

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,

The following comments are filed on behalf of the Association of Southeastern Research Libraries (ASERL). ASERL is among the largest regional research library consortia in the United States. ASERL libraries operate in an environment characterized by rapid change, opportunity, and challenge, including ever-greater demands for student and faculty success, cost efficiency and effectiveness, and anytime-anywhere access to content and services. In preparing these comments, ASERL consulted with librarians from across the country who are tasked with educating and guiding campus communities on issues of copyright.

Injunctions and contract remedies are adequate to vindicate legitimate copyright concerns; the plaintiffs in leading copyright cases involving universities have said injunctive relief would achieve their litigation goals. Abrogating sovereign immunity would have a chilling effect on legitimate activities of state research libraries, who invest heavily in copyright-protected content and receive vanishingly small numbers of complaints from copyright holders regarding alleged infringement. Crucially, state research libraries also invest substantial resources to ensure copyright compliance, prizing sovereign immunity as a shield against abusive lawsuits. The Supreme Court's opinion in *Allen v. Cooper* merely ratified the status quo, but revoking state sovereign immunity would upset the settled expectations of state IHEs, dramatically raising the stakes for everyday activities on our campuses.

Adequate remedies are available to copyright holders concerned about infringement by state entities.¹ The power to seek injunctive relief against state officials under the *Ex parte Young* doctrine, for example, is a potent deterrent to infringement by state actors. No researcher or research institution wants to invest time and resources in a project that would be vulnerable to a court order requiring all work to cease and all products to be impounded or destroyed. In the two arguably most high-profile suits alleging infringement by state institutions in the last 20 years, *Authors Guild v. HathiTrust et al.* and *Cambridge Univ. Press et al. v. Becker*, the plaintiffs said equitable relief constraining future conduct would be sufficient to vindicate their claims.²

¹ In addition to the remedies available to rightsholders, it is worth noting that other laws and regulations give state colleges and universities reason to comply with copyright, and to discourage infringement by employees and others. For example, the Higher Education Opportunity Act requires institutions that receive federal funding for student financial aid to inform 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. 20 U.S.C. § 1092(a)(1)(P). Often the institutions' libraries fulfill this obligation.

² See, e.g., Authors Guild, Court Filing Ends AG v. HathiTrust Copyright Litigation, Jan. 8, 2015, <https://www.authorsguild.org/industry-advocacy/court-filing-ends-ag-v-hathitrust-copyright-litigation/> (describing the Authors Guild's lawsuit against the HathiTrust and its library partners as "ultimately a

The majority of content purchased by libraries today is governed by license agreements, which create multiple avenues for remedying alleged infringement in ways that are simpler, cheaper, and more effective than a federal copyright lawsuit. By far and away the most commonly-used remedy available to licensors is the power unilaterally to terminate access to licensed content if the vendor detects usage that (in their opinion) violates the terms of the agreement. (The ability to monitor campus engagement with licensed resources comprehensively is another vendor-friendly aspect of the licensed-access model.) Campuswide loss of access draws the attention of campus officials at the highest level, and restoring access to valuable research materials is a powerful motivator to ensure offending behavior ends and those responsible are duly chastened and instructed how to avoid breach in the future. In addition to self-help, vendors can pursue claims in state court for breach of contract.³ Notably, contract remedies can be invoked to protect vendor business interests that copyright does not protect, and even to constrain activity (such as text and data mining) that is lawful under the Copyright Act.

While injunctive relief and remedies under contract law are more than adequate to satisfy legitimate actors and those with reasonable demands, the strategic aims of trolls, or of those who bring SLAPP lawsuits⁴ against their political enemies, require the leverage created by the full panoply of statutory damages in the Copyright Act.⁵ Abrogation would be a boon to bad actors interested in harassing and extorting state institutions. The dearth of actual litigation against state research institutions is evidence of their willingness to give satisfactory relief (whether in the form of a license payment or a take-down) for legitimate claims, and it is also evidence that bad actors correctly perceive sovereign immunity as a barrier to success in their schemes.

