



September 2, 2020

Regan A. Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Dear Ms. Smith:

Below are the comments of the Association of Public and Land-grant Universities and the Association of American Universities in response to the U.S. Copyright Office’s Notice and Request for Public Comment regarding its Sovereign Immunity Study [Docket No. 2020-9].

The Association of Public and Land-grant Universities (“APLU”) is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the United States, Canada, and Mexico. With a membership of 242 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU’s agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 199 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.1 million degrees, employ 1.1 million faculty and staff, and conduct \$42.4 billion in university-based research.

The Association of American Universities (“AAU”) is a non-profit organization that was founded in 1900 to advance the international standing of United States research universities. AAU’s mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 63 public and private research universities in the United States.

Universities play a uniquely complex and positive contributing role in the copyright ecosystem

Public colleges and universities educate approximately 14.5 million students per year in the United States.¹ In addition to teaching students at all postsecondary levels, state universities advance critical research and development across almost all fields and industries. Universities share a common mission with copyright—namely, to serve society by promoting the “Progress of Science and useful Arts” by encouraging and supporting the creation and dissemination of knowledge and creative works for the public's benefit. At the same time, universities have a distinctively robust relationship with copyright law. Universities and their constituents—faculty, students, and staff—are creators, distributors, and consumers of copyrighted material, a dynamic that has only become more complex in the digital era.

State universities collectively spend billions of dollars each year on licensing and purchasing copyrighted content and thus are excellent consumers of intellectual property rights.² Colleges and universities – as well as their individual faculty and students – license journals, buy books, and obtain other copyrighted material through their library systems, thus supporting the scholarly and commercial publishing industries, which generates billions of dollars in revenue.³ Public universities invest an estimated \$24.2 million annually in their own university presses.⁴ They are members of the Copyright Clearance Center and the performing rights organizations (ASCAP, BMI, SESAC, etc.), and they acquire innumerable licenses for software, television, film, and radio.

Furthermore, state universities and their faculty, staff, and students produce vast quantities of copyrighted content themselves. And “[a]s technology has become more fully integrated into the university environment, the variety of copyrightable faculty-created works has increased ... [O]riginal works of authorship might include software, websites, data compilations, technical manuals, textbooks, articles, visual artworks, fiction and non-fiction writings, musical works,

¹ See Statista, *College Enrollment in the United States from 1965-2018*, available at <https://www.statista.com/statistics/183995/us-college-enrollment-and-projections-in-public-and-private-institutions/> (last visited Aug. 27, 2020). See also American Academy of Arts & Science, *Public Research Universities: Serving the Public Good* at 2 (2016), https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/publications/researchpapersmonographs/PublicResearchUniv_Publi cGood.pdf.

² Last year, for example, the University of Michigan Library spent over \$29,000,000 on acquisitions of books and library licenses. This does not include the tens of millions of dollars spent on software, music, film, television, and fine art purchases and licenses by the rest of the university. Nor does this include the quite conservative estimate of \$1,000 per year that the university's approximately 48,000 students spend on textbooks.

³ See Statista, *Estimated Textbook Publishing Revenue in the United States from 2010-2018*, available at <https://www.statista.com/statistics/185042/us-publishing-revenue-from-textbooks-since-2005/> (last visited Aug. 27, 2020). See also Glenn S. McGuigan & Robert D. Russell, *The Business of Academic Publishing: A Strategic Analysis of the Academic Journal Publishing Industry and Its Impact on the Future of Scholarly Publishing*, 9 *Electronic J. Acad. & Special Librarianship*, no. 3 (2008), http://southernlibrarianship.icaap.org/content/v09n03/mcguigan_g01.html.

⁴ See Association of University Presses, AUPresses Snapshot, <http://www.aupresses.org/about-aaup/about-universitypresses/snapshot> (last updated Sept. 2019) (showing 2018 institutional allocation provided by U.S. public universities).

video games, and online courses.”⁵ As one commentator notes: “Universities are in the business of education and research. Faculty-created works—research, teaching, and service—are essential parts of universities’ education and research activities.”⁶

Sovereign immunity ensures that state universities can continue to serve the vital public goals of education, research, medical care, and community engagement. Meritless or weak copyright infringement suits aimed at accessing state coffers will severely hinder these goals. With the increased cost of warding off litigation, state universities will be forced to divert scarce resources, currently spent purchasing intellectual property licenses, buying hundreds of thousands of library books, and educating millions of students each year.

