to indicate the extent to which the alleged infringements “appear to be based on intentional or reckless conduct,” as Congress requested.<sup>157</sup> To the extent, however, that the conduct may rise only to the level of recklessness, Congress should be mindful of the legal uncertainty in this area.

## *B. Evidence Submitted*

### **1. Cases Filed**

In the NOI, the Office asked commenters to provide examples of copyright infringement suits brought against state entities and to specify “where the case was filed, what claim(s) were brought regarding the infringement, whether the case remains pending, and if not, how it was resolved.”<sup>158</sup> In response, the Office received two lists of cases. AIPLA submitted a list of nineteen cases that it concluded “demonstrate just a portion of the public-record case law supporting widespread, unremedied copyright infringement by state actors.”<sup>159</sup> And an individual commenter, Michael Bynum, submitted a list of 158 cases that he identified as copyright infringement lawsuits for “intentional infringement” filed after the Fifth Circuit’s *Chavez* decision in 2000.<sup>160</sup> Ten cases appear on both lists; they thus include a combined total of 167 cases.

State representatives raised concerns that these lists “are not entirely probative for the Copyright Office’s inquiry.”<sup>161</sup> They identified three potential deficiencies. First, they

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often the case that it is not . . . a state employee who’s actually done that removal, and that they’ve innocently obtained the image from a different website”).

<sup>156</sup> Roundtable Tr. at 26:06–23 (Dec. 11, 2020) (Thro, University of Kentucky) (advocating for focus on whether “the governmental entity has adopted a policy that actually results in a constitutional violation,” such as “if a university had a policy that we will always violate copyright and never pay any attention to it”); *id.* at 26:24–27:04 (Thro, University of Kentucky) (“[T]he fact that one in 15,000 employees at the University of Kentucky inadvertently violates someone’s copyright, or even intentionally violates their copyright, does not necessarily mean that the University of Kentucky has committed a constitutional violation.”); *id.* at 59:03–09 (Smith, University of Kansas) (arguing that intent standard requires “find[ing] state] policy that was intentional that enabled infringement”).

<sup>157</sup> Request Letter at 2.

<sup>158</sup> NOI at 34,255.

<sup>159</sup> AIPLA Initial Comments at 1–3.

<sup>160</sup> Michael Bynum Reply Comments (Oct. 8, 2020).

<sup>161</sup> Roundtable Tr. at 84:15–17 (Dec. 11, 2020) (MacDonald, University of California); *see also* University of Michigan Library Reply Comments at 1 (asserting that “[c]omments submitted by . . . the American

observed that the lists are not accompanied by “any proof, or evidence, or a determination that, setting aside 11th Amendment sovereign immunity, the state defendants did not have meritorious, or at least plausible, defenses that, had they been fully litigated, . . . may have prevailed.”<sup>162</sup> They noted that, although a case may be dismissed based on sovereign immunity, “there are typically many meritorious defenses that are raised . . . aside from sovereign immunity,” which “need to be carefully looked at” to adequately probe whether there is a pervasive pattern or practice of infringement.<sup>163</sup> To that point, the University of Michigan Library highlighted that “several of the[] cases were dismissed on grounds other than sovereign immunity, such as statute of limitations.”<sup>164</sup> Second, state representatives contended that the lists do not “actually establish that any of the[] alleged infringements, at the time of the alleged infringement, were done with intentional or reckless intent.”<sup>165</sup> Finally, noting that since 1987, “over 50,000 copyright opinions were issued by U.S. courts,” state representatives argued that the cases identified by the AIPLA, which “make up only .04% of the copyright cases filed . . . cannot be considered widespread.”<sup>166</sup>

In response to these concerns, the Office sought to identify additional publicly available information that would allow for a more complete analysis of the claims in these cases. As part of that effort, the Office entered into an academic partnership with the George Mason University Antonin Scalia Law School’s Arts & Entertainment Advocacy Clinic. Under the supervision of Office attorneys, law students reviewed the available public dockets for the listed cases and recorded the following information: the state and year in which the case was filed, the type of state defendant(s) sued, the class of work at issue, a brief summary of the allegations as stated in the complaint, whether the plaintiff(s) alleged “intentional,” “willful,” or “reckless” infringement, the cause(s) of action brought, whether plaintiff(s) sought money damages, the defenses asserted, whether the docket indicated that the parties reached a settlement agreement, whether there was a written decision (including a brief summary of the holding), and whether the written decision addressed sovereign immunity.

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Intellectual Property Law Association (AIPLA) unsuccessfully attempt to show widespread, intentional and reckless copyright infringement”).

<sup>162</sup> Roundtable Tr. at 84:17–23 (Dec. 11, 2020) (MacDonald, University of California).

<sup>163</sup> *Id.* at 89:25–91:01 (MacDonald, University of California).

<sup>164</sup> University of Michigan Library Reply Comments at 2 & n.8 (citing *Reiner v. Canale*, 301 F. Supp. 3d 727 (E.D. Mich. 2018)).

<sup>165</sup> Roundtable Tr. at 85:10–13 (Dec. 11, 2020) (MacDonald, University of California); *see also* University of Michigan Library Reply Comments at 2 (stating that the cases provided by AIPLA “were not litigated on the merits”).

<sup>166</sup> University of Michigan Library Reply Comments at 2; *see also* Roundtable Tr. at 249:01–04 (Dec. 11, 2020) (Xu, University of Michigan Library) (“[L]ast year state actors contributed 11 percent of the total GDP. And how many state infringement[s] do we see? It’s far less than one percent.”).

The results of this research are summarized below. As an initial matter, the Office notes that, out of the 167 cases in total, only 132 are included in the analysis. The excluded cases either were unavailable in searches of federal public records or did not involve copyright infringement disputes.

### a. General Findings

The Office's review of the relevant cases revealed the following:

- The 132 cases were filed between 1986 and 2020. Approximately 97% of the cases (128) were filed between 2000 and 2020, after the Supreme Court's decision in *Florida Prepaid*.
- The cases were filed against state entities in thirty-six states. Of the 132 cases examined, California (14), New York (13), and Texas (12) were the states in which infringement cases were filed the most frequently.
- Approximately 58% of the cases (76) were brought against state-funded educational institutions such as universities, colleges, and school districts. Approximately 20% (27) were brought against state agencies or the state itself. Twenty-seven cases involved claims against multiple kinds of state defendants, including state employees in their individual capacities.
- Literary works (58% or 77 cases) and pictorial, graphic, or sculptural works (30% or 40 cases) were the most common classes of works at issue.
- Plaintiffs sought money damages in approximately 88% of the cases examined (116).
- Approximately 53% of the cases (70) resulted in written decisions.
- Approximately 32% of the cases (42) resulted in written decisions dismissing copyright claims on sovereign immunity grounds.

### b. Allegations of Intentional Infringement

Of the cases examined, the complaints in approximately 59% (or 78 cases) included specific allegations of intentional infringement. An additional four cases involved allegations that defendants "knowingly" infringed or "should have known" that infringement had occurred,<sup>167</sup> but the pleadings were unclear as to whether these amounted to allegations of intentional or willful infringement.

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<sup>167</sup> See Complaint ¶ 25, *Collins v. Univ. of Ala. at Birmingham*, No. 2:09-cv-00856-JEO (N.D. Ala. May 1, 2009), ECF No. 1; Complaint ¶ 17, *Rescue Training Assoc. v. La. State Univ.*, No. 9:05-cv-81146-DTKH (S.D. Fla. Dec. 29, 2005), ECF No. 1; Complaint ¶ 22, *Bergen v. County of Middlesex, New Jersey*, No. 2:04-cv-03015 (D.N.J. June

The Office also examined whether the filings indicated that the parties settled and, if so, whether the settlement involved any admissions of wrongdoing. At least 27% of the cases (32) appeared to have resulted in settlements. An additional 11% (15 cases) were voluntarily dismissed, but it was unclear whether the actions were dismissed pursuant to a settlement agreement. None of the cases examined indicated that the settlement agreements contained any factual or legal admissions.

The Office found that the parties reached a settlement in 28% of the cases that involved allegations of intentional or willful infringement (22 out of 78 cases). In several cases, however, the actions were settled after the state entities were removed as defendants due to sovereign immunity.<sup>168</sup>

### c. Causes of Action

To assess “the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law,”<sup>169</sup> the Office also recorded other causes of action brought against state defendants in copyright infringement cases. While all 132 cases involved allegations of copyright infringement, approximately 58% (76 cases) included state law causes of action, such as breach of contract, deceptive trade practices, unjust enrichment, and tortious interference. In approximately 36% of the cases where plaintiffs brought additional causes of action (27 out of 76 cases), the courts dismissed the copyright claims due to sovereign immunity, and the parties did not have the opportunity to litigate the state law claims. For example, approximately 15% (20 cases) included contract-related causes of action. But in most of those cases, state defendants succeeded on motions to dismiss the contract claims on preemption grounds.<sup>170</sup>

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25, 2004), ECF No. 1; Complaint ¶ 21, *Abramowitz v. State of New Jersey*, 2:03-cv-01663 (D.N.J. Apr. 15, 2003), ECF No. 1.

<sup>168</sup> See *Campinha-Bacote v. Bleidt*, No. CIV.A. H-10-3481, 2011 WL 679913 (S.D. Tex. Feb. 9, 2011) (dismissing Texas A&M University as defendant and permitting claims against other defendants; the action against non-state defendants was ultimately settled); *Mktg. Info. Masters, Inc. v. Bd. of Trs. of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1095–96 (S.D. Cal. 2008) (dismissing claims against university trustees, but allowing claims against employee in individual capacity; the latter claim was settled).

<sup>169</sup> Request Letter at 2.

<sup>170</sup> See *Maisha v. Univ. of N. Carolina*, No. 1:12-CV-371, 2013 WL 1232947 (M.D.N.C. Mar. 27, 2013) (citing sovereign immunity, court dismissed university defendant from non-copyright causes of action and dismissed copyright claim because plaintiff had no registration), *aff'd*, 641 F. App'x 246 (4th Cir. 2016); *Ass'n for Info. Media & Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM MANX, 2011 WL 7447148, at \*3, \*8 (C.D. Cal. Oct. 3, 2011) (court dismissed state university from case citing sovereign immunity and held that contract claims were preempted); *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 682 (W.D. Tenn. 2010) (citing sovereign immunity, court granted Tennessee tourism agency's motion to dismiss in case where plaintiff alleged defendants infringed copyright in photographs); *Applied Pro. Training, Inc. v. Mira Costa Coll.*, No. 10CV1372 DMS (POR), 2010 WL 11463186, at \*2 (S.D. Cal. Nov. 30, 2010) (citing

#### d. Sovereign Immunity and Other Defenses

Finally, the Office examined both the defenses asserted by state defendants in pleadings and the courts' written decisions to probe whether sovereign immunity prevented the parties from litigating the merits of the allegations. State defendants raised "sovereign immunity" or "government immunity" as a defense in their answers in approximately 38% of the cases (50). The dockets also indicated that sovereign immunity was often raised in motions to dismiss filed in lieu of answers, or in motions for summary judgment. Of the seventy cases resulting in written decisions, courts dismissed the copyright claims against state entities on sovereign immunity grounds in forty-two cases (60%).<sup>171</sup>

Of the approximately twenty-eight written decisions that did not address sovereign immunity, twenty-four were decided in favor of the state on either procedural or substantive grounds.<sup>172</sup> Only one of the written decisions addressed fair use,<sup>173</sup> which state defendants raised in twenty-seven cases (20%).

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sovereign immunity, court granted college's motion to dismiss in case where plaintiff alleged defendants infringed copyright in textual works); *Parker v. Dufresne*, No. 09-CV-1859, 2010 WL 2671578, at \*4 (W.D. La. May 18, 2010) (citing sovereign immunity, magistrate judge recommended that claims against university be dismissed), *report and recommendation adopted*, No. CIV.A. 09-1859, 2010 WL 2671567 (W.D. La. June 29, 2010).

<sup>171</sup> See, e.g., *Mktg. Info. Masters, Inc. v. Bd. of Trs. of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1093–96 (S.D. Cal. 2008) (dismissing copyright claim against state defendant but permitting claim against state employee in individual capacity); *InfoMath, Inc. v. Univ. of Ark.*, 633 F. Supp. 2d 674, 678, 680–81 (E.D. Ark. 2007) (dismissing claim for monetary damages against state defendant but permitting suit for injunctive relief); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410, 421 (D.P.R. 2006) (dismissing claims against state defendant due to sovereign immunity); *Rescue Training Assocs. v. La. State Univ. & Agric. & Mech. Coll.*, No. 05-81146-CIV, 2006 U.S. Dist. LEXIS 109148, at \*4–6 (S.D. Fla. Oct. 2, 2006) (dismissing copyright claims against state defendants due to sovereign immunity and holding state claims preempted); *Lopez v. Johnson*, No. CV 02-1572 LH/LFG, 2004 WL 7338284, at \*3 (D.N.M. Jan. 22, 2004) (dismissing claims against state employees in their official capacities due to sovereign immunity); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 335–57 (S.D.N.Y. 2001) (dismissing copyright claim on Eleventh Amendment grounds, but permitting claims for injunctive relief against individual defendants to proceed).

<sup>172</sup> See, e.g., *Demartino v. Golston*, No. 4:12-cv-372, 2013 U.S. Dist. LEXIS 160242, at \*1 (E.D. Tex. Nov. 8, 2013) (adopting magistrate's recommendation and dismissing plaintiff's claim for failure to prosecute); *MacSwan v. Arizona Bd. of Regents*, No. 2:12-CV-1404-HRH, 2013 WL 12096526, at \*3 (D. Ariz. Sept. 25, 2013) (dismissing plaintiff's copyright infringement claim on finding that plaintiff created the works within the scope of their employment and thus failed to adequately allege an ownership interest in the works at issue); *Brown v. Fox Sports Net, Inc.*, No. SACV 08-833CJC (CTx), 2008 WL 11422121, at \*3 (C.D. Cal. Oct. 7, 2008) (dismissing copyright claim on finding that defendants were copyright owners of works at issue pursuant to transfer agreement).

<sup>173</sup> *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445, 464 (S.D.N.Y. 2012) (granting defendants' motion for summary judgment on fair use grounds), *aff'd in part, vacated in part on other grounds*, 755 F.3d 87, 105 (2d Cir. 2014).

## 2. Survey Evidence

In its notice of inquiry, the Office invited submissions of empirical studies analyzing the degree to which copyright owners are experiencing infringement by state entities without adequate remedies under state law, as well as the extent to which these infringements are based on intentional or reckless conduct.<sup>174</sup> The Office received one such study, from the Copyright Alliance—the results of a public survey that incorporated questions from the NOI.<sup>175</sup> The survey solicited “feedback from copyright owners on their experiences with copyright infringement by states and states’ claims of sovereign immunity.”<sup>176</sup>

### a. Survey Design and Methodology

The Copyright Alliance’s survey was comprised of thirty-six questions geared towards identifying specific instances of copyright infringement by states and/or state entities.<sup>177</sup> It was designed “in a way that [the Copyright Alliance] believed would solicit the most accurate responses from creators and copyright owners who may not have a legal background.”<sup>178</sup> The survey was made available to the public on the SurveyMonkey online platform from June 22 to August 10, 2020, and there were 657 respondents,<sup>179</sup> consisting primarily of “small businesses or individual creators.”<sup>180</sup>

### b. Survey Results

For the purposes of this report, the Office has grouped the Copyright Alliance’s survey results into five general areas discussed in detail below.

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<sup>174</sup> NOI, 85 Fed. Reg. at 34,255 (June 3, 2020).

<sup>175</sup> A copy of the Copyright Alliance’s survey is available at <https://www.copyright.gov/policy/state-sovereign-immunity/additional-record-materials/copyright-alliance-response-jan-15-2021.pdf>.

<sup>176</sup> Copyright Alliance Initial Comments at 6; *see also* Roundtable Tr. at 12:05–11 (Dec. 11, 2020) (Madigan, Copyright Alliance).

<sup>177</sup> For example, two questions asked, “Have you ever had a state government entity (e.g., state agency, state university, etc.) copy, distribute or otherwise use your copyrighted work without permission in a manner that you believed to constitute copyright infringement?” and “Has a state entity ever asserted immunity to claims of copyright infringement in the context of a contract negotiation with you?” COPYRIGHT ALLIANCE, COPYRIGHT ALLIANCE SURVEY RESULTS 1, 63 (2021), <https://www.copyright.gov/policy/state-sovereign-immunity/additional-record-materials/copyright-alliance-response-jan-15-2021.pdf> (“Copyright Alliance Survey”).

<sup>178</sup> Copyright Alliance Survey (Cover Page); Copyright Alliance Initial Comments at 7 (accord); *see also* Roundtable Tr. at 12:11–14 (Dec. 11, 2020) (Madigan, Copyright Alliance).

<sup>179</sup> Copyright Alliance Survey (Cover Page).

<sup>180</sup> Roundtable Tr. at 17:09–10 (Dec. 11, 2020) (Madigan, Copyright Alliance).

*Frequency of Infringement by State Entities*

The Copyright Alliance stated that the survey demonstrated that “creators and copyright owners . . . encountered thousands of instances of infringement by state entities.”<sup>181</sup> One hundred fifteen respondents answered that they had experienced infringement by a state or state entity.<sup>182</sup> Thirty-two respondents “(29%) said that they suffered infringement only once, while 21 [respondents] (19%) said they had suffered infringement twice.”<sup>183</sup> Fifty-eight respondents “(52%) responded ‘other,’ and when asked to specify, the respondents described multiple instances of state infringement.”<sup>184</sup> When describing these multiple instances, “people were identifying several instances, sometimes hundreds each,”<sup>185</sup> with respondents using the terms and phrases “countless,” “at least a dozen,” “several,” “too many to count,” “thousands,” and “hundreds of times.”<sup>186</sup>

Respondents were asked to identify the type of work(s) infringed, and were “able to select as many categories as applicable” from a predetermined list.<sup>187</sup> Of the eighty-one respondents who answered this question, forty (49%) selected “[p]hotographs,” and thirty-one (38%) selected “[b]ooks/poems/blogs/articles.”<sup>188</sup> Thirteen respondents (16%) selected “[a]udio/sound recordings (including recordings of songs),” while twelve respondents (15%) selected “[m]ovies/TV shows/videos.”<sup>189</sup> All remaining categories received fewer than ten responses each.<sup>190</sup>

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<sup>181</sup> Copyright Alliance Initial Comments at 7.

<sup>182</sup> Copyright Alliance Survey at 1; *see also* Copyright Alliance Initial Comments at 7.

<sup>183</sup> Copyright Alliance Initial Comments at 7; *see also* Copyright Alliance Survey at 1–2.

<sup>184</sup> Copyright Alliance Initial Comments at 7; *see also* Copyright Alliance Survey at 1–4.

<sup>185</sup> Roundtable Tr. at 206:16–18 (Dec. 11, 2020) (Madigan, Copyright Alliance).

<sup>186</sup> Copyright Alliance Survey at 3–4.

<sup>187</sup> Copyright Alliance Initial Comments at 7 n.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).”); *see also* Copyright Alliance Survey at 14–16.

<sup>188</sup> Copyright Alliance Survey; *see also* Copyright Alliance Initial Comments at 7.

<sup>189</sup> Copyright Alliance Survey at 14–16; *see also* Copyright Alliance Initial Comments at 7.

<sup>190</sup> Some of the responses provided in the “Other” category appear to identify non-copyrightable material or potential violations other than copyright infringement. *See* Copyright Alliance Survey at 16 (responses within the “other” category include “[p]rivacy invasion and legal rights as a native American,” “trademarked phrase ‘Welcome to the D’ used on all World Series promo material,” “[m]y brand name,” and “[r]adio station name and design”); *see also* Copyright Alliance Initial Comments at 7–8.

When asked to identify the state entity involved in the infringement, forty-eight of the eighty-four respondents (57%) identified state universities or institutions of higher learning.<sup>191</sup> Respondents also identified “state tourism boards, departments of natural resources, and museums.”<sup>192</sup> Some respondents noted, however, that they could not “keep track” due to the numerous instances of infringement, were unable to recall or could not identify the alleged infringer, or were “uncomfortable ‘exposing’” the alleged infringer.<sup>193</sup>

The survey also asked respondents to indicate when the alleged infringements occurred. The responses spanned the period from 1978 through 2020, with an upslope of infringements reported “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).”<sup>194</sup> The Copyright Alliance attributes this increase in cases to the growth of the internet and “the *Florida Prepaid* and *Chavez* cases that challenged the validity of the CRCA and may have resulted in states taking . . . a more liberal approach to unauthorized use of copyright-protected works.”<sup>195</sup>

Respondents were asked whether they monitored for infringement. Two hundred eighty-three respondents (57%) stated “no,” while 217 respondents (43%) stated “yes.”<sup>196</sup> Several respondents who answered “no” noted the difficulty and frustration of monitoring for infringement.<sup>197</sup> The Copyright Alliance interpreted this data to suggest that the number of actual instances of copyright infringement by a state or state entity is likely higher than what the survey reflects.<sup>198</sup>

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<sup>191</sup> Copyright Alliance Survey at 9–12; *see* Copyright Alliance Initial Comments at 8.

<sup>192</sup> Copyright Alliance Initial Comments at 8; *see also* Copyright Alliance Survey at 10–11.

<sup>193</sup> Copyright Alliance Survey at 13–14.

<sup>194</sup> Copyright Alliance Initial Comments at 8; *see also* Copyright Alliance Survey at 16–21; Roundtable Tr. at 14:01–07 (Dec. 11, 2020) (Madigan, Copyright Alliance) (discussing the “clear trend of increasing infringements” starting in the mid-to-late 90s).

<sup>195</sup> Roundtable Tr. at 14:08–13 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also* Copyright Alliance Initial Comments at 8.

<sup>196</sup> Letter from Copyright Alliance, to U.S. Copyright Office 64 (Jan. 15, 2021); *see also* Copyright Alliance Initial Comments at 14. The survey revealed that even if creators and copyright owners were monitoring for infringement, 182 out of 280 respondents (65%) were unsure that such monitoring efforts would detect state infringement. Copyright Alliance Survey at 64–65.

<sup>197</sup> *See* Copyright Alliance Initial Comments at 15. Respondents stated that “[i]t’s too difficult and time-consuming” to monitor for infringement, “[monitoring] was so time-consuming and I rarely got anywhere. I finally gave up,” and “[t]his. . . is just another David & Goliath situation where the small copyright owner is the loser.” Copyright Alliance Survey at 68, 69, 74. Others responded that they were not “sure what to do about copyright infringement” after they “found out [about the infringement] by accident.” *Id.* at 68.

<sup>198</sup> Roundtable Tr. at 13:14–20 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also id.* at 13:21–25 (Madigan, Copyright Alliance) (“I would also note that the numbers don’t account for matters settled confidentially out

*State Entities' Intent*

The survey asked whether respondents believe the infringement committed by state entities was intentional. Out of the seventy-two respondents who answered, forty-two (58%) believed that the infringement was intentional, twenty-two (31%) were unsure of whether the infringement was intentional or inadvertent, and eight (11%) believed that the infringement was inadvertent.<sup>199</sup>

The survey allowed respondents to provide a narrative description as to why they believed the infringement was intentional. Forty-two responses were provided.<sup>200</sup> In the Copyright Alliance's view, this information "showed at least non-negligent examples of infringement."<sup>201</sup> The Copyright Alliance pointed to examples in which respondents stated that "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."<sup>202</sup> Other respondents "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."<sup>203</sup>

*Response by State Entities*

The survey asked whether respondents tried to contact or notify the state entity about the infringement once it was discovered. Forty-eight respondents (69%) stated that they tried to notify the state entity, seventeen (24%) said that they did not attempt to do so, and five (7%) were unsure.<sup>204</sup> The survey allowed respondents to provide a narrative description of the state's response; forty-eight responses were provided.<sup>205</sup> According to the Copyright Alliance, a majority of respondents "described situations in which they

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of court or situations where the owners didn't pursue enforcement due to the perceived sort of futility of remedies available when suing states."); Copyright Alliance Initial Comments at 14–15 ("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.").

<sup>199</sup> Copyright Alliance Survey at 25–26; *see* Copyright Alliance Initial Comments at 9; Copyright Alliance Reply Comments at 3–4.

<sup>200</sup> *See* Copyright Alliance Survey at 26–29; Copyright Alliance Initial Comments at 9.

<sup>201</sup> Roundtable Tr. at 64:16–20 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also id.* at 65:05–08 (Madigan, Copyright Alliance) (stating that the survey shows "intentional, non-negligent instances of infringement").

<sup>202</sup> Copyright Alliance Initial Comments at 9; *see* Copyright Alliance Reply Comments at 4 (similar); Roundtable Tr. at 64:21–65:03 (Dec. 11, 2020) (Madigan, Copyright Alliance); Copyright Alliance Survey at 26–29.

<sup>203</sup> Copyright Alliance Initial Comments at 9; *see also* Copyright Alliance Reply Comments at 4; Roundtable Tr. at 64:21–65:03 (Dec. 11, 2020) (Madigan, Copyright Alliance); Copyright Alliance Survey at 26–29.

<sup>204</sup> Copyright Alliance Survey at 33 (Jan. 15, 2021); *see* Copyright Alliance Initial Comments at 12.

<sup>205</sup> Copyright Alliance Survey at 33–35.

were not taken seriously, their concerns were ignored, and the infringement continued.”<sup>206</sup> In some instances, “respondents said that the entity made general claims about having the ‘right’ to use the work,” while in other cases it was reported that “the entity ceased the infringing activity or a settlement was reached.”<sup>207</sup> In a separate question, the survey asked whether the state asserted “that it was not liable for the infringement due to the fact that states are generally immune from being sued under the 11th Amendment to the Constitution.”<sup>208</sup> Twenty-one respondents (44%) said that the state entity asserted sovereign immunity under the 11th Amendment, while sixteen (33%) reported that sovereign immunity was not asserted, and eleven (23%) did not recall.<sup>209</sup>

### *Suits against State Entities*

When asked if they sued the state entity for copyright infringement, thirteen out of seventy respondents (19%) responded “yes.”<sup>210</sup> The survey does not indicate how many suits were filed by each respondent. The Copyright Alliance notes that “[f]or 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.”<sup>211</sup> All but one of these suits were filed between 2014 and 2020.<sup>212</sup>

### *Effect of Sovereign Immunity on Infringement and Licensing*

A number of survey questions asked about the effect state sovereign immunity may be having on the licensing of copyrighted materials to states. In response to whether a state entity has ever asserted sovereign immunity in the context of a contract negotiation, sixty-seven respondents (88%) answered “no,” and nine (12%) answered “yes.”<sup>213</sup> Fifty-eight respondents (76%) answered that they did not change their sales and licensing practices with states as a result of their immunity from copyright infringement.<sup>214</sup> Similarly, a majority of respondents (56%) stated that they do not provide different licensing or payment terms in transactions with a state entity than are provided to other

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<sup>206</sup> Copyright Alliance Initial Comments at 12; *see also* Copyright Alliance Survey at 33–35 (listing the forty-eight responses provided by respondents).

<sup>207</sup> Copyright Alliance Initial Comments at 12; *see also* Copyright Alliance Survey at 33–35 (listing the forty-eight responses provided by respondents).

