



October 22, 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 reply 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]. We are grateful to the Copyright Office for extending the time to file these comments.

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. 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.

I. Substantial Evidence of Widespread, Intentional Copyright Infringement is Necessary to Abrogate Sovereign Immunity

The Supreme Court recently reiterated in *Allen v. Cooper* that Congress is precluded “from using its Article I powers ‘to circumvent’ the limits sovereign immunity ‘place[s] upon federal

jurisdiction.”¹ Further, although Section 5 of the Fourteenth Amendment permits Congress to abrogate sovereign immunity pursuant to its power to enforce the Amendment’s substantive prohibitions, there must be a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”² To abrogate sovereign immunity, Congress must show that the states are violating the Constitution, not just the copyright statute. The proposition that a violation of copyright is a violation of the Constitution is incorrect. An unintentional violation of copyright certainly does not equate to a constitutional violation, as constitutional violations require intent on the part of the government.³ Even insignificant intentional violations may not amount to a constitutional violation. None of the initial comments submitted to the Copyright Office materially supplement the thin legislative record of infringement that persuaded the Supreme Court to hold in *Allen v. Cooper* that the Copyright Remedy & Clarification Act failed the congruence and proportionality test.

II. The Initial Comments Provide Scant Evidence Regarding Actual Infringement by Public Universities

The initial comments submitted to the Copyright Office by those in favor of abrogating sovereign immunity do not provide evidence – much less “concrete evidence”⁴ – sufficient to establish a pattern of “actual constitutional violations”⁵ that compels Congress to revoke state universities’ sovereign immunity via Section 5 of the Fourteenth Amendment. As the Supreme Court stated in *Allen v. Cooper*, because the legislative record of the Copyright Remedy Clarification Act of 1990 (“CRCA”) contained only thin evidence of infringement, that record could not “support Congress’s choice to strip the States of their sovereign immunity in all copyright infringement cases.”⁶ In reviewing that sparse record, the Supreme Court noted: “This is not, to put the matter charitably, the stuff from which Section 5 legislation ordinarily arises... Those deficiencies in the record match the ones *Florida Prepaid* emphasized... Here no less than there, they signal an absence of constitutional harm.”⁷ Consequently, the CRCA failed the “congruence and proportionality” test.⁸ Likewise, the initial comments present only meager

¹ *Allen v. Cooper*, 140 S.Ct. 994 at 1000 (2020).

² *Id.* at 1004.

³ See *Washington v. Davis*, 426 U.S. 229 (1976); see also *Allen v. Cooper*, 140 S.Ct. at 1004 (“Under our precedent, a merely negligent act does not ‘deprive’ a person of property... So an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause”) (internal citations omitted).

⁴ See *Allen v. Cooper*, 140 S.Ct. at 1006 (“As an initial matter, the concrete evidence of States infringing copyrights (even ignoring whether those acts violate due process) is scarcely more impressive than what the *Florida Prepaid* Court saw”) (emphasis added).

⁵ See *id.* at 1004 (“Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations”) (emphasis added).

⁶ *Id.* at 1006.

⁷ *Id.*

⁸ *Id.* at 1007.

evidence of infringement, and still less evidence of widespread, intentional infringement that systematically violates the Constitution.

A. No Pattern of Copyright Infringement

First, many of the examples adduced in the comments reference isolated instances of perceived rather than provable – let alone proven – infringement. The Copyright Alliance, for example, shares a survey comprising descriptive statistics based on a small sample size. These survey results reveal only that some members of the Copyright Alliance subjectively believe that their copyrights were infringed by public colleges and universities, and that those respondents assume they are entitled to monetary and/or other relief.⁹

To offer another example: SoundExchange’s comment contends that of the 350 public colleges and universities it identified as regularly streaming music programming over the internet, “only about two thirds (about 245 stations) have paid SoundExchange statutory royalties for 2020.”¹⁰ Without more details, this tells us only that a *supermajority* of public schools do pay royalties, which hardly exposes a pattern of systemic non-compliance. There is no indication by SoundExchange 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. In addition, SoundExchange says that “[a]lmost 40 public college webcasters that paid statutory royalties to SoundExchange in 2019 have not yet done so for 2020, even though the deadline for minimum fee payments was January 31, 2020” and hypothesizes that this apparently significant “shift of about 10% of the total public college webcaster population from royalty-paying in 2019 to infringing in 2020” may be due to *Allen v. Cooper*.¹¹ It is hard to imagine, however, 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 2020.¹²

All in all, the examples of infringement cited in comments raise more questions than they answer.