States universities are not bad actors in the copyright ecosystem and they expend significant time and resources complying with copyright law and protecting the intellectual property rights of the authors whose works they use. In the rare instances when copyrights may be violated, it is overwhelmingly the result of unwitting mistakes stemming from lack of knowledge of the metes and bounds of copyright law, rather than intentional or reckless behavior.⁷ When sound allegations of infringement are brought to the attention of state universities or the universities themselves identify infringing uses of copyrighted content, they typically take down the infringing material, educate (and sometimes discipline) the involved students and employees, pay the requisite license fee, and/or take other appropriate steps to right the claimed wrong.

There is no record – much less a widespread or “wholesale” record – of intentional copyright violations by public universities and their constituents. The level of copyright infringement by public universities or their employees or students certainly does not constitute a pattern of constitutional violations that could justify abrogating their sovereign immunity under Section 5 of the Fourteenth Amendment. And even if there were instances in which a state university willfully infringed copyrights on a regular basis, there are extant legal mechanisms – such as injunctions, limitations on the immunity of state university employees, and the takings doctrine (discussed further below) – that can address such violations without doing harm to sovereign immunity.

Preserving state sovereign immunity from copyright infringement suits for damages protects state universities’ key public roles of research, education, health care, and community service

Preserving state sovereign immunity helps protect the strong public purpose of state universities. The abrogation of state sovereign immunity will cause state universities and other public bodies to face numerous meritless copyright infringement suits from those lured by the possibility of realizing a financial windfall. The financial drain of warding off flimsy lawsuits – particularly at a time when the COVID-19 pandemic and economic recession are placing an unprecedented

⁵ Glenda A. Gertz, *Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-for-Hire Dilemma*, 88 Wash. L. Rev. 1465,1465 (2013) (footnote omitted).

⁶ Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 Mich. Telecomm. & Tech. L. Rev. 385, 397 (2011) (footnote omitted).

⁷ See John T. Cross, *Suing the States for Copyright Infringement*, 39 Brandeis L.J. 337, 402-03 & n.298 (2001) (“it may well be that most state actors who infringe copyrights do not realize that they are infringing”).

strain on state university finances – will decrease the already constrained resources state universities can use for education, research, and development.⁸ If sovereign immunity is abrogated, state universities either will be unable to provide some public goods they now provide or at least will be unable to provide them to the same extent.

Thus while a blanket waiver of sovereign immunity surely would cause a great deal of financial harm to state universities and other state entities, it is unclear that it would provide more than a “small or negligible increase in social benefit to intellectual property owners and creators.”⁹ Incentivizing individuals to seek unjustified windfalls from a state university burdens not just the institution itself, but also the citizens of the state who look to that university for education and research, as well as for essential public services such as extension and outreach programs (related to agriculture, forestry, fisheries and wildlife management, and public land management, to name just a few), health care, publicly accessible libraries and museums, and more.

Existing practical, institutional, and remedial constraints already prevent state universities from engaging in widespread copyright infringement

Abrogating state sovereign immunity in the copyright context is unnecessary. Economic, institutional, and practical considerations already strongly disincentivize state universities from infringing copyrights. State universities are accountable to state governments and – because they are themselves creators of copyrightable content and want to maintain goodwill and reputational capital in the intellectual property marketplace – state university institutional culture cuts both practically and ethically against copyright infringement.