<sup>208</sup> Copyright Alliance Survey at 35–36; *see* Copyright Alliance Initial Comments at 12.

<sup>209</sup> Copyright Alliance Survey at 35–36; *see* Copyright Alliance Initial Comments at 12.

<sup>210</sup> Copyright Alliance Survey at 36; *see* Copyright Alliance Initial Comments at 12.

<sup>211</sup> Copyright Alliance Initial Comments at 12; *see* Copyright Alliance Survey at 36–43.

<sup>212</sup> Copyright Alliance Initial Comments at 12; *see* Copyright Alliance Survey at 43–48.

<sup>213</sup> Copyright Alliance Survey at 63; *see also* Copyright Alliance Initial Comments at 14.

<sup>214</sup> Copyright Alliance Survey at 61–63; *see also* Copyright Alliance Initial Comments at 14.

parties, while eighteen respondents (23%) answered “yes,” and sixteen respondents (21%) answered “not sure.”<sup>215</sup> Those who answered “yes” provided no further information.

### c. Survey Critiques

Commenters representing state entities challenged the reliability of the Copyright Alliance’s survey, arguing that it is not probative of widespread, intentional copyright infringement by states. Several commenters contended that the sample size of 657 respondents was not large enough to be representative, particularly given that the Copyright Alliance represents over 1.8 million individual creators.<sup>216</sup> For example, noting that “only 115 [of the Copyright Alliance’s] members claimed that they had experienced copyright infringement by state entities,” the University of Michigan Library argued that “this means that .006% of their membership has allegedly experienced copyright infringement by states.”<sup>217</sup>

These commenters also faulted the survey for its reliance on respondents’ subjective beliefs that infringement had occurred and that states had acted with the requisite intent.<sup>218</sup> Several noted that the survey did not account for exceptions or defenses other than sovereign immunity that may have independently precluded liability.<sup>219</sup> For

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<sup>215</sup> Copyright Alliance Survey at 60–61; *see also* Copyright Alliance Initial Comments at 14; Roundtable Tr. at 67:10–13 (Dec. 11, 2020) (Madigan, Copyright Alliance) (discussing the survey results for different licensing or payment terms by respondents to states or state entities).

<sup>216</sup> *See, e.g.*, Association of Public and Land-grant Universities (“APLU”) and the Association of American Universities (“AAU”) Reply Comments at 3 (noting that the Copyright Alliance’s survey is “based on a small sample size”); Roundtable Tr. at 18:06–20 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign) (discussing the issue with total number of respondents in the Copyright Alliance’s survey).

<sup>217</sup> University of Michigan Library Reply Comments at 1–2; *see also* Roundtable Tr. at 205:17–206:03 (Dec. 11, 2020) (Band, Library Copyright Alliance) (discussing the number of alleged infringements reported in the Copyright Alliance’s survey compared to the size of the Copyright Alliance’s membership).

<sup>218</sup> *See* Association of Southeastern Research Libraries (“ASERL”) and the Greater Western Library Alliance Reply Comments at 2–3; University of Illinois at Urbana-Champaign Reply Comments at 1; APLU & AAU Reply Comments at 4–5 (noting that information was not collected on whether (1) copyrighted works were registered, a prerequisite to a copyright infringement lawsuit for U.S. works; (2) the works were joint works, collective works, works made for hire, or transferred or assigned by the original copyright owner; or (3) whether the party claiming copyright infringement owned the copyright at the time of the alleged infringement).

<sup>219</sup> *See* Association of University Presses Reply Comments at 2 (discussing cases that were dismissed for reasons other than sovereign immunity or would likely fall within fair use); *id.* (“Ms. Kelly’s unsuccessful litigation against Mississippi was *not decided on state sovereign immunity grounds*; rather the court there concluded that, in her zeal, the plaintiff’s pre-publication lawsuit had to be dismissed on grounds of ripeness.”) (emphasis in original); University of Illinois at Urbana-Champaign Reply Comments at 1–2 (discussing that there was no evidence in the Copyright Alliance’s survey showing the availability of defenses or limitations to copyright infringement); APLU & AAU Reply Comments at 12 (noting a list of defenses that states and state entities can assert against copyright infringement claims).

example, they noted that information was not collected on whether copyright owners declined to take action against state university libraries or educational institutions because the uses were protected by the exemptions for such entities under sections 108 and 110 of the Copyright Act.<sup>220</sup> Likewise, commenters pointed to the survey's failure to address whether the states' actions may have constituted fair use.<sup>221</sup>

The Copyright Alliance responded to these critiques in its reply comments and at the roundtables. In response to the contention that the survey is not probative of widespread, intentional infringement, the Copyright Alliance pointed to the volume of the alleged infringements cited by respondents, noting that "people were identifying several instances, sometimes hundreds each."<sup>222</sup> With respect to criticism that the survey relied on respondents' subjective beliefs, the Copyright Alliance asserted that "there was a pattern shown in the responses to our survey that showed at least non-negligent examples of infringement."<sup>223</sup> And it argued that concerns regarding exceptions and limitations are "not entirely relevant" because "whether we abrogate or adjust state sovereign immunity would have no effect on a state[] entity's ability to defend itself by showing fair use or invoking any other limitation and exception."<sup>224</sup>

### 3. Specific Examples

The Office also received comments describing specific instances of alleged infringement by state entities. These examples are discussed in the following sections, which are organized by the type of work at issue.

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<sup>220</sup> See APLU & AAU Reply Comments at 5–6; *see also* Roundtable Tr. at 19:05–10 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign) (discussing exceptions that apply to university libraries and educational institutions).

<sup>221</sup> See University of Illinois at Urbana-Champaign Reply Comments at 1–2 ("The survey instrument should have included a definition of fair use. Similarly, the questions should have added a statement at the end such as 'when the use was not a fair use' to encourage the respondents to consider how many instances of infringement (absent sovereign immunity) would be actionable in court."); Roundtable Tr. at 18:21–19:04, 19:11–22 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign) (discussing the concern about whether fair use was considered in the Copyright Alliance's survey).

<sup>222</sup> Roundtable Tr. at 206:16–18 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also id.* at 74:16–19 (Madigan, Copyright Alliance) ("I think it's important to understand that there's no magic number of infringements or a bright line that would trigger congressional action.").

<sup>223</sup> Roundtable Tr. at 64:18–20 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also id.* at 65:04–08 (Madigan, Copyright Alliance) ("[W]hile I'm sure there are plenty of inadvertent infringements, there does appear to also be intentional, non-negligent instances of infringement, which I know some of the authors and creators can attest to."); Copyright Alliance Reply Comments at 3–4 (discussing the survey results regarding intentional or inadvertent infringement).

<sup>224</sup> Roundtable Tr. at 22:09–16 (Dec. 11, 2020) (Madigan, Copyright Alliance); *see also id.* at 23:07–19 (Madigan, Copyright Alliance) (arguing that sovereign immunity "hinders the development of the fair use doctrine").

### a. News Publishing

Commenters representing news publishers contended that their industry has experienced large-scale infringement by state entities.<sup>225</sup> They relied primarily on a recent instance in which it was alleged that “over 4,000 news outlets suffered from unauthorized copying and republication of their content by an instrumentality of the State of California over an eight-year period.”<sup>226</sup> Copyright owners argued that this example alone demonstrates “systematic industrial-scale copyright infringement” by a state actor.<sup>227</sup>

As described by commenters, in 2017 multiple news outlets, including Dow Jones & Company, The Washington Post, The New York Times, the Los Angeles Times, and McClatchy, discovered that the California Public Employee’s Retirement System (“CalPERS”), a state agency that manages pension and health benefits for more than two million members,<sup>228</sup> “was copying, republishing, and distributing thousands of protected news articles without having acquired a license or authorization from the publishers.”<sup>229</sup> These commenters alleged that CalPERS maintained a publicly accessible website where it reproduced, without authorization, full-text news articles,<sup>230</sup> and that CalPERS sent daily emails to its senior officials and stakeholders with curated links to full-text articles reproduced on the CalPERS website.<sup>231</sup>

Commenters reported that the infringement began in 2009, and continued until it was discovered in 2017.<sup>232</sup> The News Media Alliance asserted that “[i]n total, during the eight-year period, CalPERS republished approximately 53,000 news articles from roughly 4,500 news organizations,” including “over 9,000 full-text articles from The Wall Street Journal, almost 6,900 from The New York Times, over 5,500 from The Los Angeles Times, almost 3,900 from The Sacramento Bee, and almost 2,000 from The Washington

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<sup>225</sup> News Media Alliance Initial Comments at 3.

<sup>226</sup> *Id.*

<sup>227</sup> Roundtable Tr. at 49:17–24 (Dec. 11, 2020) (Linder, Dow Jones & Company).

<sup>228</sup> *About CalPERS: Facts at a Glance for Fiscal Year 2019–20*, CALPERS, <https://www.calpers.ca.gov/docs/forms-publications/facts-about.pdf>.

<sup>229</sup> News Media Alliance Initial Comments at 3; *see* Brief for Dow Jones & Company, Inc. as Amicus Curiae in Support of Petitioners at 4–5, 8 n.7, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877); Roundtable Tr. at 51:10–23 (Dec. 11, 2020) (Munter, News Media Alliance).

<sup>230</sup> News Media Alliance Initial Comments at 3–4; *see also* Copyright Alliance Initial Comments at 11.

<sup>231</sup> News Media Alliance Initial Comments at 4; *see also* Copyright Alliance Initial Comments at 11.

<sup>232</sup> News Media Alliance Initial Comments at 3 (citing Yves Smith, *CalPERS Pays \$3.4 Million to Dow Jones to Settle Massive Copyright Infringement That We Exposed*, NAKED CAPITALISM, Jul. 26, 2018, <https://www.nakedcapitalism.com/2018/07/calpers-pays-3-4-million-dow-jones-settle-massive-copyright-infringement-exposed.html>).

Post.”<sup>233</sup> According to the News Media Alliance, “there was no indication that CalPERS had acquired a license to republish or distribute any of these articles.”<sup>234</sup>

Copyright owners argued that CalPERS’s actions were deliberate and constituted a “systematic violation” of news publishers’ copyrights.<sup>235</sup> Because of the prolonged and widespread nature of the infringement, publishers concluded that CalPERS actions must have been intentional, and not merely accidental or reckless.<sup>236</sup> They noted many of the articles at issue were originally published behind paywalls and on paid news databases, such that obtaining the articles likely required planning and effort.<sup>237</sup>

The News Media Alliance reported that several of its members contacted the agency to alert it to the infringing activity.<sup>238</sup> In at least some cases, “CalPERS responded through the office of the Attorney General, indicating that it had taken down the public website on June 17, 2017, and that the agency was asserting sovereign immunity for all copyright claims.”<sup>239</sup> The News Media Alliance stated that it is not aware of any publisher that filed suit against CalPERS; instead, “at least three Alliance members decided to settle the claims,” with settlement amounts reportedly “var[ying] between low six figures and low seven figures.”<sup>240</sup>

In the News Media Alliance’s view, these amounts fall well short of the damages that could have been obtained had the publishers been able to pursue their claims in court. It estimated that in one case, CalPERS avoided paying Dow Jones & Company “tens of millions of dollars” for reproducing 9,000 articles from multiple Dow Jones publications.<sup>241</sup> Despite the estimated value, Dow Jones & Company was only able to secure a settlement of \$3.4 million.<sup>242</sup> Publishers expressed concern that even these reduced amounts will be difficult to obtain in the wake of *Allen*.<sup>243</sup> During the roundtables, a representative of Dow Jones noted that the company was in the midst of negotiating a settlement with a government entity in another state that had allegedly

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<sup>233</sup> News Media Alliance Initial Comments at 4.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 4–5.

<sup>237</sup> *Id.* at 5.

<sup>238</sup> *Id.*

<sup>239</sup> News Media Alliance Initial Comments at 5; *see also* Copyright Alliance Initial Comments at 11 (stating that, in response to Dow Jones & Company, “CalPERS asserted that sovereign immunity exempted it from any liability”).

<sup>240</sup> News Media Alliance Initial Comments at 5.

<sup>241</sup> *Id.* at 4.

<sup>242</sup> *Id.* at 5.

<sup>243</sup> Roundtable Tr. at 48:03-11 (Dec. 11, 2020) (Linder, Dow Jones & Company).

engaged in “industrial reproduction of Dow Jones’ articles without any conceivable fair use.”<sup>244</sup> The representative testified that, in response to the company’s complaint, the state entity pointed “directly to sovereign immunity,” citing *Allen*.<sup>245</sup>

### b. Music

SoundExchange, the entity designated to collect and distribute royalties under the statutory licenses for certain digital public performances of sound recordings, filed comments describing alleged instances of infringement by state college radio stations. According to SoundExchange, “public college webcasters have not complied with” the statutory licensing requirements under sections 112 and 114 of the Copyright Act, “nor, to our knowledge, obtained direct licenses from copyright owners as an alternative. In some cases, they have expressly refused to pay statutory royalties on sovereign immunity grounds.”<sup>246</sup>

Based on an informal estimate, SoundExchange identified approximately 350 public campus radio stations “that appear to regularly stream music programming over the internet.”<sup>247</sup> Of those, “only about two thirds (about 245 stations) [had] paid SoundExchange statutory royalties for 2020.”<sup>248</sup> SoundExchange noted that, among the approximately 100 stations that had not paid, almost 40 had paid in 2019.<sup>249</sup> It speculated that in some cases this change may have been due to “publicity concerning the sovereign immunity issue occasioned by the Supreme Court’s consideration of *Allen v. Cooper*,” but it acknowledged that it had “no direct evidence” of such a link.<sup>250</sup>

SoundExchange stated that it does not maintain comprehensive records of instances in which it has contacted public university webcasters about these issues,<sup>251</sup> but it provided specific information regarding two such communications. First, it described correspondence with WUTK, the college radio station at the University of Tennessee, in 2015 and 2016. After conducting investigative activities that identified WUTK as a nonpaying service, SoundExchange had “regular contact with WUTK about obtaining

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<sup>244</sup> *Id.* at 48:12–18 (Linder, Dow Jones & Company).

<sup>245</sup> *Id.* at 48:17–18 (Linder, Dow Jones & Company).

<sup>246</sup> SoundExchange Initial Comments at 1.

<sup>247</sup> *Id.* at 8.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 9.

<sup>250</sup> *Id.* at 9, 11.

<sup>251</sup> *Id.* at 4; *see also id.* (“[W]e have occasionally identified college webcasters that are infringing by using sound recordings without licensing and have contacted them about getting licensed. . . . [T]o the best recollection of the SoundExchange staff involved, we have contacted public college webcasters about licensing more than a few times over the years, sometimes with success and sometimes not.”).

license coverage for its webcasting” activities, which “culminat[ed] in a ‘final notice’ sent in April 2016.”<sup>252</sup> While WUTK ultimately paid statutory royalties for 2016, the station “declined to take steps to address its unlicensed use of copyrighted recordings in prior years.”<sup>253</sup> As an exhibit to its comments, SoundExchange submitted a letter it received from the University of Tennessee’s general counsel’s office stating that “[t]he University of Tennessee, as an arm of the State of Tennessee, is entitled to Eleventh Amendment immunity in federal court,” and therefore “there is no jurisdictional basis for SoundExchange to ‘pursue additional legal measures against WUTK’ regarding any request for payments to cover past years.”<sup>254</sup> SoundExchange reported that WUTK “subsequently paid statutory royalties for 2017 to 2019,” but had not done so for 2020 as of the time SoundExchange’s comments were submitted.<sup>255</sup>

The second public university webcaster identified by SoundExchange is WHCJ, the college radio station at Savannah State University. According to SoundExchange, WHCJ has webcast its programming “since at least 2009” and “has never paid statutory royalties to SoundExchange.”<sup>256</sup> After SoundExchange “made repeated attempts to contact WHCJ to address its infringing transmissions,” it received a letter from Georgia Department of Law asserting that the Board of Regents of the University System of Georgia, of which Savannah State is a member institution, “has immunity from a suit for damages” under the Eleventh Amendment.<sup>257</sup> The letter stated that the state of Georgia nevertheless “endeavors to support the law” and that the Department of Law would contact SoundExchange after investigating the matter further.<sup>258</sup> SoundExchange, however, has “no record of further contact about this matter from the State of Georgia.”<sup>259</sup>

Several commenters representing state entities challenged the evidence presented by SoundExchange, arguing that it reflects only a small number of instances that do not amount to widespread copyright infringement.<sup>260</sup> APLU & AAU asserted that the

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<sup>252</sup> *Id.* at 5.

<sup>253</sup> *Id.* at 6.

<sup>254</sup> *Id.* Ex. A at 1–2 (citations omitted).

<sup>255</sup> *Id.* at 6.

<sup>256</sup> *Id.* at 7, 8.

<sup>257</sup> *Id.* at 7, Ex. B at 1.

<sup>258</sup> *Id.* Ex. B at 1.

<sup>259</sup> *Id.* at 8.

<sup>260</sup> *See, e.g.*, University of Michigan Library Reply Comments at 2 (“SoundExchange also relies on shaky evidence to show widespread infringement. . . . Even if there are actual (and even egregious) examples of infringement in SoundExchange’s comment, a few examples from one or two state universities are not evidence of widespread infringement by state universities or other state actors across the country.”) (footnote omitted).

evidence actually shows that a “supermajority of public schools do pay royalties, which hardly exposes a pattern of systematic non-compliance.”<sup>261</sup> They further challenged SoundExchange’s suggestion that the lack of statutory royalty payments for 2020 is attributable to *Allen*, emphasizing that the March 2020 decision in *Allen* came two months after the January due date for payments.<sup>262</sup> And the University of Michigan Library faulted SoundExchange for “ignor[ing] the major adjustments their customers . . . fac[ed] during the pandemic,” which saw college and university campuses close at the beginning of March.<sup>263</sup> One commenter also noted that SoundExchange made “no indication . . . of whether the purported rate of non-compliance by public colleges and universities is significantly higher than the non-compliance by private colleges and universities.”<sup>264</sup>

### c. Computer Programs

The Software and Information Industry Association (“SIIA”), a trade association for the software and information industries, provided information regarding alleged infringement of computer software products by states. It stated that between 2011 and September 2020, SIIA received “86 reports of infringement by state government entities, including universities, school districts, police departments, and administrative agencies.”<sup>265</sup> According to SIIA, this total represents approximately one twentieth of the total number of infringements reported through its online piracy reporting portal.<sup>266</sup> These reports indicated that the number of computers involved in these cases “ranged from as low as five and as high as 30,000—totaling thousands of potential acts of infringement of member software.”<sup>267</sup> SIIA noted that “[a]s a general rule, these works contained both licenses advising users of the scope of copyright protection as well as a

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<sup>261</sup> APLU & AAU Reply Comments at 3 (emphasis in original).

<sup>262</sup> *Id.* at 3 n.12 (noting that SoundExchange “admit[ted] that it ha[d] ‘no direct evidence linking this shift to *Allen v. Cooper*’”) (quoting SoundExchange Initial Comments at 11); *id.* at 3 (“It is hard to imagine . . . that public university webcasters were emboldened to neglect statutory royalty payments in January 2020 in prospective reliance on a Supreme Court case that was not decided until late March 2020.”).

<sup>263</sup> University of Michigan Library Reply Comments at 2.

<sup>264</sup> APLU & AAU Reply Comments at 3.

<sup>265</sup> SIIA Reply Comments at 8. SIIA noted that it had previously identified seventy-seven alleged instances of state infringement at a congressional hearing on this issue in 2003. *Id.* at 7–8; see also *Intellectual Property Protection Restoration Act of 2003: Hearing on H.R. 2344 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 48 (2003) (statement of Mark Bohannon, General Counsel and Senior Vice President, Public Policy, SIIA). SIIA stated that it was unable to retrieve data for the years between 2002 and 2011. SIIA Reply Comments at 8.

<sup>266</sup> SIIA Reply Comments at 8.

<sup>267</sup> *Id.*

properly affixed copyright notice.”<sup>268</sup> SIIA did not provide further details on the nature or resolution of these allegations.

In addition, SIIA cited two recent cases in which software developers brought infringement claims against state entities in federal court.<sup>269</sup> In the first case, a developer filed suit against the Nebraska Department of Education for allegedly creating an infringing version of a software product it had previously licensed before terminating the license in favor of the newly created software.<sup>270</sup> The court granted the department’s motion to dismiss, holding that the state only waived sovereign immunity as to claims arising from the parties’ contract, but that the infringement claims arose out of the Copyright Act rather than the parties’ contract.<sup>271</sup> In the second case, Oracle filed suit for copyright infringement, among other claims, against the Oregon Health Insurance Exchange Information and the State of Oregon, alleging continued use of a software program despite lack of payment.<sup>272</sup> Regarding the infringement claim, the court concluded that Oregon waived sovereign immunity in its agreement with Oracle.<sup>273</sup>

In a separate comment, Glenn Forbis, an intellectual property attorney in Michigan, described alleged instances of infringement suffered by Dassault Systèmes S.A. and its subsidiaries. Dassault “is the creator of several substantial software solutions in the area of 3D CAD modeling applications, simulation applications, social and collaborative application, and information intelligence applications.”<sup>274</sup> According to Mr. Forbis, each month “hundreds of entities . . . use unlicensed and illegal copies of Dassault’s software, many times downloaded from internet sites,” and “a substantial number of [these users] are public universities.”<sup>275</sup> Mr. Forbis reported that these unlicensed uses “can reach into the several hundreds of thousands of dollars.”<sup>276</sup>

Mr. Forbis stated that Dassault has contacted several public universities “seeking cooperation to cease the ongoing use of the unlicensed copies of Dassault’s software and to receive just compensation for the past unlicensed use.”<sup>277</sup> Many times, however, Dassault is “ignored,” resulting in the continuance of the unlicensed uses and no

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 10.

<sup>270</sup> *eScholar LLC v. Neb. Dep’t of Educ.*, 497 F. Supp. 3d 414, 420–21 (D. Neb. 2020).

<sup>271</sup> *Id.* at 429–30. The court held that the breach of contract claims could go forward. *Id.* at 430.

<sup>272</sup> *Oracle Am., Inc. v. Or. Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018, 1020–22 (D. Or. 2015).

<sup>273</sup> *Id.* at 1035–38.

<sup>274</sup> Forbis Reply Comments.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

compensation for past uses.<sup>278</sup> In other cases, Mr. Forbis reported, the university representative “has flatly used the sovereign immunity of the state government from copyright infringement actions as an excuse to deprive Dassault of relief.”<sup>279</sup>

#### d. Photographs and Video

Copyright owners pointed to several examples of state infringement involving photographic works. This evidence included both aggregated data and descriptions of specific allegations by individual copyright owners.

The Copyright Alliance provided data that, in its view, indicates the pervasiveness of state infringement of photographs online.<sup>280</sup> It engaged PicRights, “an international organization that monitors for copyright infringement involving photographs and assists with enforcement and claims resolution” to search for instances of state infringement.<sup>281</sup> Typically, PicRights analysts crawl the internet searching for unauthorized uses of images, and, according to the Copyright Alliance, “frequently come across state entity websites that have reproduced copyright protected works of their clients.”<sup>282</sup> Because “PicRights is familiar with the state sovereign immunity doctrine and the uncertainty surrounding state remedies,” however, the organization “does not prioritize tracking or responding to instances of potential state infringement.”<sup>283</sup>

At the request of the Copyright Alliance, and for the purpose of this study, PicRights “conducted targeted searches aimed at uncovering specific instances of state copyright infringements,” using “state names and a list of keywords that were likely to be incorporated in the name of a state entity.”<sup>284</sup> Running searches for the period between 2017 and 2020, PicRights found “110 instances of potential infringement, with the most hits identifying websites for institutions of higher learning” in states such as Texas, New York, California, and Florida.<sup>285</sup> PicRights also identified potential infringement on state entity websites for “state bar associations, visitors’ bureaus, departments of transportation, and hospitals.”<sup>286</sup> According to the Copyright Alliance, “[t]hese results

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Copyright Alliance Initial Comments at 26–27.

<sup>281</sup> *Id.* at 26.

<sup>282</sup> *Id.* at 27.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

are likely only the tip of the iceberg,” indicating that “state entities continue to make unauthorized use of copyright protected works online.”<sup>287</sup>

In addition, the Copyright Alliance and several individual photographers provided the following allegations of specific instances of state infringement:

- The Copyright Alliance described claims asserted by a Houston-based photographer, Jim Olive, against the University of Houston.<sup>288</sup> Mr. Olive took an aerial photograph of the City of Houston while harnessed from a helicopter and made it available on his website for purchase.<sup>289</sup> He alleges that the university downloaded the photograph from his website, removed all identifying marks, and, without authorization, displayed the photograph on several pages on its website to market its College of Business.<sup>290</sup> Mr. Olive discovered the alleged infringement three years after the university first began displaying the image.<sup>291</sup> In 2017, Mr. Olive sued the university in Texas state court, contending that the use of the photograph constituted an unlawful taking under the federal and Texas state constitutions’ takings clauses.<sup>292</sup> The Texas Court of Appeals held that Mr. Olive’s takings claim, based on a single alleged act of copyright infringement, was not viable under the federal or state takings clauses.<sup>293</sup> In 2021, the Texas Supreme Court affirmed the lower court’s judgment, holding that factual “[a]llegations of copyright infringement assert a violation of the owner’s copyright, but not its confiscation, and therefore . . . do not alone allege a taking.”<sup>294</sup>
- The Copyright Alliance also described alleged infringement of the work of David K. Langford, a photographer who produces Western-themed images.<sup>295</sup> In 2010, Mr. Langford discovered that one of his images had been used without his authorization as the background on approximately 4.5 million Texas state vehicle registration stickers.<sup>296</sup> He later discovered that the image “had been scanned by a state prison inmate and reproduced under a Texas Department of Criminal

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<sup>287</sup> *Id.*

<sup>288</sup> Copyright Alliance Initial Comments at 17–18.

<sup>289</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 768 (Tex. 2021).

<sup>290</sup> *Id.*

<sup>291</sup> Copyright Alliance Initial Comments at 18.

<sup>292</sup> *Id.*; see *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2019).

<sup>293</sup> See *infra* at 66–67.

<sup>294</sup> *Jim Olive Photography*, 624 S.W.3d at 777.

<sup>295</sup> Copyright Alliance Initial Comments at 24.

<sup>296</sup> *Id.*

Justice contract with the Department of Public Safety.”<sup>297</sup> After attempting to resolve the issue by contacting the agencies directly, Mr. Langford filed suit in Texas state court for personal property theft under Texas’s Private Property Rights Protection Act.<sup>298</sup> Mr. Langford did not bring a claim for copyright infringement because he anticipated that the state agency would raise a sovereign immunity defense.<sup>299</sup> Mr. Langford ultimately reached a settlement with the agency.<sup>300</sup>

- Photographer Mike Boatman submitted comments describing alleged instances of infringement by government entities in two states.<sup>301</sup> First, Mr. Boatman alleged that the City of Memphis, Tennessee distributed three of his images to *Weekly Reader*, a national publication circulated to public elementary schools in the United States.<sup>302</sup> Because he was “[b]arred from filing federal copyright litigation due to sovereign immunity,” he sought damages based on the city’s alleged failure to return the physical transparencies containing the original images.<sup>303</sup>

The second incident Mr. Boatman described involves a photograph that he took of Kane Wasalenchuk, a professional racquetball player.<sup>304</sup> Mr. Boatman alleged that the University of North Carolina Asheville appropriated his image to market a physical education course on racquetball to their students.<sup>305</sup> Mr. Boatman’s comment includes a letter he received from the University’s general counsel’s office after bringing the issue to its attention.<sup>306</sup> The letter states that the photograph had been removed from the University’s website but that “[t]he University, as a state body, is immune from suit under the legal theory outlined in your letter, pursuant to 11th Amendment sovereign immunity.”<sup>307</sup> It further

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 24–25.