⁹ Comment COLC-2020-0009-0028, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020). Because the Copyright Alliance has not disclosed its survey instrument, we cannot assess how the questions were formulated or framed and therefore how empirically reliable the survey is.

¹⁰ Comment COLC-2020-0009-0031, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

¹¹ *Id.*

¹² SoundExchange admits that it has “no direct evidence linking this shift to *Allen v. Cooper*” and merely supposes that this may be so because the case “received a lot of attention while it was pending.” Tellingly, SoundExchange also concedes that while it has “occasionally identified college webcasters that are infringing by using sound recordings without licensing” and that “[i]n some cases, those college webcasters have been affiliated with public colleges or universities, it “does not have data tracking infringement by public college webcasters over an extended period of time” (emphases added). *Id.*

B. Lack of Clarity and Certainty Regarding Copyright Ownership

Second, even though copyright ownership is centrally relevant to infringement claims, few of the comments supply examples definitively showing that those complaining of infringement have met this basic requirement. For instance, because the respondents to the Copyright Alliance’s survey are not individually identified in its comment, there is no way to know if the respondents’ claimed copyrights are validly registered (a prerequisite for pursuing litigation and securing a damages award)¹³ or if there are any complexities related to ownership, such as joint works or collective works;¹⁴ works made for hire;¹⁵ or ownership that may have changed over time through transfer or assignment¹⁶ and/or whether the copyright holder or legal beneficiary seeking to institute an infringement action owned the copyright at the time of the alleged infringement.¹⁷

Ms. Patricia Kelly’s comment regarding her dispute with two public university presses demonstrates the peril of accepting self-stated copyright ownership claims and allegations of infringement without further due diligence.¹⁸ Ms. Kelly’s conclusory assertions that she owns copyright in her late husband’s interviews do not change the reality that the law is unsettled vis-à-vis copyright in interviews.¹⁹ Some courts have specifically rejected the notion that

¹³ See *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 193 S. Ct. 881 (2019), in which the Supreme Court held unanimously that, although the copyright statute confers exclusive rights upon the author of a work as soon as the work is created, a copyright owner may not file an infringement suit until the Register of Copyrights has registered the owner’s copyright in the work.

¹⁴ A “joint work” is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. A “collective work” is “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” *Ibid*. The distinction between joint works and collective works is legally significant. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101 (3d ed. 2017), available at <https://www.copyright.gov/comp3/chap700/ch700-literary-works.pdf>.

¹⁵ “The work made for hire concept can be complicated and has serious consequences for both the individual who creates a work and the hiring party who is considered to be the author and copyright owner of that work.” U.S. COPYRIGHT OFFICE, CIRCULAR 30: WORKS MADE FOR HIRE (2017), available at <https://www.copyright.gov/circs/circ30.pdf>.

¹⁶ See 17 U.S.C. §204(a): “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”

¹⁷ See 17 U.S.C. § 501(b): “The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it” (emphasis added). For instance, in the *Texas A&M* case we discuss below, there is a genuine dispute of material fact about the identity of the copyright holder of the work at issue at the time the work was allegedly infringed.

¹⁸ Comment COLC-2020-0009-0031, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

¹⁹ See, e.g., *Rosemont Enterprises v. Random House*, 366 F.2d 303 (2d Cir. 1966), *Quinto v. Legal Times*, 511 F. Supp. 579 (D.D.C. 1981), and *Taggart v. WMAQ Channel 5, Chicago*, No. 00-cv-4205, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000), cases in which the courts concluded that the interviewer was the copyright owner of an interview. See also Mary Catherine Amerine, *Wrestling Over Republication Rights: Who Owns the*

interviewees' responses to interviews are protectible.²⁰ Courts have also rebuffed claims that interviewees are the “authors” of their interviews.²¹ Further, courts have found that interviews²² and other biographical works usually include many uncopyrightable facts and ideas, properly resulting in “incomplete copyright protection.”²³ Bald accusations of copyright infringement cannot sustain an evidentiary record of actionable constitutional violations without, at the very least, a deeper investigation into the facts undergirding those accusations, including baseline questions about copyrightability and copyright ownership.

C. Failure to Account for or Acknowledge Limitations and Exceptions to Exclusive Rights

Third, unconsented-to uses of copyrighted content do not always result in a finding of infringement, because the copyright law provides multiple limitations on and exceptions to the exclusive rights of copyright holders, including Sections 107-112, 114-115, 117, 119, 121-122, 512, 906-907, and 1008 of the Copyright Act. These limitations and exceptions are unquestionably an integral part of our nation's copyright law and are essential to its balance. Some of these statutory limitations and exceptions are specifically applicable to nonprofit educational institutions, such as Section 108(h) (library and archives), Section 110 (TEACH Act and face-to-face teaching activities), Section 504(c)(2) (remittitur of statutory damages in certain circumstances for employees or agents of nonprofit educational institutions, libraries, or

Copyright of Interviews?, 21 MARQ. INTELL. PROP. L. REV. 159 (June 30, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878800.