First, public university leaders are accountable to state governments. “Universities receive significant public resources for research[,] and policymakers wish to hold them accountable for those investments.”¹⁰ Government is “able to demand more from universities than from industry...because academic research is far more dependent on federal funds than industrial research...”¹¹ In addition, “few state-elected officials would want to be connected with the widespread infringement of intellectual property without a justification.”¹²

⁸ See Dick Startz, *University finances and COVID-19: Different schools, different risks*, Brookings Inst. (June 18, 2020), at <https://www.brookings.edu/blog/brown-center-chalkboard/2020/06/18/university-finances-and-covid-19-different-schools-different-risks/> (last visited Aug. 30, 2020); Doug Lederman, *COVID-19's Forceful Financial Hit: A Survey of Business Officers*, Inside Higher Ed (July 10, 2020), available at <https://www.insidehighered.com/news/survey/covid-19s-forceful-financial-hit-survey-business-officers> (last visited Aug. 30, 2020); Andrew DePietro, *Here's A Look At The Impact Of Coronavirus (COVID-19) On Colleges And Universities In The U.S.*, Forbes Magazine (Apr. 30, 2020), available at <https://www.forbes.com/sites/andrewdepietro/2020/04/30/impact-coronavirus-covid-19-colleges-universities/#33ef698861a6> (last visited Aug. 30, 2020). Even before the additional financial stresses created by the COVID-19 pandemic, rising subscription costs for journals were causing even higher-resourced universities to “cut library budgets and reduce subsidies to university-affiliated publishers.” Centivany at 413.

⁹ Christopher L. Beals, Comment, *A Review of the State Sovereignty Loophole in Intellectual Property Rights Following Florida Prepaid and College Savings*, 9 U. Pa. J. Const. L. 1233, 1276 (2007).

¹⁰ Walter D. Valdivia, *University Start-Ups: Critical for Improving Technology Transfer*, Brookings Ctr. for Tech. Innovations, at 1 (Nov. 2013), https://www.brookings.edu/wpcontent/uploads/2016/06/Valdivia_Tech-Transfer_v29_NoEmbargo.pdf.

¹¹ *Id.* At 4.

¹² Beals at 1271.

Second, state universities are built on an ethical culture that cuts against infringing copyright. Not only is intentional infringement outside the ethical norms of academic practice, but state universities also actively discourage this behavior. Public universities' commitment to respect copyrights is manifest in their practices and policies, which constitute the enforceable laws for those universities. To offer just a few examples, the University of California, the University of Michigan, Michigan State University, Purdue University, the Ohio State University, the University of Virginia, the University of Utah, the University of Texas System, and the University of Washington have written policies specifically requiring their employees to honor private parties' copyrights.¹³ And, as noted above, public universities pay substantial annual fees to secure legal access to copyrighted materials from the Copyright Clearance Center, which provides coverage for "faculty, researchers and other staff members [to] collaborate freely, while respecting the intellectual property of others."¹⁴

In addition, numerous state universities have dedicated copyright resource centers, situated in university libraries or scholarly communications offices, as well as staff whose primary role is to help students, faculty, and staff understand copyright law, navigate its complexities, and employ best practices in using third party content.¹⁵ Indeed, public universities invest substantial resources in campus efforts to educate scholars, students, and the general public about copyright and discourage infringement. These copyright education efforts result in useful website guidance and, most importantly, adherence to copyright laws.¹⁶ Further, the copyright education programs

¹³ See University of California System, *Copyright and Fair Use*, available at <https://policy.ucop.edu/doc/2100007/CopyrightFairUse> (last visited Aug. 26, 2020); University of Michigan, *Copyright Compliance*, available at <https://safecomputing.umich.edu/be-aware/copyright-compliance> (last visited Aug. 24, 2020); Purdue University, *Welcome to the University Copyright Office*, available at <https://www.lib.purdue.edu/uco/index.html> (last visited Aug. 24, 2020); Michigan State University, *MSU Libraries Copyright Services*, available at <https://lib.msu.edu/node/4723/> (last visited Aug. 24, 2020); The Ohio State University, *OSU Policy*, available at <https://library.osu.edu/copyright/policy> (last visited Aug. 24, 2020); University of Virginia, *Copyright Policy*, available at [https://www.virginia.edu/siteinfo/copyright#:~:text=It%20is%20against%20University%20policy.law%20\(especial%20with%20respect%20to](https://www.virginia.edu/siteinfo/copyright#:~:text=It%20is%20against%20University%20policy.law%20(especial%20with%20respect%20to) (last visited Aug. 24, 2020); University of Utah, *Copyright Policy: Copying of Copyrighted Works*, available at <https://regulations.utah.edu/research/7-013.php> (last visited Aug. 24, 2020); University of Texas System, *UTS 107 Use of Copyrighted Materials*, available at <https://www.utsystem.edu/sites/policy-library/policies/uts-107-use-of-copyrighted-materials> (last visited Aug. 24, 2020); University of Washington, *IT Connect: Unauthorized Distribution of Copyrighted Material on the UW Network*, available at <https://itconnect.uw.edu/work/appropriate-use/unauthorized-distribution-of-copyrighted-material-on-the-uw-network/> (last visited Aug. 24, 2020).

