



Regulatory Transparency Project

Unlocking Innovation & Opportunity

Holding States Accountable for Copyright Piracy

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Introduction

Copyright secures the rights of creators and members of the creative community in the investments they have made in the creative process. Indeed, the Founders saw copyright as an integral piece of legal protection for the creative community and inscribed it into the United States Constitution. Today, authors, artists, musicians, programmers, bloggers, actors, producers, photographers, videographers, designers, and more rely on the copyright system to protect their works. This protection incentivizes further investment and fuels the country's vibrant creative ecosystem. As the U.S. Supreme Court has recognized, copyright is the engine of free expression that supplies the economic incentive to create and disseminate ideas.¹

Despite the Supreme Court's understanding of these foundational principles of copyright, a recent decision has put creators' rights and the function of the U.S. copyright system in jeopardy by severely limiting the ability of creators and copyright owners to hold states accountable when they infringe.² The Supreme Court found its hands tied by precedent, and so states can now escape any meaningful consequence for intentional acts of infringement by invoking the doctrine of sovereign immunity. This departure from the careful balance of copyright law immediately caught the attention of lawmakers and copyright stakeholders, and the Copyright Office is currently evaluating the extent of the problem of state infringement in order to determine whether legislative action is necessary. It is now critical that Congress recognize the inequity of unchecked state infringement and take steps necessary to prevent lasting harm to the future of creativity by abrogating sovereign immunity.

Copyright achieves its goal of advancing creativity and the arts by securing creators' rights against misappropriation of the fruits of their creative labors. As with the farmer who labors for a year to produce crops or the real estate developer who spends a year constructing a skyscraper, copyright provides to creators and copyright owners the legal power not only to stop theft, but to be made whole when their rights are violated. When we read about an artist whose song or sculpture was stolen by another party, we often read that the artist went to court to stop this theft and to recover damages for the injury. For example, a federal judge recently upheld a jury verdict awarding \$1 billion in damages in a case against Cox Communications for online piracy that harmed countless creators and copyright owners in the music industry.³

What if the party doing the thieving isn't an individual or a company, but is a state or a state actor, like an administrator at a public university or an official at a state tourism agency? Should an author who shared a manuscript with a university athletic department for purposes of fact checking it be able to recover damages when that athletic department shared the manuscript with thousands online and destroyed the intended market? Should a videographer be able to stop a state agency from misappropriating the recordings of a sunken pirate ship that he filmed and produced over years and years of work? Should a photographer be able to hold a state university accountable when it reproduces his work on its website without authorization, refusing to pay for a license and even refusing to give him attribution for his work?

¹ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

² See *Allen v. Cooper*, 140 S. Ct. 994 (2020).

³ See *Sony Music Entertainment, et al. v. Cox Communications, Inc., et al.*, No. 1:18-CV-00950, 2021 WL 1254683 (E.D. Va. Jan. 12, 2021); see also Chris Eggerston, *Judge Upholds \$1B Major Label Verdict Against Cox Communications*, *The Hollywood Reporter* (Jan. 13, 2021),

<https://www.hollywoodreporter.com/news/judge-upholds-1-billion-major-label-verdict-against-cox-communications>.

If the goal of our copyright system is to incentivize artists and the creation of new works, the answer to these questions should be yes. Basic notions of fairness and fair play also suggest the same answer, because states are able to secure copyright protections for the works created by their public employees and own the copyrights transferred to them. States take advantage of and benefit from the copyright system on a massive scale. State entities, particularly large state universities and other institutions of higher learning, register and enforce thousands of copyrights for a wide variety of works.⁴ Yet, when these same state entities violate others' copyrights, they assert that they cannot be sued for this copyright infringement. While reaping the benefits of copyright, states infringe copyrights and escape accountability by hiding behind the veil of sovereign immunity.

The Supreme Court's recent decision has made it harder for innovators and creators to recover when states use the fruits of their artistry without compensation. In a case about a pirate ship – not just a hypothetical example – the Court held that when Congress sought to protect creators from unauthorized and uncompensated uses of their works by state actors, Congress had not provided sufficient evidence of the scale of the problem to justify abrogating the sovereign immunity of the states.⁵ The Court invalidated the federal law that held states accountable for copyright infringement. As a result, states continue to benefit from copyright protections, but they avoid accountability for their own copyright infringement. As made clear by the legal briefs submitted in the case before the Supreme Court, as well as by comments recently submitted in response to the ongoing Copyright Office sovereign immunity study, the problem of states routinely ignoring the property rights protected by federal law is widespread and significant.

In sum, states claim the benefits of copyright, while disclaiming responsibility when they violate the rights of other copyright owners. This is unfair. It is not what Congress or the Framers of the Constitution intended, and it must change.

This paper identifies how copyright law and sovereign immunity came into conflict recently, explains why this conflict matters, and proposes a solution: Congress should enact new legislation that holds states accountable for when state officials pirate the fruits of creative labors of citizens by stealing their copyrighted works.

I. What if Copyright Law Does Not Protect Against Theft by State Actors?

Many Americans expect that our copyright laws were enacted to protect their creative output. This is true when it comes to individual pirates. However, it is no longer the case when a state actor is the one stealing a copyrighted work, as evidenced by the following illustrative examples of state copyright infringement.