²⁰ In *Taggart v. WMAQ Channel 5 Chicago*, the U.S. District Court for the Southern District of Illinois denied a plaintiff's attempt to claim exclusive copyright rights in his responses to a television interview, finding that there is no copyright in spoken words and that an interviewee is not the “author” of the “fixed work” that is copyrightable. *Taggart v. WMAQ Channel 5 Chicago*, No. 00-cv-4205, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000). If celebrities and public figures could claim that every utterance is a “valuable property right,” courts would be “inundated with claims from celebrities and public figures, all of whom may argue that their expressions should also be afforded the extraordinary protection of copyright.” *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1207 (W.D. Va. 1981).

²¹ *Taggart v. WMAQ Channel 5 Chicago*, No. 00-cv-4205, 2000 WL 1923322, at *5 (S.D. Ill. Oct. 30, 2000).

²² In *Taggart*, the district court declared that “utterances made during an interview are not an expression of an idea for the purpose of copyright law, they are simply an idea, and thus not subject to copyright protection.” *Taggart v. WMAQ Channel 5 Chicago*, No. 00-cv-4205, 2000 WL 1923322, at *4 (S.D. Ill. Oct. 30, 2000). Other courts have applied this principle even more broadly, holding that extensive quotations from interviews that appear in third parties' works may not be entitled to any copyright protection. Per the U.S. District Court for the Southern District of New York, an interviewer cannot “claim to have created these statements any more than an historian or biographer can claim to have created the facts and statements reported in a work about an historic personage.” *Rokeach v. Avco Embassy Pictures Corp.*, No. 75-cv-49, 1978 WL 23519, at *7 (S.D.N.Y. Jan. 17, 1978) (noting that patients' responses in a book-length report of a psychology study probably could not be copyrighted by the author of the study).

²³ See, e.g., *Corbello v. Valli*, No. 17-16337, slip op. at 9-10 (9th Cir. Sept. 8, 2020) (“It is thus a feature of copyright law, not a bug or anomaly, that an author who deals in fact rather than fiction receives incomplete copyright protection for the results of his labor.”)

archives). It is noteworthy that many comments decline to mention that these limitations and exceptions exist and how they might apply.

The Copyright Alliance’s comments, for example, aver that some of their survey respondents brought “infringements to the attention of at least two state universities,” but those universities “refused to license the music or take down the infringing videos, claiming, among other things, that their use was unactionable due to sovereign immunity.”²⁴ By the Copyright Alliance’s own admission, these universities asserted sovereign immunity *among other things*. Thus, it is entirely possible that these universities determined that their use of such content fell within the bounds of fair use or was permitted by another provision of the copyright law, such as safe harbor provisions in the Digital Millennium Copyright Act.

D. The Initial Comments Ignore Other Significant Deficiencies in Copyright Plaintiffs’ Claims Against Public Institutions

The Copyright Alliance also offers the story of Dr. Keith Bell, who apparently has experienced “common and damaging infringement” by public colleges and universities and has “personally sent cease and desist letters to at least nine universities and colleges.”²⁵ More information is needed to determine if Dr. Bell’s claims would be vindicated, notwithstanding sovereign immunity. But based on his track record in litigated matters, Dr. Bell is an odd case study for the Copyright Alliance to highlight. For example, several months ago, Dr. Bell lost his infringement case against a public school district on fair use grounds on summary judgment.²⁶ As the Copyright Office observed in its Fair Use Index,²⁷ the district court held that, “as a matter of law,” the use by the school district of a passage from Dr. Bell’s copyrighted work constituted fair use.²⁸ In light of its holding, the court did not rule on the other defenses asserted in the summary judgment briefs, including “Defendant’s arguments that the infringement were de minimus [*sic*], innocent, and that Defendants cannot be held vicariously liable for the coaches’ actions.”²⁹ In yet another recent matter last year, Dr. Bell faced a similar fate, where the district court found fair use on a Rule 12(b)(6) motion and dismissed his case with prejudice.³⁰ Separately, Dr. Bell is

²⁴ COLC-2020-0009-0028, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

²⁵ *Id.* at 18-20.