¹⁴ Copyright Clearance Center, *Annual Copyright License*, available at <https://www.copyright.com/academia/annual-copyright-license-2/> (last visited Aug. 24, 2020).

¹⁵ See, e.g., University of Kentucky, *Copyright Resource Center*, at <https://www.uky.edu/copyright/> (last visited Aug. 24, 2020); Purdue University, *University Copyright Office*, at <https://www.lib.purdue.edu/uco/> (last visited Aug. 24, 2020); The Ohio State University, *Copyright Services*, at <https://library.osu.edu/copyright> (last visited Aug. 24, 2020); Michigan State University, *Office of Copyright*, at <https://lib.msu.edu/copyright/> (last visited Aug. 24, 2020); University of North Texas, *Copyright Advisory Services*, at <https://library.unt.edu/services/copyright-advisory/> (last visited Aug. 24, 2020); University of Michigan, *Copyright Services*, at <https://www.lib.umich.edu/research-and-scholarship/copyright-services> (last visited Aug. 30, 2020).

¹⁶ See, e.g., University of Texas System, *Copyright Crash Course*, <https://guides.lib.utexas.edu/copyright> (last visited Aug. 30, 2020); see also the following University of California websites: University of California Copyright, <https://copyright.universityofcalifornia.edu> (last visited Aug. 27, 2020); University of California Office of the

typically offer extensive individual consultations and on-demand workshops for campus scholars.¹⁷

Third, state universities are creators of copyrightable materials and also comprise communities of independent creators.¹⁸ One need only look at public universities' extensive intellectual property policies governing the disposition and protection of university-controlled intellectual property to appreciate the seriousness with which universities approach intellectual property rights.¹⁹ Infringing copyrights is ultimately against state universities' interests as co-creators, and universities themselves are deeply concerned about the proper enforcement of copyright law. This, too, undermines any incentive to infringe.

Fourth, state universities are keenly aware that they must maintain their reputational capital. “[M]any state entities, especially universities, are entering into the commercial domain, where goodwill translates into business relationships, licensing revenues, and further funding of their research activities. As this process occurs, goodwill becomes even more crucial for those state entities seeking any measure of commercial success.”²⁰ For example, public universities that engage in repeated infringement “would likely encounter a great deal of difficulty in a number of key activities. It would be difficult for them to partner with private industry groups to fund research, to attract new research faculty, or to form partnerships with private universities.”²¹ On a related note, much of a public university's intellectual output – including copyrightable works – is licensed to third parties through agreements that require warranties of non-infringement and sometimes indemnifications. If public universities engaged in rampant copyright infringement, it would meaningfully impact their ability to license their own copyrightable works (such as

President, Copyright in Online Instruction Guidance, <https://copyright.universityofcalifornia.edu/use/online-instruction.html> (last visited Aug. 27, 2020); University of California-Los Angeles, <https://www.library.ucla.edu/support/publishing-data-management/scholarly-communication-resources-education/ucla-library-copyright-policies> (last visited Aug. 27, 2020); University of California-Santa Cruz, <https://guides.library.ucsc.edu/fair-use> (last visited Aug. 27, 2020); University of California-Merced, https://libguides.ucmerced.edu/copyright/for_instructors (last visited Aug. 27, 2020).

¹⁷ See, for example, University of California-Berkeley Office of Scholarly Communication Services, <https://www.slideshare.net/UCBScholComm> (last visited Aug. 27, 2020).