⁴ Copyright Alliance, Comment on Notice of Inquiry on the U.S. Copyright Office's Sovereign Immunity Study (Sept. 3, 2020) (Providing data on the thousands of copyrights registered by state universities and other state entities and explaining that “[o]ne of the glaring injustices related to state sovereign immunity is the fact that state entities continuously reap the benefits of the copyright system by registering and enforcing their own copyrights while at the same time enjoying immunity from monetary damages in infringement claims.”); for recent examples of state universities enforcing their intellectual property rights, See Erin Hogge, *Business owner sued by Penn State for trademark infringement ordered to pay nearly \$10K*, DAILY COLLEGIAN (May 21, 2020); see also Christina Tabacco, *University Sues After COVID-19 Party Instagram Account Uses Trademarks*, LAW STREET MEDIA (Aug. 24, 2020); see also *Josh Smith & Slater Teague, University of Texas asks Johnson County to change longhorn logo*, WJHL.COM (May 21, 2020).

⁵ See *Allen v. Cooper*, 140 S. Ct. 994 (2020).

A. Michael Bynum

By way of illustration, consider the struggle of author Michael Bynum to protect his written work from online piracy by a state university. Bynum is an author and editor of numerous sports history books. He also owns a publishing company. He invests time researching, collecting and reviewing documents, conducting interviews, and editing content created by writers he employs on a work-for-hire basis. His work ultimately led him to begin researching Texas A&M University.⁶

Michael Bynum wrote a book about Texas A&M, Aggie Pride, and subsequently became intrigued by the story of E. King Gill, an A&M legend who influenced the school's "12th Man" credo. In fact, he became so intrigued that he began to research the 12th Man tradition for an independent book project by him and his publishing company.⁷ The passion of the A&M community for all things 12th Man indicated there was a market for such a book and in the 1990s, Bynum began his work. He extensively reviewed documentation, visited significant locations in Gill's life, and conducted interviews with members of the Texas A&M Athletic Department.⁸ Bynum ultimately hired a writer to write a biography of Gill that he planned to use as the first chapter of his new book. In 2006, Bynum asked personnel at the Texas A&M Athletic Department to proofread the chapter, and they agreed to do so. A few years later, in 2010, Bynum again communicated with Athletic Department staff and sent in another copy of the chapter, which included a statement of Bynum's copyright ownership.⁹

Bynum planned to release his book via his publishing company in the fall of 2014, and in conjunction with the 75th Anniversary of the Aggies' 1939 championship season. Before he could publish the book, however, the Texas A&M Athletic Department published a near verbatim copy of his work and distributed on the internet a link to a digital copy of the book in the University's e-Newsletter and on its social media accounts.¹⁰ Bynum contacted the Athletic Department and received a response acknowledging the "mix-up."¹¹ But, as things are wont to do on the internet, copies of Bynum's work continued to circulate by email and on social media long after the University had removed the content. By sharing his work directly with the Texas A&M alumni and football fan communities, the University essentially destroyed the market for Bynum's work. After all, how many people do you know—even devoted college football fans—who are interested in paying to read about a 1920's Texas A&M football player?

Understanding the market implications of the Texas A&M Athletic Department's actions in releasing his book on the internet, Bynum ultimately decided not to publish the book. He then filed a lawsuit against Texas A&M for copyright infringement seeking to recover damages for the economic injury he suffered. In defending itself, Texas A&M asserted a defense of sovereign immunity. In other words, the university is now saying that, since it is an agency of the state of Texas, it can't be sued.

Put Texas A&M's legal defense into perspective: The Texas A&M Athletic Department uses U.S. intellectual property laws to protect its own investments, including its investment in developing and profiting from the 12th Man as a registered trademark. It also takes advantage of U.S. courts to sue anyone who may infringe its rights in this trademark. But when an author has his work on the 12th

⁶ *Canada Hockey LLC v. Texas A&M*, S.D. Tex 4:17-cv-00181 (Mar. 29, 2019).

⁷ *Canada Hockey LLC v. Texas A&M*, S.D. Tex 4:17-cv-00181 at 3 (Mar. 29, 2019).

⁸ *Id.*

⁹ *Id.* ("copyright is held by Canada Hockey dba Epic Sports; copyright ownership is not disputed").

¹⁰ *Id.* at 5.

¹¹ *Id.*

Man published without authorization by the Texas A&M Athletic Department, it claims that it cannot be brought into court to resolve the dispute. Is it fair that a state university can take advantage of the protections of our U.S. intellectual property system as Texas A&M did when it secured a trademark, and even sued people to protect that trademark, but simultaneously refuses to be sued when it misappropriates the intellectual property of others?

B. Frederick Allen

Frederick “Rick” Allen is a videographer with over thirty-five years of experience in documentary production, freelance videography, and underwater video services. Allen exemplifies a key function of the U.S. copyright system. The copyright system has facilitated the rise of an entire professional class of independent creators who support themselves and contribute to our society on the basis of the property rights secured in the fruits of their labors.

In 1998, Allen’s Nautilus Productions company was hired by UNC-TV, in association with the state of North Carolina, to capture underwater video footage of the famous pirate Blackbeard’s Queen Anne’s Revenge, an early 18th century shipwreck discovered off the coast of North Carolina. Despite entering into an agreement in which he expressly retained copyright in his video footage, Allen discovered in 2013 that his footage had been uploaded to the North Carolina’s Department of Natural and Cultural Resources website without his authorization. After Allen notified them of the infringement of his copyrighted video footage, North Carolina compensated him. But two years later, North Carolina passed a law that immunized it from being sued for copyright infringement by officially converting copyrighted works like Allen’s video footage into a public record. Embracing the piracy of Allen’s work, North Carolina even went as far to name it “Blackbeard’s Law.”