<sup>299</sup> *Id.* at 25.

<sup>300</sup> *Id.*

<sup>301</sup> Mike Boatman Initial Comments at 1.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 2.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 3.

<sup>307</sup> Letter from Lucien Capone III, General Counsel, University of North Carolina Asheville, to Evan A. Anderson, Law Office of Carolyn E. Wright, LLC (July 7, 2011).

stated that if Mr. Boatman brought suit, the University would “pursue any and all actions available to it, including Rule 11 sanctions as applicable.”<sup>308</sup>

- Ryan French, a photographer and videographer, submitted comments describing alleged infringement by the Florida Department of Transportation (“FDOT”). According to Mr. French, in 2011 the agency ran a bicycle safety campaign called “See the Blind Spots,” which included “public service announcements on broadcast television statewide.”<sup>309</sup> Mr. French alleged that FDOT’s announcements included “multiple clips of accidents [Mr. French] posted on his website and YouTube” with his “watermark . . . intentionally blurred.”<sup>310</sup> He stated that when he contacted FDOT, it “would not take responsibility for the problem,” blaming the “‘mistake’ on the marketing agency . . . hired to produce the videos.”<sup>311</sup> Mr. French explained that “[t]he ad was pulled” and that he “filed a copyright complaint on the online-PSA hosted on various video platforms, but was not compensated.”<sup>312</sup>
- Rick Allen, the plaintiff in *Allen*, submitted comments describing a separate instance of alleged infringement involving the state of Alabama. He alleged that in 2010, the Alabama Department of Conservation and Natural Resources (“ADCNR”) misappropriated an underwater image he created of a rare shark, altered the image to remove the attribution, and displayed it on the department’s website.<sup>313</sup> After becoming aware of the infringement, Mr. Allen contacted the ADCNR with a letter of complaint and an invoice for use of the image.<sup>314</sup> While the ADCNR agreed to remove the image from its site, the agency did not pay the requested fee.<sup>315</sup>
- Pixsy Inc., submitted comments describing its research into alleged state infringement of photographs and other visual works. Pixsy is an “image licensing and copyright agent for photographers, agencies, artists, designers and illustrators,” with “artificial intelligence technology” that can “scan the public

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<sup>308</sup> *Id.*; see also Mike Boatman Initial Comments at 3 (same). In their reply comments, APLU & AAU noted that Mr. Boatman ultimately reached a settlement with the University for \$4,000, an amount they assert is “above the cost of a license.” APLU & AAU Reply Comments at 12.

<sup>309</sup> Ryan French Initial Comments.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> Rick Allen Initial Comments at 1.

<sup>314</sup> *Id.*; see also *id.* at 4–7.

<sup>315</sup> *Id.* at 1; Roundtable Tr. at 34:14–25 (Dec. 11, 2020) (Allen, Nautilus Productions).

internet” to inform their clients “where and how their images have been used.”<sup>316</sup> Pixsy reported 41,245 uses of client images by 1,625 U.S. postsecondary institutions with .edu domains, which “represents approximately \$16.5 million in image licensing revenue for the creative industries” based on an average licensing fee amount of \$400 per image use.<sup>317</sup> According to Pixsy, “[t]he image industry has found that 85% of image uses online are unauthorized uses.”<sup>318</sup> Based on that percentage, it estimated that photographers and artists have likely lost approximately \$14 million in licensing revenue to postsecondary institutions.<sup>319</sup>

Pixsy argued that lost licensing fees are often unrecoverable when public institutions, which represent 30% of postsecondary institutions in the United States, are responsible for the unauthorized use.<sup>320</sup> It alleged that “while some U.S. State entities pay license fees to cover the use of . . . clients’ images on their websites, many representatives of State entities refer to State sovereign immunity and do not pay a license fee as a result.”<sup>321</sup> To support its claim, Pixsy provided a sample of six letters it received from representatives of state entities in response to requests for license fees.<sup>322</sup> In each letter, the state entity agreed to cease its use of the identified third party image(s), but refused to pay the requested retroactive licensing fee, citing sovereign immunity.<sup>323</sup>

### e. Books

Copyright owners provided several examples of alleged state infringement relating to books and similar types of literary works.

- The Copyright Alliance’s comments described allegations asserted by Dr. Keith Bell, “a leading expert on sports performance enhancement” and the author of several books, including *Winning Isn’t Normal* and *The Nuts and Bolts of Psychology for Swimmers*.<sup>324</sup> Dr. Bell also testified on his own behalf during the roundtables. According to the Copyright Alliance, while Dr. Bell “has identified infringement by a variety of individuals and organizations, ranging from small business to

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<sup>316</sup> Pixsy Inc. Reply Comments at 1.

<sup>317</sup> *Id.* at 2 & n.4.

<sup>318</sup> *Id.* at 2.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 2–3.

<sup>321</sup> *Id.* at 2.

<sup>322</sup> *Id.* at 4–11.

<sup>323</sup> *Id.*

<sup>324</sup> Copyright Alliance Initial Comments at 18.

Fortune 500 companies,” the “most common and damaging infringement Dr. Bell comes across has been by state entities, specifically by public schools, universities, and colleges.”<sup>325</sup> Dr. Bell testified that state entities have “distributed [and] disseminated” his registered books “out to, literally, millions of people without any kind of remuneration from them.”<sup>326</sup> Providing an example, he alleged that “eight of the[] sports [teams]” at the University of Louisville “infringed on [his] copyright, [and] gave attribution to anonymous.”<sup>327</sup> He reported to the Copyright Alliance that he has “personally sent cease and desist letters to at least nine universities and colleges” and “more than 100 public school districts.”<sup>328</sup> But he has “not pursued copyright infringement claims against roughly 120 other universities and colleges and many hundreds of public schools because of likely sovereign immunity defenses.”<sup>329</sup>

- The Copyright Alliance described allegations by Michael Bynum, an author who has written and edited over 125 books profiling college and professional athletes.<sup>330</sup> The Copyright Alliance recounted that “[a]fter spending over ten years researching” a “biography of Texas A&M University’s football legend E. King Gill,” 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.”<sup>331</sup>

Mr. Bynum filed suit against the Texas A&M Athletic Department in federal court, asserting claims for copyright infringement and unlawful takings, and a claim under the Digital Millennium Copyright Act.<sup>332</sup> According to the Copyright Alliance, “[d]espite presenting clear evidence of the infringement,” the Southern District of Texas dismissed the claims because “the department is not a separate legal entity and lacks capacity to be sued,” and would not permit Mr. Bynum to “substitute the University [] as the proper defendant” because “it is a

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<sup>325</sup> *Id.* at 19.

<sup>326</sup> Roundtable Tr. at 98:18–99:04 (Dec. 11, 2020) (Bell).

<sup>327</sup> *Id.* at 99:05–10 (Bell).

<sup>328</sup> Copyright Alliance Initial Comments at 19.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 20.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* (citing Complaint, *Can. Hockey LLC v. Tex. A&M Univ. Athletic Dep’t*, 484 F. Supp. 3d 448 (S.D. Tex. 2020) (No. 17-cv-00181), ECF No. 1).

- state entity and protected by sovereign immunity.”<sup>333</sup> The state unlawful takings claim was 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.”<sup>334</sup>
- Also alleging state infringement by Texas A&M University, Andrea Johnson, founder of C Math is Easy, an organization that offers in-person and online tutoring services, testified that the university misappropriated and distributed several of her math tutoring packets without her authorization.<sup>335</sup> Specifically, Ms. Johnson discovered her “workbook retyped” into a math packet distributed by the university’s Upward Bound program.<sup>336</sup> She asserted that the program “lifted at least 30, 40 pages of the meat of [her] workbook” and that the infringing work was then “given to high schools in [her] district.”<sup>337</sup> Ms. Johnson explained that every attorney she approached for help advised that her copyright infringement claim could not be remedied due to sovereign immunity.<sup>338</sup>
  - The Copyright Alliance also reported an account involving the work of Dr. Walter Whittle. As an independent contractor who retains the copyright in the proprietary materials provided to his clients, Dr. Whittle “has worked to develop unique competency-based job descriptions for over one third of all school districts in Ohio.”<sup>339</sup> According to the Copyright Alliance, in 2010, Dr. Whittle discovered that “a South Carolina high school teacher had posted part of his materials on the internet.”<sup>340</sup> Concerned that similar infringements may be occurring, Dr. Whittle “soon documented 137 violations by separate school districts.”<sup>341</sup> Dr. Whittle ultimately settled twenty-seven of the violations out of court, but he believes that these settlements “fell well short of compensating him for his loss and expenses,” which he estimated to be in excess of \$685,000.<sup>342</sup>

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<sup>333</sup> Order Granting Partial Dismissal at 14–18, *Canada Hockey LLC v. Texas A&M Univ. Athletic Dept.*, 484 F. Supp. 3d 448 (S.D. Tex. 2020) (No. 17-cv-00181) (S.D. Tex. 2020), ECF No. 96.

<sup>334</sup> Copyright Alliance Initial Comments at 21.

<sup>335</sup> Roundtable Tr. at 39:17–40:05 (Dec. 11, 2020) (Johnson, C Math is Easy).

<sup>336</sup> *Id.* at 40:06–14 (Johnson, C Math is Easy).

<sup>337</sup> *Id.* at 40:09–14 (Johnson, C Math is Easy).

<sup>338</sup> *Id.* at 43:07–13 (Johnson, C Math is Easy).

<sup>339</sup> Copyright Alliance Initial Comments at 23.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 23–24.

State representatives responded that these examples fall short of establishing a pattern of intentional infringement, arguing that the allegations failed to account for fair use and other defenses available to the state.<sup>343</sup> With respect to Dr. Bell's allegations specifically, APLU & AAU argued that he is "an odd case study for the Copyright Alliance to highlight," given that courts have dismissed several of his claims on the merits.<sup>344</sup> In their view, this indicates that many of his allegations "have serious deficiencies and, at worse, are pursued in bad faith, or, at best, involve facts subject to reasonable dispute."<sup>345</sup>

State representatives also argued that even "in instances when copyright infringement by employees of state colleges and universities is intentional, copyright holders do have recourse against those employees."<sup>346</sup> APLU & AAU cite Mr. Bynum's case against Texas A&M Athletic Department as an example, noting that while the court "granted Texas A&M's motion to dismiss all claims based on sovereign immunity and also dismissed two claims against defendant employees under qualified immunity (and failure to state a claim), the court allowed claims against one remaining employee . . . to proceed."<sup>347</sup>

#### f. Other

The Office received one additional comment describing alleged infringements of works that do not clearly fall into any of the categories above.<sup>348</sup> Patricia Ward Kelly, the widow of dancer, actor, and director Gene Kelly, submitted comments describing an instance in which she became aware that an individual "intended to edit a collection of [Mr. Kelly's] interviews to be published by The University Press of Mississippi without obtaining the necessary permissions."<sup>349</sup> Ms. Kelly stated that when her attorneys contacted the editor and the publisher to inform them that the materials were protected by copyright, they "refused to provide any information" about the intended contents of

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<sup>343</sup> See, e.g., APLU & AAU Reply Comments at 6–9; Roundtable Tr. at 19:05–15 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign).

<sup>344</sup> APLU & AAU Reply Comments at 6; see also Roundtable Tr. at 111:10–112:14 (Dec. 11, 2020) (MacDonald, University of California, Office of General Counsel) (discussing "Dr. Bell's recent track record of litigated matters that have, unfortunately for him, not fared very well").

<sup>345</sup> APLU & AAU Reply Comments at 7.

<sup>346</sup> *Id.* at 9–11.

<sup>347</sup> *Id.* (citing Order Granting Partial Dismissal, *Canada Hockey LLC v. Texas A&M Univ. Athletic Dept.*, 484 F. Supp. 3d 448 (S.D. Tex. 2020) (No. 17-cv-00181), ECF No. 96).

<sup>348</sup> An individual commenter, Shelia Bolar, also submitted comments alleging that her body of work has been "intentionally, deliberately and willfully criminal infringed upon by multiple violators," including by state and federal law enforcement agencies. Bolar Initial Comments. Ms. Bolar did not provide specific details regarding these alleged instances of infringement.

<sup>349</sup> Kelly Initial Comments. Ms. Kelly's allegations also are described in the Copyright Alliance's comments. See Copyright Alliance Initial Comments at 21–23.

the book.<sup>350</sup> Ms. Kelly subsequently engaged in a “legal battle to preserve control over [Mr. Kelly’s] intellectual property and [her] rights as the designated custodian of that property,” including filing an infringement suit and seeking an “injunction to block the publication” of the book.<sup>351</sup> The court ultimately dismissed the lawsuit, finding that the infringement claim was not ripe.<sup>352</sup> The court concluded “that no copyright infringement ha[d] yet occurred,” as the defendant was still “early in the process of researching and selecting interviews [for the book, and she] . . . ha[d] not made any final decisions yet on what interviews to include.”<sup>353</sup>

Ms. Kelly also alleged that the University of Kentucky Press “refused [her] attorney’s request regarding yet “another publication misappropriating [Mr. Kelly’s] words.”<sup>354</sup> In addition, she stated that “the University Press of Kansas has similarly embarked upon a publication without any of the necessary permissions granted for the use of Gene’s intellectual property.”<sup>355</sup> Ms. Kelly did not provide further details on either of these instances.<sup>356</sup>

#### 4. Effect on Licensing

In the NOI, the Office inquired into the extent to which sovereign immunity may affect the licensing or sale of copyrighted works to state entities.<sup>357</sup> Specifically, the Office asked (1) whether copyright owners “provide different payment or licensing terms in transactions with state entities than are provided in transactions with other parties”; (2) whether copyright owners have “changed aspects of their sales or licensing practices as a result of state sovereign immunity”; and (3) whether “different states or state entities take different approaches to working with copyrighted material.”<sup>358</sup>

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<sup>350</sup> Kelly Initial Comments; *see also* Copyright Alliance Initial Comments at 22. The Association of University Presses asserted, however, that “copyright to the interviews . . . belongs to other parties, who properly gave permission for their content to be reproduced.” Association of University Presses Reply Comments at 2.

<sup>351</sup> Kelly Initial Comments; *see also* Copyright Alliance Initial Comments at 22.

<sup>352</sup> *Kelly v. Univ. Press of Miss.*, No. CV 16-2960 PA (GJSx), 2016 U.S. Dist. LEXIS 114310 (C.D. Cal. Aug. 16, 2016).

<sup>353</sup> *Kelly v. Univ. Press of Miss.*, No. CV 16-2960 PA (GJSx), 2016 U.S. Dist. LEXIS 114310, at \*11–12 (C.D. Cal. Aug. 16, 2016) (quoting Marshall Decl. in Opp’n to Mot. Prelim. Inj. ¶¶ 7–8).

<sup>354</sup> Kelly Initial Comments; *see also* Copyright Alliance Initial Comments at 22.

<sup>355</sup> Kelly Initial Comments; *see also* Copyright Alliance Initial Comments at 22.

<sup>356</sup> *But see* Association of University Presses Reply Comments at 2 (asserting that “in the University Press of Kansas book, *Gene Kelly: The Making of a Creative Legend* . . . , brief quotations taken from Mr. Kelly’s interviews fall well within the legally recognized definition of fair use”).

<sup>357</sup> NOI at 34,255.

<sup>358</sup> *Id.*

In response, several commenters generally described the negative impact that sovereign immunity has on creators' licensing markets and licensing opportunities,<sup>359</sup> but provided few specific examples. AIPLA suggested that there may be such an effect in the context of educational licensing, noting that because a "large percentage of U.S. educational institutions are public or at least partially state-funded[,] . . . such institutions have substantial market power to drive down licensing fees."<sup>360</sup> AIPLA contended that states often acquire educational materials "through individual employees that utilize discretionary budgets to acquire low-cost copies, which avoids formal school board ratification, statutory public bidding procedures for government contracts and/or procurement policies."<sup>361</sup> "In such cases," it asserted, "state actors that exceed the scope of a license can later disavow the license and claim that the content owner is 'chargeable with notice' of government contracting procedures that were not followed."<sup>362</sup> AIPLA did not, however, identify specific state entities that have engaged in such practices. Other commenters described the ways in which state infringement can result in lost licensing revenue,<sup>363</sup> but did not provide examples of differences in pricing or licensing terms offered to states compared to those offered to private entities.

Conversely, several commenters and roundtable participants indicated that copyright owners do not provide different licensing or payment terms to state entities.<sup>364</sup> For

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<sup>359</sup> See, e.g., Allen Initial Comments at 1 ("All of my intellectual property taken by [states] represents a lost economic opportunity to license my work and contribute to our economy."); NPPA Initial Comments at 12 ("[I]f the competitor is an infringing state actor that claims sovereign immunity from copyright infringement, . . . the licensor's financial and contractual efforts, as well as its reputation, are damaged. In addition, the licensor risks losing future business because potential clients are much less likely to pay for the 'exclusive' right to use images that are being used freely by a competitor, especially if that competitor is an infringing state that is free from liability. . . . [U]nrestricted copyright infringement by state actors effectively destroys the creator's licensing market for any image the state actor appropriates.") (footnote omitted).

<sup>360</sup> AIPLA Initial Comments at 4.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* (citing *El Camino Community College Dist. v. Superior Court*, 173 Cal.App.3d 606, 613 (1985))

<sup>363</sup> See, e.g., Pixsy Reply Comments at 2 (estimating "approximately \$14 million in lost licensing revenue for photographers and artists when postsecondary institutions use their images"); Roundtable Tr. at 72:20–25 (Dec. 11, 2020) (Sedlik, Art Center College of Design, PLUS Coalition) (stating that if a state illegally used one of his photographs and placed it on the cover of a book, he could "never license that photograph for another book cover during the copyright life of the work, because no publisher [would] take it for a book cover if it ha[d] previously been featured on a book cover").

<sup>364</sup> See, e.g., ASERL Initial Comments at 2–3; Copyright Alliance Initial Comments at 13–14; Library Copyright Alliance Initial Comments at 2; University of Michigan Library Initial Comments 1–2; University of Minnesota Initial Comments at 2; Roundtable Tr. at 67:10–13 (Dec. 11, 2020) (Madigan, Copyright Alliance); Roundtable Tr. at 72:09–13 (Dec. 11, 2020) (Sedlik, Art Center College of Design, PLUS Coalition); Roundtable Tr. at 120:22–121:03 (Dec. 11, 2020) (Molnar, Ohio Attorney General's Office); Roundtable Tr. at 121:16–18 (Dec. 11, 2020) (MacDonald, University of California, Office of General Counsel). *But see* News Media Alliance Initial Comments at 4 ("[A]ll news publishers offer different terms and licenses to their clients, often depending on the type of client and license sought . . .").

example, the University of Minnesota stated, “[w]e are not familiar with any variations in copyright-related terms around licensing or sales of copyrighted works to the University of Minnesota that are due specifically to our status as an arm of the state government.”<sup>365</sup> A representative of the PLUS Coalition, an initiative to facilitate licensing of image rights, similarly noted that in his experience, “the license terms employed by visual artists in contracting with the states are no different than the license terms they use when contracting with other parties.”<sup>366</sup> More generally, several representatives of state universities emphasized the substantial amounts their institutions spend on licensing fees each year, which they believe refutes the suggestion that states are exercising undue bargaining power in negotiations for copyrighted content.<sup>367</sup>

#### IV. STATE POLICIES TO PREVENT INFRINGEMENT

As part of this study, the Office invited comments on policies and practices that state entities have developed to prevent infringement by their employees.<sup>368</sup> In addition, the Office devoted a session of its roundtable discussion to this topic. The record developed for this study indicates that many state universities and libraries have developed policies regarding the proper use of copyrighted materials. As noted below, however, very little evidence was submitted regarding the policies of other types of state entities.<sup>369</sup> As a result, it is unclear to what extent they have policies similar to those at universities, or to what extent they may provide education to employees about the appropriate use of copyrighted material.<sup>370</sup>

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<sup>365</sup> University of Minnesota Initial Comments at 2.

<sup>366</sup> Roundtable Tr. at 72:09–13 (Dec. 11, 2020) (Sedlik, Art Center College of Design, PLUS Coalition).

<sup>367</sup> See *id.* at 70:13–15 (Benson, University of Illinois at Urbana-Champaign) (“[O]ur library is one of the largest in the world. We spend \$16 million in licensing fees.”); *id.* at 121:08–16 (MacDonald, University of California, Office of General Counsel) (“We pay approximately \$100 million every year in library content. . . . Some campuses pay well into the tens of millions of dollars a year. This is just library content. This is separate from a lot of other content that we license for.”); *id.* at 122:09–13 (Levine, University of Michigan Library) (“[C]urrently, in our library, we spent in the range of \$29 million on collections, meaning things that we license and purchase.”); *id.* at 247:20–22 (Vockell, University of Texas) (“[O]ur libraries [are] spending \$60 million” on licenses.).

<sup>368</sup> NOI at 34,255.

<sup>369</sup> Commenters provided a handful of examples of such policies by other agencies. The News Media Alliance noted that California’s Attorney General has issued policy guidelines admonishing state agencies to respect copyrights. News Media Alliance Initial Comments at 5 & n.16. During the roundtables, Maria Sapiandante, an intellectual property attorney who represents state agencies, noted that the state of California mandates that its employees undergo training about copyright. Roundtable Tr. at 33:10–19 (Dec. 11, 2020) (Sapiandante, citing and discussing Cal. Gov’t Code 13988).

<sup>370</sup> See Roundtable Tr. at 173:08–174:11 (Dec. 11, 202) (Klaus). One university library representative testified that librarians help provide copyright training to non-university state agencies and institutions, but did not

## *A. Legal and Organizational Rules*

### **1. The Higher Education Opportunity Act**

Commenters representing state universities pointed to the Higher Education Opportunity Act (“HEOA”) as a legal basis to ensure their compliance with copyright law.<sup>371</sup> The HEOA is a federal statute that requires institutions receiving federal funding to take certain measures to discourage copyright infringement. The HEOA has two provisions that are particularly relevant to this topic. Section 488(a)(i)(E) requires institutions to “explicitly inform[] students that unauthorized distribution of copyrighted material . . . may subject the students to civil and criminal penalties”<sup>372</sup> and to describe “the institution’s policies with respect to unauthorized peer-to-peer file sharing” and what discipline students may face.<sup>373</sup> Section 493 requires an institution to “develop[] plans to effectively combat the unauthorized distribution of copyrighted material” and “to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property, as determined by the institution in consultation with the chief technology officer or other designated officer of the institution.”<sup>374</sup>

The first of those provisions is aimed primarily at students, not university employees. Although the second provision applies more generally to the institution and its policies, it focuses on distribution and file sharing, rather than copying and use more generally. Moreover, it is unclear from the record the extent to which university policies under HEOA focus on actions by employees, as opposed to students. Despite these limitations, the HEOA’s requirement that the institution have a copyright policy that is communicated to its constituencies, may reduce the overall incidence of infringement, including unauthorized copying.

### **2. Copyright Policies Developed by State Institutions**

Several of the comments submitted by state universities highlighted institutional policies that have been developed to prevent or respond to copyright infringement. The University of Minnesota noted the existence of several written policies relating to the use

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provide details about the nature or extent of such training. *See* Roundtable Tr. at 174:13–176:04 (Dec. 11, 2020) (Samberg, University of California, Berkeley).

<sup>371</sup> APLU & AAU Reply Comments at 13; Roundtable Tr. at 96:12–16 (Dec. 11, 2020) (MacDonald, University of California, Office of the General Counsel).

<sup>372</sup> 20 U.S.C. § 1092(a)(1)(P)(i).

<sup>373</sup> *Id.* § 1092(a)(1)(P)(ii)–(iii).

<sup>374</sup> *Id.* § 1094(a)(29)(A), (B).

of copyrighted materials.<sup>375</sup> It also has a web page that instructs copyright owners on the University's procedures for reporting infringement, including the emails of university personnel and the information needed to respond to the report.<sup>376</sup> In the same vein, the University of Illinois pointed to its policies to combat infringement,<sup>377</sup> and comments from APLU & AAU provided links to other university policies relating to copyright infringement.<sup>378</sup> Although the extent of the information provided varies, these websites generally provide basic information about copyright law and a series of frequently asked questions, many of which deal with file sharing and uses of copyrighted materials in teaching (both online and in-class).<sup>379</sup> Most contain a description of fair use.<sup>380</sup> They also direct students and faculty with specific questions to an appropriate office of the university.<sup>381</sup>

Library representatives highlighted similar policies. Yvonne Dooley, a business librarian and copyright specialist at the University of North Texas, stated that the university has a

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<sup>375</sup> University of Minnesota Initial Comments at 4 (discussing, and providing URLs to, the Board of Regents' policy on copyright, the University's, Acceptable Use of Information Technology Resources policy, the University's policy on research misconduct policy, and the University's policy on Teaching and Learning: Student Responsibilities).

<sup>376</sup> *Id.* at 4–6.

<sup>377</sup> University of Illinois at Urbana-Champaign Initial Comments at 1 (describing outreach efforts and providing a URL for its copyright policy). See University of Massachusetts Amherst Libraries Initial Comments at 2 (stating that "copyright infringement is viewed as a related ethical issue [to plagiarism], and significant educational outreach is done to prevent such issues before they occur").

<sup>378</sup> APLU & AAU Initial Comments at 5 n.13 (listing several university policies and providing the URLs where they may be accessed). ASERL also noted that state librarians can (and do) take advantage of library-focused copyright programming, such as the "CopyrightX: Libraries" online course and specialized copyright events targeted at librarians. ASERL Initial Comments at 3–4 & n.11–16 (providing examples of copyright-focused programming and online classes that "have been joined by thousands of learners drawn from the library community").

<sup>379</sup> *E.g.*, University of Kentucky, *Copyright Resource Center*, <https://www.uky.edu/copyright> (last visited Aug. 10, 2021); Purdue University, *University Copyright Office*, <https://www.lib.purdue.edu/uco> (last visited Aug. 10, 2021); The Ohio State University, *Copyright Services*, <https://library.osu.edu/copyright> (last visited Aug. 10, 2021); Michigan State University, *Office of Copyright*, <https://lib.msu.edu/copyright> (last visited Aug. 10, 2021).

<sup>380</sup> *E.g.*, Purdue University, *University Copyright Office*, <https://www.lib.purdue.edu/uco> (last visited Aug. 10, 2021); The Ohio State University, *Copyright Services*, <https://library.osu.edu/copyright> (last visited Aug. 10, 2021); University of California-Santa Cruz, *Fair Use and Copyright*, <https://guides.library.ucsc.edu/fair-use> (last visited Aug. 10, 2021); University of Michigan, *Copyright Services*, <https://www.lib.umich.edu/research-and-scholarship/copyright-services> (last visited Aug. 10, 2021).

