

To: The United States Copyright Office

From: Jack Bernard, J.D., M.A.

Re: Comments for the State Sovereign Immunity Study Public Roundtable; 12/11/20

The most consistent critique presented at the roundtable and in commentary was of immunity generally. Many of those who favor abrogation commented about fairness, at times with earnest eloquence and moving passion. The broad sentiment was that it is unfair or wrong for the Eleventh Amendment to bar lawsuits against the government that seek monetary damages. This is a critique of immunity generally. There are many kinds of immunity and immunity, by its nature, can be or seem unfair. Eleventh Amendment immunity, state sovereign immunity, qualified immunity, diplomatic immunity, judicial immunity, absolute immunity, and the like, all give the covered entity/individual protections that are not ordinarily available to the general public. The Eleventh Amendment was part of the bargain to inspire States to join the union and it explicitly provides broad protections to the States. It is applicable not only in copyright cases against the government, but in the vast majority of circumstances in which a member of the public might wish to seek financial damages from the government. This barrier to damages is intentional. The Supreme Court did not abandon immunity in *Adams v. Cooper* nor did the Copyright Office solicit commentary about immunity doctrine generally. So, as fervently as some commentators decry the protections immunity provides, criticisms of immunity as unfair are not within the scope our discussion, today, or in the Study itself. This is why the Copyright Office sought information focused on whether copyright infringement by the States was intentional or reckless.

No evidence has been presented to support the proposition that there is widespread, intentional, or reckless infringement of copyrighted works by States. It is incumbent upon those seeking to abrogate to show pervasive intentional or reckless copyright infringement on the part of the States. It is not enough to merely suppose, allege, or assume infringement, pervasiveness, intentionality, or recklessness—there has to be actual evidence; Congress and the Supreme Court have underscored this point unequivocally. I have reviewed all of the evidence presented by commentators who seek abrogation. It is filled with suppositions, allegations, and assumptions. A large portion of the examples are assertions that assume infringement without adequate evidence and without consideration of uses authorized by the Copyright Act (e.g., §§107, 108, 109, 110, etc.) or existing licenses. Even where there are credible instances of a state infringing, there was no evidence that such infringements were widespread, intentional, or reckless. Umbrage—imagined or legitimate—is not evidence of pervasive copyright infringement by the States nor is it evidence of intentionality or recklessness. Commentators explicitly claiming to represent millions of rights holders managed to get survey response rates of significantly less than .1% of those they purported to speak for. This same group kept their survey instrument and methods out of their report, which means even their poor response rates cannot be adequately assessed; this is not credible evidence. Another group proffered as evidence that not enough governmental entities procured licenses from their organization. This is not sufficient evidence because licenses are only necessary when the uses in question are made and not otherwise authorized. The amount of

inadequacies in the evidence presented could fill pages and other commentators have already addressed many of these infelicities for the Copyright Office; so, I will not unpack them here.

If there were infringement and it were as widespread, intentional, and reckless as those seeking abrogation suggest, it should have been quite easy to demonstrate—States, after all, are subject to myriad sunshine laws. Instead, the evidence is sparse and unsubstantiated. Also, in cases where a plaintiff prevailed in court, 1) these courts did not find evidence of pervasive intentionality or recklessness and 2) the fact that the prevailing party could not retrieve a financial award is not evidence of widespread intentionality or recklessness, even if immunity is disappointing to the plaintiff.

Many of the perspectives shared at the Roundtable do not remotely reflect the experiences I have observed of government. What struck me most on the part of the commentary at the Roundtable and in the submitted comments was how alien the descriptions of the government were. I took my first government job in 1987 (at the State Services for the Blind in Minnesota) and have worked for and alongside the government at the federal, state, and local levels throughout most of the years since then. As anyone who has worked with or for the government knows, there are robust systems in place to do just about everything. The States procure tens if not hundreds of billions of dollars of copyrighted works each year. Those purchases are widespread and intentional—governmental protocols ensure that they are. Governmental bodies have policies and practice guides that, for instance, describe what and how software can be used on government machines and what the consequences are for employees who do not follow the policies.