It is unlikely that any state agency or division invests more heavily in the acquisition of content protected by copyright than do state research libraries. Over the last 20 years, state libraries and archives in the US have spent more than \$30 billion purchasing copyrighted materials.⁶ In its inquiry, the Copyright Office asks, “To what extent does state sovereign immunity affect the

success” due to the suspension of the Orphan Works Program and the stipulation that HathiTrust would follow Section 108 of the Copyright Act in creating “replacement copies” for preservation purposes); Andrew Albanese, Publishers Appeal “Flawed” Decision in GSU E-Reserves Case, Publishers Weekly, <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/53903-publishers-appeal-flawed-decision-in-gsu-e-reserves-case.html> (last visited Aug 30, 2020) (Copyright Clearance Center, which funds 50% of the ongoing litigation against Georgia State University, said in a statement, “This case sought no monetary damages and has always centered around clarifying the balance embodied in fair use”).

³ The Fifth Circuit’s discussion of contract remedies in *Chavez v Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), is instructive, and culminates in the conclusion that “all signs point to the existence of a remedy against the states for breach of contracts involving copyrights in state court.”

⁴ Strategic lawsuit against public participation, Wikipedia, https://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation (last visited Aug. 31, 2020).

⁵ On whether statutory damages are working in any case, see Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy In Need of Reform, 51 Wm. & Mary L. Rev. 439–511 (2009).

⁶ Brief Amici Curiae Am. Library Ass’n, Ass’n Of College And Research Libraries, Ass’n Of Research Libraries, Soc’y Of Am. Archivists, And Software Preservation Network In Support Of Respondents 3, *Allen v. Cooper*, 589 US ____ (No. 18-877).

licensing or sale of copies of copyrighted works to state entities?” To our knowledge, licensing terms for library materials are not affected in any way by state sovereign immunity. The terms in vendor contracts tend to vary with the nature and orientation of the vendor, not the nature of the purchasing institution: larger, for-profit vendors tend to have complex standard contracts that strongly favor the vendor,⁷ while non-profit, scholar-aligned vendors tend to have simpler agreements that are more evenhanded. Overall sales and spending also appear to be unaffected by the presence of sovereign immunity. Statistics on academic library spending, such as the survey maintained for more than a century by the Association of Research Libraries (ARL), show a long-running trend of steeply increasing costs associated with copyrighted material. Library materials costs grew by 123% between 1998 and 2018, compared to a 54% increase in the Consumer Price Index.⁸ Far from experiencing a “value gap” in our favor, our libraries have paid more for content, and our costs have escalated more quickly, than any other consumer group.

Libraries at state IHEs consistently take a responsible, balanced approach to working with in-copyright material. In addition to our substantial investments in content, our libraries commit significant resources to ensure that policies and procedures are consistent with copyright law, and that our faculty, staff, and students are well-informed about their rights and responsibilities under the law. In addition to the attorneys in their General Counsels’ offices, it is increasingly common for state IHEs to employ full-time staff, and in some cases entire teams, dedicated to copyright policy, education, and outreach, typically housed in the college or university library.⁹ These teams curate online resources¹⁰ and lead regular workshops and webinars on the legal rights and responsibilities of authors, teachers, and learners.

Rank and file academic librarians at state IHEs take copyright seriously too, as evidenced by the success of online courses like “CopyrightX” and “CopyrightX: Libraries,”¹¹ “Copyright for

⁷ For example, when Louisiana State University sought to enforce its contract with Elsevier, alleging breach by the vendor, Elsevier’s strategic designation of its Dutch parent company as the counterparty in the license caused months of delay and additional legal work for the University. See Kaylyn Groves, Louisiana State University Sues Elsevier for Breach of Contract, Ass’n of Research Libraries, May 2, 2017, <https://www.arl.org/news/louisiana-state-university-sues-elsevier-for-breach-of-contract/>. (“Elsevier has not accepted service of process for the lawsuit through the Louisiana long-arm statute nor at the Elsevier corporate office in New York City.”)

⁸ Ass’n of Research Libraries, *Expenditure Trends in ARL University Libraries, 1998-2018*, avail. at <https://www.arl.org/wp-content/uploads/2019/10/expenditure-trends.pdf>.

⁹ The University Information Policy Officers, a group whose membership is limited to college and university library staff who have copyright as a significant part of their job, currently includes 54 members from state IHEs, representing 40 state institutions. Through the outreach and education efforts described below, this consortium of experts supports a much larger cadre of staff at their own and many other institutions.

¹⁰ See, e.g., Copyright @ LSU, <https://www.lib.lsu.edu/services/copyright/>; University of Virginia Library, Copyright Essentials for Scholarly Work, <https://copyright.library.virginia.edu/copyright-resources/essentials/>.

