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Regan A. Smith

General Counsel and Associate Register of Copyrights

U.S. Copyright Office

101 Independence Avenue, SE

Washington, DC 20559-6000

Reply Comments of ASERL and GWLA, State Sovereign Immunity Study [Docket No. 2020-9]

Dear Ms. Smith,

The Association of Southeastern Research Libraries (ASERL) and the Greater Western Library Alliance (GWLA) appreciate the opportunity to respond to the initial comments addressing the Copyright Office's June 3, 2020, Notice of Inquiry, as well as the extension of time granted by the Copyright Office. Together, ASERL and GWLA represent academic libraries at 76 research universities in the United States. We write in response to allegations of infringement at universities and libraries and to explain why initial comments fail to approach the standard set in *Allen v. Cooper* for evidence to support abrogation of the states' 11th Amendment immunity.¹ In *Allen*, the Supreme Court concluded that Congress acted without sufficient evidence when it attempted to abrogate state sovereign immunity through the Copyright Remedy Clarification Act of 1990, (CRCA).² The record before Congress was inadequate because it failed to show state infringement rising to the level of 14th Amendment violation.³ Now, as then, the record fails to meet that bar.

¹ The Eleventh Amendment reads: "The Judicial Power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

² In *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018), *aff'd*, 140 S. Ct. 994, 206 L. Ed. 2d 291 (2020) the Supreme Court affirmed consistent lower court decisions spanning from *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) to *Flack v. Citizens Mem. Hosp.*, No. 6:18-cv-3236, 2019 WL 1089128, at *3 (W.D. Mo. Mar. 7, 2019) holding the Copyright Remedy Clarification Act to be unconstitutional and noting that Congress could only identify "at most a dozen instances of copyright infringement by States," many of which were rejected by courts on their merits or did not involve intentional infringement, thus the CRCA was neither congruent nor proportional to conduct the CRCA sought to remedy.

³ *Seminole Tribe v. Florida*, 517 U.S. 44, 55–56, 59, 72–73 (1996). Congress may abrogate state sovereign immunity only when it unequivocally expresses its intent to abrogate immunity and only pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment.

The present Notice of Inquiry “[sought] to determine the degree to which copyright owners face infringement from state actors [and] whether such infringement is based on intentional or reckless conduct.” 85 Fed Reg. 34,252, 34,252 (Jun. 3, 2020). The comments submitted do not establish that copyright owners face reckless or intentional infringement by state actors to any meaningful degree. The comments focus instead on *perceived* infringement. Perception is an inappropriate standard for two reasons. First, a perception of a grievance is not reliable evidence of underlying infringement. Second, between a sense of grievance and a finding of infringement, many limitations and exceptions to the exclusive rights of copyright holders may be interposed. Copyright holders may not like the application of fair use, for example, but it is a vital part of copyright law. When these complaints are examined in light of the full range of copyright’s rights, limitations, and exceptions, virtually no evidence has been presented to show state sovereign immunity shielding widespread intentional or reckless infringement.

In *Allen v. Cooper*, the Court described previous efforts to document the allegedly harmful effect of state sovereign immunity on copyright enforcement. Notwithstanding the broad conclusion of Register Oman’s report favoring abrogation, the Court observed that,

Despite undertaking an exhaustive search, Oman came up with only a dozen possible examples of state infringement... Neither the Oman Report nor any other part of the legislative record show concern with whether the States' copyright infringements (however few and far between) violated the Due Process Clause. Of the 12 infringements listed in the report, only two appear intentional, as they must be to raise a constitutional issue.⁴

The comments so far do not improve on the evidence in the Oman Report.

A fundamental misunderstanding of copyright is pervasive throughout the initial comments. For example, comments include the assertion of copyright in a person’s name (COLC-2020-0009-0007), the claim that abrogating sovereign immunity will address the prevalence of phishing schemes from other countries (COLC-2020- 0009-0010), the claim that libraries previously kept in check by CRCA are now plotting copyright infringing activities (COLC-2020-0009-0021), and a comment about federal agents allegedly committing burglary and stealing unidentified intellectual property (COLC-2020-0009- 0014). Other comments are purely conclusory, in the form of “it is still stealing” (COLC-2020- 0009-0011), arguing libraries “can get away with not paying writers” (COLC 2020-0009-0021). We note these comments to

⁴ *Allen v. Cooper*, No. 18-877, slip op. at 14-15 (U.S. Mar. 3, 2020).

underscore the broader point that a sense of grievance, even grievance against a state actor, does not reliably indicate an abuse of sovereign immunity.