<sup>381</sup> *E.g.*, University of Kentucky, *Copyright Resource Center*, <https://www.uky.edu/copyright/contact> (last visited Aug. 10, 2021); Michigan State University, *Office of Copyright*, <https://lib.msu.edu/copyright> (last visited Aug. 10, 2021); Purdue University, *University Copyright Office*, <https://www.lib.purdue.edu/uco> (last visited Aug. 10, 2021); The University of Texas System, *UTS 107 Use of Copyrighted Materials*; <https://www.utsystem.edu/sites/policy-library/policies/uts-107-use-of-copyrighted-materials> (last visited Aug. 10, 2021).

“copyright compliance policy” that gives examples of uses that comply with the law, imparts information on legal penalties, and describes university discipline policies with respect to copyright infringement.<sup>382</sup> Rachael Samberg, a librarian at the University of California, Berkeley, spoke about the copyright policies created by the library, including specific policies governing the digitization of the library’s collection<sup>383</sup> According to Ms. Samberg, within the University of California system, there are multiple layers of policies relating to copyright—some are system-wide, some campus-wide, and some operate at a departmental level.<sup>384</sup>

### *B. Educational Efforts*

Commenters also noted that state institutions invest substantial amounts of time and effort to educate faculty, students, and other employees about copyright infringement issues.<sup>385</sup> As examples, commenters pointed to disciplinary codes and information provided over email to inform students and others about university policies concerning copyright;<sup>386</sup> online resources that educate the university community about copyright infringement and best practices;<sup>387</sup> and collaborations with campus partners to provide copyright instruction.<sup>388</sup> In addition, several participants at the roundtable spoke about outreach efforts to educate university components and other institutions and agencies on copyright matters. Harold Evans, Associate Vice President, Legal and Research at the University of Arkansas System, stated that he delivers a “Copyright 101” presentation at the various campuses, in order “to advise faculty and staff on what their rights and responsibilities are under the Copyright Act.”<sup>389</sup> Raven Lanier, of the University of Michigan, described her efforts with a variety of institutional constituencies, including those developing course materials, “to educate and consult on matters of copyright.”<sup>390</sup> Douglas Shontz, Chief Intellectual Property Counsel for the University of Illinois, stated that its copyright librarians has had numerous “one-on-one consultations” with students

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<sup>382</sup> Roundtable Tr. at 138:03–13 (Dec. 11, 2020) (Dooley, University of North Texas).

<sup>383</sup> *Id.* at 148:05–149:03 (Samberg, University of California, Berkeley). Ms. Samberg also adverted to policies in other areas, such as course materials and copying library materials. *Id.* at 152:17–20 (Samberg, University of California, Berkeley). Brandon Butler stated that the University of Virginia library also has a removal policy when notified that digitized material may be infringing. *Id.* at 150:01–06 (Butler, ASERL, Software Preservation Network).

<sup>384</sup> *Id.* at 151:05–22 (Samberg, University of California, Berkeley).

<sup>385</sup> APLU & AAU Initial Comments at 5–6.

<sup>386</sup> University of Illinois at Urbana-Champaign Initial Comments at 1.

<sup>387</sup> ASERL Initial Comments at 3.

<sup>388</sup> University of Illinois at Urbana-Champaign Initial Comments at 1.

<sup>389</sup> Roundtable Tr. at 139:09–21 (Dec. 11, 2020) (Evans, University of Arkansas).

<sup>390</sup> *Id.* at 142:22–143:16 (Lanier, University of Michigan Library).

and faculty concerning copyright compliance.<sup>391</sup> Brandon Butler, a representative of ASERL, noted that the ASERL has programs to inform their members about best practices in dealing with copyrighted material, and that it conducts webinars to assist institutions with copyright compliance.<sup>392</sup>

Commenters additionally pointed out that many institutions have full-time staff dedicated to copyright policy and education. The University of Michigan Library noted that it established a copyright office in the mid-2000s to provide “copyright information and education to the U-M community through research guides, workshops, and individual consultations.”<sup>393</sup> The University of Massachusetts Amherst Libraries hired a copyright specialist in 2012 to help educate the university community about copyright law.<sup>394</sup> In written comments, the specialist stated that she has spent “hundreds of hours of consultations and trainings on my campus,” as well as conducting training sessions on other University of Massachusetts campuses.<sup>395</sup> She also indicated that the University has attorneys and others who can provide personal consultations for students and faculty regarding claims of copyright infringement.<sup>396</sup>

### *C. Cultural Norms and Expectations*

Finally, state representatives argued that more informal cultural and reputational considerations further reduce the likelihood of widespread intentional infringement by state educational institutions. The University of Massachusetts Libraries noted that universities treat plagiarism, for example, “as a serious ethical matter warranting disciplinary action.”<sup>397</sup> Other commenters asserted that universities have an interest, as

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<sup>391</sup> *Id.* at 146:12–17 (Shontz, University of Illinois). In addition, the University of Illinois Press stated that it provides authors who submit manuscripts to it with detailed instructions to prevent copyright infringement. University of Illinois Library and the University of Illinois Press Reply Comments at 2 (providing the URL containing these instructions); *see also* Association of University Presses Reply Comments at 1–2 (noting the resources invested by university presses relating to copyright and referring to the organization’s website, which contains guidelines for authors relating to copyright infringement).

<sup>392</sup> Roundtable Tr. at 135:08–36:09 (Dec. 11, 2020) (Butler, ASERL, Software Preservation Network).

<sup>393</sup> University of Massachusetts Amherst Libraries Initial Comments at 2. This comment also noted that other “state colleges and universities employ copyright specialists who provide similar services to their communities and the public at large.” *Id.*

<sup>394</sup> University of Massachusetts Amherst Libraries Initial Comments at 1. The specialist “was hired, not in response to complaints from rightsholders about infringement, but out of the proactive desire of the University to assist faculty and staff in understanding their rights and responsibilities under copyright.” *Id.*

<sup>395</sup> *Id.* at 3.

<sup>396</sup> *Id.* at 2–3. In the last eight years, the University has received “virtually no complaints of infringement.” *Id.* at 3.

<sup>397</sup> University of Massachusetts Amherst Libraries Initial Comments at 2; *see also* University of Minnesota Initial Comments at 1 (“The general culture in state governments and educational and research institutions is one of compliance with relevant legal and ethical considerations as a matter of course.”).

creators of copyrighted material, to respect and support copyrights.<sup>398</sup> Sara Benson, Copyright Librarian at the University of Illinois at Urbana-Champaign, stated that “we, at the universities, have a lot of creators[.] . . . [W]e create scholarship, we create books.”<sup>399</sup> William Thro, of the University of Kentucky, similarly noted that “universities are creators of copyright and various other intellectual property . . . . We want our employees to do that, and we want to take advantage of that, so we’re not going to do anything intentionally to undermine that from happening.”<sup>400</sup> Others observed that state universities and administrators do not want to foster a reputation for being infringers,<sup>401</sup> and that state legislators would not wish the universities to be so perceived.<sup>402</sup> As Yunxiao Xu of the University of Michigan Library stated, “[w]e can’t just go about infringing copyrights or we wouldn’t even get any funds from our state legislature anymore.”<sup>403</sup>

## V. Existing Remedies

The Supreme Court held in *Allen* that a state does not violate the Due Process Clause of the Fourteenth Amendment “unless it fails to offer an adequate remedy” for the relevant unconstitutional conduct.<sup>404</sup> The Court held that the CRCA’s legislative record was insufficient to establish such a failure, as it reflected little consideration of “the availability of state-law remedies for copyright infringement.”<sup>405</sup> The first part of this section describes the Office’s findings regarding various state-law causes of action that have been identified as potential alternative remedies for copyright owners against state entities. In addition, although the availability of federal remedies does not bear directly on the abrogation issue, the second part of this section discusses copyright owners’ ability to obtain injunctive relief against state officials in federal court, as well as other

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<sup>398</sup> University of Massachusetts Amherst Libraries Initial Comments at 7 (“[N]ot only do educators and librarians *not* infringe ‘intentionally or recklessly’, but that our community is among the most respectful and supportive of rightsholders’ interests and prerogatives.”) (emphasis in original); *id.* at 6 (“The one consistent thread that runs through all my consultations is concern on the parts of librarians, academic authors, and administrators, for ‘doing the right thing.’”).

<sup>399</sup> Roundtable Tr. at 21:06–08 (Dec. 11, 2020) (Benson, University of Illinois at Urbana-Champaign).

<sup>400</sup> *Id.* at 27:17–21 (Thro, University of Kentucky).

<sup>401</sup> APLU & AAU Initial Comments at 6; Roundtable Tr. at 163:19–164:05 (Dec. 11, 2020) (Lanier, University of Michigan Library); Roundtable Tr. at 161:01–03 (Dec. 11, 2020) (Samberg, University of California, Berkeley) (“[T]he reputation of the university is at stake whenever the university is taking action with respect to its policies and decision-making on copyright”); *see* Roundtable Tr. at 158:17–19 (Dec. 11, 2020) (Butler, ASERL, Software Preservation Network) (“[A]cademics generally are afraid to engage in anything they think might come within a mile of something unlawful”).

<sup>402</sup> Roundtable Tr. at 168:09–11 (Dec. 11, 2020) (Evans, University of Arkansas) (“[P]ublic universities have to be very concerned about taking actions that will upset members of the state legislature”).

<sup>403</sup> *Id.* at 216:09–11 (Xu, University of Michigan Library).

<sup>404</sup> *Allen*, 140 S. Ct. at 1004.

<sup>405</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1006 (2020).

potential alternative federal causes of action, to provide Congress with a fuller picture of the overall state of the law in this area.

## *A. Potential Remedies in State Court*

### **1. Waiver to Suit in State Court**

Before turning to specific causes of action, the Office notes at the outset that the availability of any state-law claim against a state is dependent upon the state having waived its sovereign immunity to suit in its own courts. As part of this study, the Office surveyed the constitutional and statutory provisions of every state and the District of Columbia pertaining to waivers of immunity. A chart summarizing the Office’s findings is provided in Appendix E. Most states have waived their sovereign immunity with respect to at least some state-law claims. Twenty-eight states constitutionally authorize their state legislatures to specify the procedures and requirements for private suits against states and state entities. An additional nineteen states and the District of Columbia do not have express constitutional provisions addressing the issue but have enacted statutes permitting such suits. By contrast, three state constitutions direct that the state shall never be made a defendant in any court of law or equity.<sup>406</sup>

Among the states that have waived immunity, the procedural and substantive requirements for bringing such actions vary. Thirty-seven states waive immunity for tort actions against the state, and fifteen states permit contract claims. Some states require pre-authorization by a designated official prior to filing a claim or review of the findings of the state official by the state legislature,<sup>407</sup> while others limit jurisdiction to particular causes of action to be brought in specially designated courts or claims commissions.<sup>408</sup>

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<sup>406</sup> See ALA. CONST. art. I, § 14; ARK. CONST. art. 5V, § 20; W. VA. CONST. art. VI, § 35.

<sup>407</sup> See e.g., CONN. GEN. STAT. § 4-160(a) (effective June 28, 2021) (“Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable.”); S.D. CODIFIED LAWS § 21-32-7 (2018) (“After the conclusion of . . . [the] hearing, the commissioner shall prepare his findings, fully itemized, in respect to the amount of the claim or damages” and “[s]uch findings shall be filed in the office of the clerk of courts of the county in which the petition was filed and a duplicate thereof filed in the Office of the Governor, who shall submit the same to the next session of the Legislature for consideration, compromise, settlement, or rejection by appropriate action.”); KAN. STAT. ANN. § 46-907 *et seq.* (providing for consideration of claims by legislature’s joint committee on special claims against the state).

<sup>408</sup> See e.g., ARK. CODE ANN. §§ 19-10-201–223, 21-5-701–708, 6-82-501–507 (2021) (establishing a claims commission for the hearing and adjudication of claims against the state of Arkansas, its agencies, and its institutions); 705 ILL. COMP. STAT. ANN. 505/8 (effective Nov. 27, 2018) (establishing exclusive jurisdiction in Court of Claims for state-law, contract, and tort claims against state); N.C. GEN. STAT. § 143-291 (“The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments,

## 2. Effect of Federal Preemption

Even where a state has waived its immunity with respect to particular causes of action brought in state court, the doctrine of federal preemption remains a hurdle. Section 301 of the Copyright Act preempts state law claims regarding “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103” of the Act.<sup>409</sup> Under this provision, state courts are precluded from adjudicating claims if (1) the work at issue falls within the “subject matter of copyright,” and (2) the claimed rights are “equivalent to” the exclusive rights specified in section 106.<sup>410</sup>

Courts generally hold that a right is “equivalent” to a section 106 right if no extra element is required to prove a violation of the right instead of or in addition to the elements required to prove copyright infringement.<sup>411</sup> The Second Circuit has clarified that “[w]hile we have indeed begun by inquiring whether ‘an extra element is required instead of or in addition to’ what is required for a copyright infringement claim, not all ‘extra elements’ are sufficient to remove the claim from the ‘general scope’ of copyright.”<sup>412</sup> The “critical inquiry” is whether such additional elements “change[] the nature of the action so that it is qualitatively different from a copyright infringement claim.”<sup>413</sup>

Courts have held that section 301 preempts a variety of tort claims, including some that appear to require an “extra element,” when the underlying nature of the claim sought to

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institutions and agencies of the State.”); S.D. CODIFIED LAWS § 21-32-8, 21-32-3-7 (2018) (providing for advisory proceedings before commissioner).

<sup>409</sup> 17 U.S.C. § 301(a).

<sup>410</sup> *Id.*; see *Crow v. Wainwright*, 720 F.2d 1224, 1225–26 (11th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984).

<sup>411</sup> See *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1019 (9th Cir. 2017) (“To survive preemption, the state cause of action must protect rights which are qualitatively different from the copyright rights. The state claim must have an extra element which changes the nature of the action”) (quoting *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006)); *Forest Park Pictures v. Universal TV Network, Inc.*, 683 F.3d 424, 430 (2d Cir. 2012) (“[I]f an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, there is no preemption”) (quoting *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir.1992)) (internal quotation marks omitted); *Ritchie v. Williams*, 395 F.3d 283, 287 n.3 (6th Cir. 2005) (“If there is no ‘extra element,’ or the ‘extra elements’ are merely ‘illusory,’ then the claim is equivalent to a copyright action,” and it is preempted) (citing *Wrench v. Taco Bell Corp.*, 256 F.3d 446, 454 (6th Cir. 2001)).

<sup>412</sup> *Jackson v. Roberts (In re Jackson)*, 972 F.3d 25, 43–44 (2d Cir. 2020) (quoting *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992)).

<sup>413</sup> *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (quoting *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)).

vindicate an exclusive section 106 right, including tortious interference with a contract or a business relationship,<sup>414</sup> misappropriation,<sup>415</sup> conversion of intangible property,<sup>416</sup> unjust enrichment,<sup>417</sup> and unfair competition.<sup>418</sup> In other cases, however, courts have held that claims based on conversion of personal property,<sup>419</sup> unfair trade practices,<sup>420</sup>

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<sup>414</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983) (holding that plaintiff's tortious interference claim based on defendant's publication of excerpts from plaintiff's manuscript was preempted because it sought to recover the right to authorize the creation of derivative works) *rev'd on other grounds*, 471 U.S. 539 (1985).

<sup>415</sup> *NBA v. Motorola, Inc.*, 105 F.3d 841, 851–54 (2d Cir. 1997) (holding that plaintiff's commercial misappropriation claim based on defendant's delivery of real-time game scores was preempted because plaintiff's allegations were "virtually synonymous" with "wrongful copying" and "are in no meaningful fashion distinguishable from infringement of a copyright"); *see Mktg. Info. Masters, Inc. v. Bd. of Trs. of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1098 (S.D. Cal. 2008) (holding that plaintiff's misappropriation of trade secret claim was preempted because it lacked the 'extra element' of 'disclosure' of a secret in contravention of a specific duty to keep that information confidential) (quoting *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1195 (C.D. Cal.2001)) (internal quotations omitted).

<sup>416</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983) (holding that plaintiff's conversion claim based on defendant's publication of excerpts from plaintiff's manuscript was preempted because the right plaintiff sought to protect was "control over reproduction and derivative use of copyrighted material."); *see R.D. Wolf, Inc. v. Brancard*, No. CV010507650S, 2004 Conn. Super. LEXIS 720 (Conn. Super. Ct. Mar. 8, 2004) (holding that plaintiff's conversion claim was preempted because plaintiff did not seek relief for the actual physical deprivation of the architectural plans (the property), but for the subsequent actions taken with the plans by defendant); *Richdale Dev. Co. v. McNeil Co.*, 508 N.W.2d 853 (Neb. 1993) (holding that plaintiff's conversion claim was preempted because the essence of the claim was plaintiff's damage resulting from reproduction and distribution of architectural plans and not physical deprivation of the plans).

<sup>417</sup> *Briarpatch Ltd., L.P. v. Phx. Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) (holding that plaintiff's unjust enrichment claim based on defendants turning plaintiff's book into a motion picture was preempted because the "specific right they are trying to enforce is the right of adaptation -- *i.e.*, the right to prepare or authorize preparation of a derivative work based on a novel or screenplay").

<sup>418</sup> *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998) (holding that plaintiff's unfair competition claim based on defendant's "publishing and placing on the market" plaintiff's copyrighted images was preempted); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986) (holding that plaintiff's unfair competition claim based on defendants' use of plaintiff's book in a motion picture was preempted "to the extent it seeks protection against copying" of plaintiff's book).

<sup>419</sup> *Nika Corp. v. City of Kan. City*, 582 F. Supp. 343 (W.D. Mo. 1983) (holding that plaintiff's conversion of personal property claim based on city's conversion of certain documents and materials which plaintiff claimed were its exclusive property after termination of contract was not preempted).

<sup>420</sup> *Balboa Ins. Co. v. Trans Glob. Equities*, 1351, 267 Cal. Rptr. 787, 802 (Cal. Ct. App. 4th Dist. 1990) (holding that "copyright does not preempt a cause of action based on breach of confidence"); *see Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992) (noting that unfair competition claims based upon breaches of confidential relationships" are not preempted by federal copyright law).

trade secret misappropriation,<sup>421</sup> and civil theft or fraud<sup>422</sup> include a “sufficiently significant” extra element to avoid preemption.

If a state law claim based on copyright infringement by a state entity is not preempted, the copyright owner nevertheless will have more limited remedies than are available under federal copyright law. The Copyright Act allows a copyright owner who timely registers its copyright to collect statutory damages ranging from \$750 to \$150,000 per work infringed and recover attorneys’ fees.<sup>423</sup> The Act also allows a copyright owner seeking actual damages to present proof only of the infringer’s gross revenue, after which the infringer has the burden to “prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.”<sup>424</sup> A copyright owner bringing a state-law claim is not eligible for statutory damages and generally is not eligible for attorneys’ fees; it must prove its actual damages under the relevant state law. Some states limit the sum of monetary awards available against a state, so that the actual harm suffered by the plaintiff may exceed the award permitted under the law.<sup>425</sup>

Commenters representing copyright owners suggested that these limits on remedies makes litigation against states a more daunting and expensive prospect. The News Media Alliance pointed to the CalPERS infringement case involving Dow Jones as an example. Dow Jones estimated that its actual damages were “approximately \$22 million and its statutory damages award would have been about \$7.3 million” at a \$750 statutory rate.<sup>426</sup> But because CalPERS asserted sovereign immunity, Dow Jones

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<sup>421</sup> *Comput. Assocs. Int’l., Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992) (holding that “[t]he defendant’s breach of duty is the gravamen of [certain] trade secret claims, and supplies the ‘extra element’ that qualitatively distinguishes such trade secret causes of action from claims for copyright infringement that are based solely upon copying”).

<sup>422</sup> *Korman v. Iglesias*, 736 F. Supp. 261 (S.D. Fla. 1990) (holding that plaintiff’s claim for civil theft under Florida Statutes §§ 772.11 and 812.014 was not preempted by the Copyright Act because the civil theft cause of action did not contain the same elements as a copyright cause of action; defendant’s scienter, knowingly making false representations, did not correspond to the scienter set forth in 17 U.S.C.S. § 506).

<sup>423</sup> 17 U.S.C. §§ 412, 504(c)(1)–(2). Statutory damages and attorneys’ fees are available only for infringement that begins on or after the effective date of registration of the work(s) at issue or within three months of first publication. 17 U.S.C. § 412.

<sup>424</sup> 17 U.S.C. § 504(b).

<sup>425</sup> See e.g., MISS. CODE ANN. § 11-46-15 (2018) (“In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed” “the sum of Five Hundred Thousand Dollars” “for all claims arising out of a single occurrence”); MINN. STAT. § 3.736 subd. 4 & 4a (2020) (establishing limits on monetary liability of the state).

<sup>426</sup> Roundtable Tr.at 47:09–13 (Dec. 11, 2020) (Linder, Dow Jones & Company); Brief for Dow Jones & Company, Inc. as Amicus Curiae 8–9 n.7, *Allen v. Cooper*, 140 S. Ct. 994 (2020).

ultimately accepted a settlement offer of \$3.4 million.<sup>427</sup> Copyright owners also expressed concern that “the damages for a claim of breach of contract are both lower and less certain than those available under the Copyright Act,” so that “the remedies available in such cases do not necessarily justify the costs.”<sup>428</sup> In contrast, state representatives expressed concern that allowing suits seeking statutory damages could have a chilling effect on legitimate activities of state research libraries<sup>429</sup> and lead to increased litigation, much of which they believe may be frivolous.<sup>430</sup>

### 3. Contract Claims

Claims involving a breach of contract are less likely to be preempted by section 301 because the claim requires the existence of a contract, which is not an element of a claim for copyright infringement.<sup>431</sup> Some representatives of state university libraries argued that the increased digitization of copyrighted works makes the presence of a contract more likely.<sup>432</sup> The Library Copyright Alliance explained, “[a]n increasing percentage of library acquisition budgets are devoted to electronic licenses of content rather than purchases of monographs and print issues of serials.”<sup>433</sup> If a license is involved and the library violates the terms of that license, “the copyright owner can sue the library under

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<sup>427</sup> Brief for Amicus Curiae Dow Jones & Company, Inc. in Support of Petitioners at 8–9 n.7, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877); Roundtable Tr. at 47:90–13, 47:24–48:01 (Dec. 11, 2020) (Linder, Dow Jones & Company) (discussing the approximate amount of damages Dow Jones & Company could potentially have received as a result of the infringement).

<sup>428</sup> News Media Alliance Initial Comments at 7.

<sup>429</sup> Library Copyright Alliance Initial Comments at 5 (“The elimination of sovereign immunity with respect to copyright claims would have a negative impact on the digital preservation activities of state-run collecting institutions.”).

<sup>430</sup> University of Michigan Library Initial Comments at 2 (“Without sovereign immunity, states will face a greater number of complaints from people who are primarily looking for a quick windfall.”); ASERL Initial Comments at 2 (“[a]brogation would be a boon to bad actors interested in harassing and extorting state institutions”); Roundtable Tr. at 168:24–169:13 (Dec. 11, 2020) (Samberg, University of California, Berkeley).

<sup>431</sup> See e.g., *Ryan v. Editions Ltd.*, 786 F.3d 754, 761 (9th Cir. 2015) (noting that the court has “long recognized that a contractually-based claim generally possesses the extra element necessary to remove it from the ambit of the Copyright Act’s express preemption provision”); *Lee v. Mt. Ivy Press, L.P.*, 827 N.E.2d 727 (Mass. App. Ct. 2005) (holding that plaintiff’s state law claims against publisher for breach of contract, conversion, fraud, and a violation of Massachusetts General Laws chapter 93A were not preempted by section 301 because each claim had an extra element that rendered it qualitatively different from a federal copyright claim); *Durgom v. Janowiak*, 87 Cal. Rptr. 2d 619 (Cal. Ct. App. 4th Dist. 1999) (holding that defendant’s nonpayment of royalties was contract issue not preempted by federal copyright law).

<sup>432</sup> Library Copyright Alliance Initial Comments at 4–5; ASERL Initial Comments at 2; see Roundtable Tr. at 229:15–22 (Dec. 11, 2020) (Band, Library Copyright Alliance) (arguing that “preemption is not a problem in the vast majority of cases because . . . the content is licensed by the state entity . . . so there’s always a contract action”).

<sup>433</sup> Library Copyright Alliance Initial Comments at 4.

state law for breach of contract.<sup>434</sup> Thus, it argued that breach of contract claims are a viable option for an increasing number of copyright owners.

Copyright owners disagreed. First, they disputed that infringements by states typically occur in the context of a licensing agreement.<sup>435</sup> A representative of the PLUS Coalition, a licensing initiative for image rights, contended that “the vast majority of infringements do not involve a contractual relationship between the rights holder and the state entity.”<sup>436</sup> Instead, “the state entity may obtain copies from sources such as Google [I]mages, social media, websites,” and exploit those copies “without the creators’ knowledge.”<sup>437</sup>

Second, copyright owners noted that, despite the existence of an “extra element,” some courts “will reject contract claims that are at their core about copyright violation[s].”<sup>438</sup> Indeed, certain courts have held that “pre-emption should continue to strike down claims that, although denominated ‘contract’ nonetheless complain directly about the reproduction of expressive materials.”<sup>439</sup> These courts adopt a fact-specific approach that may bar a copyright owner’s contract claim if “the right in question is infringed by the mere act of reproduction, performance, distribution or display.”<sup>440</sup>

#### 4. Takings Claims

A copyright owner whose work has been infringed by a state actor could also potentially bring a suit alleging that the infringement constitutes a taking of property without just compensation, in violation of the Fifth Amendment of the U.S. Constitution or the state constitution.<sup>441</sup> In *Florida Prepaid*, the Supreme Court cited a takings claim as a possible remedy for patent infringement by the state.<sup>442</sup> Likewise, several academic

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<sup>434</sup> *Id.*

<sup>435</sup> Roundtable Tr. at 267:07–10 (Dec. 11, 2020) (Sedlik, Art Center College of Design, PLUS Coalition); *id.* at 236:24–237:05 (Bynum, Author) (“[I]n my case . . . I never had a contract with Texas A&M. They were just people that came in the middle of the night and took my work and posted it out to 350,000 people.”).

<sup>436</sup> Roundtable Tr. at 267:07–10 (Dec. 11, 2020) (Sedlik, Art Center College of Design, PLUS Coalition).

<sup>437</sup> *Id.* at 267:10–14 (Sedlik, Art Center College of Design, PLUS Coalition).

<sup>438</sup> Roundtable Tr. at 233:07–11 (Dec. 11, 2020) (Calzada, National Press Photographers Association).

<sup>439</sup> *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061 (C.D. Cal. 2000) (internal quotation marks omitted) (quoting 1 NIMMER ON COPYRIGHT § 1.01[B][1][a] ] at 1–19 and 1–22).

<sup>440</sup> *Id.* (quoting *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 431 (8th Cir. 1993)) (internal quotations omitted) (finding that because the alleged implied-in-fact contract between plaintiff and defendants did not regulate the parties’ conduct beyond mere use of plaintiff’s ideas, the rights protected by that contract were equivalent to the exclusive rights protected by the Copyright Act of 1976, and thus preempted).