Not long after the law was passed, Allen discovered several more of his videos had been uploaded to state websites and he sued North Carolina in federal court for copyright infringement. After a hearing, he won in the trial court. But a federal appeals court—and eventually the Supreme Court—found that a law passed by Congress in 1990 that stripped states of their sovereign immunity for copyright infringement claims was unconstitutional. As a result, North Carolina is immune from Allen’s undisputed legal claim for relief given the unauthorized use of his work by a North Carolina state agency.¹²

The Supreme Court’s decision left Allen with little recourse for the blatant and intentional theft of his videos. In comments he submitted to the Copyright Office for its study on sovereign immunity, Allen states that “because of current law and Supreme Court precedent, I am powerless to enforce my constitutionally granted intellectual property rights against infringement by States.”¹³ In addition to the lost licensing opportunities Allen has suffered as a result of North Carolina’s infringement, similar to Bynum’s lost sales opportunities of his book, Allen has incurred hundreds of thousands of dollars in legal expenses seeking to hold the state accountable for its piracy of his copyrighted work. Moreover, the time he’s spent monitoring and responding to this infringement has robbed him of countless hours that he could have spent on his additional creative endeavors.

¹² See *Allen v. Cooper*, 140 S. Ct. 994 (2020).

¹³ Frederick Allen, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (June 6, 2020).

C. Jim Olive

Over the course of a 50-year career in photography, Jim Olive has captured images that have been licensed for use in print and digital media all over the world. His unique artistic vision often finds him going to great lengths to get the perfect shot, including hanging from a helicopter to capture an iconic shot of the Houston skyline. Unfortunately, he's experienced substantial theft of many of his copyrighted works over the years.

Most recently, his impressive and difficult-to-capture image of the Houston skyline was used without authorization by the University of Houston. In 2017, he sued The University of Houston, claiming an unlawful taking of his property by a state actor under the Texas Constitution. His decision to pursue a takings claim under the Texas Constitution, as opposed to a straightforward copyright infringement claim, stemmed from his understanding that the University of Houston would invoke sovereign immunity and thus render any copyright infringement claims largely unenforceable. Despite the undisputed fact that the University of Houston used his valid property rights in his photograph without permission and without paying him, the University of Houston still argued that Mr. Olive's constitutional claim was unenforceable. The Court of Appeals for the First District of Texas agreed with the University of Houston, holding that copyright infringement by a state agency or official does not constitute an illegal taking of property under either the Texas or U.S. constitutions.¹⁴

Olive's legal case continues, as he has appealed the ruling to the Texas Supreme Court, which has agreed to hear the case. But Olive's experience is testament to the fact that even pursuing alternative claims at a state level when one's copyright has been infringed is a risky proposition. Many state courts will not recognize intellectual property theft as a constitutional taking and thus meaningful legal remedies remain unattainable to copyright owners suffering piracy of their life's work. Even worse, Olive has yet to be compensated for the infringement of his copyrighted photograph, and, like Allen, he has spent unnecessary, extensive money and time in litigation in seeking redress for the undisputed violation of his rights by the state.

II. Copyright Principles and States' Rights

Neither the Founders nor modern Congresses intended that state actors be allowed to infringe the intellectual property rights of others with impunity. The Founders enshrined copyright protection in the Constitution, and George Washington himself played an integral role in securing intellectual property protections in the new republic.¹⁵ A strong proponent of a patent system that protected and incentivized innovation, Washington understood that effective intellectual property laws were essential to a vibrant economy and ultimately the success of the country. The foundation established by the Founders for balanced and effective intellectual property laws was reinforced by several Congresses, which worked over the years to delineate further the rights of creative Americans under our copyright system. It seems unlikely that those who devised and subsequently shaped U.S. copyright law believed that states should get a free pass when they infringe the rights of intellectual property owners, and for most of the country's history, states enjoyed no such immunity.

¹⁴ See *Univ. of Houston Sys. v. Jim Olive Photography*, No. 01-18-00534-CV, 2019 WL 2426301 (Tex. App.-Houston [1st Dist.] 2019).

¹⁵ Gene Quinn, *Patents, Copyrights and the Constitution, Perfect Together*, IPWATCHDOG (Feb. 19, 2018), <https://www.ipwatchdog.com/2018/02/19/patents-copyrights-constitution/id=93941/>

The Constitution states plainly that Congress shall have the power “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹⁶ Pursuant to this power, Congress has enacted laws since 1790 to provide exclusive rights to innovators and creators via the patent and copyright systems.

The First Congress enacted our first copyright law in 1790, and copyright has since been a central feature of American intellectual property law, “incentivizing authors, musicians, and other creators to produce new works by enabling them to sustain themselves from the fruits of their labor, unencumbered by the government.”¹⁷ Copyright “protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture” and provides an exclusive right to the creator to print, publish, perform, or otherwise share the work.¹⁸ When that exclusive right is violated, a copyright holder may seek injunctive relief, which requires an infringing party to stop its unauthorized use of the work, as well as a broad array of damages to compensate for the harm caused by the infringement, and in some cases even the costs associated with bringing the lawsuit.¹⁹

Today, our U.S. copyright law expressly addresses the participation of federal and state governments in the copyright system. Copyright law precludes protection for works of the federal government, but it still allows the federal government to own copyrights in works transferred to it by others.²⁰ Current law also allows state governments to secure copyright protection in their own works and any works transferred to them.²¹