At my own institution, the University Library spent more than \$29 Million last year on library acquisitions. That does not include what our Kresge, Bentley, and Michigan Law libraries spent on acquisitions. That also does not include software licenses unrelated to collections, public performance licenses, and other artistic works licenses licensed by any of the libraries on campus. It also does not include any of the acquisitions and licenses of any of the 19 schools and colleges on the Ann Arbor campus, etc. etc. Each of these acquisitions and purchases operate as part of a governmental system. There is a governmental process that makes sure that copyright holders can rely on the government to reliably procure works, each year.

Moreover, governmental institutions like mine, hire teams of people to assure not only that copyrighted works are appropriately purchased, but that the population within and outside of our community are informed about how copyright works. At my institution, there are four copyright lawyers who work in the library. There is a copyright expert who works at the School of Music Theatre & Dance, and there are IP specialists at many of our other schools and colleges. There is a team of licensing specialists in our Procurement division.

The government is the perennial copyright consumer; there are systems in place to assure it.

It is not that the States have little interest. At least one commentator expressed the sentiment that, while libraries may care about these issues, it is clear from the lack of representation at

the Roundtable and in the commentary that the States, themselves, do not. This is, I believe, a mistaken assumption. The entirety of the Copyright Office's State Sovereign Immunity Study—from the Notice of Inquiry issued on June 3, 2020 to the virtual roundtable discussion, today, December 11, 2020—has taken place during unprecedented times, where the states have had more on their plates and less in their coffers than at any time in recent history. Every single State and State agency has had to dedicate an abundance resources in time, effort, and money to saving lives during the COVID-19 pandemic. At the same time, there have been enormous economic changes, terrible job loss and business closures, and shortages of food, medical supplies, building materials, and the like. In addition, State governments have had to navigate widespread protests relating to a variety of social and political matters. While some people have had more time on their hands during the pandemic, State government have been stretched beyond all expectations. Of course, because it is State governments that step in when there are pandemics, economic crises, food shortages, and protests, this is, in part, why immunity doctrines exist.

The Eleventh Amendment is not about proactive governmental decision making. I want to address a misunderstanding that came up several times, today. You have heard, quite rightly, from the academic commentators that postsecondary institutions do not rely on the Eleventh Amendment when making decisions about how to use copyrighted works. (In my thirty-three years in the academy, I have never heard or seen anyone use or even suggest using sovereign immunity as a rationale for making a business or academic decision, whether about copyright, patent, or any other area.) The misunderstanding comes in the rejoinder. Those seeking to abrogate, as well as members of the Copyright Office, today, questioned essentially: "If the States don't rely on the Eleventh Amendment to make decisions, why would it matter if there were no sovereign immunity?" The mistaken assumption in these types of questions is that the States are focused on immunity *before* they make the decision to use a copyrighted work. States, instead, are more interested in dissuading those who would seek, as many do, to garner a windfall from the State. In my own experience, well over 90% of the allegations of copyright infringement that come to my institution are not actually copyright infringement (e.g., we already have a license, it is a work in the public domain, it is a fair use, etc.). In cases where we inadvertently infringed, we settle, buy a license, or find some other equitable solution. For some in the public, there is misguided notion that States are brimming with dollars and that a wheel squeaky enough will be able to pry some of those dollars loose. The Eleventh Amendment, when pled, ends cases from those who would rent-see. While it is true that States are entitled to use the Eleventh Amendment and to tell would-be plaintiffs that this is a defense available to the State, it is mistaken to equate this notion with how States make decisions to use copyrighted works.

Biography and Disclaimer. Jack Bernard is Associate General Counsel at the University of Michigan and he teaches, there, in the schools of Law, Information, and Education, as well as at the Ford School of Public Policy. These comments are his own views and not those of the University of Michigan.