<sup>441</sup> U.S. CONST. AMEND. V (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>442</sup> *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 644 n.9 (1999) (“It is worth mentioning that the State of Florida provides remedies to patent owners for alleged infringement on the part

commentators have posited that a takings claim would be available in at least some circumstances of state copyright infringement.<sup>443</sup>

This theory, however, has rarely been tested, and the viability of such a claim remains uncertain. Copyright owners who have sought to bring takings claims have encountered difficulty establishing their basic elements. For example, *University of Houston System v. Jim Olive Photography* centers around a photograph depicting the Houston skyline taken by Jim Olive, a professional photographer.<sup>444</sup> An employee of the University of Houston's College of Business obtained a copy of the photograph from Olive's website, where it was being offered for license, and uploaded it onto the college's website without authorization or payment.<sup>445</sup> Olive asserted takings claims under both the federal and Texas state constitutions against the university.

The Texas Supreme Court held that the allegations of infringement of Olive's copyright did not state a claim for a *per se* taking under the federal or state constitution.<sup>446</sup> A *per se* taking involves "an 'actual taking of possession and control' by the government."<sup>447</sup> Copyright infringement does not qualify as such, the court held, because it does not destroy the copyright owner's bundle of legal rights with respect to the copyrighted work.<sup>448</sup> The court further held that copyright infringement does not amount to "physical occupation" of property because copyright is 'nonrivalrous,' meaning that 'another person can use it without simultaneously depriving anyone else of its use.'<sup>449</sup> The court thus affirmed the dismissal of Olive's claims.

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of the State. Aggrieved parties may pursue . . . a judicial remedy through a takings or conversion claim.") (citing *Jacobs Wind Electric Co. v. Florida Dept. of Transp.*, 626 So.2d 1333 (Fla. 1993)).

<sup>443</sup> See, e.g., Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1163 (2000) (inverse condemnation claim available for state infringement); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 562–63 (1998) (takings claim is a "plausible avenue for relief" if the government use destroys virtually all of the property's value"); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685, 693–726 (1989) (arguing that state use of copyright should be governed by Fifth Amendment takings jurisprudence rather than conventional remedies available against private party infringers).

<sup>444</sup> *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2019).

<sup>445</sup> *Id.* at 363.

<sup>446</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 774–77 (Tex. 2021). The court assumed without deciding that copyright qualified as property for the purpose of takings law. *Id.* at 770.

<sup>447</sup> *Id.* at 772–73 (quoting *Horne v. Dep't of Agric.*, 576 U.S. 351, 362 (2015)).

<sup>448</sup> *Id.* at 774–77.

<sup>449</sup> *Id.* at 776 (quoting Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 Fla. L. Rev. 529, 562–63 (1998)).

Likewise, in *Smith v. Lutz*, a Texas appeals court upheld dismissal of a programmer’s takings claim against the University of Texas for infringing copyrighted software.<sup>450</sup> The court held that a takings claim was unavailable due to a lack of evidence that the University intended to act under its eminent domain powers.<sup>451</sup>

## ***B. Available Remedies against State Entities in Federal Court***

### **1. Injunctive Relief**

One remedy for copyright infringement by a state entity that survives *Allen* is a suit for injunctive relief in federal court. In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment does not preclude suits in federal court seeking injunctive relief against state officers.<sup>452</sup> Copyright owners accordingly can, and do, bring copyright infringement suits against state officers seeking injunctive relief.<sup>453</sup> Fifty percent of respondents to the Copyright Alliance survey indicated they would bring a suit against a state for injunctive relief only.<sup>454</sup> Plaintiffs in six of the cases on the lists AIPLA and Mr. Bynum submitted requested only injunctive relief in their complaints.

The ability to seek an injunction in federal court provides some relief to copyright owners whose works have been infringed by state entities. First, bringing a suit for an injunction allows copyright owners to have their claims decided upon the merits.<sup>455</sup> Second, if they prove infringement and meet the other requirements for such equitable relief, the copyright owner can obtain an injunction against the defendant.<sup>456</sup> Third, several commenters maintained that the monetary cost of defending against a claim seeking an injunction and the adverse publicity the state would receive based on a claim of copyright infringement are powerful deterrents.<sup>457</sup>

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<sup>450</sup> *Smith v. Lutz*, 149 S.W.3d 752, 760–61 (Tex. App.–Austin 2004).

<sup>451</sup> *Id.*

<sup>452</sup> *Ex parte Young*, 209 U.S. 123 (1908).

<sup>453</sup> See, e.g., *Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018) (discussing copyright infringement claims by three academic publishers seeking injunctive relief against several officials of Georgia State University); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (discussing copyright infringement claims by a group of authors and authors’ associations seeking injunctive and declaratory relief against several state university presidents and the HathiTrust).

<sup>454</sup> Copyright Alliance Initial Comments at 13.

<sup>455</sup> Library Copyright Alliance Initial Comments at 4.

<sup>456</sup> See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (laying out four-factor test for obtaining a permanent injunction).

<sup>457</sup> University of Michigan Library Reply Comments at 3; Library Copyright Alliance Initial Comments at 4; ASERL Initial Comments at 1.

There are, however, significant limitations to the relief an injunction provides. As discussed in comments from the Copyright Alliance and the News Media Alliance, the most obvious is the inability to recover damages,<sup>458</sup> which prevents the copyright owner from recovering lost profits and any decrease in the value of the copyrighted work. SIIA pointed out that many copyright owners invest in the creation of ancillary works in addition to the specific work that may have been infringed, and the value of those ancillary products may also be affected by the infringement.<sup>459</sup> NPPA explained that the inability to obtain damages is particularly harmful for works for which the timing of first publication is critical, such as a photograph of a news or sporting event, because the entire value of the work may be destroyed by an act of infringement during the key time period.<sup>460</sup> Copyright owners also noted that the inability to recover damages can make the cost of bringing a suit prohibitive, particularly for copyright owners with limited resources.<sup>461</sup>

Additionally, as the Copyright Office has previously noted, an injunction provides limited relief against future infringement because it can only be issued and enforced against specific individuals, not the state generally.<sup>462</sup> Even then, enforcement of the injunction can require the filing of a motion for contempt and additional litigation with the attendant costs.<sup>463</sup> These limitations prevent copyright owners from obtaining complete relief when their copyrights are infringed, which as former Register of

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<sup>458</sup> Copyright Alliance Initial Comments at 30–32; News Media Alliance Initial Comments at 8–9; *see also* U.S. Gen. Accounting Office, GAO-01- 811, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS 13 (2001), <https://www.gao.gov/assets/240/232603.pdf>.

<sup>459</sup> *See* SIIA Reply Comments at 8–10 (providing the example of educational publishers who create software as well as “back end servers, artificial intelligence that adapts learning to the ability of a student, and the creation of entire learning platforms on which this content can be analyzed, discussed, taught, tested, and commented on”).

<sup>460</sup> NPPA Initial Comments at 13 (stating that the value of a photograph is often highest when it is first published).

<sup>461</sup> AIPLA Initial Comments at 5 (stating that nonprofits are particularly unlikely to seek injunctive relief); Roundtable Tr. at 196:16–20 (Dec. 11, 2020) (Calzada, National Press Photographers Association) (“Playing whack-a-mole in federal court is an expensive proposition and it’s really not something that most photographers have the resources to engage in.”); *id.* at 199:06–14 (Madigan, Copyright Alliance) (“[A]s to injunctions . . . when we . . . asked the folks who would not be willing to pursue injunctions, why they wouldn’t, we heard a lot about how expensive they are, how they only offer prospective relief, how they do nothing to remedy for past injuries.”); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT 13–14 (1988), <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>.

<sup>462</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT 15 (1988), <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>.

<sup>463</sup> *Id.*

Copyrights Marybeth Peters testified is “central to the balance of interests in the Copyright Act.”<sup>464</sup>

## 2. Personal-Capacity Suits against State Officials

Another available remedy for copyright infringement by a state entity in federal court is a suit for damages against a state official in his or her personal capacity.<sup>465</sup> During the roundtable, a representative of the Ohio Attorney General’s Office described such suits as a “pretty easy workaround” to enable recovery against the state, noting that the state will indemnify the individual defendant for any damages.<sup>466</sup> But this potential remedy, too, has limitations. As an initial matter, it is unclear from the record to what extent, or under what circumstances, other states will indemnify officials found liable in such cases.<sup>467</sup> To the extent a state does not do so, the copyright owner’s ability to recover damages may be limited by the individual official’s ability to satisfy a judgment.

In addition, to be able to bring such a suit, the copyright owner must know, or must uncover, the identity of the specific individual responsible for the infringement. The individual state official may also be protected from liability by qualified immunity, which shields government officials if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>468</sup> In the copyright context, a state official will be immune from liability unless it was clearly established at the time of the alleged infringement that the conduct of the state official constituted copyright infringement. In several cases, copyright owners have been unable to prove that a state official should have known that his or her conduct

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<sup>464</sup> *Intellectual Property Protection Restoration Act of 2003: Hearing on H.R. 2344 Before the Subcomm. on Courts., the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 18 (2003) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), [http://commdocs.house.gov/committees/judiciary/hju87815.000/hju87815\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju87815.000/hju87815_of.htm).

<sup>465</sup> See, e.g., *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988) (affirming district court ruling that state official could be sued in her personal capacity for damages for copyright infringement); *Lane v. First Nat’l Bank of Bos.*, 687 F. Supp. 11, 17 (D. Mass. 1988) (denying summary judgment when copyright law was clear on the relevant issue at the time state official infringed work such that there was no qualified immunity).

<sup>466</sup> Roundtable Tr. at 94:04–14 (Dec. 11, 2020) (Molnar, Ohio Attorney General’s Office).

<sup>467</sup> See *Kentucky v. Graham*, 473 U.S. 159, 167–68 (1985) (noting that an individual state official, not the state, is liable for any damages award); Roundtable Tr. at 61:16–62:06 (Dec. 11, 2020) (Thro, University of Kentucky) (“As to whether the state would indemnify, that’s going to be an open question in terms of state law. We do not indemnify if you’re clearly and unambiguously acting outside the scope of your employment”); *id.* at 189:09–12 (Evans, University of Arkansas) (“Our state law does cover the indemnification of employees who are acting in good faith in the course of their duties and responsibilities to the state entity.”).

<sup>468</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

was infringing due to the unsettled nature of the legal issue involved.<sup>469</sup> Such a conclusion may be particularly likely in fact-specific inquiries such as fair use and the work-made-for-hire doctrine.

### 3. Constitutional Claims

The Supreme Court held in *United States v. Georgia* that a federal statute's abrogation of state sovereign immunity is valid insofar as the statute creates a private right of action for damages against states "for conduct that *actually* violates the Fourteenth Amendment."<sup>470</sup> Although commenters did not address this theory, the district court in *Allen* recently cited *Georgia* in concluding that a copyright owner may be able to bring a claim against a state to the extent the infringement amounts to a constitutional violation.<sup>471</sup> At least one circuit court has suggested that a plaintiff faced with an Eleventh Amendment bar to a copyright suit might be able to find recovery in federal court for a takings clause violation.<sup>472</sup> As discussed above, however, the likelihood that a copyright owner could successfully argue that infringement of its copyright constituted a taking remains uncertain under current case law.

## VI. ANALYSIS AND CONCLUSIONS

The congressional request initiating this study asked that the Office conduct research "to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights."<sup>473</sup> As part of that analysis, the

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<sup>469</sup> See, e.g., *Isaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1013–16 (D. Minn. 2014) (dismissing claims against university employees in their individual capacities due to law not clearly establishing at the relevant time that the conduct constituted copyright infringement); *Molinelli-Freytes v. Univ. of P.R.*, 792 F. Supp. 2d 150, 157 (D.P.R. 2011) (finding qualified immunity because the potential application of the work-for-hire doctrine in academic context was not settled at the relevant time); *Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, 2:10-cv-09378-CBM (MANx), 2012 WL 7683452, at \*5–6 (C.D. Cal. Nov. 20, 2012) (finding qualified immunity because a reasonable person could have believed that defendant's use of the copyrighted work was fair use); *Campinha-Bacote v. Bleidt*, No. H-10-3481, 2011 WL 4625394, at \*3 (S.D. Tex. Oct. 3, 2011) (finding qualified immunity because defendant could have reasonably believed her conduct would not violate copyright law).

<sup>470</sup> *United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding abrogation was valid with respect to a claim that state violated the Fourteenth Amendment based on the conditions in which it confined a paraplegic prisoner and distinguishing invalid abrogation when claims did not rest on allegations of unconstitutional state conduct).

<sup>471</sup> *Allen v. Cooper*, No. 5:15-cv-00627-BO, \*23 (E.D.N.C. Aug. 18, 2021). The court noted that it had never ruled on whether Allen had a valid "case-by-case" abrogation claim under *Georgia* based on his allegations that "defendants' conduct amounted to a taking without compensation and simultaneously violated both the CRCA and the Fifth Amendment." *Id.* The court authorized Allen to amend his complaint to allege additional facts regarding his takings claim and the intentionality of the state's conduct. *Id.* at \*24.

<sup>472</sup> *Lane v. First National Bank of Boston*, 871 F.2d 166, 174 (1st Cir. 1988).

<sup>473</sup> Request Letter at 1.

Office was asked to “study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law” and to “consider the extent to which such infringements appear to be based on intentional or reckless conduct.”<sup>474</sup> The inquiry thus involves both a factual and a legal component. First, the Office has collected and analyzed the allegations of state infringement submitted by copyright owners in this study, as well as the information provided by state institutions in response. Second, the Office has attempted to determine whether these allegations, taken as a whole, are likely to be considered sufficient to meet the standard for abrogation set forth in Supreme Court case law, given the available remedies.

With respect to the factual record, the Office can report that the number of allegations of state infringement provided in response to the NOI is substantially greater than the number cited in the Oman Report. Commenters submitted lists collecting over 130 copyright infringement suits brought against state entities in thirty-six states. Nearly all of these cases were filed between 2000 and 2020. In addition, the survey results submitted by the Copyright Alliance include allegations of state infringement reported by 115 copyright owners, with the majority of respondents stating that their works have been infringed by state entities on multiple occasions. The Office also received individual anecdotes from approximately a dozen copyright owners.

The evidence indicates that state infringement constitutes a legitimate concern for copyright owners. While the merits of individual claims may often be uncertain, it seems clear that there are in fact instances in which some state entities infringe copyrights—whether intentionally, recklessly, or negligently—and that those infringements can cause harm to the value of the copyrighted works. Moreover, copyright owners’ inability to bring copyright infringement claims for damages in such cases can leave them with inadequate remedies. While some may be able to assert tort or contract claims in state court, many such claims will be preempted by the Copyright Act, and in any event do not provide the same remedies as are available for copyright infringement. Likewise, recent cases cast doubt on the viability of claims seeking to recover under a takings theory. And although copyright owners may seek injunctive relief or bring personal-capacity suits against state officials in federal court, injunctions do not compensate copyright owners for monetary harm, and qualified immunity or lack of resources may prevent monetary relief against individual state infringers.

The Office also is mindful that, at least in the copyright context, conclusive evidence of intentional or reckless state infringement may be elusive. Sovereign immunity itself may dissuade copyright owners from bringing suit and often prevents adjudication of

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<sup>474</sup> *Id.* at 2.

the merits of plaintiffs' claims, making it inherently difficult to develop any record of unconstitutional conduct.

The Office also heard from representatives of a number of state entities, primarily universities and libraries, who provided information about their efforts to educate their communities about copyright through the adoption of policies and educational programs. They also expressed concern about the potential impact on their operations if infringement suits for damages were permitted to proceed.

As to the legal analysis, the Office notes as a preliminary matter that the standard according to which the evidence is to be weighed is not entirely clear. There has been only a limited number of instances in which the Supreme Court has found sufficient evidence to support abrogation of state sovereign immunity. As discussed, in the more than two decades since it articulated the "congruence and proportionality" test in *City of Boerne*, the Court has upheld congressional abrogation provisions on only two occasions. Those cases arose in the different contexts of disability- and sex-based discrimination, respectively. Thus, while *Florida Prepaid* and *Allen* provide examples of evidentiary records that are insufficient for abrogation in the intellectual property context, the Court has provided less guidance as to the nature and volume of evidence that *would* be sufficient in this area.

It appears, however, that the threshold as enunciated by the Supreme Court since the CRCA was enacted has been set quite high. In general, the Court's decisions indicate that the instances of unlawful conduct must be sufficiently numerous to establish a pattern. In *Lane*, the Court found it significant that Congress had "gathered evidence from every State in the Union" and found "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions."<sup>475</sup> Similarly, in *Hibbs*, the Court noted that nineteen states had laws limiting how many hours women could work and that many states offered their employees different durations of parental leave depending on the sex of the parent.<sup>476</sup> Conversely, where the evidence consisted of no more than "half a dozen examples," the Court found that the record "[e]ll far short of even suggesting [a] pattern of unconstitutional discrimination."<sup>477</sup> In *Florida Prepaid*, the Court concluded that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations," where the legislative history "provide[d] only two examples of patent infringement suits against the States."<sup>478</sup> And

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<sup>475</sup> *Lane*, 541 U.S. at 516, 526 (internal citations omitted).

<sup>476</sup> *Hibbs*, 538 U.S. at 729–31.

<sup>477</sup> *Garrett*, 531 U.S. at 369–70.

<sup>478</sup> 527 U.S. at 640.

in *Allen*, the Court likewise found insufficient evidence of a pattern based on “a dozen possible examples of state infringement.”<sup>479</sup>

Further, the analysis is not limited to simply tallying the number of allegations of infringement against states. As discussed, only intentional or possibly reckless infringements can rise to the level of a due process violation. Moreover, although the Court has said little regarding the need to assess the validity of the claims, it suggested in *Allen* that uncorroborated allegations alone are not sufficient.<sup>480</sup>

In light of these precedents, we are unable to conclude with certainty that the evidence provided in this study would be held sufficient to establish a pattern of unconstitutional conduct. Although the record includes more examples of potential infringement than in *Florida Prepaid* and *Allen*, it falls short of the evidence of pervasive unconstitutional conduct by state entities in *Lane* and *Hibbs*. Nor has the Office been presented with evidence of any state policies permitting or encouraging infringement, as was the case in *Hibbs*. To the contrary, we received considerable evidence of policies and programs adopted by a number of state entities in order to deter infringement. With respect to litigated cases, the lists provided by commenters do not by themselves indicate the extent to which the cases involved credible allegations of intentional infringement. Only about half of the cases provided to the Office resulted in a written decision, with the majority dismissing the copyright claims on sovereign immunity grounds, and nearly all of the others decided in favor of the state. Similar challenges arise in assessing the survey evidence and individual anecdotes. While the number of alleged infringements reported appears significant on its face, the Office has no basis to evaluate whether any given respondent had a valid copyright interest, whether the state may have had meritorious defenses, and whether any infringement was intentional or reckless.

Given that the evidence gathered here far exceeds that underlying the CRCA, Congress may still choose to proceed with adopting new abrogation legislation. In light of the foregoing concerns, however, there is a material risk that a court could find even this more robust record insufficient to meet the constitutional abrogation standard. The Office nevertheless continues to believe that infringement by state entities is an issue worthy of congressional action.

The Office has long been of the view that “[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 interest[s] in the Copyright Act,” and that state infringers should be

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<sup>479</sup> 140 S. Ct. at 1006.

<sup>480</sup> *Id.* (noting that Oman Report “listed seven court cases brought against States (with another two dismissed on the merits) and five anecdotes taken from public comments (but not further corroborated)”).

subject to infringement liability to the same extent as other parties.<sup>481</sup> The Office appreciates the concerns of the universities, libraries, and other state entities represented in this study, and their implementation of policies and educational programs to ensure respect for copyright. We note that these entities will generally be able to invoke protection from non-meritorious infringement suits under the Copyright Act's exceptions and limitations, including fair use, exceptions for reproduction by libraries and archives, and limitations on remedies.<sup>482</sup> State users of copyrighted works, however, are not limited to these institutions. Other state entities, ranging from athletic departments to tourism offices to radio stations, may make use of copyrighted works for a variety of purposes, including some that affect the works' markets. While the Office received little evidence relating to these types of entities, there would seem to be little justification for immunizing them from damages if they intentionally engage in the same conduct for which a private party could be held liable.

Previous Congresses have considered legislation that would have avoided the need for abrogation by establishing a waiver-based framework for infringement suits against states. Under that model, a state's ability to recover damages for infringement of its own intellectual property rights would be conditioned on its waiving sovereign immunity from infringement suits.<sup>483</sup> If Congress decides not to proceed with new abrogation legislation, the Office would support further consideration of a waiver approach, as well as other options to ensure that copyright owners have meaningful remedies when states infringe their rights. As always, the Office stands ready to provide technical advice or other assistance to Congress on any legislative proposals.

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<sup>481</sup> *Sovereign Immunity and the Protection of Intellectual Property: Hearing before the S. Comm. on the Judiciary, 107th Cong. 10–11 (2002)* (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office) (stating that “the current state of affairs is unjust and unacceptable”).

<sup>482</sup> 17 U.S.C. §§ 107, 108, 504(c)(2).

<sup>483</sup> See *Intellectual Property Protection Restoration Act of 2003*, S. 1191, 108th Cong. (2003); see also *Intellectual Property Protection Restoration Act of 2003: Hearing on H.R. 2344 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (2003)*; *State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Judiciary Comm., 106th Cong. (2000)*.

**APPENDIX A**      **CONGRESSIONAL REQUEST LETTER**

# United States Senate

WASHINGTON, DC 20510

## VIA ELECTRONIC TRANSMISSION

April 28, 2020

Maria Strong  
Acting Register of Copyrights and Director  
United States Copyright Office  
101 Independence Avenue, SE  
Washington, D.C. 20559

Dear Acting Register Strong:

The Supreme Court's ruling last month in *Allen v. Cooper* created a situation in which copyright owners are without remedy if a State infringes their copyright and claims State sovereign immunity under the Eleventh Amendment of the U.S. Constitution.<sup>1</sup> We are concerned about the impact this may have on American creators and innovators, and we would like for the Copyright Office to research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights. We likewise are asking the Patent and Trademark Office to advise on the pervasiveness and patterns of States' infringements of patents and trademarks.

As you know, *Allen v. Cooper* involved a challenge to the constitutionality of the Copyright Remedy Clarification Act (CRCA),<sup>2</sup> which Congress enacted in 1990 to abrogate State sovereign immunity for copyright infringement and establish that a State would be liable "in the same manner and to the same extent" as a private party under copyright law. The Supreme Court found the CRCA was unconstitutional because it applied to all infringements of copyright by States, not just unconstitutional infringements.

But *Allen v. Cooper* provided Congress a blueprint for how to validly abrogate State sovereign immunity from certain copyright infringement claims. One element the court pointed to was the importance of Congress identifying a pattern of unconstitutional infringement before enactment. Though the Supreme Court found that the legislative record for the CRCA was insufficient despite a 1990 report from the Register of Copyrights titled *Copyright Liability of States and the Eleventh Amendment*, that report turned up only a handful of cases that alleged State infringements of copyright. It is on this point that we request the Copyright Office's expertise and advice.

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<sup>1</sup> See *Allen v. Cooper*, No. 18-877 (Mar. 23, 2020).

<sup>2</sup> Pub. L. No. 101-553, 104 Stat. 2749 (1990).

We have heard from affected copyright owners that in recent years State infringements of copyright have become much more common. We ask that the Copyright Office study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law. As part of this analysis, the Office should consider the extent to which such infringements appear to be based on intentional or reckless conduct.

So that Congress can evaluate whether legislative action needs to be taken, please provide a public report summarizing the findings of your study, as well as the facts and analyses upon which those findings are based, no later than April 30, 2021. Thank you for your careful attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

	
<hr/>	<hr/>
Thom Tillis	Patrick Leahy
United States Senator	United States Senator

**APPENDIX B**      **FEDERAL REGISTER NOTICES**

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

OSHA is requesting that OMB extend the approval of the collection of information (paperwork) requirements contained in the Anhydrous Ammonia Storage and Handling Standard. There is a slight adjustment decrease in burden hours for this ICR. The burden hours have decreased a total of 1 hour (from 337 to 336 hours).

*Type of Review:* Extension of a currently approved collection.

*Title:* Anhydrous Ammonia Storage and Handling Standard (29 CFR 1910.111).

*OMB Number:* 1218-0208.

*Affected Public:* Business or other for-profit; farms.

*Number of Respondents:* 201,300.

*Frequency of Response:* On occasion.

*Total Responses:* 2,013.

*Average Time per Response:* 10 minutes (10/60 hour) for a worker to replace or revise markings on ammonia containers.

*Estimated Total Burden Hours:* 336.

*Estimated Cost (Operation and Maintenance):* \$0.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

- (1) Electronically at <http://www.regulations.gov>, which is the Federal e-Rulemaking Portal; (2) by facsimile; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for this ICR (Docket No. OSHA-2010-0050). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you

must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627).

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as your social security number and date of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

## V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1-2012 (77 FR 3912).

Signed at Washington, DC, on May 28, 2020.

**Loren Sweatt,**

*Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2020-11986 Filed 6-2-20; 8:45 am]

**BILLING CODE 4510-26-P**

## LIBRARY OF CONGRESS

### U.S. Copyright Office

[Docket No. 2020-9]

### Sovereign Immunity Study: Notice and Request for Public Comment

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The U.S. Copyright Office is initiating a study to evaluate the degree to which copyright owners are experiencing infringement by state entities without adequate remedies under state law, as well as the extent to which such infringements appear to be based on intentional or reckless conduct. The Office seeks public input on this topic to assist it in preparing a report to Congress.

**DATES:** Written comments are due on or before August 3, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the [www.regulations.gov](http://www.regulations.gov) system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through [www.regulations.gov](http://www.regulations.gov). Specific instructions for submitting comments are available on the Copyright Office website at <http://www.copyright.gov/docs/sovereignimmunitystudy>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

#### FOR FURTHER INFORMATION CONTACT:

Regan A. Smith, General Counsel and Associate Register of Copyrights, [regans@copyright.gov](mailto:regans@copyright.gov); Kevin R. Amer, Deputy General Counsel, [kamer@loc.gov](mailto:kamer@loc.gov); or Mark T. Gray, Attorney-Advisor, [mgray@loc.gov](mailto:mgray@loc.gov). They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** On March 23, 2020, the Supreme Court issued its decision in *Allen v. Cooper*,<sup>1</sup> holding that the Copyright Remedy Clarification Act of 1990 ("CRCA"), which attempted to make states subject to liability for copyright infringement to the same extent as other parties, did not validly abrogate states' sovereign immunity against suit. Following the decision, Senators Thom Tillis and Patrick Leahy sent a letter to the Copyright Office requesting that the Office "research this issue to determine whether there is sufficient basis for federal legislation

<sup>1</sup> 140 S. Ct. 994 (2020).

abrogating State sovereign immunity when States infringe copyrights.”<sup>2</sup>

## I. Background

### a. The Copyright Remedy Clarification Act

Under the doctrine of sovereign immunity, “a federal court generally may not hear a suit brought by any person against a nonconsenting State.”<sup>3</sup> The Fourteenth Amendment to the Constitution, however, “can authorize Congress to strip the States of immunity.”<sup>4</sup> Section 1 of that Amendment provides that states may not “deprive any person of life, liberty, or property, without due process of law,”<sup>5</sup> and section 5 gives Congress the “power to enforce, by appropriate legislation,” those prohibitions,<sup>6</sup> including by subjecting states to suit in federal court.<sup>7</sup>

Enacted on November 15, 1990, the CRCA amended the Copyright Act to expressly provide that states are not immune from suit for copyright infringement.<sup>8</sup> Congress adopted the legislation in response to a 1985 Supreme Court decision, *Atascadero State Hospital v. Scanlon*, in which the Court held that to abrogate state sovereign immunity under the Fourteenth Amendment, Congress must use “unequivocal” language making its intention explicit.<sup>9</sup> At the time, the Copyright Act was silent on whether states were subject to liability,<sup>10</sup> although some pre-*Atascadero* courts had held that Congress intended states to be subject to infringement claims.<sup>11</sup>

<sup>2</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), available at <https://www.copyright.gov/rulemaking/state-sovereign-immunity/letter.pdf> (“Request Letter”).