¹⁸ See Centivany, 17 Mich. Telecomm. & Tech. L. Rev. at 397; Gertz, 88 Wash. L. Rev. at 1465-1466.

¹⁹ For example, see: University of Missouri System, *Copyright Regulations*, available at https://www.umsystem.edu/ums/rules/collected_rules/business/ch100/100.030_copyright_regulations (last visited Aug. 24, 2020); University of Michigan, *Who Holds Copyright at or in Affiliation with the University of Michigan*, available at <https://spg.umich.edu/policy/601.28> (last visited Aug. 30, 2020); University of Arkansas System, *Patent and Copyright Policy*, available at <https://www.uasys.edu/board-policy/210-1/> (last visited Aug. 24, 2020); University of Texas System, *Rule 90101: Intellectual Property*, at <https://www.utsystem.edu/board-of-regents/rules/90101-intellectual-property> (last visited Aug. 24, 2020); University of California System, *Copyright Ownership*, at <https://policy.ucop.edu/doc/2100003/CopyrightOwnership> (last visited Aug. 24, 2020); University of Oregon, *Inventions, License Agreements, Educational & Professional Materials Development, Patents & Copyrights*, available at <https://policies.uoregon.edu/vol-2-academics-instruction-research/ch-7-innovation-tech-transfer-economic-development/inventions> (last visited, Aug. 24, 2020); Indiana University, *Intellectual Property Policy*, available at <https://policies.iu.edu/policies/ua-05-intellectual-property/index.html> (last visited Aug. 24, 2020); University of Connecticut, *Intellectual Property and Commercialization Policy*, at <https://policy.uconn.edu/2015/10/08/intellectual-property-and-commercialization-policy/#> (last visited Aug. 24, 2020).

²⁰ Beals, 9 U. Pa. J. Const. L. at 1270.

²¹ *Id.* At 1270-1271.

software) to third parties, thus diminishing the much-needed licensing revenue streams relied upon by universities.

State universities therefore rarely intentionally or recklessly infringe copyrights (or patents and trademarks).²² Furthermore, there is no evidence that public universities are more likely than private institutions to violate copyright law, willfully or not. Public universities do not view sovereign immunity as a license to infringe with impunity. This is not surprising given state universities' institutional ethical cultures, reinforced by "the bureaucratic and public-service-oriented culture of state governmental entities, as well as the absence of a significant profit motive."²³ For example, state universities did not respond to *Florida Prepaid* by abusing patents.²⁴ In fact, state universities in the Fifth Circuit strengthened their commitment to comply with federal intellectual property laws after the Fifth Circuit ruled that the CRCA did not validly abrogate state sovereign immunity.²⁵ In the wake of that decision, for instance, the University of Houston's General Counsel's office reviewed the impact of the Fifth Circuit's decision on institutional operations, and the university determined to strengthen—not slacken—its compliance with federal intellectual property law.²⁶

The outcome of the long-running *Cambridge University Press, et al. v. Becker, et al.* e-reserves case (often referred to as the "Georgia State" litigation) is also instructive in this context.²⁷ This case, which commenced twelve years ago and which has been adjudicated, now, five times, involved claims that Georgia State University ("GSU") engaged in "systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works" via its e-reserves system; GSU claimed that its uses were fair uses. Today, after over 1000 pages of judicial opinion, the court has concluded that all but 11 of the originally alleged 126 infringements were fair uses. This is evidence of the complexity of copyright (for plaintiffs and state universities, alike), *not* of systematic, widespread, intentional, or reckless infringement. Although the publisher plaintiffs in this case hoped to use this litigation to establish a pattern or practice of

²² See Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1433 (2000) ("[T]he nature of public entities and the employees attracted to them suggest that state infringement, to the extent it occurs, is likely to be unintentional and episodic in most areas of state activity.").

²³ Young, 81 Tex. L. Rev. at 1564.

²⁴ See Tejas N. Narechania, Note, *An Offensive Weapon?: An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-Owned Patents*, 110 Colum. L. Rev. 1574, 1605 (2010) ("[S]tates do not wield their immunity as a patent sword.").