²⁶ *Bell v. Worthington City Sch. Dist.*, No. 2:18-cv-961, 2020 U.S. Dist. LEXIS 96464 (S.D. Ohio June 2, 2020).

²⁷ U.S. Copyright Office Fair Use Index (April 2020), <https://www.copyright.gov/fair-use/summaries/bell-worthingtoncityschdist-sdohio2020.pdf>.

²⁸ *Bell*, slip op. at 20.

²⁹ *Id.*

³⁰ *Bell v. Magna Times, LLC*, 2019 WL 1896579 (D. Utah Apr. 29, 2019).

currently engaged in a lawsuit against Liberty University (a private institution), which has argued forcefully in court filings that it made fair use of Dr. Bell's work.³¹

Most recently, on October 14, 2020, Dr. Bell lost his infringement case in the U.S. District Court for the Northern District of California against a small nonprofit pool club and was ordered to pay more than \$120,000 in fees and \$2,054.80 in costs to the defendant.³² In granting the defendant's motion for attorney's fees, the court said that Dr. Bell's \$25,000 original settlement demand "borders on the extortionate" and that "Bell is motivated by the desire to extract disproportionate settlements."³³ The court further stated: "*Leveling exorbitant settlement demands at nonprofits and public schools does not advance the purposes of the Copyright Act.*"³⁴ All of the above strongly indicates that the many claims by Dr. Bell – who is characterized as a "professional litigant"³⁵ – against public universities, school districts, and other public institutions have serious deficiencies and, at worse, are pursued in bad faith, or, at best, involve facts subject to reasonable dispute.

The Copyright Alliance's and Ms. Kelly's comments do not allow for the possibility that the university presses accused of infringement correctly concluded, upon careful review, that fair use applied.³⁶ University presses have stringent policies and procedures for conducting permissions inventories, securing third-party permissions, and documenting that necessary permissions have been granted and on what terms.³⁷ As publishers, they respect the rights of other publishers, authors, and copyright owners, as they hope others will respect their rights in turn. One of the

³¹ See *Bell v. Liberty University, Inc.*, No. 6:2020cv00001 (W.D. Va. Jan. 20, 2020). In arguing that its use of a passage from Bell's book was fair use, Liberty University cites *Bell v. Magna Times, LLC*.

³² *Bell v. The Oakland Community Pools Project, Inc.*, Case No. 19-cv-01308-JST, Dkt. No. 68 (N.D. Cal. Oct. 14, 2020) (Order Granting Motion for Attorney's Fees) available at <https://images.law.com/contrib/content/uploads/documents/403/55651/Bell-v.-OCPP.Tigar-fee-order-1.pdf>.

³³ *Id.* at 6.

³⁴ *Id.* at 7 (emphasis added).

³⁵ *Id.* at 6. As noted in the court's fee order against Dr. Bell, there are docket records for "24 copyright and trademark actions filed by Bell since 2017, many of them against public schools." *Id.* at 6 n.3.

³⁶ Quite the contrary, Ms. Kelly says in no uncertain terms: "This is not about Fair Use...This is about the protection of copyrights." Comment COLC-2020-0009-0031, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020). But one cannot just wave away fair use as if it is not itself an inextricable part of copyright law: "fair use has been an essential aspect of our copyright law for nearly 175 years" and the doctrine is "a vital aspect of U.S. copyright law...[that] is applied regularly in our daily life." U.S. Copyright Office, *U.S. Copyright Office Publishes Index of Fair Use Decisions* (Apr. 28, 2015), at <https://www.copyright.gov/newsnet/2015/580.html> (quoting, respectively, Maria A. Pallante, former Register of Copyrights, and Danny Marti, former U.S. Intellectual Property Enforcement Coordinator at the White House.) Moreover, "[c]ourts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission." U.S. Copyright Office, More Information on Fair Use, at <https://www.copyright.gov/fair-use/more-info.html>.

³⁷ See, e.g., Association of University Presses, Author Responsibilities and Copyright Guidelines (Jan. 2018), available at <https://aupresses.org/permissions-faq/>.

presses Ms. Kelly names determined, after a scrupulous analysis, that the manuscript’s use of brief quotations were scholarly fair uses, which, under the Copyright Act, do not require Ms. Kelly’s authorization. The other press Ms. Kelly singles out engaged in a protracted correspondence with counsel for the Gene Kelly Estate, which issued a cease-and-desist order that was denied by a California court (that is, the only legal action was decided in favor of the author and the press, rather than the plaintiff alleging infringement).³⁸ Nevertheless, Ms. Kelly’s efforts ultimately had a chilling effect on important scholarship, because the author, her university, and the press decided not to continue with the manuscript’s publication because they did not have the resources for a long legal battle.³⁹

Similarly, the comments from the two associations of photographers contain examples of cases that, upon reaching the courts, might have been resolved by fair use.⁴⁰ The National Writers Union avers that public libraries intentionally infringe copyrights because libraries cannot afford to pay for content, but fair use, Section 108 of the Copyright Act, and the first sale rights can and do permit the activities objected to by the National Writers Union.⁴¹ Fair use and other limitations on and exceptions to exclusive rights are not only legally sound and codified in the Copyright Act, but also of critical importance to the public interest that public colleges and universities – and their presses and libraries – serve.