<sup>3</sup> *Allen*, 140 S. Ct. at 1000.

<sup>4</sup> *Id.* at 1003.

<sup>5</sup> U.S. Const. amend. XIV, sec. 1.

<sup>6</sup> U.S. Const. amend. XIV, sec. 5.

<sup>7</sup> *Allen*, 140 S. Ct. at 1003.

<sup>8</sup> Public Law 101–553, sec. 2(a)(2), 101 Stat. 2749 (1990), codified at 17 U.S.C. 511.

<sup>9</sup> 473 U.S. 234, 247 (1985).

<sup>10</sup> See 17 U.S.C. 501(a) (1977) (“Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.”).

<sup>11</sup> See *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) (affirming copyright damages and attorneys’ fees award under 1909 Act because language providing for damages against infringers was “sweeping and without apparent limitation, suggesting that Congress intended to include states within the class of defendants”); *Johnson v. Univ. of Va.*, 606 F. Supp. 321, 324 (W.D. Va. 1985) (“[B]ased on the *Mills Music* analysis of the 1909 Act, and this court’s examination of the operative language of the 1976 Act, the court determines that the 1976 Act waived the states’ Eleventh Amendment immunity from liability for damages and equitable relief for copyright infringements.”).

Shortly after the *Atascadero* decision, Congress asked then-Register of Copyrights Ralph Oman to study what “practical problems” copyright owners faced in enforcing their rights against state governments.<sup>12</sup> The Office subsequently issued a request for public comment<sup>13</sup> and received approximately forty responses.<sup>14</sup> Most comments were submitted by copyright owners, some of whom expressed concern about the risk of future infringement by state entities, while others discussed past acts of infringement committed by states.<sup>15</sup> The Office summarized these comments in a public report (the “Oman Report”), which ultimately recommended that Congress “amend the Copyright Act . . . to ensure that copyright owners have an effective remedy against infringing states.”<sup>16</sup>

*But see* *Wihtol v. Crow*, 309 F.2d 777, 782 (8th Cir. 1962) (dismissing copyright claim against school district on Eleventh Amendment grounds because the district was “an instrumentality of the State of Iowa, constituting a part of its educational system and engaged in performing a state governmental function under state law and at state expense”).

<sup>12</sup> Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, to Ralph Oman, Register of Copyrights, U.S. Copyright Office at 1 (Aug. 3, 1987), reproduced in U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment, A Report of the Register of Copyrights* (June 1988), <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>.

<sup>13</sup> Request for Information: *Eleventh Amendment*, 52 FR 42045 (Nov. 2, 1987).

<sup>14</sup> The public comments can be viewed at <https://archive.org/details/Copyright11thAmendmentStudyComments>.

<sup>15</sup> U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* 6 (June 1988) (“Oman Report”) (“The major concern of copyright owners appears to be widespread, uncontrollable copying of their works without remuneration”), available at <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>. The CRCA’s legislative history reveals similar concerns about prospective infringement. See *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States*, Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary, 101st Cong. 102 (1989) (testimony of Barbara Ringer, former Register of Copyrights) (until *Atascadero*, states believed “you have got to pay,” but now “their lawyers are going to tell them you don’t have to pay,” and “gradually, and maybe not so gradually, this free ride will become quite the rule rather than the exception unless you do something”); *Copyright Remedy Clarification Act*, Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 101st Cong. 69 (1989) (prepared statement of Copyright Remedies Coalition) (expressing concern that “states may well confuse insulation from damages with full immunity from any copyright liability, causing them to believe that their activities are beyond the reach of the Copyright Act”).

<sup>16</sup> Oman Report at 104. The Office’s specific legislative recommendations turned on whether Congress could abrogate state immunity under Article I, section 8, clause 8 of the Constitution (the

After the Office issued its report, the CRCA was introduced in Congress, and Congress held hearings on the issue of state infringement. The final legislation amended the Copyright Act to provide that “[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment . . . or under any other doctrine of sovereign immunity, from suit in Federal court by any person” for copyright infringement.<sup>17</sup> It further provided that “[a]ny State . . . shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.”<sup>18</sup>

### b. *Florida Prepaid v. College Savings Bank*

Nine years after enactment of the CRCA, the Supreme Court issued an opinion in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>19</sup> which addressed whether Congress had validly abrogated states’ immunity from patent infringement suits when it adopted the Patent Remedy Act. In *Florida Prepaid*, the Court set out a number of requirements that Congress needed to meet for such abrogation to constitute a valid exercise of Congress’s authority under section 5 of the Fourteenth Amendment. First, Congress was required to identify a “pattern of patent infringement” by state governments.<sup>20</sup> Second, the infringement must constitute a violation of the Fourteenth Amendment such that patent owners

“Intellectual Property Clause”). The Supreme Court had not yet addressed that question. Shortly before the report was completed, however, the Court granted certiorari in *United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987), certiorari granted *sub nom. Pennsylvania v. Union Gas Co.*, 485 U.S. 958 (1988), in which the Third Circuit had held that Article I could be a basis for abrogation. The Oman Report recommended that if the Supreme Court affirmed that decision, Congress should revise section 501 of the Copyright Act to “clarify its intent to abrogate states’ Eleventh Amendment Immunity pursuant to its [Intellectual Property Clause] power.” Oman Report at 104. Otherwise, the Report recommended that Congress “amend the jurisdictional provision in 28 U.S.C. 1338(a), to provide that where states are defendants, private individuals may sue them in state court for copyright damages.” *Id.* at 104–05.

<sup>17</sup> 17 U.S.C. 511(a); see also *id.* at 511(b) (“In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity.”).

<sup>18</sup> *Id.* at 501(a).

<sup>19</sup> 527 U.S. 627 (1999).

<sup>20</sup> *Id.* at 640.

were being deprived of property “without due process of law.”<sup>21</sup> The Court explained that such a deprivation occurs “only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent.”<sup>22</sup> The Court cautioned that, because states do not violate due process when they commit a “negligent act that causes unintended injury to a person’s property,” patent infringement that was merely negligent rather than intentional or reckless did not violate the Fourteenth Amendment.<sup>23</sup> Third, there must be “congruence and proportionality” between the constitutional violations Congress seeks to remedy and the means adopted for that purpose.<sup>24</sup>

The Court in *Florida Prepaid* struck down the Patent Remedy Act for failure to meet these requirements. It concluded that Congress had not identified a pattern of infringement because (1) Congress had “little evidence of infringing conduct” by state actors;<sup>25</sup> (2) Congress “barely considered” the adequacy of state-law remedies for patent infringement by the state;<sup>26</sup> (3) the legislative record did not reflect a pattern of intentional or reckless infringements, but instead consisted only of “a handful of instances of state patent infringement that do not necessarily violate the Constitution”;<sup>27</sup> and (4) the legislation was not limited to “cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy,” or cases where the infringement was not negligent or committed pursuant to state policy.<sup>28</sup> After the Court’s decision, Congress considered, but did not pass, legislation that would have conditioned states’ ability to recover damages for infringement of their own intellectual property on their waiver of immunity to infringement damages.<sup>29</sup>

#### c. *Allen v. Cooper*

This year, the Supreme Court decided *Allen v. Cooper*, a case considering the validity of the CRCA’s abrogation of state immunity. In *Allen*, a videographer brought an infringement action against North Carolina after the state published his videos and photographs of a sunken pirate ship online without authorization. North Carolina contended that it was immune to suit and that the CRCA failed to properly abrogate its immunity. Applying the analysis from *Florida Prepaid*, the Court held that the CRCA failed the congruence and proportionality test for substantially the same reasons that applied to the Patent Remedy Act.<sup>30</sup> With respect to the legislative record, the Court found the evidence of copyright infringement supporting the CRCA to be “scarcely more impressive than what the *Florida Prepaid* Court saw,” amounting to “only a dozen possible examples of state infringement.”<sup>31</sup> The Court also pointed to congressional testimony and statements by Members of Congress suggesting that copyright infringement by states currently was not a widespread problem.<sup>32</sup>

The Court further held that Congress had failed to make a sufficient showing of *unconstitutional* infringement by states. Under its precedent, the Court noted, “a merely negligent act does not ‘deprive’ a person of property,” and therefore “an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause.”<sup>33</sup> In the case of the CRCA, only two of the infringements cited in the legislative record appeared to be intentional.<sup>34</sup> Moreover, the record contained “no information about the availability of state-law remedies for copyright infringement (such as contract or unjust enrichment suits)—even though they might themselves satisfy due process.”<sup>35</sup> The Court thus concluded that the balance struck by the CRCA “between constitutional wrong

and statutory remedy” was “askew.”<sup>36</sup> The “exceedingly slight” evidence of Fourteenth Amendment injury, combined with the fact that the statute extended to “every infringement case against a State,” meant that “the law’s ‘indiscriminate scope’ [was] ‘out of proportion’ to any due process problem.”<sup>37</sup>

At the conclusion of the opinion, the Court observed that its decision “need not prevent Congress from passing a valid copyright abrogation law in the future.”<sup>38</sup> It noted that in adopting the CRCA, “Congress acted before this Court created the ‘congruence and proportionality’ test,” and therefore it “likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection.”<sup>39</sup> Under that standard, “if [Congress] detects violations of due process, then it may enact a proportionate response,” and [t]hat kind of tailored statute can effectively stop States from behaving as copyright pirates.”<sup>40</sup>

#### d. *Current Study*

On April 28, 2020, Senators Thom Tillis and Patrick Leahy sent a letter to the Copyright Office noting that the *Allen* decision has “created a situation in which copyright owners are without remedy if a State infringes their copyright and claims State sovereign immunity,” and expressing concern “about the impact this may have on American creators and innovators.”<sup>41</sup> The letter states that the Senators “have heard from affected copyright owners that in recent years State infringements of copyright have become much more common.”<sup>42</sup> To determine whether there is a sufficient basis for federal legislation, the letter asks that the Office “study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law. As part of this analysis, the Office should consider the

<sup>21</sup> *Id.* at 642.

<sup>22</sup> *Id.* at 643.

<sup>23</sup> *Id.* at 645.

<sup>24</sup> *Id.* at 639 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

<sup>25</sup> *Id.* at 640–41.

<sup>26</sup> *Id.* at 643–44.

<sup>27</sup> *Id.* at 645–66.

<sup>28</sup> *Id.* at 646–47.

<sup>29</sup> See *Sovereign Immunity and Protection of Intellectual Property*, Hearing Before Senate Comm. on the Judiciary, 107th Cong. 3–4 (Feb. 27, 2000) (prepared statement of Sen. Patrick Leahy), <https://www.govinfo.gov/content/pkg/CHRG-107shrg85184/pdf/CHRG-107shrg85184.pdf> (discussing Intellectual Property Protection Restoration Act of 2001 and stating that “no condition could be more reasonable or proportionate than the condition that in order to obtain full protection for your federal intellectual property rights, you must respect those of others”);

*Intellectual Property Restoration Act of 2003*, Hearing Before House Subcomm. on Courts, the Internet, and Intellectual Property, 108th Cong. (June 17, 2003) (prepared statement of Marybeth Peters, Register of Copyrights), available at <https://www.copyright.gov/docs/regstat061703.html> (stating that proposed legislation “provides significant incentives for a State to waive its immunity, but does so in a way that is inherently proportional and fair to the States and copyright owners”).

<sup>30</sup> *Allen*, 140 S. Ct. at 999.

<sup>31</sup> *Id.* at 1006.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1004. The Court had previously reserved, but not decided, the question “whether reckless conduct suffices” to violate due process. *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986)).

<sup>34</sup> *Id.* at 1006.

<sup>35</sup> *Id.* at 1006–07.

<sup>36</sup> *Id.* at 1007.

<sup>37</sup> *Id.* (quoting *Florida Prepaid*, 527 U.S. at 646–47).

<sup>38</sup> *Id.*; see also *id.* at 1009 (Breyer, J., concurring) (“One might . . . expect that someone injured by a State’s violation of [its] duty [not to infringe copyright] could ‘resort to the laws of his country for a remedy,’ . . . . Or more concretely, one might think that Walt Disney Pictures could sue a State (or anyone else) for hosting an unlicensed screening of the studio’s 2003 blockbuster film, *Pirates of the Caribbean* (or any one of its many sequels).” (citation omitted)).

<sup>39</sup> *Id.* at 1007.

<sup>40</sup> *Id.*

<sup>41</sup> Request Letter at 1.

<sup>42</sup> *Id.* at 2.

extent to which such infringements appear to be based on intentional or reckless conduct.”<sup>43</sup> The letter requests that the Office provide a public report summarizing the findings of this study, as well as the facts and analyses upon which those findings are based, by April 30, 2021.<sup>44</sup>

Pursuant to this request, the Office is seeking public input in multiple phases. The Office is providing 60 days for written comments from interested parties on the topics outlined below. To fulfill the request from Congress and the requirements of the Court, the Office seeks factual evidence and other verifiable information to support this inquiry. For each question, to the extent available, please include empirical data or other quantitative analysis in your response. If describing a litigation matter, please include information sufficient for the Office to identify such matter, such as the relevant court, docket number, asserted claims, and dates. As applicable, the Office encourages commenters to append relevant materials, such as pleadings, opinions, or other documentary evidence, in support of their comments. If participants currently gathering empirical research and analyses find themselves unable to complete them within the 60-day period for submissions, they are encouraged to contact the Office promptly, describing the nature of the research and indicating the time required for completion. To the extent possible, the Office will seek to accommodate such submissions by providing an additional comment period limited to the provision of empirical data at a later date, but encourages all commenters to meet the noticed deadline if possible, so that the Office may fully consider the submissions in light of the congressional deadline.

After this comment period has closed, the Office intends to host one or more public roundtables to seek additional input, potentially virtually. The Office may request further written comments on particular issues discussed in response to this notice and/or at the public roundtables.

## II. Subjects of Inquiry

The Copyright Office invites written comments on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every

subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted. The Office also requests that commenters explain their interest in the study and, with respect to each answer, the basis for their knowledge (e.g., the commenter is a copyright owner, artist, academic, or state official).

1. Please provide information regarding specific instances of infringing conduct committed by a state government entity, officer, or employee, including, where relevant:

- a. The work(s) infringed;
- b. The act(s) of alleged infringement;
- c. When the infringement occurred;
- d. The state actor(s) who committed the infringement;
- e. Whether the infringement was intentional or reckless, and the basis for that conclusion;
- f. Whether the infringement was committed pursuant to a state policy;
- g. Whether the state was contacted by or on behalf of the copyright owner in response to the infringement, and if so, how the state responded;
- h. Whether a lawsuit was filed as a result of the infringement, and if so, where the case was filed, what claim(s) were brought regarding the infringement, whether the case remains pending, and if not, how it was resolved; and
  - i. If a lawsuit was not filed, why the copyright owner chose not to do so, including whether it attempted to resolve the matter privately in lieu of litigation, and any relevant details with respect to those attempts.

2. To what extent does state sovereign immunity affect the licensing or sale of copies of copyrighted works to state entities? For example:

- a. Do copyright owners provide different payment or licensing terms in transactions with state entities than are provided in transactions with other parties?
- b. Have copyright owners changed aspects of their sales or licensing practices as a result of state sovereign immunity?
- c. Do different states or state entities take different approaches to working with copyrighted material? Are there particular states that more frequently infringe?

3. What remedies are available for copyright owners when states infringe their works?

- a. To what extent did copyright owners file suits under the Copyright Act against state entities prior to the Supreme Court's decision in *Allen v. Cooper*?
- b. In your opinion, does the availability of injunctive relief against

state officials provide an adequate remedy to address the needs of copyright owners in response to instances of state copyright infringement?

c. To what extent are there state law causes of action that may provide a remedy for copyright infringements by state entities? Are there state court cases in which a copyright owner has been awarded a judgment on such a claim?

d. To the extent state law provides a cause of action relevant to copyright infringement, how do the elements of the cause of action and/or available remedies differ from those applicable to claims under the Copyright Act?

e. In your opinion, are those remedies adequate to address the needs of copyright owners in response to instances of state copyright infringement?

4. How can Congress determine whether copyright infringement by a state is common or infrequent? What metrics should be used in making such a determination?

5. Has the prevalence of infringement by states increased in recent years?

a. What empirical evidence is available to determine whether and to what extent there has been a change over time?

b. To what extent, if any, have instances of actual or threatened infringement by states increased since the decision in *Allen*, or can they be expected to increase?

6. How do different states handle claims of infringement? Please discuss, as relevant:

a. Whether any state agencies carry insurance policies that would cover infringement by a state employee, and if so, whether those insurance policies distinguish between infringement that is intentional, reckless, or negligent;

b. Any laws, regulations, or policies that state entities have adopted to minimize the likelihood of, or to provide a remedy for, copyright infringement by a state entity;

c. How frequently copyright owners claim a state actor has infringed their rights, either privately or in litigation;

d. How state entities typically respond to credible claims of copyright infringement, including any formal or informal policies providing for negotiations with or payment to the copyright owner, as well as whether the Attorney General's office is notified of such claims;

e. What state entities are eligible to assert sovereign immunity as a defense to copyright infringement claims;

f. Whether state entities have the right to waive sovereign immunity as a defense to an infringement lawsuit in

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Senators Tillis and Leahy also sent a letter to the Patent and Trademark Office requesting a study of patent and trademark infringement by state entities. See Letter from Sens. Thom Tillis & Patrick Leahy to Andrei Iancu, Director, U.S. Patent and Trademark Office (Apr. 28, 2020).

federal court, and what authority permits or prevents such waiver; and g. Whether any states record and/or track copyright infringement claims received by state entities.

7. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: May 29, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2020–12019 Filed 6–2–20; 8:45 am]

**BILLING CODE 1410–30–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (20–051)]

### Notice of Intent To Grant an Exclusive License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant exclusive invention license.

**SUMMARY:** NASA hereby gives notice of its intent to grant an exclusive invention license in the United States to practice the invention described and claimed in NASA Case Number MFS–33884–1, entitled “Ruggedizing a Commercial Camera for Space Flight Environments,” to Imperx, Inc., having its principal place of business in Boca Raton, Florida. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

**DATES:** The prospective exclusive license may be granted unless NASA receives written objections including evidence and argument, no later than June 18, 2020 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA no later than June 18, 2020 will also be treated as objections to the grant of the contemplated exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

**ADDRESSES:** Objections relating to the prospective license may be submitted to James J. McGroary, Chief Patent Counsel/LS01, NASA Marshall Space Flight Center, Huntsville, AL 35812,

(256) 544–0013. Email [james.j.mcgroary@nasa.gov](mailto:james.j.mcgroary@nasa.gov).

**FOR FURTHER INFORMATION CONTACT:** Kyle Costabile, Technology Transfer, ST22, NASA Marshall Space Flight Center, Huntsville, AL 35812, (256) 316–9556. Email [kyle.p.costabile@nasa.gov](mailto:kyle.p.costabile@nasa.gov).

**SUPPLEMENTARY INFORMATION:** This notice of intent to grant an exclusive invention license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at <http://technology.nasa.gov>.

**Helen M. Galus,**

*Agency Counsel for Intellectual Property.*

[FR Doc. 2020–11933 Filed 6–2–20; 8:45 am]

**BILLING CODE 7510–13–P**

## POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–143 and CP2020–153; MC2020–144 and CP2020–154; MC2020–145 and CP2020–155; MC2020–146 and CP2020–156]

### New Postal Products

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission’s consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* June 5, 2020.

**ADDRESSES:** Submit comments electronically via the Commission’s Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

## I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request’s acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service’s request(s) can be accessed via the Commission’s website (<http://www.prc.gov>). Non-public portions of the Postal Service’s request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.<sup>1</sup>

The Commission invites comments on whether the Postal Service’s request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

## II. Docketed Proceeding(s)

1. *Docket No(s):* MC2020–143 and CP2020–153; *Filing Title:* USPS Request to Add Priority Mail Contract 621 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* May 28, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 *et seq.*, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* June 5, 2020.

<sup>1</sup> See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

requires the employer to make a thorough periodic inspection of alloy steel chain slings in use on a regular basis, but at least once a year. Paragraph (b)(6)(ii) requires the employer to make and maintain a record of the most recent month in which each alloy steel chain was inspected and make the record available for examination.

Paragraph (c)(15)(ii) requires that all welded end attachments of wire rope slings be proof tested by the manufacturer at twice their rated capacity prior to initial use, and that the employer retain a certificate of the proof test and make it available for examination.

Paragraphs (e)(1)(i), (ii), and (iii) require that synthetic web slings be marked or coded to show the manufacturer's name or trademark, the rated capacity for the type of hitch, and the type of synthetic webbing material.

Paragraph (f)(2) requires that all hooks for which no applicable manufacturer's recommendations are available be tested twice before they are put into use. The employer shall maintain a record of the dates and results of the tests.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must-comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

There is an adjustment decrease of 3,269 burden hours (from 52,428 hours to 49,159 hours). This decrease is a result of new data indicating a decrease in the number of cranes and derricks from 122,091 to 115,829.

*Type of Review:* Extension of a currently approved collection.

*Title:* Rigging Equipment for Material Handling (29 CFR 1926.251).

*OMB Control Number:* 1218-0233.

*Affected Public:* Business or other for-profits.

*Number of Respondents:* 115,829.

*Total Responses:* 306,729.

*Frequency of Responses:* On occasion.

*Average Time per Response:* Average of 3 minutes (3/60 hour) for an

employer to maintain and disclose a certificate to 30 minutes (30/60 hour) for an employer to acquire information and make a tag for a sling.

*Estimated Total Burden Hours:* 49,159.

*Estimated Cost (Operation and Maintenance):* \$0.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows:

(1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (OSHA Docket No. 2010-0038). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693-2350, (TTY) (877) 889-5627.

Comments and submissions are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information, such as social security numbers and dates of birth. Although all submissions are listed in the <http://www.regulations.gov> index, some information (e.g., copyrighted material) is not publicly available to read or download through this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the <http://www.regulations.gov> website to submit comments and access the docket is available at the website's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

## V. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1-2012 (77 FR 3912).

Signed at Washington, DC, on June 18, 2020.

**Loren Sweatt,**

*Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2020-13520 Filed 6-23-20; 8:45 am]

**BILLING CODE 4510-26-P**

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 2020-9]

### Sovereign Immunity Study: Notice and Request for Public Comment

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of Inquiry; extension of comment period.

**SUMMARY:** The U.S. Copyright Office is extending the deadline for the submission of written comments in response to its June 3, 2020, notice of inquiry regarding its state sovereign immunity policy study. In addition, the Office is providing for a second round of written comments.

**DATES:** Initial written comments in response to the notice of inquiry published June 3, 2020, at 85 FR 34252, must be received no later than 11:59 p.m. Eastern Time on September 2, 2020. Written reply comments and empirical research studies must be received no later than 11:59 p.m. Eastern Time on October 2, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the [www.regulations.gov](http://www.regulations.gov) system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through [regulations.gov](http://www.regulations.gov). Specific instructions for submitting comments are available on the Copyright Office website at <http://www.copyright.gov/docs/sovereignimmunitystudy>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

**FOR FURTHER INFORMATION CONTACT:**

Kevin Amer, Deputy General Counsel,

kamer@copyright.gov; Mark T. Gray, Attorney-Advisor, mgray@copyright.gov; or Jalyce E. Mangum, Attorney-Advisor, jmang@copyright.gov. They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** On June 3, 2020, the U.S. Copyright Office issued a notice of inquiry (“NOI”) commencing a policy study on state sovereign immunity from copyright infringement suits.<sup>1</sup> Congress has requested that the Office “research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”<sup>2</sup> To assist Congress in making that assessment, the Office solicited public comment on several issues concerning the degree to which copyright owners face infringement from state actors today, whether such infringement is based on intentional or reckless conduct, and what remedies, if any, are available to copyright owners under state law.

To ensure that members of the public have sufficient time to comment, and to ensure that the Office has the benefit of a complete record, the Office is extending the deadline for the submission of comments to 11:59 p.m. Eastern Time on September 2, 2020.

The Office has also determined that interested parties should be given an opportunity to address any comments submitted in response to the NOI. In addition, as noted in the NOI,<sup>3</sup> the Office is seeking to provide sufficient time for parties engaged in empirical research in this area to complete and submit their findings. Accordingly, the Office is providing for a second round of written comments. Additional comments must be submitted no later than October 2, 2020. In general, these comments should be limited to issues or concerns presented in the initial comments. The Office will, however, consider any empirical research submitted by the October 2 deadline as part of the record in this proceeding.

Dated: June 22, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2020-13725 Filed 6-23-20; 8:45 am]

**BILLING CODE 1410-30-P**

<sup>1</sup> 85 FR 34252 (June 3, 2020).

<sup>2</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), <https://www.copyright.gov/rulemaking/statesovereignimmunity/letter.pdf>.

<sup>3</sup> See 85 FR at 34255.

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: (20-053)]

### Name of Information Collection: COVID 19 Census of NASA Grantees

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of information collection—Renewal with change of an Existing Information Collection.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

**DATES:** Comments are due by August 24, 2020.

**ADDRESSES:** All comments should be addressed to Claire Little, National Aeronautics and Space Administration, 300 E Street SW, Washington, DC 20546-0001 or call 202-358-2375.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to R. Travis Kantz, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546; 281-792-7885 or email [R.Travis.Kantz@nasa.gov](mailto:R.Travis.Kantz@nasa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

NASA is requesting an extension with change to this existing collection in order to continue to gather information consistent with OMB and NASA COVID guidance. This data will help inform NASA about the status and ongoing implementation issues surrounding COVID mitigation for NASA grantees and will improve the quality and responsiveness of NASA in responding to grantee issues which impact scientific research funded by NASA.

This information may be disclosed as necessary to NASA personnel, contractors, and partners to administer NASA Education programs. It also may be disclosed to NASA administrators and managers, Office of Management and Budget (OMB) officials, and members of Congress for the purposes of accountability and tracking of program and project efficiency and effectiveness.

##### II. Methods of Collection

Interview.

##### III. Data

*Title:* COVID 19 Census of NASA Grantees.

*OMB Number:* 2700-0177.  
*Type of review:* Renewal with Change.  
*Affected Public:* Educational institutions from k-12, universities, community and tribal colleges, museums.  
*Estimated Annual Number of Activities:* 12.  
*Estimated Number of Respondents per Activity:* 156.  
*Annual Responses:* 12.  
*Estimated Time per Response:* 15 minutes.  
*Estimated Total Annual Burden Hours:* 22464.  
*Estimated Total Annual Cost:* \$10,953,446.

#### IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA’s estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

**Roger Kantz,**

*NASA PRA Clearance Officer.*

[FR Doc. 2020-13538 Filed 6-23-20; 8:45 am]

**BILLING CODE 7510-13-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 20-058]

### NASA Advisory Council; Aeronautics Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Aeronautics Committee of the NASA Advisory Council (NAC). This meeting will be held for soliciting, from the aeronautics community and other persons, research and technical information relevant to program planning.

local workforce entities would receive funding and technical assistance from ETA in order to better serve disability beneficiaries, with a portion of Ticket funding reserved for rewarding strong performance and program innovation. States and localities would be allowed greater flexibility in tailoring services to fit local circumstances. The redesigned program would retain key features of the current program, such as benefits counseling and suspension of SSA medical Continuing Disability Reviews (CDRs) while program participants pursue employment.<sup>3</sup>

In close coordination with SSA and ETA, DOL's Office of Disability Employment Policy (ODEP) will provide policy analysis and guidance to support the transfer and improvement of the program.

### Request for Information

Through this RFI, we are soliciting feedback from interested and affected parties on the potential benefits and challenges in transferring the Ticket program to DOL and serving program participants through the public workforce systems, in order to enable them to increase employment and earnings and maximize self-sufficiency. We are also interested in evidence supporting or challenging the assumptions underlying this proposal. Responses to this RFI will inform decisions regarding the development, design, and implementation of the redesigned program. As such, responses supported by substantial evidence and careful reasoning will be afforded greatest weight. This RFI notice is for internal planning purposes only and should not be construed as a solicitation or as an obligation on the part of DOL or any participating federal agencies.

We ask respondents to address the following questions in the context of the preceding discussion in this document. Respondents do not need to address every question and should focus on those that relate to their expertise or perspective. To the extent possible, please clearly indicate the question(s) addressed in your response. We ask that each respondent include the name and street address of his or her institution or affiliation, if any, and the name, title, street address, email address, and telephone number of a contact person for his or her institution or affiliation, if any.

<sup>3</sup> Medical CDRs are periodic reviews of an individual's medical impairment(s) to determine continuing eligibility for SSI and/or SSDI.

### Questions

#### Workforce System Capacity

1. How might state workforce systems use new Ticket program funding to increase capacity to effectively serve SSA disability beneficiaries, given that the number of SSA disability beneficiaries who will seek services in a particular locality is unknown?

2. How might state workforce systems integrate the provision of the Ticket program with other existing WIOA services? What opportunities and challenges will arise in doing so?

3. How could DOL's ETA help prepare state workforce systems for a potentially significant increase in SSA disability beneficiaries seeking services?

4. What ongoing federal support would be most helpful to state workforce systems as they administer the Ticket program?

5. How could state workforce systems provide quality remote services, when necessary, to serve SSA disability beneficiaries regionally or nationwide?

6. What are key considerations in transferring SSA's Work Incentives Planning and Assistance (WIPA) services to state workforce agencies?

#### Participant Experience and Outcomes

7. What specific program changes could improve experiences and outcomes for persons accessing the redesigned Ticket program services through the workforce system?

8. What is the capacity of the workforce system to effectively serve young adults or transition-age youth (*i.e.*, ages 14–18) under a redesigned Ticket program? What capacity and coordination issues would arise in serving transition-age youth?

#### Employment Networks and Vocational Rehabilitation

9. What lessons can be taken from current EN models (*e.g.*, community-based, nonprofit, workforce ENs) or collaborative AJC program models that can inform the new Ticket program?

10. How can VR entities partner with state workforce systems to support SSA disability beneficiaries in the redesigned Ticket program?

#### Funding Structure, Performance Metrics and Performance-Based Payments

11. What payment structures and which WIOA performance indicators (if any) would encourage state workforce systems to provide robust employment and training services to persons with disabilities, leading to job placement and ongoing support to ensure job retention?

12. Which of the WIOA performance indicators (if any) could serve as

potential interim measures to trigger partial performance-based payments?

13. What are appropriate intervals (medium- and long-term) for performance-based payments?

14. How would workforce entities and DOL track and measure program success? Would workforce entities require access to new administrative data sources?

### General

15. What challenges within the current Ticket program would potentially remain in a redesigned program administered by state workforce entities, and what could DOL do to address or mitigate them?

16. What strengths of the current Ticket program contribute to the success of individual Ticket holders, and how could these be preserved in the redesigned program?

17. Are there current or recent state examples of integrated systems that offer lessons for successful implementation of the redesigned Ticket program?

18. What are the implications of the current COVID–19 pandemic for redesigning the Ticket program at this time, such as employer demand, workforce system capacity, and remote services?

19. Are there additional considerations in transferring the Ticket program from SSA to DOL?

Signed at Washington, DC, this \_\_th day of September, 2020.

**Jennifer Sheehy,**

*Deputy Assistant Secretary for Disability Employment Policy.*

[FR Doc. 2020–21533 Filed 9–28–20; 8:45 am]

**BILLING CODE 4510–FK–P**

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## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 2020–9]

### Sovereign Immunity Study: Notice and Request for Public Comment

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry; extension of comment period.

**SUMMARY:** The U.S. Copyright Office is extending the deadline for the submission of reply comments and empirical research studies in response to the June 3 and June 24, 2020, notices regarding its state sovereign immunity policy study.

**DATES:** Written reply comments and empirical research studies in response

to the notices published June 3, 2020, at 85 FR 34252, and June 24, 2020, at 85 FR 37961, must be received no later than 11:59 p.m. Eastern Time on October 22, 2020.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <http://www.copyright.gov/docs/sovereignimmunitystudy>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Kevin Amer, Deputy General Counsel, [kamer@copyright.gov](mailto:kamer@copyright.gov); Mark T. Gray, Attorney-Advisor, [mgray@copyright.gov](mailto:mgray@copyright.gov); or Jalyce E. Mangum, Attorney-Advisor, [jmangum@copyright.gov](mailto:jmangum@copyright.gov). They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** On June 3, 2020, the U.S. Copyright Office issued a notice of inquiry (“NOI”) commencing a policy study on state sovereign immunity from copyright infringement suits.<sup>1</sup> Congress has requested that the Office “research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”<sup>2</sup> To assist Congress in making that assessment, the Office solicited public comment on several issues concerning the degree to which copyright owners face infringement from state actors today, whether such infringement is based on intentional or reckless conduct, and what remedies, if any, are available to copyright owners under state law.

On June 24, 2020, the Office issued an additional notice providing for a second round of written comments to permit interested parties the opportunity to address any comments submitted in response to the NOI and to allow parties engaged in empirical research to complete and submit their findings.<sup>3</sup> To ensure that members of the public have sufficient time to comment, and to ensure that the Office has the benefit of

a complete record, the Office is extending the deadline for the submission of additional comments and/or empirical research to 11:59 p.m. Eastern Time on October 22, 2020.

Dated: September 24, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2020-21566 Filed 9-28-20; 8:45 am]

**BILLING CODE 1410-30-P**

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (20-078)]

### NASA Astrophysics Advisory Committee; Meeting.

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Astrophysics Advisory Committee. This Committee reports to the Director, Astrophysics Division, Science Mission Directorate, NASA Headquarters. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

**DATES:** Monday, October 19, 2020, 11:00 a.m.–5:00 p.m., Tuesday, October 20, 2020, 11:00 a.m.–5:00 p.m., and Wednesday, October 21, 2020, 11:00 a.m.–5:00 p.m., Eastern Time.

**FOR FURTHER INFORMATION CONTACT:** Ms. KarShelia Henderson, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358-2355 or [khenderson@nasa.gov](mailto:khenderson@nasa.gov).

**SUPPLEMENTARY INFORMATION:** The meeting will be available to the public by WebEx.

On Monday, October 19, the event address for attendees is: <https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e8ac0c8ba6c20d6158a15014539ff4fe5>, the event number is 199 918 6105, and event password is ixXyezN@783.

On Tuesday, October 20, the event address for attendees is: <https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e2402f4eea7472e33624d6ab4cfee14f5>, the event number is 199 163 7113, and the event password is TSpcc97Hd\*5.

On Wednesday, October 21, the event address for attendees is: <https://>

[nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=eb739cd4ce1f20ff24be91839cbc1d217](https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=eb739cd4ce1f20ff24be91839cbc1d217), the event number is 199 599 3836, and the event password is bKsf3Unn\$57.

The agenda for the meeting includes the following topics:

- Astrophysics Division Update
- Updates on Specific Astrophysics Missions
- Reports from the Program Analysis Groups
- Reports from Specific Research and Analysis Programs

The agenda will be posted on the Astrophysics Advisory Committee web page: <https://science.nasa.gov/researchers/nac/science-advisory-committees/apac>.

The public may submit and upvote comments/questions ahead of the meeting through the website <https://arc.cnf.io/sessions/h259/#!/dashboard> that will be opened for input on October 5, 2020.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

**Patricia Rausch,**

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. 2020-21428 Filed 9-28-20; 8:45 am]

**BILLING CODE 7510-13-P**

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## NATIONAL SCIENCE FOUNDATION

### Notice of Permits Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit issued.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

**FOR FURTHER INFORMATION CONTACT:** Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703-292-8030; email: [ACApermits@nsf.gov](mailto:ACApermits@nsf.gov).

**SUPPLEMENTARY INFORMATION:** On August 20, 2020, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on September 23, 2020 to:

<sup>1</sup> 85 FR 34252 (June 3, 2020).

<sup>2</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), <https://www.copyright.gov/rulemaking/statesovereign-immunity/letter.pdf>.

<sup>3</sup> 85 FR 37961 (June 24, 2020); see 85 FR at 34255.

Name of applicant organization	State	Service area	Estimated Annualized 2021 Funding
Rhode Island Legal Services, Inc .....	RI	RI-1	1,036,191
South Carolina Legal Services, Inc .....	SC	MSC	166,572
South Carolina Legal Services, Inc .....	SC	SC-8	6,466,912
Dakota Plains Legal Services, Inc .....	SD	NSD-1	1,098,419
East River Legal Services .....	SD	SD-2	461,315
Dakota Plains Legal Services, Inc .....	SD	SD-4	501,191
Legal Aid Society of Middle Tennessee and the Cumberlands .....	TN	TN-10	3,347,711
Memphis Area Legal Services, Inc .....	TN	TN-4	1,661,056
West Tennessee Legal Services, Inc .....	TN	TN-7	765,560
Legal Aid of East Tennessee .....	TN	TN-9	2,703,092
Texas RioGrande Legal Aid, Inc .....	TX	MSX-2	2,081,141
Texas RioGrande Legal Aid, Inc .....	TX	NTX-1	36,819
Lone Star Legal Aid .....	TX	TX-13	12,888,876
Legal Aid of NorthWest Texas .....	TX	TX-14	9,794,740
Texas RioGrande Legal Aid, Inc .....	TX	TX-15	12,318,247
Utah Legal Services, Inc .....	UT	MUT	99,574
Utah Legal Services, Inc .....	UT	NUT-1	96,783
Utah Legal Services, Inc .....	UT	UT-1	2,516,704
Central Virginia Legal Aid Society, Inc .....	VA	MVA	200,938
Southwest Virginia Legal Aid Society, Inc .....	VA	VA-15	928,630
Legal Aid Society of Eastern Virginia .....	VA	VA-16	1,682,317
Virginia Legal Aid Society, Inc .....	VA	VA-17	865,389
Central Virginia Legal Aid Society, Inc .....	VA	VA-18	1,404,007
Blue Ridge Legal Services, Inc .....	VA	VA-19	922,443
Legal Services of Northern Virginia, Inc .....	VA	VA-20	1,711,145
Legal Services of the Virgin Islands, Inc .....	VI	VI-1	208,408
Legal Services Vermont .....	VT	VT-1	558,386
Northwest Justice Project .....	WA	MWA	757,981
Northwest Justice Project .....	WA	NWA-1	335,121
Northwest Justice Project .....	WA	WA-1	6,318,864
Legal Action of Wisconsin, Inc .....	WI	MWI	428,697
Wisconsin Judicare, Inc .....	WI	NWI-1	182,487
Wisconsin Judicare, Inc .....	WI	WI-2	1,081,437
Legal Action of Wisconsin, Inc .....	WI	WI-5	4,132,260
Legal Aid of West Virginia, Inc .....	WV	WV-5	2,966,918
Legal Aid of Wyoming, Inc .....	WY	NWY-1	203,288
Legal Aid of Wyoming, Inc .....	WY	WY-4	565,108

These grants will be awarded under the authority conferred on LSC by section 1006(a)(1) of the Legal Services Corporation Act, 42 U.S.C. 2996e(a)(1). Grant awards are made to ensure civil legal services are provided in every service area, although no listed organization is guaranteed a grant award. Grants will become effective, and grant funds will be distributed, on or about January 1, 2021.

LSC issues this notice pursuant to 42 U.S.C. 2996f(f). Comments and recommendations concerning potential grantees are invited and should be delivered to LSC within 30 days from the date of publication of this notice.

Dated: October 30, 2020.

**Stefanie Davis,**

*Senior Assistant General Counsel.*

[FR Doc. 2020-24513 Filed 11-4-20; 8:45 am]

**BILLING CODE 7050-01-P**

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 2020-9]

### Sovereign Immunity Study: Announcement of Public Roundtables

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of public roundtables.

**SUMMARY:** The U.S. Copyright Office is conducting a study to evaluate the degree to which copyright owners are experiencing infringement by state entities without adequate remedies under state law, as well as the extent to which such infringements appear to be based on intentional or reckless conduct. To aid its analysis, the Office is announcing public roundtables to provide the opportunity for members of the public to address the following topics: Evidence of actual or threatened copyright infringement by states; state policies and practices for minimizing copyright infringement and addressing infringement claims; and alternative

remedies under state law for copyright infringement.

**DATES:** The roundtables will be held on Friday, December 11, 2020. Attendees will be able to join the event online starting at approximately 8:30 a.m., and the event will run until approximately 5:00 p.m.

**ADDRESSES:** The Office will conduct the roundtables remotely using the Zoom videoconferencing platform. Requests to participate as a panelist in a roundtable session should be submitted by 11:59 p.m. Eastern Time on November 16, 2020 using the form available at <https://www.copyright.gov/policy/state-sovereign-immunity/hearing-request.html>. Any person who is unable to send a request via the website should contact the Office using the contact information below to make an alternative arrangement for submission of a request to participate. Additional information will be made available at <https://www.copyright.gov/policy/state-sovereign-immunity/roundtable>.

**FOR FURTHER INFORMATION CONTACT:**  
Kevin R. Amer, Deputy General

Counsel, [kamer@copyright.gov](mailto:kamer@copyright.gov); Mark T. Gray, Attorney-Advisor, [mgray@copyright.gov](mailto:mgray@copyright.gov); or Jalyce E. Mangum, Attorney-Advisor, [jmang@copyright.gov](mailto:jmang@copyright.gov). They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** On June 3, 2020, the U.S. Copyright Office issued a notice of inquiry (“NOI”) commencing a policy study on state sovereign immunity from copyright infringement suits.<sup>1</sup> Congress has requested that the Office “research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”<sup>2</sup> To assist Congress in making that assessment, the Office solicited public comment on several issues concerning the degree to which copyright owners face infringement from state actors today, whether such infringement is based on intentional or reckless conduct, and what remedies, if any, are available to copyright owners under state law. Initial comments were due on September 2, 2020, and reply comments and empirical studies were due on October 22, 2020. Information about the study, including the NOI and public comments, may be accessed on the Copyright Office website at <https://www.copyright.gov/policy/state-sovereign-immunity/>.

The Office is now announcing that it will hold roundtable discussions on December 11, 2020, to allow interested members of the public to discuss and provide additional information on the topics of the study. The roundtables will be held virtually over Zoom to allow maximum participation and avoid the need for participants to travel. Each roundtable session will cover a topic relevant to the study, as discussed below. Depending on the level of interest, the Office may hold multiple sessions on the same topic to accommodate a greater number of participants and provide additional time for discussion.

Members of the public who seek to participate in a roundtable should complete and submit the form available on the Office website at <https://www.copyright.gov/policy/state-sovereign-immunity/hearing-request.html> no later than November 16, 2020. Shortly thereafter, the Office will notify participants of their selection and panel assignments. In order to

accommodate the expected level of interest, the Office plans to assign no more than one representative per organization to each session.

The Office will post a tentative agenda for the roundtables on its website on or about December 4, 2020. The Office also will provide sign-up information for members of the public who wish to observe, but not participate in, one or more of the roundtable sessions. The sessions will be video recorded and transcribed, and copies of the recording and transcript will be made available on the Copyright Office website

#### Roundtable Subjects of Inquiry

The roundtables will consist of sessions on the following topics: (1) Evidence of actual or threatened copyright infringement by states; (2) state policies and practices for minimizing copyright infringement and addressing infringement claims; and (3) alternative remedies under state law for copyright infringement.

#### *Evidence of Actual or Threatened Copyright Infringement by States*

Congress has asked the Office to “study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law.”<sup>3</sup> To this end, the Office seeks evidence concerning actual or threatened copyright infringement by states, including both specific instances of infringing conduct and empirical information relating to broader trends. Relevant issues include, but are not limited to, the prevalence and outcomes of infringement suits brought against state actors; whether the frequency of infringement by states has changed over time and whether it is likely to increase or decrease in the future; and the extent to which state immunity affects sales and licensing practices in transactions involving state entities. In addition, in light of the Supreme Court’s articulation of the standard of intent required to establish unconstitutional infringement,<sup>4</sup> the Office is particularly interested in information that would allow it to assess the extent to which state infringements have involved intentional or reckless conduct.

#### *State Policies and Practices for Minimizing Copyright Infringement and Addressing Infringement Claims*

The Office is interested in whether or to what extent states have adopted policies to address complaints of

copyright infringement and/or to decrease the likelihood of inadvertent infringement by state employees and institutions. The Office is particularly interested in testimony by state officials about their own practices, but the Office also invites participation by organizations or individuals who have navigated the relevant processes or otherwise have experience with this topic.

#### *Alternative Remedies Under State Law for Copyright Infringement*

The Supreme Court’s decision in *Allen v. Cooper* requires Congress to consider whether states “fail[] to offer an adequate remedy for an infringement.”<sup>5</sup> The Office accordingly is interested in hearing from members of the public about what remedies states provide for infringement of copyright, as well as whether those remedies are adequate for enforcement purposes. The Office would be particularly interested in hearing from those who have asserted alternative state-law remedies in court and how such cases were resolved. Discussion of these issues should include consideration of the relationship of any state-law cause of action to the preemption provisions under section 301 of the Copyright Act.<sup>6</sup>

Dated: November 2, 2020.

**Regan A. Smith,**

*General Counsel and Associate Register of Copyrights.*

[FR Doc. 2020-24577 Filed 11-4-20; 8:45 am]

**BILLING CODE 1410-30-P**

#### **MORRIS K. UDALL AND STEWART L. UDALL FOUNDATION**

#### **Sunshine Act Meetings**

**TIME AND DATE:** 10 a.m. to 12 p.m. (MST), Friday, November 20, 2020.

**PLACE:** The offices of the Morris K. Udall and Stewart L. Udall Foundation, 130 South Scott Avenue, Tucson, AZ 85701.

**STATUS:** This meeting will be open to the public. Due to COVID-19, visitors are currently prohibited from entering the Udall Foundation offices. Members of the public who would like to attend this meeting should contact Elizabeth Monroe at [monroe@udall.gov](mailto:monroe@udall.gov) prior to November 20 to request the teleconference connection information.

**MATTERS TO BE CONSIDERED:** (1) Call to Order and Chair’s Remarks; (2) Executive Director’s Remarks; (3) Remarks from Senator Tom Udall; (4)

<sup>1</sup> 85 FR 34252 (June 3, 2020).

<sup>2</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), <https://www.copyright.gov/policy/state-sovereign-immunity/letter.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> See *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020).

<sup>5</sup> *Id.*

<sup>6</sup> 17 U.S.C. 301.

**APPENDIX C**      **COMMENTING PARTIES AND  
ROUNDTABLE PARTICIPANTS**

**Parties Who Submitted Initial Comments in  
Response to the June 3, 2020 Notice of Inquiry**

American Intellectual Property Law Association (AIPLA)	Library Copyright Alliance (LCA)
Allen, Frederick	McMahan, Kelley
Association of Public and Land-grant Universities and the Association of American Universities (APLU-AAU)	Miglavs, Jnis
Association of Southeastern Research Libraries (ASERL)	National Press Photographers Association (NPPA)
B., Mat	National Writers Union (NWU)
Boatman, Mike	News Media Alliance (NMA)
Bolar, Shelia	Petersen, Elsa
Cacciottolo, Neil J.	Peterson, Amos
Flynn, Joshua	Searcy, Steven
Fons, Eric	SoundExchange
French, Ryan	University of Illinois at Urbana Champaign
Gigante, Alexander	University of Massachusetts
Hawkins, Kevin	University of Michigan Library
Hockley Photography	University of Minnesota
Kelly, Patricia	Whidbey Writers Group

**Parties Who Submitted Reply Comments in  
Response to the June 3, 2020 Notice of Inquiry**

Association of Public and Land-grant Universities and the Association of American Universities (APLU & AAU)	Fakouri, Maryam
Association of Southeastern Research Libraries (ASERL) and the Greater Western Library Alliance (GWLA)	Forbis, Glenn
Association of University Presses (AUPresses)	Pixsy Inc.
Bynum, Michael	Songwriters Guild of America (SGA) & Society of Composers & Lyricists (SCL)
Caldwell, Kenneth	Software and Information Industry Association (SIIA)
Copyright Alliance	University of Illinois at Urbana-Champaign
Enriquez, Ana	University of Michigan Library

**Virtual Roundtable Participants  
(December 11, 2020)**

Allen, Frederick (Nautilus Productions)	MacDonald, Agnus (University of California, Office of General Counsel)
Band, Jonathan (Library Copyright Alliance) (LCA)	Madigan, Kevin (Copyright Alliance)
Bell, Keith	Molnar, Isaac (Ohio Attorney General's Office)
Benson, Sara (University of Illinois at Urbana-Champaign)	Munter, Johannes (News Media Alliance) (NMA)
Butler, Brandon (Association of Southeastern Research Libraries (ASERL); Software Preservation Network (SPN))	Murphy, Kristen (American Chemical Society) (ACS)
Bynum, Michael	Olson, Darcee (Louisiana State University)
Calzada, Alicia (National Press Photographers Association) (NPPA)	Samberg, Rachael (University of California, Berkeley)
Dooley, Yvonne (University of North Texas)	Sapiandante, Maria
Evans, Harold (University of Arkansas)	Sedlik, Jeff (Art Center College of Design)
Johnson, Andrea (C MATH is EASY)	Shontz, Douglas (University of Illinois; Association of Public and Land-Grant Universities)
Klaus, Kurt (Dunlap Bennett & Ludwig, PLLC)	Smith, Kevin (University of Kansas)
Laiho, Devin (Colorado Attorney General's Office)	Thro, William (University of Kentucky)
Lanier, Raven (University of Michigan Library)	Vockell, Marc (University of Texas)
Levine, Melissa (University of Michigan Library)	Wassom, Brian (American Intellectual Property Law Association) (AIPLA)
Linder, Craig (Dow Jones & Company)	Xu, Yuanxiao (University of Michigan Library)

**APPENDIX D      ROUNDTABLE AGENDA**



UNITED STATES COPYRIGHT OFFICE

# State Sovereign Immunity Study Roundtable

Virtual Event

Friday, December 11, 2020

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10:00 – 11:30 AM

**SESSION 1**

Evidence of  
Infringement – Part 1

Frederick Allen  
Sara Benson  
Andrea Johnson  
Craig Linder  
Kevin Madigan  
Johannes Munter  
Maria Sapiandante  
Jeff Sedlik  
Kevin Smith  
William Thro

Nautilus Productions  
University of Illinois at Urbana Champaign  
C MATH is EASY  
Dow Jones & Company  
Copyright Alliance  
News Media Alliance  
Intellectual Property Attorney  
Art Center College of Design  
University of Kansas  
University of Kentucky

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11:30 – 11:45 AM    BREAK

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11:45 AM – 1:15 PM

**SESSION 2**

Evidence of  
Infringement – Part 2

Dr. Keith Bell  
Michael Bynum  
Devin Laiho  
Melissa Levine  
Angus MacDonald  
  
Isaac Molnar  
Kristen Murphy  
Brian Wassom

Author  
Author  
Colorado Attorney General's Office  
University of Michigan Library  
University of California, Office of General Counsel  
Ohio Attorney General's Office  
American Chemical Society  
American Intellectual Property Law Association

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1:15 – 2:00 PM    LUNCH

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2:00 – 3:30 PM

**SESSION 3**

State Policies and  
Practices

Brandon Butler  
  
Yvonne Dooley  
Harold Evans  
Kurt Klaus  
Raven Lanier  
Rachael Samberg  
Douglas Shontz

Association of Southeastern Research Libraries; Software Preservation Network  
University of North Texas  
University of Arkansas  
Dunlap Bennett & Ludwig, PLLC  
University of Michigan Library  
University of California, Berkeley  
University of Illinois; Association of Public and Land-Grant Universities

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3:30 – 3:45 PM    BREAK

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3:45 – 5:15 PM

**SESSION 4**

State Law Remedies

Jonathan Band  
Michael Bynum  
Alicia Calzada  
Kevin Madigan  
Darcee Olson  
Marc Vockell  
Yuanxiao Xu

Library Copyright Alliance  
Author  
National Press Photographers Association  
Copyright Alliance  
Louisiana State University  
University of Texas  
University of Michigan Library

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5:15 – 6:00 PM

**OPEN MIC**

**APPENDIX E      WAIVERS OF IMMUNITY BY STATE**

## Waivers of Immunity by State

State	Does State Constitution Permit the Legislature to Waive Sovereign Immunity?	Does State Law Permit Actions Against the State?	Types of Claims Available	Forums Available
AL <sup>1</sup>	No	–	–	–
AK <sup>2</sup>	Yes	Yes	Contract, quasi-contract, or tort claims	State court
AZ <sup>3</sup>	Yes	Yes	Not specified	State court
AR <sup>4</sup>	No	Yes	Not specified	State claims commission
CA <sup>5</sup>	Yes	Yes	Not specified	State court
CO <sup>6</sup>	Not specified	Yes	Specified tort claims	State court
CT <sup>7</sup>	Yes	Yes	Claims for which a private person could be liable; suits must be authorized by Claims Commissioner	State court
DE <sup>8</sup>	Yes	Yes	Tort, contract, and liability insurance claims	State court
DC <sup>9</sup>	–	Yes	Contract and tort claims	DC court
FL <sup>10</sup>	Yes	Yes	Tort claims	State court
GA <sup>11</sup>	Yes	Yes	Contract and tort claims	State court
HI <sup>12</sup>	Not specified	Yes	Tort claims	State court
ID <sup>13</sup>	Yes	Yes	Tort claims	State court
IL <sup>14</sup>	Yes	Yes	State-law claims	State court
IN <sup>15</sup>	Yes	Yes	Contract and tort claims	State court
IA <sup>16</sup>	Not specified	Yes	Tort claims	State court
KS <sup>17</sup>	Not specified	Yes	Torts and other approved claims	State court
KY <sup>18</sup>	Yes	Yes	Contract claims	State court
LA <sup>19</sup>	Yes	Yes	Contract and tort claims	State court
ME <sup>20</sup>	Not specified	Yes	Specified tort claims	State court
MD <sup>21</sup>	Yes	Yes	Contract and tort claims	State court
MA <sup>22</sup>	Not specified	Yes	Tort claims	State court
MI <sup>23</sup>	Yes	Yes	Tort claims where immunity is specifically waived and employment related claims	State court

State	Does State Constitution Permit the Legislature to Waive Sovereign Immunity?	Does State Law Permit Actions Against the State?	Types of Claims Available	Forums Available
MN <sup>24</sup>	Not specified	Yes	Tort claims and employment-related claims under certain federal statutes	State court for tort claims; federal court or other court of competent jurisdiction for federal claims
MS <sup>25</sup>	Not specified	Yes	Tort claims	State court
MO <sup>26</sup>	Not specified	Yes	Tort claims	State court
MT <sup>27</sup>	Yes	Yes	Tort claims	State court
NE <sup>28</sup>	Yes	Yes	Tort claims	State court
NV <sup>29</sup>	Yes	Yes	Tort claims	State court
NH <sup>30</sup>	Not specified	Yes	Contract and tort claims	State court
NJ <sup>31</sup>	Not specified	Yes	Act or omission of a public employee within scope of employment; contract claims	State court
NM <sup>32</sup>	Not specified	Yes	Torts claims where immunity is specifically waived and claims related to religious freedom	State court
NY <sup>33</sup>	Yes	Yes	Claims for which individuals and corporations can be liable	State court
NC <sup>34</sup>	Not specified	Yes	Tort claims	State commission
ND <sup>35</sup>	Yes	Yes	Contract and tort claims; claims involving title to property	State court
OH <sup>36</sup>	Yes	Yes	Claims available to private parties	State court
OK <sup>37</sup>	Not specified	Yes	Tort claims	State court
OR <sup>38</sup>	Yes	Yes	Contract and tort claims	State court
PA <sup>39</sup>	Yes	Yes	Specified tort claims	State court

State	Does State Constitution Permit the Legislature to Waive Sovereign Immunity?	Does State Law Permit Actions Against the State?	Types of Claims Available	Forums Available
RI <sup>40</sup>	Not specified	Yes	Tort claims	Not specified
SC <sup>41</sup>	Yes	Yes	Tort claims unless listed under exceptions to waiver of immunity.	State court
SD <sup>42</sup>	Yes	Yes	Claims involving real or personal property; waiver of immunity to the extent of liability insurance coverage by the state.	State court for claims involving property; not specified for other claims
TN <sup>43</sup>	Yes	Yes	Specified state-law claims	State commission
TX <sup>44</sup>	Not specified	Yes	Specified tort and contract claims	State court
UT <sup>45</sup>	Not specified	Yes	Specified state-law claims	State court
VT <sup>46</sup>	Not specified	Yes	Tort claims	State court
VA <sup>47</sup>	Not specified	Yes	Tort claims	State court
WA <sup>48</sup>	Yes	Yes	Tort claims	State court
WV <sup>49</sup>	No	No	–	–
WI <sup>50</sup>	Yes	Yes	Contract and tort claims	State court
WY <sup>51</sup>	Yes	Yes	Contract and tort claims	State court

<sup>1</sup> ALA. CONST. art. I, § 14 (“[T]he State of Alabama shall never be made a defendant in any court of law or equity.”).