By definition, anyone who violates any of the exclusive rights of a copyright owner is a copyright infringer.²² The law plainly sets forth that “anyone” includes “any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.”²³ Further, States shall be subject to the provisions of the Copyright Act, including being subject to injunctive relief, and actual or statutory damages, in the same manner and to the same extent as any nongovernmental entity.²⁴

Taken together, these provisions allow the states and their agencies, such as governmental departments, public universities, etc., to participate fully in the copyright system, providing state actors the customary incentives both to engage in creative endeavors and to respect the rights of others engaged in such endeavors. Indeed, between 1978 and 1999, state institutions of higher education held over 32,000 copyrights.²⁵ And for much of the 20th century it was also understood that copyright owners could seek monetary remedies against states and their instrumentalities when states infringed the owners’ rights. Former Register of Copyrights Marybeth Peters described this understanding at a Senate hearing on sovereign immunity in 2000, explaining that “[f]or most of our

¹⁶ U.S. Const. art. I, § 8, cl. 8.

¹⁷ Alden Abbott et al., *Creativity and Innovation Unchained: Why Copyright Law Must be Updated for the Digital Age by Simplifying It* 4 (Regulatory Transparency Project of the Federalist Society, October 27, 2017), <https://regproject.org/paper/creativity-innovation-unchained-copyright-law-must-updated-digital-age-simplifying/>

¹⁸ Copyright in General (FAQ), <https://www.copyright.gov/help/faq/faq-general.html>.

¹⁹ Copyright Act of 1976, 17 U.S.C. §§ 502-505.

²⁰ *Id.* at § 105.

²¹ *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2nd. Cir. 2001).

²² *Id.* at § 501(a).

²³ *Id.*

²⁴ *Id.*

²⁵ U.S. Gov’t Accountability Office, GAO-01-811, *Intellectual Property: State Immunity in Infringement Actions* 44-45 (2001).

history, it has been assumed that the States enjoyed no special immunity from suits for infringement of intellectual property rights.²⁶ For example, in 1979 the State of Arizona appealed a trial court's award of damages for its willful copyright infringement and it asserted its sovereign immunity.²⁷ The federal appellate court upheld the award of damages against the state and explained:

“A state may not, consistent with the Constitution, infringe the federally protected rights of the copyright holder, and thereafter avoid the federal system of statutory protections. The “exclusive Rights” of an author, guaranteed under the Constitution and Copyright Act, would surely be illusory were a state permitted to appropriate with impunity the rights of lawful copyright holder.”²⁸

III. Sovereign Immunity and the Copyright Remedy Clarification Act

Shortly after the Ninth Circuit's decision in *Mills Music*, federal law on sovereign immunity under the Eleventh Amendment began to shift. “One of the principles of our federal system is that each state is a sovereign entity and that, absent consent, a sovereign entity is inherently immune from suit brought by an individual in federal court.”²⁹ This principle is enshrined in the U.S. Constitution's Eleventh Amendment: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

The Supreme Court's 1985 decision in *Atascadero State Hospital v. Scanlon* was a crucial turning point.³⁰ In *Atascadero*, the Supreme Court held that any legislative waiver or abrogation of a state's sovereign immunity under the 11th Amendment must be “unequivocal.” Although *Atascadero* was not an intellectual property case, the Supreme Court's ruling was broad and federal courts began to apply this rule to hold that the Copyright Act did not unequivocally abrogate state sovereign immunity, which left copyright owners without the ability to seek monetary remedies in cases of copyright infringement by the states. Federal courts were constrained by the Supreme Court's new mandate that Congress must expressly abrogate or reject state immunity under the 11th Amendment, and there was no such express declaration in the Copyright Act.³¹ Nonetheless, judges expressed in these decisions their concerns that this result would create an injustice by “allow[ing] states to violate federal copyright laws with virtual impunity,” and that it was up to “Congress ... to remedy this problem.”³²

Government officials responded to these legal developments and the legitimate concerns about creators losing full protection for their copyrighted works. In 1988, the Copyright Office issued a report that found that copyright owners had demonstrated they would suffer immediate harm if they were unable to sue infringing states in federal court. The report recommended that Congress amend the Copyright Act “to ensure that copyright owners have an effective remedy against

²⁶ *State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. on Courts and Intellect. Prop. of the S. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights), <https://www.copyright.gov/docs/regstat72700.html>.

²⁷ *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979).

²⁸ *Id.* at 1286.

²⁹ Robert T. Neufeld, *Closing Federalism's Loophole in Intellectual Property Rights*, Berkeley Tech. L.J. 1295, 1299 (2002).

³⁰ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

³¹ See, e.g., *BV Eng'g v. Univ. of California, Los Angeles*, 858 F.2d 1394, 1396 (9th Cir. 1988).