¹¹ The CopyrightX courses are intense and selective synchronous courses which attract hundreds of library-based learners each year. See Jill Cirasella, *Course Review: CopyrightX*, 7 JOURNAL OF LIBRARIANSHIP AND SCHOLARLY COMMUNICATION (2019), <https://jisc-pub.org/article/10.7710/2162-3309.2297/> (last visited Aug. 30, 2020).

Multimedia,¹² and “Copyright for Educators and Librarians”¹³—courses which have been joined by thousands of learners drawn from the library community.¹⁴ The Copyright First Responders program of in-person workshops has empowered teams of librarians at several state IHEs to serve as frontline copyright resources in their communities.¹⁵ Librarians also regularly attend specialized copyright events like the Kraemer Copyright Conference, which has grown from 80 attendees to more than 200 annually since its founding in 2013.¹⁶ Leading national library groups like the American Library Association and the Society of American Archivists routinely host conference sessions, workshops, and professional development seminars focused on copyright literacy, best practices, and the latest legal developments. Another effort, the Library Copyright Institute, offers a “program of systematic, deep instruction in copyright law for librarians...targeted at training librarians at institutions with fewer resources and no copyright expert on staff,” taught by leading copyright experts drawn primarily from libraries at state IHEs, with funding from the Institute for Museum and Library Services.¹⁷ ASERL itself offers a robust schedule of webinars, workshops, and other learning opportunities related to copyright, including the recent addition of online “Copyright Office Hours” that connect ASERL member librarians with copyright experts. Taken together, these efforts and investments reduce nearly to zero the likelihood of intentional infringement sufficient to raise a due process claim that could underwrite abrogation of immunity under *Allen v. Cooper*.

One reason for this substantial investment in copyright literacy at state IHEs’ libraries is the close connection between copyright, education, and free expression. Copyright and education in the U.S. have been intimately linked since the first federal Copyright Act was passed in 1790. Entitled “An Act for the Encouragement of Learning,” its primary purpose was to promote the production and dissemination of knowledge in the young republic. Copyright is also inextricably linked to the First Amendment. The Supreme Court has affirmed both that “the Framers intended copyright itself to be the engine of free expression”¹⁸ and that copyright must include

¹² Anne Gilliland, Lisa Macklin, and Kevin Smith, “Copyright for Multimedia,” Coursera, <https://www.coursera.org/learn/copyright-for-multimedia>.

¹³ Anne Gilliland, Lisa Macklin, and Kevin Smith, “Copyright for Educators and Librarians,” Coursera, <https://www.coursera.org/learn/copyright-for-education>.

¹⁴ For example, the courses led by Gilliland, Macklin, and Smith had received over 27,000 registrations as of August 24, 2020. Email on file with authors.

¹⁵ Kyle K. Courtney, *The Copyright First Responders Model*, 4 TICKER: THE ACADEMIC BUSINESS LIBRARIANSHIP REVIEW (2020), <http://hdl.handle.net/2027/spo.16481003.0004.204>.

¹⁶ “Interview with Carla Myers,” Consortium of College and University Media Centers, https://www.ccumc.org/page/Myers_Interview/Interview-with-Carla-Myers-Kraemer-Copyright-Conference_.htm (last visited Aug. 30, 2020). The Copyright and Licensing Office at Brigham Young University, housed in the Harold B. Lee Library, also hosts an annual conference catering to legal scholars and professionals alongside librarians. BYU Copyright and Trademark Symposium, <https://copyrightsymposium.byu.edu/>.

¹⁷ David R. Hansen, William Cross, Anne Gilliland, Patrick Roughen, and Arnetta C Girardeau, *The Library Copyright Institute 2019 Materials and Report*, <https://osf.io/bx45z/>. Evaluation surveys submitted by participants after the institute indicated high levels of satisfaction.

¹⁸ *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 558 (1985).

balancing features like the fair use doctrine as “built-in First Amendment accommodations”¹⁹ to ensure exclusive rights do not unduly burden the growth and spread of knowledge.