²⁵ See *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

²⁶ See Young, 81 Tex. L. Rev. at 1564-1565 ("[T]he University remained *bound*—both legally and ethically—by the federal intellectual property laws. As a result, the General Counsel's office concluded, 'we are not running to the copy machine or logging into every bootleg music and software site we can get to. There are far too many other reasons besides fear of lawsuits for money damages in federal court for us to respect the intellectual property of creative people.'") (footnote omitted).

²⁷ See Andrew Albanese, *After Third Ruling, Is GSU E-Reserves Case Finally Nearing Conclusion?*, Publisher's Weekly (Mar. 30, 2020), available at <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82859-after-third-ruling-is-gsu-e-reserves-case-finally-nearing-conclusion.html> (last visited Aug. 30, 2020). See also Krista L. Cox, *Eleventh Circuit Reverses and Remands Georgia State E-Reserves Case (Again)*, available at <https://www.authorsalliance.org/2018/10/26/eleventh-circuit-reverses-and-remands-georgia-state-e-reserves-case-again/> (last visited Aug. 27, 2020).

infringement, the outcome demonstrated that Georgia State University, like most public universities, was not the blatant, willful infringer that the plaintiffs alleged it to be.²⁸

Congress did not identify a widespread pattern of state copyright infringement when passing the Copyright Remedy Clarification Act or tailor the Act to remedying such a pattern

Beyond these practical considerations, doctrinal considerations, too, foreclose arguments in favor of abrogating state sovereign immunity from copyright infringement suits for damages. For one thing, there are already multiple injunctive or other equitable remedies for copyright infringement by state actors, including injunctions and impoundment.²⁹ An injunction is likely the most important of the extant remedies (more on this below).³⁰ In addition, some state courts have “recognized an exception to immunity for suits brought against state officials, on the ground that those officials have acted outside their statutory authority. State officials are likewise subject to the equitable remedy of mandamus.”³¹ Individual employees and officers of public universities can and are sued for copyright infringement in their personal capacity; a public institution’s sovereign immunity does not extend to a suit against the employee in the employee’s personal capacity.³² The availability of these measures renders a sweeping abrogation of state sovereign immunity not only unnecessary, but also disproportionate to the harm it seeks to address.

Besides injunctive relief, various other mechanisms can protect copyrights.³³ For example, “private parties may be able to sue the state in a local court under common law causes of action, such as unjust enrichment.”³⁴ Most states have already consented to such suits in state court.³⁵ In

²⁸ See Steve Kolowitz, *Publishers Double Down*, Inside Higher Ed (Sept. 11, 2012), available at <https://www.insidehighered.com/news/2012/09/11/publishers-will-appeal-district-courts-decision-e-reserve-copyright-case> (citing a statement by the Association of American Publishers asserting Georgia State University engaged in a “lengthy pattern and practice of widespread infringement” that “if left uncorrected...will encourage educational institutions across the country to engage in massive infringement of copyright at a great cost to the entire academic community.”) (last visited Aug. 30, 2020).

²⁹ See 17 U.S.C. §§ 502, 503.

³⁰ See, e.g., *National Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1308-12 (11th Cir. 2011).

³¹ Michael Shaunessy and Ethan Ranis, *Sovereign Immunity and Intellectual Property*, State Bar of Texas Annual Meeting: Intellectual Property Law Section (June 14, 2019), available at http://mcginnislaw.com/images/uploads/news/Sovereign_Immunity_and_IP.pdf (last visited Aug. 31, 2020).

³² See *Ex parte Young*, 209 U.S. 123 (1908). Immunity for public officials is “qualified,” meaning they are only entitled to such immunity if their actions violated “clearly established” law. See, e.g., *National Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 2008 U.S. Dist. LEXIS 32116, at *65–*81 (M.D. Ga. Apr. 18, 2008), *aff’d in part, vacated and remanded in part*, 633 F. 3d 1297 (11th Cir. 2011). To provide another example, the Texas A&M “12th Man” lawsuit is still proceeding against one individual Texas A&M employee who posted the allegedly infringing material. See David Barron, *Texas A&M athletic department among defendants dropped in ‘12th Man’ lawsuit*, Houston Chron. (Apr. 2, 2010), available at <https://www.chron.com/sports/aggies/article/Aggies-athletics-defendant-drop-12th-Man-lawsuit-13736369.php> (last visited Aug. 30, 2020). But even when qualified sovereign immunity applies and the costs of defense are paid for by the university, no individual ever wants to be named as a defendant or otherwise pursued for copyright infringement – yet another practical consideration that militates against copyright infringement.

