January 14, 2020

VIA EMAIL

Ms. Jalyce Magnum, Esq.
Attorney-Advisor
U.S. Copyright Office
Library of Congress
101 Independence Avenue SE
Washington, D.C. 20559-6000

Dear Ms. Magnum:

Thank you for the opportunity to submit closing "open mic" comments in the wake of the Copyright Office's round tables on sovereign immunity. What follows are the Software and Information Industry Association's (SIIA's) reactions to some of the remarks made in the sessions that we observed.

As a matter of initial framing, we heard representatives of state universities laud the "bedrock constitutional right of the states" to immunity, and express skepticism over the desirability of that immunity being lost. The Eleventh Amendment's protection of state sovereign immunity is *procedural,* not substantive. A court's acceptance of an Eleventh Amendment defense does not convey normative approval over unlawful acts. And statements about a state's "bedrock rights" have an important limit: the states have no immunity for conduct that *actually* violates the Fourteenth Amendment. *United States v. Georgia*, 546 U.S. 151, 159 (2006). Assuming that the CRCA cannot be revived,[1] the need for a record to remedy *constitutional* violations seems minimal. *See id.*

The Copyright Office has amassed ample evidence to support Congressional enactment of a remedial federal statute. As it compiles its report, SIIA urges the Office to reject invitations to conflate the procedural nature of sovereign immunity into excusing

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[1] We note that the applicability of *U.S. v. Georgia* continues to be litigated. *See Canada Hockey, LLC v. Texas A&M University Athletic Department* (5th Cir. No. 20-20503).

responsibility for substantive copyright policies that state universities may disagree with.

For example, some state panelists seemed to question application of the Copyright Act's statutory damages provisions to universities. While the university representatives mainly seemed to be concerned with the existence of statutory damages in the first place, we note that a federal statute that permitted deterrent awards against states could face arguments about its constitutionality, and that federal jury instructions require consideration of deterrence as a factor when considering these awards.[2] With that said, any alleged defect could be cured by simply striking deterrence from the list of factors in the jury instruction, or in the statute itself. It does not prevent Congress from creating (or courts from applying) statutory damages to remediate the effects of state actions proven to be unconstitutional.

Given their disagreement with statutory damages, some of these same panelists suggested that qualified immunity adequately addressed the needs of copyright owners. There are two practical problems with this approach. First, the copyright owner's ability to obtain redress would depend on the presence or absence of indemnification by the state. Second, the piercing of qualified immunity requires the reviewing court to determine that the plaintiff has alleged the violation of a constitutional right, and that at the time of the defendant's bad acts, the right was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Although some older cases have found individual employees liable,[3] there are others which have insulated state entities from liability for garden variety infringement.[4] As a practical matter, the doctrine only applies when a judicial decision addresses the precise

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[2] *E.g.*, Pattern Jury Instructions, 9.32 (model instruction on statutory damages) (Eleventh Cir. (2017)).

[3] *E.g.*, *Lane v. First Nat. Bank of Bos.*, 687 F. Supp. 11, 17 (D. Mass. 1988), *aff'd,* 871 F.2d 166 (1st Cir. 1989).

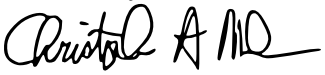
[4] *E.g., Reiner v. Canale*, 301 F. Supp. 3d 727, 742 (E.D. Mich. 2018) (professors' use of photograph in class materials subject to qualified immunity); *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n,* No. CV 16-4781-SVW-FFM, 2016 WL 9223889, at *1 (C.D. Cal. Dec. 22, 2016), aff'd, 953 F.3d 638 (9th Cir. 2020) (unlicensed public performance excused because fair use might apply).

conduct at issue.[5] And as a doctrinal one, application of the *Pearson* rule will block relief for copyright owners, as courts can determine that the violation of the constitution was not "clearly established" without ever establishing an underlying constitutional violation. What that means, as a matter of practice, is that the next wronged copyright owner will not be able to recover, even on the exact same facts.

Finally, several state actors suggested that existing state procedures could be used to resolve a Fifth Amendment takings claim. Procedurally, Congress has preempted both equivalent rights available under state laws and the jurisdiction of state courts in copyright cases.[6] It is not required to provide a forum that copyright owners must exhaust before vindicating constitutional rights.[7]

SIIA commends the Copyright Office for the work that it has done on this matter, and we thank you for the opportunity to submit these remarks. We look forward to working with you as you continue examining this important subject.

Sincerely,



Christopher A. Mohr
VP for Intellectual Property and
General Counsel

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[5] *Cf. Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019) (officers have qualified immunity for alleged theft of property taken pursuant to a search warrant), cert. denied sub nom. Jessop v. City of Fresno, California, 140 S. Ct. 2793 (2020), reh'g denied, 141 S. Ct. 198 (2020). SIIA expresses no opinion about the appropriate scope of qualified immunity in the law enforcement context, nor on whether Congress should eliminate qualified immunity for copyright infringement for state employees. We do, however, note the difference between criminal investigations and activities in which states are acting in the same manner as their private counterparts.

[6] 17 U.S.C. 301. *See also Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004).

[7] *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2173 (2019).