Fair use and First Amendment freedoms are vital in all phases of the research lifecycle. They help ensure researchers’ access to resources that could be lost or destroyed if not for library preservation efforts, power new modes of analysis like text and data mining, provide for quotation and reuse in published critique and commentary, and finally complete the cycle by ensuring students may access and repurpose material as part of their own entry into the research community. And of course, graduates of state IHEs put their skills to use in a wide variety of creative endeavors beyond the walls of the academy, providing the next generation of creators and creative leaders to keep the cycle of progress moving forward.²⁰

These processes can grind to a halt when confronted with high perceived legal risk. In response to the NOI’s request for “empirical evidence...to determine whether and to what extent there has been a change over time,” in copyright-related activity by state entities, it is worth noting a growing body of research showing that some research communities stop far short of what the law permits them to do when working with copyrighted materials.²¹ A “permissions culture” can take hold in communities whose members overestimate the scope of copyright’s exclusive rights and are uncertain about users’ rights such as fair use. This fear, uncertainty, and doubt is exacerbated by misperception of the magnitude of the legal remedies that can be brought to bear against even an unwitting or well-intended infringer. If sovereign immunity were abrogated, this chilling effect would certainly be more widespread, and research would suffer accordingly. In the long run, the scope of fair use itself could contract.²²

Abrogation could have a related chilling effect on state research libraries, who must rely on the flexible right of fair use to conduct some of their most important functions, and to meet major challenges posed by the digital age. Fair use has arguably never been more clearly defined in

¹⁹ Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Golan v. Holder, 565 U.S. 302 (2012).

²⁰ See, e.g., Notable Alumni, UVA College and Graduate School of Arts and Sciences, <https://as.virginia.edu/notable-alumni>.

²¹ See, e.g., Patricia Aufderheide, “The Chilling Effect of Copyright Permissions on Academic Research: The Case of Communication Researchers” 49 Joint PIJIP/TLS Research Paper Series 1 (2020), <https://digitalcommons.wcl.american.edu/research/49> (researchers “are often unsure or confused, even unknowing, about fair use; ...this lack of knowledge and/or familiarity leads to both failure to execute and failure to initiate” research projects affected by copyright); Wakaruk, Amanda, and Céline Gareau-Brennan. “Introducing the Copyright Anxiety Scale,” ERA, January 31, 2020, <https://doi.org/10.7939/r3-69zc-gg58>; Patricia Aufderheide, Peter Jaszi, Bryan Bello, and Tijana Milosevic, *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report* (2014) https://cmsimpact.org/wp-content/uploads/2016/01/fair_use_for_visual_arts_communities.pdf (visual arts community members’ “work is constrained and censored, most powerfully by themselves, because of that confusion [about copyright] and the resulting fear and anxiety”).

²² See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L. J. 882 (2007) available at <https://ssrn.com/abstract=918871>.

the courts,²³ and libraries have been increasingly comfortable with robust reliance on fair use in service of their missions.²⁴ However, even if the odds of losing an infringement suit are low due to a strong fair use argument, astronomical statutory damages can make even a slim chance of failure intolerable. Needless legal risk should not slow progress as state research libraries rush to rescue cultural heritage from a gathering storm of media obsolescence.²⁵

Finally, we note that several questions in the NOI probe whether any change had occurred, or was expected to occur, as a result of the Supreme Court's opinion in *Allen v. Cooper*. With respect to state IHEs, there is no reason to expect changed behavior. Prior to *Allen*, we believed, along with the leading treatises and copyright textbooks, that the Supreme Court's opinions in *Florida Prepaid* and *Seminole Tribe*, together with the appellate courts' subsequent application of those cases to copyright, left little doubt that state sovereign immunity from federal copyright liability was intact. As *amici* representing state entities made clear in the *Allen* case, abrogation would have disturbed settled expectations; while leaving immunity intact merely preserved the status quo.

Thank you for the opportunity to comment on this matter.

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²³ See, e.g., Clark D. Asay, Arielle Sloan & Dean Sobczak, Is Transformative Use Eating the World?, 61 B.C.L. Rev. 905 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss3/3> (finding a unified approach to fair use across district and appellate courts, with a core concept (transformative use) driving the resolution of the four factor inquiry).

²⁴ See, e.g., Prudence S Adler et al., Code Of Best Practices In Fair Use For Academic And Research Libraries (2012).

²⁵ See, e.g., Mike Casey, Why Media Preservation Can't Wait: The Gathering Storm, 44 IASA J. 15 (2015) (explaining that aging media formats, aging media players, and even aging people with the expertise to fix old equipment, add up to a perfect storm that makes migration of 20th century media to sustainable digital formats an urgent need.) While Section 108 permits some preservation activities, its contours are sufficiently narrow that libraries must routinely avert to fair use to permit mission-critical activity.