Even sophisticated copyright holders sometimes fail to correctly gauge the nature and extent of alleged infringements and to account for fair use and other uses authorized by Congress. On September 29, 2020, the United States District Court for the Northern District of Georgia entered its final order in *Cambridge University Press v. Patton* – after over twelve years of litigation – again declaring Georgia State University to be the prevailing party and ordering the plaintiff publishers to pay Georgia State’s costs (but not fees this time). Over the long course of the case, the plaintiffs – who initially alleged that Georgia State had engaged in “pervasive, flagrant, and ongoing” infringement of thousands of copyrighted works – prevailed on only *ten* claims.⁴² The

³⁸ See Kelli Marshall, *When Your Scholarship Goes to Court*, Chron. of Higher Ed. (Mar. 27, 2017), <https://community.chronicle.com/news/1746-when-your-scholarship-goes-to-court>.

³⁹ *Id.*

⁴⁰ See Comments COLC-2020-0009-0029 and COLC-2020-0009-0005, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

⁴¹ See Comment COLC 2020-0009-0021, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020). Data from the Association of Research Libraries (ARL) shows that, in 2019 alone, ARL’s 69 U.S. public university members spent a total of \$898,120,833 on one-time resource purchases (e.g., print books), ongoing resource purchases (journals, databases, etc.), and “collection support” (e.g., interlibrary loan and document delivery fees). Anam Miam and Gary Roebuck. *ARL Statistics 2018–2019* (Association of Research Libraries, forthcoming 2020). As we noted in our initial comment, last year the University of Michigan Library spent over \$29,000,000 on acquisitions of books and library licenses, on top of expenditures to provide copyright education & training to University of Michigan students, faculty, and staff. Surely the University of Michigan and other public universities – most of which have faced sharp cuts in state funding and other budgetary shortfalls in recent years – would not dedicate such a substantial amount to acquiring books and library licenses if they believed they can infringe with impunity.

⁴² See *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2020), available at https://admin.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4527-1.pdf.

court ultimately concluded that a limited injunction was the appropriate remedy for this minor number of proven infringements.

In sum, very little of the “empirical” evidence presented by commenters who favor abrogating sovereign immunity establishes that copyright infringement actually occurred in a given instance or that the alleged infringers had no meritorious defenses to the supposed infringement. Again, without more robust documentation, it is impossible to know the full story of these alleged infringements. Nor does much of the information that can be gleaned from adjudicated cases in the public record, such as the cases involving Georgia State and Dr. Bell, paint a picture of rampant, intentional infringement causing constitutional injury so widespread and persistent that Congress should take the momentous step of abrogating sovereign immunity.

III. The Initial Comments Overstate the Extent of “Intentional” Infringement

A number of the comments suggest that copyright infringement is usually intentional. The Copyright Alliance, for example, reports that 42 (58%) of its survey respondents said that they believed infringement of their work(s) to be intentional.⁴³ Further, per the Copyright Alliance, “[a]ll 42 respondents who viewed the infringement as intentional provided additional information, describing situations in which an attorney’s warnings were ignored, copyright management information (CMI) on the works was ignored or removed, or use of the works continued when an entity was aware that a license had expired. Some recounted situations where permission was asked by the state entity, and when permission was denied, the entity went on to make unauthorized use of the work anyway.”⁴⁴ But, again, the Copyright Alliance does not provide evidence that what the survey respondents “believed” to be intentional infringements were just that, and not instead honest errors by the users of the content, or even licit uses of that content. And there is nothing nefarious or improper about asking for permission, then, upon denial of permission, proceeding with the fair use of another’s copyrighted work; indeed, many judicial decisions finding in favor of fair use have had a similar fact pattern.⁴⁵

One need only look at YouTube, Twitter, Facebook, Instagram, and other social media outlets to see the thousands if not millions of unintentional or innocent infringements that take place every day. On the contrary, as we explained in our initial comments, universities are one of the few societal sectors that undertake consistent, rigorous systemic efforts to comply appropriately with copyright law and to educate their constituents about the benefits and obligations of copyright law. Simply put: infringement is not always intentional, as some commenters posit or assume.