³² *Id.* at 1400.

infringing states.”³³ In response to the *Atascadero* decision, the Copyright Office report, and subsequent court decisions, Congress enacted in 1990 the Copyright Remedy Clarification Act (“CRCA”) to explicitly abrogate the sovereign immunity of states under Eleventh Amendment in copyright infringement suits.³⁴

The CRCA did exactly what the Supreme Court required in *Atascadero*. The statute unequivocally declared that a state or state entity “shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person ... for a violation of any of the exclusive rights of a copyright owner...”³⁵ Moreover, Congress made clear that in a suit against a state or state entity that “remedies ... are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State...”³⁶

One might think that this explicit legislative statement would do the trick: Congress clearly wanted the states to be held to account when they violated the rights of copyright owners. Unfortunately for authors and artists everywhere, the Supreme Court’s jurisprudence regarding how Congress can constitutionally abrogate sovereign immunity has continued to evolve in the years since the CRCA was enacted into law. In 1996, the Supreme Court decided another case on sovereign immunity and this time it ruled that Congress must unequivocally express its intent to abrogate state sovereign immunity and act pursuant to a valid source of constitutional power.³⁷ In *Seminole Tribe v. Florida*, the Court held that, because the Eleventh Amendment limits the judicial power under Article III of the Constitution, Congress cannot use its Article I authority to abrogate state sovereign immunity. Instead, the Supreme Court explained that a valid abrogation of state sovereign immunity must be accomplished pursuant to Section 5 of the Fourteenth Amendment.³⁸ In short, the Supreme Court now held that Congress had to eliminate sovereign immunity in a very specific way.

Where does that leave creators and the liability of a state actor who infringes their copyrights? The *Seminole Tribe* case was not about copyright law, and so the Supreme Court did not expressly address the CRCA. However, relatively quickly after its *Seminole Tribe* decision, the Supreme Court did consider whether Congress had effectively overruled a state’s sovereign immunity for lawsuits alleging infringement of patents. In its decision in 1999 in *Florida Prepaid Secondary Ed. Expense Bd. v. College Savings Bank*, the Supreme Court struck down the Patent Remedy Act, a law that achieved for patent owners what the CRCA achieved for copyright owners in abrogating sovereign immunity of states and state actors for infringement liability.³⁹ The Supreme Court held that Congress did unequivocally express its intent to abrogate sovereign immunity, but it had failed to justify the necessity of the legislation under section 5 of the Fourteenth Amendment as required by the *Seminole Tribe*.⁴⁰ Though the Court recognized that patents are “property” within the meaning of the Fourteenth Amendment’s Due Process Clause, it found insufficient evidence in the

³³ U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment* 104 (1988), <https://eric.ed.gov/?id=ED306963>.

³⁴ Copyright Remedy Clarification Act, Pub. L. No. 01-553 (1990) (codified as 17 U.S.C. § 511 (2000)); *see also*, Neufeld at 1302-03 (discussing the interplay between the case law and congressional action).

³⁵ 17 U.S.C. § 511(a).

³⁶ *Id.* at § 511(b).

³⁷ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

³⁸ *Id.* at 59. In strict legal terms, Congress can only do this as a means of enforcing the Due Process Clause guarantee in the Fourteenth Amendment.

³⁹ *Florida Prepaid Secondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

⁴⁰ *Id.* at 647-48.

congressional record to support the proposition that Congress was responding to widespread and persistent constitutional violations of patent rights by state actors justified the abrogation of sovereign immunity. In other words, Congress had failed to identify a significant enough problem in states stealing patented innovations and it failed to show how the Patent Remedy Act solved that problem.

Whether or not the Florida Prepaid decision applied equally to the CRCA and its abrogation of state sovereign immunity for copyright theft became a debate. The legislative record supporting the enactment of the CRCA was significant and considerably more developed in identifying unremedied instances of State infringement of copyright, including the 1988 report from the Register of Copyrights identifying many instances of copyright infringement by the states, many of which were never brought to court and held accountable for their theft in light of the sovereign immunity of states.⁴¹ Importantly, in addition to extensively identifying instances of copyright infringement by states, the congressional record also highlighted the inadequacy of then-existing legal remedies in deterring this infringement.⁴² This evidence distinguished the congressional record supporting the CRCA from the congressional record for the Patent Reform Act that the Supreme Court found to be constitutionally deficient.

Nonetheless, federal courts did not always acknowledge these differences. In 2000, the Court of Appeals for the Fifth Circuit relied on Florida Prepaid in holding that the CRCA did not pass constitutional muster in abrogating state sovereign immunity.⁴³ In *Chavez v. Arte Publico Press*, the Fifth Circuit considered Denise Chavez's claim that the University of Houston had infringed her copyright by publishing her book without her consent. The University of Houston argued that Chavez could not sue it because it was a public university and thus had sovereign immunity as a state actor under the Eleventh Amendment. The court agreed. Although the congressional record of the CRCA was more developed than the record for the Patent Remedy Act, the court in *Chavez* still found that the congressional record was deficient in providing evidence of the problem of infringement by states and the necessity of abrogating sovereign immunity under the Fourteenth Amendment as the remedy for these legal wrongs.

Recognizing that Florida Prepaid and *Chavez* put the CRCA's abrogation of state immunity in doubt, Congress requested in 2001 that the Government Accountability Office (GAO) conduct a study to (1) determine the extent to which states have been accused of intellectual property infringement, and (2) identify the other remedies available to protect intellectual property owners. The GAO study found that "few alternatives or remedies appear to remain after Florida Prepaid for intellectual property owners who believe that a state has infringed their property," and in 2003 Congress considered enacting the Intellectual Property Protection Restoration Act to ensure that intellectual property owners had meaningful recourse against state infringement.⁴⁴ This proposed legislation would have achieved several goals: (1) conditioning a state entity's ability to obtain monetary awards in lawsuits it brings to enforce its own intellectual property rights on its waiver of sovereign immunity for infringement of others' intellectual property rights, (2) abrogating state sovereign immunity for unconstitutional violations of intellectual property rights, and (3) codifying the Ex

⁴¹ See *supra* note 31.

⁴² See The Copyright Clarification Act: Hearing on 12 S. 497 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 101st Cong. III (1989), at 1, 53.