³³ See *Young*, 81 Tex. L. Rev. at 1561.

³⁴ Narechania, 110 Colum. L. Rev. at 1604.

³⁵ *Ibid.*

addition, copyright owners could file – and have filed – inverse condemnation suits against a state, seeking “just compensation” for an alleged “taking” of property under the Fifth Amendment or an equivalent law under the relevant state’s constitution.³⁶ If there are circumstances “in which the government use destroys virtually all of the property’s value,” a takings claim is a plausible avenue for relief.³⁷ Moreover, shifting “to state courts the relatively few copyright cases filed against states that don’t waive immunity” likely will not undermine the uniformity of copyright law.³⁸

In light of the existing practical and remedial constraints just discussed, it is no surprise that Congress could not identify a “widespread or persisting deprivation of constitutional rights” or “pattern of constitutional violations” from state copyright infringement when it passed the CRCA.³⁹ In all events, Congress did not properly tailor its remedy.

The legislative record of the CRCA did not show a pattern of state copyright infringement sufficient to warrant abrogating state sovereign immunity. In fact, the CRCA’s legislative record shows “little evidence of infringing conduct.”⁴⁰ Even the primary sponsor of the Copyright Remedy Clarification Act (“CRCA”) in the House stated that “thus far there have not been any significant number of wholesale takings of copyright rights by States or State entities.”⁴¹ Former U.S. Register of Copyrights Ralph Oman, testifying in favor of the CRCA, himself conceded that “the States are not going to get involved in wholesale violation of the copyright laws.”⁴²

Most of the evidence of alleged copyright infringement by states or state universities came in the 1988 report by Mr. Oman.⁴³ The Register’s Report discussed “at most seven incidents” of potential copyright infringement by the states.⁴⁴ And only two of these incidents clearly showed willfulness.⁴⁵ Likewise, the Register’s Report discussed concerns from solicited public comments showing anxiety about merely hypothetical harms: “The major concern of copyright owners appears to be widespread, uncontrollable copyright of their works without remuneration: 19 parties worried that with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them.”⁴⁶ The Register’s Report thus reveals hypothesizing about what

³⁶ See *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019), in which the Supreme Court ruled 5-4 that a plaintiff may file a takings claim in federal court under 42 U.S.C. § 1983 without first having exhausted state remedies through filing an inverse condemnation claim in state court. See also *University of Houston System v. Jim Olive Photography, DBA Photolive*, 580 S.W.3d 360 (Tex. App. 2019). Although the takings claim under the Texas constitution and the Fifth Amendment of the U.S. Constitution ultimately was unsuccessful in this case, it is readily conceivable there are other jurisdictions where such suit would prevail.

³⁷ See Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 Fla. L. Rev. 529, 562-63 (1998) (quoted in *University of Houston System v. Jim Olive Photography*).

³⁸ Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. Cal. L. Rev. 1161, 1166 (2000).

³⁹ *Fla. Prepaid*, 527 U.S. at 640, 645.

⁴⁰ *Id.* at 640.

⁴¹ *Hearings on H.R. 1131, Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States, Before the Subcomm. On Courts, Intellectual Property, and the Admin. Of Justice of the H. Comm. on the Judiciary*, 101st Cong., at 48 (1989) (statement of Rep. Kastenmeier) (“House Hearings”).

⁴² *Id.* at 53.

⁴³ See U.S. Copyright Office, A Report of the Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment* (1988), available at <http://files.eric.ed.gov/fulltext/ED306963.pdf> (“Register’s Report”).

⁴⁴ *Id.* at ii-xi.