⁴³ COLC-2020-0009-0028, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

⁴⁴ *Id.*

⁴⁵ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In *Campbell*, 2 Live Crew informed Acuff Rose that they had written a parody of Roy Orbison’s song, “Oh, Pretty Woman,” that they would give full credit for ownership and authorship of the original song to Acuff Rose, Dees, and Orbison, and that they were willing to pay a fee for use of the song. Acuff Rose denied permission and 2 Live Crew released its parody anyway. The Supreme Court ultimately found that 2 Live Crew’s parody qualified as a fair use.

Assuming intentionality is not only counterfactual, but also contrary to what the Copyright Act itself anticipates. Section 504(c)(2) exists because Congress expected that some colleges and universities might reasonably but mistakenly believe that their use of a copyrighted work was a fair use under Section 107. Congress wisely concluded that when such errors are made, courts must remit statutory damages.⁴⁶

Importantly, at many large public universities, numerous individuals – including, at times, non-employees such as students – are able to post content on a university-owned webpage or other university media, but without knowledge of relevant university officials and without the requisite “volitional conduct” of the university. As the Supreme Court made clear in the *Aereo* decision in 2014, “a defendant may be held directly liable *only* if it has engaged in volitional conduct that violates the [Copyright] Act.”⁴⁷ There are important questions as to whether a public university has the requisite volitional conduct to be liable for copyright infringement in instances where copyrighted content is posted without “some aspect of volition”⁴⁸ by the university or applicable university personnel, especially in light of the governance model at many public universities that promote decentralized, shared governance, and “academic freedom” norms.

But in instances when copyright infringement by employees of state colleges and universities is intentional, copyright holders do have recourse against those employees. If a university official intentionally disregards a copyright holder’s rights, qualified sovereign immunity no longer applies because that official would fall within the *Florida Prepaid* “reckless” standard.⁴⁹ The *Bynum v. Texas A&M University Athletic Department* case, cited by several commenters, is instructive in this regard.⁵⁰ Although 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

⁴⁶ Relatedly: the section-by-section analysis of the DMCA issue by the House Judiciary after its passage notes, in the context of the repeat infringer policy condition, that “it should be recognized that there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial.” Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 36 (1998)).

⁴⁷ *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 453 (2014); see also *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017) (volitional conduct “remains an element of a direct infringement claim”); *BWP Media USA, Inc. v. T & S Software Associates, Inc.*, 852 F.3d 436, 440 (5th Cir. 2017) (“T&S and the infringing content are not linked by volitional conduct. It cannot be said that T&S’s conduct ‘cause[d] in some meaningful way an infringement.’”); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (“[V]olitional conduct is an important element of direct liability....”); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (“[T]he Copyright Act . . . requires conduct by a person who causes in some meaningful way an infringement.”).

⁴⁸ *Am. Broad. Cos.*, 573 U.S. at 453-54.

⁴⁹ See *Allen v. Cooper*, 140 S.Ct. at 1004 (“Under our precedent, a merely negligent act does not ‘deprive’ a person of property...So an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause”) (internal citations omitted).

⁵⁰ *Bynum v. Texas A&M Univ. Athletic Dept.*, 2020 WL 5332994 (S.D. Tex. Jan. 19, 2017). This case is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit.

remaining employee – for direct, contributory, and vicarious copyright infringement – to proceed.⁵¹ Thus, qualified immunity is not a complete shield.

We note, too, that the Texas A&M case further illustrates the point we made above: namely, that the anecdotes and cases referenced by various commenters are not unquestionable proof of copyright infringement, much less widespread infringement, whether negligent or intentional. The Texas A&M case is currently litigating several genuine disputes of material fact about, among other things, who was the copyright holder as a matter of law and who was the copyright holder at the time of the alleged infringement. This is not a trivial matter. It could eviscerate the plaintiff's claims and render sovereign immunity moot, insofar as "[a] plaintiff in a copyright infringement suit bears the burden of proving ownership of the copyright."⁵²

IV. Public Universities Appropriately Use Sovereign Immunity as a Shield, not as a Sword

Some of the comments express grievances about not being able to recover monetary damages from state actors that ceased using copyrighted material upon receiving a complaint about alleged infringement.⁵³ State actors' willingness to quickly stop using such content should be seen as a sign of good faith (even though those states may have had valid fair use or other defenses). But the more important point for these purposes is that the goal of sovereign immunity, founded on constitutional principles of federalism, is to ensure that federal courts are limited in their ability to impose monetary damages against the states.