⁴³ *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

⁴⁴ U.S. Gen. Accounting Office, GAO-01- 811, *Intellectual Property: State Immunity in Infringement Actions* 13 (Sept. 2001), <https://www.gao.gov/assets/240/232603.pdf>.

parte Young doctrine, which permits injunctions against state officials.⁴⁵ Unfortunately, while Congress clearly recognized the need for a legislative fix to the ongoing problem of state’s hiding behind their sovereign immunity in infringing copyrights, patents, and other intellectual property rights, it failed to enact the law.

The Supreme Court again revisited the issue of sovereign immunity in 2006 in a case about whether payments from a bookstore chain that was on the verge of bankruptcy to a state college could be “clawed back” under federal bankruptcy law.⁴⁶ Like copyright, Congress is granted the power to establish a “uniform Laws on the subject of Bankruptcies” under Article I, Section 8 of the Constitution, but the state college claimed sovereign immunity. The Court recognized that both the majority and dissent in *Seminole Tribe* “reflected an assumption that the holding” in that case would apply to the Bankruptcy Clause, but the Supreme Court nonetheless held that sovereign immunity had been validly abrogated and allowed the clawback lawsuit against the state college to proceed.⁴⁷

Litigation over the CRCA’s constitutionality was largely insignificant over the next ten years until Frederick Allen’s case against the state of North Carolina in 2015 set in motion a series of events that would ultimately lead to the Supreme Court. As discussed above, despite the clear acts of intentional infringement by the state of North Carolina, the Fourth Circuit—and eventually the Supreme Court—found that the CRCA was unconstitutional and therefore North Carolina was shielded from his claims.

IV. The Continuing (and Increasing) Problems of States’ Sovereign Immunity for Copyright Theft

Obviously, the concern of courts and Congress that the absence of a meaningful remedy against state infringers would “allow states to violate federal copyright laws with virtual impunity” has been borne out.⁴⁸ Indeed, instances of infringement by states multiplied steadily in the years since the CRCA’s constitutionality was challenged.⁴⁹ Not only do we have the examples of piracy discussed above—public universities using copyrighted books and photographs without permission and a state’s unauthorized use copyrighted video footage of pirate ship salvage—but there are numerous other instances of state piracy of copyrights identified in the court records of these and other cases.

The examples of state piracy of copyrights are wideranging and arise from many different creative endeavors. For example, a photographer reported that a state, which had for years licensed his photographs, abruptly repudiated its existing contract with him in the wake of the *Seminole Tribe* decision and refused to pay him any longer for its continuing use of his photographs.⁵⁰ Newspaper publishers recently sued for copyright infringement a California state agency for its wholesale copying of thousands of articles over a number of years, and despite showing clear evidence of

⁴⁵ *Ex Parte Young*, 209 U.S. 123 (1908).

⁴⁶ *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

⁴⁷ *Id.* at 364.

⁴⁸ *See BV Engineering v. UCLA*, 858 F.2d 1394, 1400 (9th Cir. 1988).

⁴⁹ Copyright Alliance, Comment on Notice of Inquiry on the U.S. Copyright Office’s Sovereign Immunity Study (Sept. 3, 2020).

⁵⁰ *See* Brief for Recording Industry Association of America as Amicus Curiae Supporting Petitioners, at 8-9, *Allen v. Cooper*, 140 S. Ct. 994 (2020),

https://www.supremecourt.gov/DocketPDF/18/18-877/87418/20190207123314429_18-877acRIAA.PDF.

massive infringement, the agency asserted that sovereign immunity exempted it from any liability.⁵¹ Professional organizations that represent copyright owners in musical works recently reported an increase in infringement by numerous state universities copying and synching music to videos to promote their own revenue-generating offerings on various online platforms.⁵² Similarly, the software industry has reported 77 recent instances of “obvious and flagrant ... piracy” by states, including one case in which a state hospital “all but admitted wrong doing and appeared potentially willing to settle ... for hundreds of thousands of dollars in damages” before suddenly reversing position and claiming sovereign immunity.⁵³ Getty Images records include more than 50 instances of state infringement with 16 incidents arising just in the last three years.⁵⁴

Government agencies have also documented lawsuits filed by creators against state entities for copyright infringement. The GAO identified approximately 24 copyright infringement lawsuits filed against states between 1985 and 2001.⁵⁵ Michael Bynum, the photographer discussed earlier, identified in his court filings against Texas A&M in his current case over 150 other copyright infringement cases filed against states between 2000 and 2017.⁵⁶ The number of lawsuits filed against states for copyright infringement undoubtedly undercounts the total number of instances of state copyright infringement. The lack of available monetary remedies to remedy the harm experienced by the copyright owner means that many, if not most, lawsuits are never even filed in federal court. What’s more, Michael Bynum and the plaintiffs in the suits he compiled represent a small group of copyright owners who either monitor for or discovered the acts of infringement by chance. Like the iceberg underneath the water, the amount of state infringement that goes undetected is likely much more substantial. Many copyright owners simply do not have the time or resources to constantly monitor for infringement, and they are even less likely to pursue copyright infringement lawsuits against states when they know meaningful remedies will be blocked by sovereign immunity.

Few would argue it is good policy to incentivize widespread copyright infringement by state actors. Yet, there is little incentive for states to respect the rights of creators when the most severe consequence they face is a court order directing a state employee to stop the infringement in the future (an injunction), without any prospect of monetary damages for the past and ongoing harms caused by the copyright infringement. In the face of an ineffective legal deterrent, continued state budget pressures, and mounting examples of state actors who effectively get away with ripping off creative works, we can only expect the trend of recent years to continue.

