TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:          )
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SOVEREIGN IMMUNITY       )
ROUNDTABLES             )

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IN THE MATTER OF:  
SOVEREIGN IMMUNITY  
ROUNDTABLES  

Remote Conference  
1220 L Street, N.W.  
Washington, D.C.  

Friday,  
December 11, 2020  

The parties met, pursuant to the notice, at  
10:05 a.m.  

PARTICIPANTS:  

Session 1:  

Frederick Allen, Nautilus Productions  
Sara Benson, University of Illinois at Urbana Champaign  
Andrea Johnson, C MATH is EASY  
Craig Linder, Dow Jones & Company  
Kevin Madigan, Copyright Alliance  
Johannes Munter, News Media Alliance  
Maria Sapiandante, Intellectual Property Attorney  
Jeff Sedlik, Art Center College of Design  
Kevin Smith, University of Kansas  
William Thro, University of Kentucky  

Session 2:  

Dr. Keith Bell, Author  
Michael Bynum, Author  
Devin Laiho, Colorado Attorney General's Office  
Melissa Levine, University of Michigan Library  
Angus MacDonald, University of California, Office of General Counsel  
Isaac Molnar, Ohio Attorney General's Office  
Kristen Murphy, American Chemical Society  
Brian Wassom, American Intellectual Property Law Association  

Heritage Reporting Corporation  
(202) 628-4888
PARTICIPANTS: (Cont'd)

Session 3:

Brandon Butler, Association of Southeastern Research Libraries; Software Preservation Network
Yvonne Dooley, University of North Texas
Harold Evans, University of Arkansas
Kurt R. Klaus Sr., National Partner, Dunlap Bennett & Ludwig, PLLC
Raven Lanier, University of Michigan Library
Rachael Samberg, University of California, Berkeley
Douglas Shontz, University of Illinois; Association of Public and Land Grant Universities

Session 4:

Jonathan Band, Library Copyright Alliance
Michael Bynum, Author
Alicia Calzada, National Press Photographers Association
Kevin Madigan, Copyright Alliance
Darcee Olson, Louisiana State University
Marc Vockell, University of Texas System
Yuanxiao Xu, University of Michigan Library
PROCEEDINGS

(10:05 a.m.)

MS. SMITH: I think we are all here, and we are about to start our roundtables, so if anyone who is a panelist -- I think we're all muted, but if we can mute if you're not muted, and I think everyone else, including the Copyright Office, if we can turn off our video for a second because we are so excited that we are able to start today's event with welcoming opening remarks by our brand new register that we are so thrilled to have, Shira Perlmutter. Shira?

MS. PERLMUTTER: Thanks, Regan. Good morning, everyone. On behalf of the Copyright Office, I want to welcome all of you to this roundtable for our policy study on sovereign immunity.

Today's event is a first for the Office. These are the first public roundtables we've conducted entirely remotely. I'm grateful to the Copyright Office staff, and, in particular, the Office of General Counsel and the Office of Public Information and Education for working to ensure a smooth transition to this online format, and for making this event accessible to as many members of the public as possible.

I'd also like to thank our panelists in

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advance for their contributions. As with all
Copyright Office studies, our analysis and
recommendations depend on the strength of the record
presented to us, and we appreciate your willingness to
provide the benefit of your expertise.

The issue of state sovereign immunity to
infringement suits has long been a concern for the
Copyright Office. In 1988, at the request of
Congress, Register Ralph Oman issued a report
summarizing comments on this topic and proposing
legislative changes. The Office's findings and
recommendations provided the basis for the Copyright
Remedy Clarification Act of 1990.

Later, Register Marybeth Peters testified to
Congress regarding proposed legislation that sought to
avoid the constitutional issue by encouraging
voluntary waivers of immunity by states. She noted
that the ability of copyright owners to protect their
property and to obtain complete relief when their
rights are violated is central to the balance of
interests in the Copyright Act.

The current study comes at the request of
Senators Tillis and Leahy following the Supreme
Court's recent decision in Allen v. Cooper striking
down the Copyright Remedy Clarification Act. Their
request stressed the importance of the legislative record to an assessment of whether there is a sufficient basis for abrogating state sovereign immunity. Today's discussion is therefore critical to the Office's, and, ultimately, to Congress' consideration.

We look forward to an illuminating discussion. Thank you again for your participation, and let me now turn the proceedings back over to Regan.

MS. SMITH: Thank you so much, Shira, and thank you for those remarks.

We are going to begin the roundtables. As Shira said, my name is Regan Smith, General Counsel of the Copyright Office. Before we start with the first panel, I will go over a few logistical items to make sure we're getting this correct.

So I think everyone who is on panel one can turn on their videos and maybe stay muted until we commence. And so the roundtable sessions will be moderated by the Copyright Office attorneys here, on the call. We will pose questions and call on panelists to respond. We'll do our best to give everyone the opportunity to chime in. You can use the raise hand button on Zoom or you could kind of raise

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your hand if you need to signal, but if you're not speaking, please mute your audio to minimize any extraneous noise.