Further, there is simply no persuasive evidence that, as some commenters imply, public colleges and universities typically invoke sovereign immunity in bad faith or use the doctrine affirmatively as an excuse to infringe copyrights. Under current law, public entities do not have to consent to infringement lawsuits; thus, it is particularly illogical for public entities to consent to litigation over copyright infringement – which can be enormously costly and time-consuming for all parties – if there are other grounds on which they could prevail.

Mr. Mike Boatman's initial comment is telling on this point.⁵⁴ In 2011, Mr. Boatman brought a complaint against the University of North Carolina Asheville ("UNCA") pertaining to a photograph that was posted by a faculty member to a faculty website to promote a racquetball class. Embedded in Mr. Boatman's comment is a July 7, 2011 letter from UNCA's legal counsel explaining that UNCA had removed the photograph from its website and that it did not admit to copyright infringement; UNCA's letter also noted the university is immune from suit the

⁵¹ See Order Granting Partial Dismissal, *Canada Hockey LLC d/b/a Epic Sports, et al. v. Texas A&M Univ. Athletic Dept.*, No. 17-cv-00181 (S.D. Tex. Mar. 29, 2019). See also Cheryl Beise, *Texas A&M immune from copyright infringement claims*, IP Law Daily, Wolters Kluwer Law & Business (Sept. 8, 2020), available at <https://irus.wolterskluwer.com/news/ip-law-daily/texas-a-m-immune-from-copyright-infringement-claims/120633/> (last visited Oct. 18, 2020).

⁵² *Urbont v. Sony Music Entm't*, 831 F.3d 80, 87 (2d Cir. 2016).

⁵³ See, e.g., COLC-2020-0009-0020, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

⁵⁴ COLC-2020-0009-0006, Sovereign Immunity Study: Notice and Request for Public Comment, 85 Fed. Reg. 107 (Notice of Inquiry, June 3, 2020).

Eleventh Amendment. What Mr. Boatman does not disclose in his comment is that, in 2014 – after further correspondence (which was omitted from his submission) – UNCA and Mr. Boatman reached a “nuisance-value” settlement in the amount of \$4,000, even though the university had concluded that, notwithstanding sovereign immunity, a court would have decided the case in UNCA’s favor based on fair use or other defenses.⁵⁵ Thus, Mr. Boatman’s complaint that “North Carolina and every state that abuses sovereign immunity is also stealing a portion of tax revenue due to the United States!” is peculiar when he was, in fact, compensated at an amount above the cost of a license by a tax-exempt organization for the allegedly infringing use. UNCA showed that public universities do respect – and are required to respect (*see* Section V *infra*) – copyright rights by removing images and providing some compensation when the circumstances warrant it.

As demonstrated above, copyright litigation outcomes are notoriously unpredictable because they are so fact-specific. There are reasonable cases for public colleges and universities to invoke sovereign immunity, especially when there are good faith defenses such as fair use, lack of copyright ownership, lack of volitional conduct, time-barred due to the statute of limitations, “innocent” infringement under Section 504(c)(2), lack of provable damages, first sale doctrine, or a myriad other defenses. It is similarly rational for courts to dismiss certain cases based on sovereign immunity (or on other procedural grounds such as the lack of a copyright registration) rather than reach the merits in those cases. Thus, it is inappropriate to imply that public universities must be acting in bad faith merely because they sometimes seek to avail themselves of the sovereign immunity defense to which they are entitled.

V. Public Universities’ Compliance with the DMCA & HEOA Further Underscores Their Systemic Commitment to Copyright Laws

Finally, we believe it is important to highlight that several initial comments correctly point out that public universities are widely compliant with the Digital Millennium Copyright Act (DMCA), as well as with the Higher Education Opportunity Act (HEOA). These comments reinforce AAU and APLU’s position that public universities are not wanton infringers of copyrights. Indeed, rights organizations themselves generally recognize that universities comply with the DMCA.

Institutions of higher education take their responsibilities for complying with the DMCA and the HEOA very seriously. Universities are bound by Section 512(i)(1)(A) in the DMCA, which conditions availability of the safe harbors on a service provider adopting, reasonably implementing, and informing subscribers of the service provider’s network of “a policy that provides for the termination in appropriate circumstances” of the accounts of subscribers “who are repeat infringers.” To meet this responsibility, universities undertake significant, ongoing educational efforts to: help students, faculty, and staff understand their personal responsibilities and risks in relation to respecting copyright online; promulgate policies that hold members of the institutional community accountable for consistent, willful failure to refrain from infringing

⁵⁵ Mr. Boatman’s decision to omit certain details underscores the point we have made throughout this comment: namely, that an evidentiary record of systematic, intentional copyright infringement is woefully incomplete without the full context of each alleged infringement.

activities (as distinct from the appropriate exercise of fair use); and provide dedicated personnel and technological resources with which to field and respond to DMCA notices.