Other responses to the inquiry describe claims that would likely have been resolved by fair use, if they ever reached the courts. The comment of Patricia Ward Kelly alleges several instances of infringement by scholarly authors and university presses, involving interviews done with her late husband, Gene Kelly (COLC-2020-0009-0019). The use of appropriately tailored quotations from interviews in scholarly books and articles is a paradigmatic example of fair use,⁵ but Mrs. Kelly says nothing about fair use in her comment. Copyright ownership in interviews is complex and depends on the nature of the interview and the agreements between interviewer and subject, among other things. Mrs. Kelly's comment does not address these complexities, and seems to misunderstand important copyright principles such as the distinction between ownership of copies and ownership of copyrights.⁶ Mrs. Kelly's legal threats have been effective in imposing a prior restraint on every planned book she has discovered, which suggests her power to chill academic speech likely exceeds the rights given to her by the law.

Another subset of comments, including those by the National Press Photographers' Association, allege generic and hypothetical problems, and mischaracterize the law (COLC-2020-0009-0029). Describing generally how any infringing use is liable to be an unwelcome phenomenon for an exclusive licensee and may create issues for the licensor, they offer no evidence that reckless or intentional infringement by state entities is widespread, or that it has actually harmed licensors. The NPPA is wrong when it writes that "if the [exclusive licensee's] competitor is an infringing state actor that claims sovereign immunity from copyright infringement, the licensee has no remedy." Under *Ex parte Young*, the licensee has exactly the remedy it needs: an injunction to stop the unlicensed use and reestablish its exclusivity.

The Copyright Alliance claims to "represent the interests of over 1.8 million creators," but like the Oman report, its survey results fail to show widespread infringement by state entities (COLC-2020-0009-0028). The survey report doesn't disclose critical aspects of its methodology and the survey instrument is not included with the comment. A close examination of the results undermines their arguments. The survey asked if respondents "believe" that their copyrights were infringed by state actors, and if so, how often, when, and so on, but provides no metric to

⁵ 17 U.S. § 107 (Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright).

⁶ 17 U.S. § 202 (Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied....).

gauge whether the beliefs are accurate. Case studies that include claims courts have characterized as “frivolous” provide good cause for suspecting that these beliefs are unreliable.

The Copyright Alliance profiles sports psychologist and author Keith Bell, asserting Bell ended his writing career due to a sense of powerlessness and defeat which he attributed to state infringement. The comment neglects to mention that Bell has sued or threatened to sue high school coaches and sports teams all over the country, many of them for simply retweeting images with a snippet from a book Bell published in 1982. A 2018 newspaper report describes a \$40,000 settlement Bell extracted from a school district in Minnesota, and explains that, “In the past year, Bell has filed at least six federal lawsuits for copyright infringement, four of which complained of a single retweet by a club, high school or college coach.”⁷ The tide seems to have turned against Mr. Bell, however, as an Ohio court ruled in June that two coaches’ display of his work in a locker-room was fair use,⁸ and then in October a California court ordered him to pay \$120,000 in attorneys’ fees after characterizing Bell as “motivated by the desire to extract disproportionate settlements.”⁹ His early success at monetizing such salutary, benign, de minimis, and fair uses, together with his dwindling prospects as courts catch on to his scheme, add important context to Bell’s claim to have lost over \$100 million in “licensing fees.” The limitations and exceptions that are an integral part of copyright appear to be the real source of Bell’s dissatisfaction. Abrogating state sovereign immunity would only make it easier for litigants like Bell to misuse the courts.

The Copyright Alliance offers a handful of additional details to support the notion that the grievances recorded in its survey represent genuine infringement, but none of these are dispositive. They cite respondents who complained of state use after a license was sought and denied. In *Campbell v. Acuff Rose Music, Inc.*, 510 US 569 (1994), the Supreme Court ruled that “being denied permission to use a work does not weigh against a finding of fair use.” The Copyright Alliance claims its survey shows an increase in infringement in recent years, as compared to the decades going back to 1976, but there is no reason to believe their survey results are representative of the universe of actual infringements since 1976. The prevalence of

⁷ Josh Verges, “Rosemont school district to pay author \$40,000 for unauthorized sports tweets,” *Twin Cities Pioneer Press*, Oct. 3, 2018, <https://www.twincities.com/2018/10/03/rosemount-school-district-to-pay-author-40000-for-unauthorized-sports-tweets/>.