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 6.

the “consequences of state immunity would be”—while only five comments mentioned “actual problems faced in attempting to enforce their claims against state government.”⁴⁷ Furthermore, out of the forty-four comments received before publication of the Register’s Report, only eleven parties claimed that injunctive relief was neither an adequate remedy nor a deterrent.⁴⁸

Even Mr. Oman concluded the discussion of his year-long investigation by expressing his doubt that states would perpetuate significant infringing activity: [A]uthors and copyright proprietors have demonstrated *at least the potential for harm* from the uncompensated use by States and State entities of works protected under the Federal Copyright Act... As a practical matter, States continue to buy books...and other copyrighted works... I doubt very much, Mr. Chairman, if you fail to enact this bill, that the States would all launch a massive conspiracy to rip off the publishers across-the-board. *They are all respectful of the copyright law*, and what State or State official wants to get a reputation as a copyright pirate?”⁴⁹ Mr. Oman also “acknowledged that most copyright infringement by states is unintentional, stating that ‘[the States] would want [immunity] only as a shield for the State treasury from the occasional error or misunderstanding or innocent infringement.’”⁵⁰ When Mr. Oman urged passage of the CRCA, he did so not based on a pattern of past copyright infringement by states or state universities—but rather to “guard against sloppiness” given the “potential for harm.”⁵¹ This is hardly a “widespread and persisting deprivation of constitutional rights.”⁵²

In passing the CRCA, Congress failed to meaningfully address alternative remedies besides a sweeping abrogation of state sovereign immunity for copyright infringement claims. Congress therefore failed to consider a necessary predicate to showing constitutional violations. More importantly, Congress failed to consider whether injunctions could rectify any existing problems. Yet “the availability of injunctions against state officers to compel compliance with federal law” is “[f]irst and foremost” among the remedies for combating copyright infringement.”⁵³ Individuals can “invoke a variety of prospective remedies provided by the federal intellectual property laws, including not only an injunction against further publication but perhaps also impoundment and disposition of the unlawful copies.”⁵⁴

Conclusion

Protecting state universities (and states themselves) from copyright infringement suits has important roots in constitutional history. States did not give up their sovereign immunity from copyright infringement suits for damages as part of the plan of the Convention. The lack of debate surrounding the Copyright Clause “is best explained by the simple fact that no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity.” *Alden v. Maine*, 527 U.S. 706 at 741 (1999) (discussing states’ immunity from suit in their own courts). More broadly, abrogating Eleventh Amendment sovereign immunity in

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 5-6.

⁴⁹ House Hearings at 7-8 (emphases added).

⁵⁰ *Chavez*, 204 F.3d. at 607 (quoting House Hearings at 8).

⁵¹ House Hearings at 7-9.

⁵² *Fla. Prepaid*, 527 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526).

⁵³ Young, 81 Tex. L. Rev. at 1561.

⁵⁴ *Id.* At 1561-1562 (footnote omitted).

the copyright context may well be a slippery slope to federal lawsuits seeking monetary damages against states even outside the copyright context.

In sum, state universities have shown that they “are willing to accept the obligation of copyright law” and continually work to ensure compliance.⁵⁵ Again, while examples of negligent copyright infringement and, rarely, instances of intentional infringement might be adduced, they do not rise to the level of a persistent pattern of violations that justify abrogating states’ sovereign immunity. States are co-sovereigns in our federal system and, as such, are entitled to the constitutionally enshrined prerogatives of sovereign immunity. Further, from a practical standpoint, abrogating sovereign immunity would simply embolden plaintiffs – particularly those with anemic claims – to engage in rent-seeking in a way that would not advance the aims of copyright law while diminishing state universities’ ability to fulfill their public missions, which include spending billions of dollars on copyrighted works each year. Congress therefore should preserve state sovereign immunity for copyright claims and protect state universities from costly litigation that diverts crucial resources from important societal goods like education, research, outreach, health care, and other public services.

Sincerely,



Peter McPherson
President
APLU



M. Matthew Owens
Interim President
AAU

⁵⁵ Jennifer J. Demmon, *Congress Clears the Way for Copyright Infringement Suits Against States: The Copyright Remedy Clarification Act*, 17 J. Corp. L. 833, 858 (1992).