BEFORE THE UNITED STATES COPYRIGHT OFFICE

RESPONSE OF THE LIBRARY COPYRIGHT ALLIANCE TO
REQUEST FOR COMMENTS ON SOVEREIGN IMMUNITY

The Library Copyright Alliance ("LCA") welcomes the opportunity to provide comments in response to the Copyright Office's notice of inquiry concerning sovereign immunity published in the Federal Register on June 3, 2020. Many of the libraries represented by LCA are run by state governments, including libraries at state colleges and universities, as well as state libraries. The Supreme Court's decision in *Allen v. Cooper* confirmed twenty years of lower court decisions holding the Copyright Remedy Clarification Act to be unconstitutional.[1] Even though state-run libraries have understood that they are immune from damages liability for copyright infringement, they have not exploited this immunity to run roughshod over copyright. Accordingly, at least with respect to libraries, there has not been the sort of constitutional harm required by *Allen* to abrogate sovereign immunity.

2. To what extent does state sovereign immunity affect the licensing or sale of copies of copyrighted works to state entities? For example: a. Do copyright owners provide different payment or licensing terms in transactions with state entities than are provided in transactions with other parties? b. Have copyright owners changed aspects of their sales or licensing practices as a result of state sovereign immunity? c. Do different states or state entities take different approaches to working with copyrighted material? Are there particular states that more frequently infringe?

---

[1] *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000); *Flack v. Citizens Mem. Hosp.*, No. 6:18-cv-3236, 2019 WL 1089128, at *3 (W.D. Mo. Mar. 7, 2019); *Reiner v. Canale*, 301 F. Supp. 3d 727, 749 (E.D. Mich. 2018); *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1007-08 (D. Minn. 2014); *Coyle v. Univ. of Ky.*, 2 F. Supp. 3d 1014, 1017-19 (E.D. Ky. 2014); *Whipple v. Utah*, No. 10-811, 2011 WL 4368568, at *20 (D. Utah Aug. 25, 2011); *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 669 (W.D. Tenn. 2010); *Romero v. Cal. Dep't of Transp.*, No. 08-8047, 2009 WL 650629, at *3-5 (C.D. Cal. Mar. 12, 2009); *Mktg. Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1092 (S.D. Cal. 2008); *InfoMath v. Univ. of Ark.*, 633 F. Supp. 2d 674, 680-81 (E.D. Ark. 2007); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410, 414 (D.P.R

Over the past twenty years, state-run libraries have spent an estimated thirty billion dollars purchasing copyrighted works.[2] This demonstrates conclusively that sovereign immunity has not adversely affected the sale or license of copyrighted works to state entities. We are not aware of copyright owners providing different terms to state-run libraries due to sovereign immunity. To the extent that copyright owners provide different terms to state-run libraries, this likely is because of the scale of the transactions. State university systems have far more students and faculty than private universities, so are able to negotiate volume discounts and other customized terms.

3. What remedies are available for copyright owners when states infringe their works? a. To what extent did copyright owners file suits under the Copyright Act against state entities prior to the Supreme Court's decision in ***Allen v. Cooper***? b. In your opinion, does the availability of injunctive relief against state officials provide an adequate remedy to address the needs of copyright owners in response to instances of state copyright infringement?

The adjudicated disputes between state-run libraries and copyright holders involve complex issues concerning the application of the Copyright Act of 1976 to digital technologies, not flagrant acts of piracy. These pre-*Allen* cases demonstrate that copyright holders have a means of vindicating their rights against state actors under *Ex Parte Young*, 208 U.S. 129 (1908).

In *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), the Authors Guild sued HathiTrust, a consortium of research universities that operated a digital repository. The Authors Guild also named as defendants a HathiTrust member not entitled to sovereign immunity (Cornell University) and the presidents of four state-run HathiTrust members (Univ

The Authors Guild sued for declaratory judgment and injunctive relief. Both the district court and the Second Circuit found that the copies made by HathiTrust were permitted by the fair use right, 17 U.S.C. § 107.

Notwithstanding state sovereign immunity, the Authors Guild was able to have a federal court adjudicate a copyright infringement claim based on the actions of four state-run universities. If it had prevailed on the merits, the Authors Guild would have succeeded in shutting HDL down. Its interests would have been completely vindicated.

In ongoing litigation, three academic publishers are challenging the electronic course reserve system managed by the library at Georgia State University ("GSU"), which allows students to access sections of books that instructors place on reserve as supplemental reading. The named defendants are members of the GSU Board of Regents and GSU officials. After the publishers filed their complaint, GSU adopted a more rigorous fair use policy that would govern its electronic reserve system. Not satisfied with the new policy, the publishers continued their litigation. The district court conducted a bench trial with respect to 74 claimed infringements that occurred after GSU's adoption of its new fair use policy. The district court found that publishers failed to establish a *prima facie* case of infringement in 26 instances, that fair use applied in 43 instances, and that GSU infringed copyright in five instances. *Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012), *aff'd in part, rev'd in part*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

The publishers appealed to the Eleventh Circuit, which found errors in aspects of the district court's fair use analysis. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014). On remand, the district court found that GSU prevailed on its fair use defense for 44 of the 48 instances. *Cambridge Univ. Press v. Becker*, No. 1:08-cv-1425, slip op. at 18, 2016 WL 3098397 (N.D. Ga. Mar. 31, 2016), *aff'd in part, rev'd in part*, *Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018).

The publishers appealed again, and once more the Eleventh Circuit found errors in the district court's fair use analysis. *Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018). In the second remand, the district court on March 2, 2020, found that fair use permitted 38 of the 48 claimed infringements. Motions for attorney fees are now pending before the district court.

---

full text of the work in machine readable format, as well as images of each page of the work as they appear in the print version. Thus, HDL holds eight permanent copies of each work. *Id*. In addition to preserving the books in the repository, HDL enables full-text search of the books and provides full text access to people with print disabilities.

The GSU litigation demonstrates once again that notwithstanding state sovereign

The elimination of sovereign immunity with respect to copyright claims would have a negative impact on the digital preservation activities of state-run collecting institutions. Digital technology offers libraries an unprecedented ability to preserve the valuable works in their collections. These digital preservation activities implicate the Copyright Act's reproduction and distribution rights, forcing libraries to rely upon the fair use right, 17 U.S.C. § 107, in order to engage in the preservation activities. However, the precise boundaries of the preservation activities permitted by fair use are not certain. Sovereign immunity currently allows state-run libraries and archives to manage this uncertainty by limiting their exposure to damages liability. The elimination of sovereign immunity would expose these collecting institutions to significant damages liability, potentially resulting in a dramatic decrease in digital preservation activity. This is so even if the abrogation applies only to intentional or reckless infringements. Plaintiffs seeking a payday would be incentivized to pursue libraries engaged in mass-preservation projects.

September 2, 2020