⁵¹ See Brief for Dow Jones & Company, Inc. as Amicus Curiae Supporting Petitioners, at 4-6, *Allen v. Cooper*, 140 S. Ct. 994 (2020), https://www.supremecourt.gov/DocketPDF/18/18-877/112136/20190813120121554_18-877%20Allen%20v%20Govenor%20Brief%20for%20Amicus%20Curiae%20Dow%20Jones.pdf.

⁵² Comments of the Copyright Alliance, U.S. Copyright Office Sovereign Immunity Study 10 (Feb. 2021), <https://copyrightalliance.org/wp-content/uploads/2021/02/Copyright-Alliance-Comments-Sovereign-Immunity-Study-No.-2020-9.pdf> (“[S]tate universities in at least 30 states have frequently infringed sound recordings, with many such infringements still ongoing.”).

⁵³ Brief for Dow Jones & Company, Inc. as Amicus Curiae Supporting Petitioners, p. 4-6, *Allen v. Cooper*, No. 18-877 (U.S. Mar. 23, 2020).

⁵⁴ Brief of The Copyright Alliance and The Chamber of Commerce of the United States as Amici Curiae in Support of Petitioner at 16, *Allen v. Cooper*, No. 18-877 (August 13, 2019).

⁵⁵ U.S. Gen. Accountability Office, GAO-01-811, Intellectual Property: State Immunity in Infringement Actions (2001), <https://www.gao.gov/assets/240/232603.pdf>.

⁵⁶ *Canada Hockey LLC v. Texas A&M University Athletic Dep’t*, 484 F. Supp. 3d 448 (S.D. Tex. 2020).

Some commentators who oppose the abrogation of state sovereign immunity point to injunctive relief as a sufficient remedy for copyright owners and creators who have encountered infringement of their rights by a state agency. This is the relief provided by the *ex Parte Young* doctrine that permits citizens to obtain injunctions against individual state officials to stop future violations of individual rights secured under the Constitution.⁵⁷ But an injunction only stops future instances of copyright infringement, and thus it does not remedy the harms already caused by the infringement. In a recent survey on creators' experiences with state infringement of their copyrights, survey respondents detailed the inadequacy of injunctions, citing the high cost, stress, and time associated with bringing a suit that would ultimately provide no redress for past harms.

The insufficiency of injunctions as the sole remedy for copyright owners has long been recognized by government agencies and scholars. When Congress passed the CRCA in 1990, it called injunctions an incomplete remedy and expressly rejected the suggestion that the availability of injunctions against state officials standing alone is adequate to protect copyright owners' rights.⁵⁸ Years later, the 2001 GAO report on state sovereign immunity again made clear that when a state cannot be sued for damages and a copyright owner can only obtain an injunction, it is "an incomplete remedy because, while it might stop the person enjoined from continuing the infringement, the state would not be liable for monetary damages."⁵⁹

Further confirming the limits of injunctions in providing a complete remedy for the harms experienced by creators when states infringe their copyrights, a 2012 law review article described injunctions as prohibitively expensive remedies that offer only relief against future harms and do nothing to remedy the past injury that initially justified the injunction.⁶⁰ Importantly, the scholar noted the simple fact that injunctions provide no remuneration for lost market share or lost licensing opportunities, and they require ongoing monitoring to ensure compliance—a requirement that most copyright owners and individual creators cannot meet. Finally, as to *Ex parte Young* injunctions, the article notes that an injunction may stop infringement by an individual actor, but it does nothing to prevent another state official from engaging in the same act of infringement, which would require an entirely new lawsuit to be filed again and again against each individual official.

This situation, where states are essentially free to steal copyrighted works and only face the threat of an injunction against individual officials, will harm the creative industries. It will harm authors and artists by destroying markets for works already created, and for which they will be denied fair and just compensation in court as they would receive if any private individual committed the same wrong. It will also threaten the incentives to create, particularly for those works that are consumed heavily by states and state agencies, such as computer software, educational materials, books, music, photographs, movies, and more. The doctrine of sovereign immunity is an important feature of our constitutional system of government, but the failure to hold states accountable for their theft of intellectual property rights, especially the copyrights that are secured by Congress under its authority granted directly to it by the Constitution, is a serious concern. It conflicts with the fundamental constitutional justification that Congress enact copyright and patent laws to "promote the progress

⁵⁷ See *supra* note 43.

⁵⁸ S. Rep. 101-305, at 12 (1990) ("Injunctions only prohibit future infringements and cannot provide compensation for violations that have already occurred.").

⁵⁹ U.S. Gen. Accounting Office, GAO-01-811, *Intellectual Property: State Immunity in Infringement Actions*, at 13 (Sept. 2001), <https://www.gao.gov/assets/240/232603.pdf>.

⁶⁰ Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 514, 534 (2012).

of science and useful arts.”⁶¹ Rampant state infringement of copyright that goes unremedied due to a veil of sovereign immunity impedes this innovation and creativity.