<sup>2</sup> ALASKA CONST. art. II, § 21 (“The legislature shall establish procedures for suits against the State.”); ALASKA STAT. § 09.50.250 (“A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim.”).

<sup>3</sup> ARIZ. CONST. art. 4IV, pt. 2, § 18 (“The legislature shall direct by law in what manner and in what courts suits may be brought against the state.”); ARIZ. REV. STAT. § 12-821.01 (“Persons who have claims against a public entity, public school or a public employee shall file claims with the person or persons authorized to accept service for the public entity, public school or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues.”); *id.* § 12-401 (“Actions against counties shall be brought in the county sued unless several counties are defendants, when it may be brought in any one of the counties . . . . Actions against public officers shall be brought in the county in which the officer, or one of several officers, holds office.”).

<sup>4</sup> ARK. CONST. art. 5V, § 20 (“The State of Arkansas shall never be made defendant in any of her courts.”); ARK. CODE ANN. §§ 19-10-201–223, 21-5-701–708, 6-82-501–507 (establishing a claims commission for the hearing and adjudication of claims against the state of Arkansas, its agencies, and its institutions).

<sup>5</sup> CAL. CONST. art. III, § 5 (“Suits may be brought against the State in such manner and in such courts as shall be directed by law.”); CAL. GOV. CODE §§ 815–996.6 (California Tort Claims Act); CAL. GOV. CODE § 945 (“A public entity may sue and be sued”); *see id.* § 955 (“The proper court for trial of actions against the State for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situate.”); *id.* § 955.2 (“Notwithstanding any other provision of law, where the State is named as a defendant in any action or proceeding for death or injury to person or personal property and the injury or the injury causing death occurred within this State, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury occurred or where the injury causing death occurred.”).

<sup>6</sup> COLO. REV. STAT. § 24-10-104 (“Notwithstanding any provision of law to the contrary, the governing body of a public entity, by resolution, may waive the immunity granted in section 24-10-106 for the types of injuries described in the resolution. Any such waiver may be withdrawn by the governing body by resolution.”); *id.* § 24-10-106 (“This section provides for partial waiver of immunity for tort actions against the state.”); COLO. R. CIV. P. 98 (noting that actions against a public officer “shall be tried in the county where the claim, or some part thereof, arose”).

<sup>7</sup> CONN. CONST. art. XI, § 4 (“Claims against the State shall be resolved in such manner as may be provided by law.”); CONN. GEN. STAT. §§ 4-159(c), (e) (“The General Assembly may grant the claimant permission to sue the state under the provisions of this section when the General Assembly deems it just and equitable and believes the claim to present an issue of law or fact under which the state, were it a private person, could be liable. . . . The review by the General Assembly of claims submitted to it by the Office of the Claims Commissioner under this section shall be conducted in accordance with such procedures as the General Assembly may prescribe.”); *id.* § 4-160(a) (“Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable.”); *id.* § 4-160(d) (“The claimant shall bring such action against the state as party defendant in the judicial district in which the claimant resides or, if the claimant is not a resident of this state, in the judicial district of Hartford or in the judicial district in which the claim arose.”); *Miller v. Egan*, 265 Conn. 301, 338, 828 A.2d 549, 559 (Conn. 2003) (finding that when plaintiff brings action for money damages against state, he must proceed through Office of the Claims Commissioner pursuant to chapter; otherwise, the action will be dismissed for lack of subject matter jurisdiction under doctrine of sovereign immunity); *LaPaglia v. Conn. Valley Hosp.*, No. CV175039918S, 2018 Conn. Super. LEXIS 3191, at \*20 (Super. Ct. Oct. 2, 2018) (finding no exception to the application of sovereign immunity to the plaintiff’s copyright infringement claim).

<sup>8</sup> DEL. CONST. art. I, § 9 (“Suits may be brought against the State, according to such regulations as shall be made by law.”); DEL. CODE ANN. tit. 10, §§ 4001–05, 4010–13; *id.* tit. 18, § 6511 (“The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.”).

<sup>9</sup> D.C. CODE § 2-359.04 (“Unless otherwise specifically provided by law of the District, the District government and every officer, department, agency, or other unit of the District government shall not raise the defense of sovereign immunity in the courts of the District in an action based upon a written procurement contract executed on behalf of the District government.”); *id.* § 2-402 (“The Mayor of the District of Columbia is empowered to settle, in his discretion, claims and suits, either at law or in equity, against the District of Columbia whenever the cause of action . . . [a]rises out of the negligence or wrongful act . . . [or] [a]rises out of the existence of facts and circumstances which place the claim or suit within the doctrines and principles of law decided by the courts in the District of Columbia or by the Supreme Court of the United States to be controlling in the District of Columbia.”).

<sup>10</sup> FLA. CONST. art. X, § 13 (“Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”); FLA. STAT. ANN. § 768.28 (“In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.”); *id.* (noting that the action shall be heard in the county where the property is located or where the cause of action accrued. If it’s

an action against a state university, a county where the university's main campus is location or where the cause of action accrued).

<sup>11</sup> GA. CONST. art. I, § 2, para. IX (“The General Assembly may waive the state’s sovereign immunity from suit by enacting a State Tort Claims Act . . . The state’s defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies. . . . [the state] may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. . . . No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.”); GA. CODE ANN. § 50-21-1 (“The defense of sovereign immunity is waived as to any action ex contractu for the breach of any written contract existing on April 12, 1982, or thereafter entered into by the state, departments and agencies of the state, and state authorities.”); *id.* § 50-21-23 (“The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances . . . [t]he state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.”) *id.* § 50-21-28 (providing that contract claims shall be heard in the Superior Court of Fulton County and tort actions shall be heard in the state or superior court in the county where the tort occurred.).

<sup>12</sup> HAW. REV. STAT. § 662-2 (“The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”); *id.* § 662-3 (“The circuit courts of the State and, except as otherwise provided by statute or rule, the state district courts shall have original jurisdiction of all tort actions on claims against the State, for money damages, accruing on and after July 1, 1957, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the State while acting within the scope of the employee’s office or employment.”).

<sup>13</sup> IDAHO CONST. art. IV, § 18 (“The governor, secretary of state, and attorney general shall constitute a board of examiners, with power to examine all claims against the state . . . [a]nd no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board.”); IDAHO CODE § 6-903 (“Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties[.]”); *id.* § 6-915 (“Actions against the state or its employee shall be brought in the county in which the cause of action arose or in Ada County.”).

<sup>14</sup> ILL. CONST. art. XIII, § 4 (“Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.”); 705 ILL. COMP. STAT. ANN. 505/8 (establishing exclusive jurisdiction in Court of Claims for state-law, contract, and tort claims against state).

<sup>15</sup> IND. CONST. art. IV, § 24 (“Provision may be made, by general law, for bringing suit against the State; but no special law authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.”); IND. CODE § 34-13-1-1 (“Any person having a claim against the State arising out of an express or implied contract may bring suit within ten (10) years after accrual of the claim[.]”); *id.* § 34-13-2-3 (“This chapter shall not be construed as[] a waiver of the Eleventh Amendment to the Constitution of the United States, consent by the state of Indiana or its employees to be sued in any federal court, or consent to be sued in any state court beyond the boundaries of Indiana.”); *id.* § 34-13-3-1 (“This chapter applies only to a claim or suit in tort.”).

<sup>16</sup> See IOWA CODE § 699.5 (“A suit shall not be permitted for a claim under this chapter unless the attorney general has made final disposition of the claim. However, if the attorney general does not make final disposition of a claim within six months after the claim is made in writing to the director of the department of management, the claimant may, by notice in writing, withdraw the claim from consideration and begin suit”); *id.* § 699.13 (Claims against the state are barred unless notice is provided in writing within two years of the claim.); see *id.* § 699.2 (defining “claim” as “[a]ny claim against the state of Iowa for money only,

on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while acting within the scope of the employee's office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death."); *id.* § 699.6 ("Judgments in the district courts in suits under this chapter shall be subject to appeal to the supreme court of the state in the same manner and to the same extent as other judgments of the district courts."); *id.* §§ 25.1, 25.2 (providing for consideration of specified claims against the state by department of management and state appeal board).

<sup>17</sup> *See* KAN. STAT. ANN. *See* KAN. STAT. ANN. § 75-6103(a) ("Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state"); *id.* § 61-2802 (governing procedure for claims filed in the district court against "any officers of the state, or any subdivisions thereof"); *id.* § 46-907 *et seq.* (providing for consideration of claims against state by legislature's joint committee on special claims against the state); *id.* § 46-919 ("A recommendation by the joint committee on special claims against the state that an award be made to any claimant shall not be construed as a waiver of immunity from liability on the part of the state or any agency thereof nor shall such recommendation impose liability upon the state or any agency thereof in the amount recommended.").

<sup>18</sup> KY. CONST. § 231 ("The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."); KY. REV. STAT. ANN. § 45A.245 ("Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury").

<sup>19</sup> LA. CONST. art. X, § 10(A)–(B) ("Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property. . . . The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability."); LA. STAT. ANN. § 13:5106 ("No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.").

<sup>20</sup> ME. STAT. tit. 14, § 8103 ("Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter."); *id.* § 8104-A ("Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances. . . . ownership; maintenance or use of vehicles, machinery and equipment . . . construction, operation or maintenance of any public building . . . [d]ischarge of pollutants . . . [and] [r]oad construction, street cleaning or repair."); *id.* § 8106 ("The Superior Court shall have original jurisdiction over all claims permitted under this chapter").

<sup>21</sup> MD. CONST. art. V, § 6 ("It shall be the duty of the Clerk of the Court of Appeals and the Clerks of any intermediate courts of appeal, respectively, whenever a case shall be brought into said Courts, in which the State is a party or has interest, immediately to notify the Attorney General thereof."); MD. CODE ANN., STATE GOV'T § 12-104 ("Subject to the exclusions and limitations in this subtitle and notwithstanding any other provision of law, the immunity of the State and of its units is waived as to a tort action, in a court of the State[.]"); *id.* § 12-201 ("Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.").

MASS. GEN. LAWS ch. 258, § 2 ("Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment[.]"); *id.* § 12 ("Claims against the commonwealth, except as otherwise expressly provided in this chapter or by any general or special provision of law, may be enforced in the superior court.").

<sup>23</sup> MICH. CONST. art. IX, § 22 ("Procedures for the examination and adjustment of claims against the state shall be prescribed by law."); MICH. COMP. LAWS § 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise

or discharge of a governmental function.”); *id.* §§ 15.361–15.369 (“AN ACT to provide protection to employees who report a violation or suspected violation of state, local, or federal law”); *id.* § 15.361(a) (“Employee includes a person employed by the state or a political subdivision of the state except state classified civil service.”); *id.* § 600.6419(1)(a) (establishing jurisdiction in court of claims over “any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers,” subject to specified exceptions).

<sup>24</sup> MINN. STAT. § 1.05 (waiving sovereign immunity for violations of certain federal statutes and allowing aggrieved party to bring action against the state in federal court or in any other court of competent jurisdiction); *id.* § 3.736 subdiv. 1 (“The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . .”); *id.* subdiv. 2 (“[Such] claim shall be brought under this section as a civil action in the courts of the state.”); *id.* subdiv. 4 & 4a (establishing limits on monetary liability of the state); *id.* subdiv. 8 (“A state agency . . . may procure insurance against liability of the agency and its employees for damages resulting from the torts of the agency and its employees. Procurement of the insurance is a waiver of the limits of governmental liability under subdivisions 4 and 4a only to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim.”).

<sup>25</sup> MISS. CODE ANN. § 11-46-5 (“Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . . only to the extent of the maximum amount of liability provided for in Section 11-46-15.”); *id.* § 11-46-13(2) (“The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place.”).

<sup>26</sup> MO. REV. STAT. § 537.600 (“Such sovereign or governmental tort immunity as existed at common law in this state . . . shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived[.]”); *id.* § 508.060 (“All actions whatsoever against any county shall be commenced in the circuit court of such county”); *see id.* § 508.010 (limited the venue for tort suits within the state).

<sup>27</sup> MONT. CONST. art II, § 18 (“The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.”); *id.* art. III, § 39 (listing express limitations on the legislature’s powers, not limiting the power to make laws waiving sovereign immunity); MONT. CODE ANN. § 2-9-102 (“Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.”); *id.* § 2-9-105 (“The state and other governmental entities are immune from exemplary and punitive damages.”); *id.* § 2-9-311 (“The district court shall have jurisdiction over any action brought under parts 1 through 3 of this chapter”).

<sup>28</sup> NEB. CONST. art V, § 22 (“The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.”); NEB. REV. STAT. ANN. §§ 81-8,209–81-8,239.11 (noting that the state shall be liable for “damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death”); *id.* § 81-8,214 (“The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim.”).

<sup>29</sup> NEV. CONST. art IV, § 22 (“Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution”); N.R.S. §§ 41.031 through 41.0337 (Nevada Tort Claims Act); *id.* § 41.031 (“Nevada hereby waives its immunity from liability and action and consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons, except as otherwise provided.”); *id.* (“An action against the State of Nevada must be filed in the county where the cause or some part thereof arose or in Carson City.”).

<sup>30</sup> N.H. REV. STAT. § 541-B:1IIa (defining a “claim” as “any request for monetary relief for either [b]odily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general court to follow the appropriate standard of care when that duty was owed to the person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law; or [p]roperty damages suffered by a state employee or official during the performance of that employee's or official's duties while on state business where compensation is appropriate under principles of equity and good conscience.”); *id.* § 541-B:9-a (“When a claim filed pursuant to this chapter is against both the state and an agent, official or employee of the state, the court shall determine whether the state is responsible for the actions of the agent, employee or official. If the court determines that the state is responsible for the actions of the agent, employee or official; the agent, employee or official shall be dismissed as a defendant and the plaintiff shall proceed solely against the state.”); *id.* § 541-B-9 (the board of claims and the superior court share jurisdiction depending on amount of claim); *id.* § 491:8 (“The superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state, including specific performance and other equitable remedies that are not limited to money damages.”).

<sup>31</sup> N.J.S.A. § 59:2-2 (“A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.”); *id.* § 59:13-3 (“The State of New Jersey hereby waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law.”); *id.* § 59:9-1 (“Tort claims under this act shall be heard by a judge sitting without a jury or a judge and jury where appropriate demand therefor is made in accordance with the rules governing the courts of the State of New Jersey.”); *id.* § 59:13-4 (“The courts of competent jurisdiction of the State of New Jersey shall have jurisdiction over all claims against the State for breach of a contract, either express or implied in fact.”).

<sup>32</sup> N.M.R.A. §§ 41-4-1 through 41-4-12 (granting immunity from tort liability except for claims resulting from injury caused by law enforcement officers and the negligent operation or maintenance of motor vehicles, aircraft and watercraft; buildings, public parks, machinery, equipment and furnishings; airports; public utilities; medical facilities; health care providers; or highways and streets); *id.* § 28-22-3 (“A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency”); *id.* § 41-4-1 (“A. Exclusive original jurisdiction for any claim under the Tort Claims Act [41-4-1 NMSA 1978] shall be in the district courts of New Mexico. Appeals may be taken as provided by law. B. Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act [41-4-1 NMSA 1978], shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county. Venue for all other claims pursuant to the Tort Claims Act, shall be in the county in which the principal offices of the governing body of the local public body are located.”).

<sup>33</sup> N.Y. CONST. art. VI, § 18b (“The legislature may provide for the manner of trial of actions and proceedings involving claims against the state”); N.Y. CT. CL. ACT § 8 (“The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.”); *id.* § 9(2) (Court of Claims has jurisdiction “[t]o hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article.”); *Morell v. Balasubramanian*, 514 N.E.2d 1101 (N.Y. 1987) (State immune when performing governmental act (legislating, judging, or making discretionary decisions) as opposed to proprietary act (act substitutes for or supplement traditionally private enterprises).); *see Student Lifeline, Inc. v. State of N.Y.*, 847 N.Y.S.2d 905,

905 (Ct. Cl. 2007) (finding that the court is “divested of jurisdiction over” copyright infringement aspect of plaintiff’s claims).

<sup>34</sup> N.C. GEN. STAT. § 143-291 (“The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.”).

<sup>35</sup> N.D. CONST. art. I, § 9 (“All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.”); N.D. CENT. CODE § 32-12.02 (“An action respecting the title to property, or arising upon contract, may be brought in the district court against the state the same as against a private person.”); *id.* § 32.12.2-02 (“The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee’s scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant.”); *id.* § 32-12.2.10 (“This chapter does not waive the state’s immunity under the Eleventh Amendment to the United States Constitution in any manner, and this chapter may not be construed to abrogate that immunity.”).

<sup>36</sup> OH. CONST. art. I, § 16 (“Suits may be brought against the state, in such courts and in such manner, as may be provided by law.”); OHIO REV. CODE ANN. § 2743.02 (subject to exceptions, “[t]he state hereby waives its immunity from liability . . . and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties . . . .”); *id.* § 2743.03(A)(1) (court of claims has “original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code.”).

<sup>37</sup> OKLA. STAT. tit. 51, § 152.1 (“A. The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts. B. The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.”); OKLA. STAT. tit. 51, § 153 (“The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in The Governmental Tort Claims Act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state.”); *id.* § 163(A) (“Venue for actions against the state within the scope of this act shall be either the county in which the cause of action arose or Oklahoma County, except that a constitutional state agency, board or commission may, upon resolution filed with the Secretary of State, designate another situs for venue in lieu of Oklahoma County.”).

<sup>38</sup> ORE. CONST. art. IV, § 24 (“Provision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizeing [sic] such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.”); OR. REV. STAT. ANN. § 30.265 (waiver for torts); *id.* § 30.320 (waiver for contracts); *id.* § 30.310 (“A suit or action may be maintained by the State of Oregon or any county, incorporated city, school district or other public corporation of like character in this state, in its corporate name, upon a cause of suit or action accruing to it in its corporate character, and not otherwise, in the following cases: (1) Upon a contract made with the public corporation. (2) Upon a liability prescribed by law in favor of the public corporation. (3) To recover a penalty or forfeiture given to the public corporation. (4) To recover damages for injury to the corporate rights or property of the public corporation.”).

<sup>39</sup> PA. CONST. art. I, § 11 (“Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”); 42 PA. CONS. STAT. ANN. § 8521(b) (“Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.”); *id.* § 8522 (list of exemptions from sovereign immunity); *id.* § 8523 (“Actions for claims against a

Commonwealth party may be brought in and only in a county in which the principal or local office of the Commonwealth party is located or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose. If venue is obtained in the Twelfth Judicial District (Dauphin County) solely because the principal office of the Commonwealth party is located within it, any judge of the Court of Common Pleas of Dauphin County shall have the power to transfer the action to any appropriate county where venue would otherwise lie.”).

<sup>40</sup> R.I. GEN. LAWS § 9-31-1(a) (The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall . . . hereby be liable in all actions of tort in the same manner as a private individual or corporation . . . .”); *see Rosen v. Chang*, 758 F. Supp. 799, 804 (D.R.I. 1991) (“Both federal and state courts have interpreted R.I.G.L. § 9–31–1 as a waiver of the State’s Eleventh Amendment immunity to tort suits in federal court.”).

<sup>41</sup> S.C. CONST. ANN. art. XVII, § 2 (“The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted.”); S.C. CODE ANN. § 15-78-40 (“The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.”); *id.* § 15-78-60 (exceptions to waiver of immunity); *id.* § 15-78-100(b) (“Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.”).

<sup>42</sup> S.D. CONST. article III, § 27 (“The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.”); S.D. CODIFIED LAWS § 21-32-8 (“In any and all actions to determine adverse claims to real or personal property, or involving the possession of real or personal property, or to foreclose mortgages or other liens upon real or personal property, or to partition the same, the state of South Dakota may be sued and made defendant in the courts of this state.”); *id.* § 21-32-16 (“To the extent such liability insurance is purchased pursuant to § 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.”); *see also id.* § 21-32-7 (providing for advisory proceeding before commissioner).

<sup>43</sup> TENN. CONST. art. I, § 17 (“Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.”); TENN. CODE ANN. § 9-8-307(a)(1) (“[The Tennessee Claims Commission] has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of ‘state employees,’” for certain enumerated claims), (f) (“No language contained in this chapter is intended to be construed as a waiver of the immunity of the state of Tennessee from suit in federal courts guaranteed by the eleventh amendment to the Constitution of the United States.”); *see id.* § 20-13-102 (“No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea or demurrer of the law officer of the state, or counsel employed for the state.”).

<sup>44</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021 (“A governmental unit in the state is liable for: (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if: (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and (B) the employee would be personally liable to the claimant according to Texas law; and (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.”); *id.* § 101.102 (“A suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises.”); TEX. GOV’T CODE § 311.034 (“In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of ‘person,’ as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”); TEX. LOC. GOV’T CODE § 271.152 (“A local governmental entity that is authorized by statute or the constitution to enter into a contract and

that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.”); *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 366 (Tex. App. 2019) (“Texas has not waived sovereign (governmental) immunity in the Texas Tort Claims Act for copyright infringement by a governmental unit.”).

<sup>45</sup> UTAH CODE ANN. § 63G-7-301 (“Immunity from suit of each governmental entity is waived as to any contractual obligation” and enumerated state-law claims); *id.* § 63G-7-403 (action may be brought in the district court).

<sup>46</sup> 12 V.S.A. § 5601(a) (“The State of Vermont shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment, under the same circumstances, in the same manner, and to the same extent as a private person would be liable to the claimant except that the claimant shall not have the right to levy execution on any property of the State to satisfy any judgment. The Superior Courts of the State shall have exclusive jurisdiction of any actions brought hereunder.”).

<sup>47</sup> VA. ST. §§ 8.01-195.3 (“Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, and any transportation district shall be liable for claims for money only accruing on or after July 1, 1986, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury or death.”); Va. Code Ann. § 8.01-195.4 (“The general district courts shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim against the Commonwealth or any transportation district cognizable under this article when the amount of the claim does not exceed \$4,500, exclusive of interest and any attorneys’ fees. Jurisdiction shall be concurrent with the circuit courts when the amount of the claim exceeds \$4,500 but does not exceed \$25,000, exclusive of interest and such attorneys’ fees. Jurisdiction of claims when the amount exceeds \$25,000 shall be limited to the circuit courts of the Commonwealth.”).

<sup>48</sup> WASH. CONST. art. II, § 26 (“The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.”); REV. CODE WASH. (ARCW) § 4.92.010 (“Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court.”).

<sup>49</sup> W. VA. CONST. art. VI, § 35 (“The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.”).

<sup>50</sup> WIS. CONST. art. IV, § 27 (The legislature shall direct by law in what manner and in what courts suits may be brought against the state.); WIS. STAT. ANN. § 893.80(4) (“No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.”); *id.* § 893.82(3) (“[N]o civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer’s, employee’s or agent’s duties . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.”); *see Holytz v. City of Milwaukee*, 17 Wis.2d 26, 39, 115 N.W.2d 618 (1962) (“[S]o far as governmental responsibility for torts is concerned, the rule is liability - the exception is immunity.”); *Energy Complexes v. Eau Claire County*, 152 Wis. 2d 453, 449 N.W.2d 35 (1989) (finding that the section 893.80(4) immunity provision does not apply to breach of contract suits).

<sup>51</sup> WYO. CONST. art. 1, § 8 (“Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.”); WYO. STAT. § 1-39-104(a) (“Any immunity in actions based on a contract entered into by a governmental entity is waived except to the extent provided by the contract if the contract was within the powers granted to the entity and was properly executed and except as provided in section 1-39-120(b)”); *id.* § 1-39-105–112 (waiving immunity for actions arising from the negligent operation or maintenance of any motor vehicle, aircraft or watercraft; any building, recreation area or public park; airports; public utilities; medical facilities; and the negligence of health care providers or peace officers); *id.* § 1-39-117 (“Original and exclusive jurisdiction for any claim filed in state court under this act shall be in the district courts of Wyoming.”).