On the flip side, DMCA enforcement agent notices frequently contain inaccurate information, such as citing instances of alleged infringement at IP addresses that were not in use at the time a notice specifies. Even though rights holders and their agents should consider fair use before asserting infringement, institutions regularly see a high degree of notices requesting takedown of content that any good-faith determination would identify as fair use. In addition, institutions are seeing a growing tendency for rights enforcement agents to include settlement offers to alleged infringers in their notices. This distorts the notice-and-takedown process from an operational perspective while giving the impression that generating revenue, and not mitigating infringement, is the enforcement agent's underlying objective.

For its part, the HEOA requires colleges and universities that receive federal funding for student financial aid to take several specific measures to reduce the amount of unlawful uploading and downloading of copyrighted works on campus networks.⁵⁶ First, institutions must make an annual disclosure informing students that the illegal distribution of copyrighted materials may subject them to criminal and civil penalties and describes the steps that institutions will take to detect and punish illegal distribution of copyrighted materials.⁵⁷ Second, institutions must certify to the Secretary of Education that they have developed plans to “effectively combat” the unauthorized distribution of copyrighted material, including through use of technology-based deterrents. Third, “to the extent practicable,” institutions must offer alternatives to illegal file sharing.⁵⁸ These funding requirements underscore the commitment by colleges and universities of complying with (rather than intentionally or recklessly disregarding) copyright laws.

VI. Conclusion

State universities consistently have shown that they “are willing to accept the obligation of copyright law” and continually work to ensure compliance.⁵⁹ And the proffered examples of infringement allegedly committed by state universities simply do not collectively rise to the level of a persistent pattern of intentional constitutional violations that justifies abrogating states’ sovereign immunity. Further, from a practical standpoint, abrogating sovereign immunity would simply embolden plaintiffs – particularly those with weak or unsupported 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. Public universities already receive a continuous stream of initial demands that include monetary equivalents to outright purchasing all rights in the works, not just small sums approximating a reasonable licensing fee. The financial drain of warding off

⁵⁶ All 237 of AAU’s and APLU’s U.S.-based public member universities receive Title IV funding. See 2019-20 Integrated Postsecondary Data System (IPEDS), available at <https://nces.ed.gov/ipeds/>.

⁵⁷ 20 U.S.C. § 1092(a)(1)(P).

⁵⁸ 20 U.S.C. § 1094(a)(29).

⁵⁹ 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).

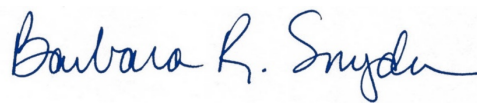
meritless lawsuits is particularly acute amid the COVID-19 pandemic and economic recession, which are placing an unprecedented strain on state university finances.⁶⁰ Congress, therefore, should preserve state sovereign immunity for copyright claims and protect state universities from protracted exchanges and costly litigation that divert crucial resources from important societal goods like education, research, outreach, health care, and other public services.

Finally, we urge the Copyright Office to take steps to consult with states, municipalities, and other state government bodies before concluding its sovereign immunity study. It is unsurprising that such entities, which are struggling to manage the unprecedented human strain and financial toll of the COVID-19 pandemic, did not submit comments. However, given the enormous impact that abrogating state sovereign immunity would have on state governments, it is incumbent upon the Copyright Office and Congress to ensure that the other components of state governments are heard.

Sincerely,



Peter McPherson
President
APLU



Barbara R. Snyder
President
AAU

⁶⁰ See Robert Kelchen, Justin Ortagus, Dominique Baker, & Kelly Rosinger, *Trends in State Funding for Public Higher Education*, InformEd States Higher Education Policy Initiative (Aug. 2020), available at https://static1.squarespace.com/static/5d9f9fae6a122515ee074363/t/5f4d2ae0e8f13c2a2dabd9ea/1598892770478/IS_Brief_TrendsInStateFunding_Aug2020.pdf (last visited Sep. 1, 2020); Dick Startz, *University finances and COVID-19: Different schools, different risks*, Brookings Inst. (June 18, 2020), available 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); and 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.” Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH. L. REV. 385, 413 (2011).