V. What Did the Supreme Court Do?

The U.S. Supreme Court directly addressed the new modern sovereign immunity doctrine and the CRCA in the recent case of *Allen v. Cooper*. Hopes were high that the Justices would secure the rights of Mr. Allen and other creators by respecting the express language of Congress in abrogating sovereign immunity for state infringements of federally created and enforced copyrights. There were some hopeful signs in the oral argument held in late 2019 – Justice Sotomayor, for instance, commented that North Carolina’s attempts to evade copyright law “trouble [her] deeply.”⁶²

On March 23, 2020, the Supreme Court issued its decision and found the CRCA to be unconstitutional in falling short of its requirements for abrogating state sovereign immunity.⁶³ Justice Elena Kagan’s majority opinion in *Allen* focused on the importance of following precedent and the earlier *Florida Prepaid* opinion that resulted in the Supreme Court invalidating the parallel patent law statute that had abrogated state sovereign immunity for patent infringement.⁶⁴

But there were some bright spots. The Supreme Court’s opinion in *Allen* unequivocally states that “[c]opyrights are a form of property.”⁶⁵ The opinion also provides a roadmap for how Congress could pass a revised version of the CRCA that would pass constitutional muster, noting that the Supreme Court’s decision “need not prevent Congress from passing a valid copyright abrogation law in the future.” As the Supreme Court concludes: “[e]ven while respecting constitutional limits, [Congress] can bring digital Blackbeards to justice.”⁶⁶ State officials who seek to exploit the loophole in liability in infringing other people’s copyrights, while still demanding that these same people respect their copyrights, can ultimately be held to account.

In laying out a path for legislative reform, the Supreme Court suggested that if Congress develop a legislative record that demonstrates evidence of copyright piracy by state officials and agencies and link the scope of the abrogation of sovereign immunity to the redress or prevention of these demonstrated harms to creators, then abrogation of state sovereign immunity would be appropriate pursuant to Section 5 of the Fourteenth Amendment. In the case of Rick Allen, Mike Bynum, and others, there is ample evidence that states acted intentionally to infringe their copyright and thereby deprive them of property. If victims of this type of theft have no recourse or remedy against the infringer, they have been stripped of their constitutional due process rights and Congress must consider legislative action to override sovereign immunity.

⁶¹ U.S. Const. art. I, § 8, cl. 8.

⁶² Transcript of Oral Argument at 32, *Allen v. Cooper*, 140 S. Ct. 994 (2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-877_k5gm.pdf.

⁶³ See *Allen v. Cooper*, 140 S. Ct. 994 (2020).

⁶⁴ See *id.* at 1007 (“*Florida Prepaid* all but rewrote our decision today. That precedent made clear that Article I’s Intellectual Property Clause could not provide the basis for an abrogation of sovereign immunity. And it held that Section 5 of the Fourteenth Amendment could not support an abrogation on a legislative record like the one here.”); See also *supra* note 37 and accompanying text (discussing *Florida Prepaid* decision).

⁶⁵ *Allen*, 140 S. Ct. at 1004. However, Justice Clarence Thomas wrote separately in a concurrence and disagreed that copyrights are “property” under the Due Process Clause, stating that “I believe the question whether copyrights are property within the original meaning of the Fourteenth Amendment’s Due Process Clause remains open.” *Id.* at 1008 (Thomas, J., concurring).

⁶⁶ *Id.* at 1007.

VI. How Can Creators Protect Their Works from State Theft?

There are a number of ways to correct the problem. Given the mounting evidence of widespread and unconstitutional takings of copyrighted property, Congress could make another run at enacting a law validly abrogating state sovereign immunity. There is already much documentation, some discussed earlier, of state-supported copyright infringement, and this evidence would assist Congress in its task of clearly identifying the problem and solution, as required by existing Supreme Court precedent. In the wake of *Allen v. Cooper*, and at the request of Senators Thom Tillis and Patrick Leahy, the Copyright Office recently launched a study to evaluate the extent to which copyright owners are harmed by copyright infringement by state officials and agencies. While the study is ongoing, creators and copyright owners have already made their voices heard by submitting comments that detail frequent and damaging encounters with state infringement and by participating in roundtables hosted by the Copyright Office. If a robust record of infringement is created that demonstrates an unconstitutional deprivation of property, the Copyright Office can recommend, and Congress has the power to abrogate state sovereign immunity.

Alternatively, some have suggested an approach in which states that are acting as market participants, not as sovereigns, would be subject to lawsuits for copyright infringement. For instance, if a state is providing education through universities, providing tourism services, or healthcare services at hospitals, the state agencies and officials acting in these capacities are not providing traditional governmental services, such as providing police or courts. If officials, entities, or agencies acting in these commercial market capacities benefit from enforcing their copyrights in courts, then this can be deemed to be an admission that they are also subject to lawsuits in court as defendants for copyright infringement. Courts have enforced this “market participant” exception to state sovereign immunity, and Congress has recognized this “market participant” exception to state sovereign immunity as well, such as in the Foreign Sovereign Immunities Act. Congress could amend Section 105 of the Copyright Act either to bar states from owning copyrights or to require that a state who wishes to take advantage of the benefits of copyright ownership, including availing itself of money damages, waive its sovereign immunity from lawsuit for its infringement of the copyrights of others.

Regardless of which option is undertaken, something should be done. There is a profoundly unlevel playing field when it comes to copyright ownership and duties between state officials and private citizens. States currently get all the benefits of copyright ownership, especially when state officials and agencies act in ways that directly compete with other private companies or entities in the marketplace, but they have none of the obligations. This violates basic notions of fairness and the rule of law. The same policies might be enacted, with even greater efficacy, on the patent side. After all, it is hardly equitable to allow a state all the benefits of intellectual property ownership and participation in the intellectual property system, without the corresponding duties to respect the intellectual property of others and the ability to be held accountable for the failure to adhere to those duties.