⁸ See U.S. Copyright Office, *Bell v. Worthington City Sch. Dist.*, Fair Use Index, <https://www.copyright.gov/fair-use/summaries/bell-worthingtoncityschdist-sdohio2020.pdf>.

⁹ Scott Graham, “‘Professional Litigant’ Gets in Too Deep With Suit Against Swim Club,” *Law.com*, October 21, 2020, <https://www.law.com/therecorder/2020/10/21/professional-litigant-gets-in-too-deep-with-suit-against-swim-club/>.

recent claims in their survey is more likely the result of recency bias: people tend to recall and give more weight to recent events than they do past ones. Thus, respondents asked to describe examples of a phenomenon are more likely to report recent events than more distant ones, and those with recent experiences are more likely to respond to a call for stories than those with distant ones. The curated survey can't bear the weight of the Alliance's inferences, much less can it support a further causal link to specific court cases.

Finally, the survey respondents provided evidence that adequate remedies are available to those who bring claims against state entities. When informed of their right to seek an injunction to stop alleged state infringement, many more respondents (288 - 50% of respondents) expressed willingness to pursue this remedy than said they would not bother (55 - 9% of respondents), (COLC-2020-0009-0028 at 10). Similarly, a final group of comments demonstrates that when informed of potential infringement, the state entity removed the offending materials immediately. See, e.g., COLC-2020-0009-0020.

State sovereign immunity is grounded in the Constitutional principle of Federalism and in recognition that the ability of federal courts to assess monetary damages against the states creates opportunity for the federal government to interfere with state governance and policy. In cases where alleged infringement does not meet the Constitutional threshold, cases that bar damages should be seen as evidence of the Constitution and the Copyright Act working as the Framers intended. The comments submitted in response to the Notice of Inquiry do not show the required "pattern of infringement" first described in the *Florida Prepaid* decision and applied to copyright in *Allen*. They reinforce that to the extent that it can be found at all, "most state infringement was innocent or at worst negligent."¹⁰ To attempt to revoke state sovereign immunity in copyright actions based on the weak and often irrelevant record created by these comments would be disproportionate to the scant evidence of cognizable infringement.

ASERL and GWLA urge the Copyright Office to consider the comments filed by universities, libraries and their associations. The Association of Public Land Grant Universities and Association of American Universities (COLC-2020-0009-0024) highlight academic institutions' role as engines of creativity and economic development for the United States. The University of Illinois at Urbana Champaign (COLC-2020-0009-0018) and University of Minnesota (COLC- 2020-0009-0026) confirm the paucity of copyright infringement claims and University Council's responsiveness when those claims arise. The University of North Carolina

¹⁰ *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. at 645

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at Charlotte confirms this.¹¹ Libraries at academic institutions adhere to the American Library Association's Code of Ethics, which states that library employees shall "respect intellectual property rights."¹² Likewise, recognition of copyright's exceptions is vital as libraries undertake digital preservation of deteriorating materials. The University of North Texas (COLC-2020-0009-0034), University of Michigan (COLC-2020-0009-0026), and University of Massachusetts at Amherst (COLC-2020-0009-0032) note libraries' role in educating faculty and staff about copyright and its exceptions. ASERL and GWLA recognize that copyright often requires balancing competing interests, but abrogating sovereign immunity to address "innocent or negligent infringement" remains a grossly disproportionate response. The existing remedies for copyright holders, including injunctions and contractual remedies, are adequate and effective in deterring infringement, a conclusion demonstrated by the comprehensive lack of evidence presented in response to the Copyright Office's Notice of Inquiry.

Thank you for the opportunity to respond on this matter.

Prepared on behalf of the Association of Southeastern Research Libraries and the Greater Western Library Alliance by:

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¹¹ The UNC Charlotte Office of Legal Affairs notes that the University has not been named in any copyright infringement lawsuits for at least the last ten years. During the same time period, in the one instance the office can recall receiving allegations of copyright infringement, the allegations were thoughtfully reviewed and amicably resolved.

¹² <http://www.ala.org/tools/ethics>