Given the number of panelists and topics that we have to cover, we are trying to ask responders to limit responses to no more than two minutes. We apologize in advance that, if it's going over, we may need to cut you off. We may even need to mute. We're going to try not to do that, but we appreciate your understanding of our time constraints, our need to hear from everyone. It's a virtual format we're all adjusting to. So if you can try to limit your comments to the specific question posed, there will be a few opportunities for everyone to speak, we envision.

Secondly, we have five scheduled sessions. This first one is scheduled to stop at 11:30, at which time we'll have a short break. They can be accessed by the same Zoom link we are now using throughout the day.

I'm not sure, but perhaps certain panelists may be accessing one link where you can turn your video on for a panel that you're not on. Just, if you don't do that, that will help to turn your video on when it is the session you're scheduled for.
Our final session of the day is an open mic session in which members of the public are able to provide additional comments for the benefit of our administrative record.

If you are interested in participating, you may sign up at a Survey Monkey link provided in a chat box no later -- by 3:00 p.m., Eastern Time. If someone wanted to give me a nod if we have the Survey Monkey link up there yet? Yes, I see a nod. Okay. So you should be seeing that if you are watching these roundtables.

Beginning at 5:15, Copyright Office staff will call on and un-mute those who have signed up to participate, time permitting. Comments should be about three minutes, anything related to our study, and can be on any topics noted throughout the day.

And, finally, today's event is being recorded. That video will be posted on the Copyright Office website and YouTube channel eventually. We also have a court reporter transcribing the proceedings, as you may know if you've participated in front of the old school physical format of these roundtables, and that transcript, too, will be posted on the Copyright Office website.

So now I'm going to start the first panel.

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This session concerns evidence of actual or threatened infringement by state actors. I will provide a little bit of a roadmap so folks understand, or they may want to chime in, because I do think the virtual medium makes it a little harder to anticipate, so I want to make sure we can maximize our limited time.

So we are hoping to touch on a few key areas in this order. Namely, first, sort of qualitative considerations in evaluating evidence of infringement in broader trends; secondly, individual examples; third, the nature of alleged infringements at issue, that is, whether reckless or intentional conduct is implicated, how could we tell whether exceptions and limitations may apply; and, finally, whether state immunity has any effects upon sales and licensing practices.

So, before we begin, I'm going to ask my Copyright Office colleagues who are joining us today to introduce themselves, and, actually, all of the Copyright Office's colleagues present who are -- I don't see on video because you will be participating. Other panelists could do this -- pop up now to say hello. So starting with Mr. Amer.

MR. AMER: Good morning, Kevin Amer, Deputy General Counsel.
MS. RUBEL: Jordana Rubel, Assistant General Counsel.

MS. MANGUM: Jalyce Mangum, Attorney Advisor.

MR. GRAY: Mark Gray, also Attorney Advisor.

MS. KERN: Melinda Kern, Ringer Fellow.

MS. SMITH: Thank you. Thank you all. And now I think I will call on participants, so if you can provide your name and your affiliation. We'll sort of hold off on opening statements, but you will have the opportunity to tell us your broad interests in the first question posed to you. If we could start with Mr. Allen.

MR. ALLEN: Good morning. Thanks for having me here. I'm Frederick Allen from Nautilus Productions, and I'm the Allen in Allen v. Cooper.

MS. SMITH: Thank you.

Ms. Benson?

MS. BENSON: Good morning, my name is Sara Benson. I am the copyright librarian at the University of Illinois Libraries.

MS. SMITH: Thank you.

Ms. Johnson?

MS. JOHNSON: My name is Andrea Johnson. I'm with C Math is Easy in Corpus Christi, Texas.
MS. SMITH: Thank you.

Mr. Linder?

MR. LINDER: Good morning, my name is Craig Linder, Associate General Counsel at Dow Jones and Company. We're the publisher of The Wall Street Journal, Barron's, Market Watch, and other publications.

MS. SMITH: Thank you.

Mr. Madigan?

MR. MADIGAN: Hey, everyone, I'm Kevin Madigan. I'm VP of Legal Policy and Copyright Counsel at the Copyright Alliance.

MS. SMITH: Mr. Munter?

MR. MUNTER: Hi, all. I'm Johannes Munter. I'm a consultant with the News Media Alliance.

MS. SMITH: Thank you.

Ms. Sapiandante? I hope I pronounced that right. I think you're muted.

MS. SAPIANDANTE: Hi, I'm Maria Sapiandante. I'm an attorney that practices intellectual property for state agencies.

MS. SMITH: Thank you.

Mr. Sedlik?

MR. SEDLIK: I'm Jeff Sedlik. I am a professor at the Art Center College of Design, and I
am President and CEO of the PLUS Coalition.

MS. SMITH: Thank you.

Mr. Smith?

MR. SMITH: Hi. Thank you for having me here today. My name is Kevin Smith. I'm the Dean of Libraries, and a courtesy professor of law, that is, I teach copyright law, at the University of Kansas Law School.

MS. SMITH: Thank you.

And, finally, just because alphabetically, Mr. Thro.

MR. THRO: Yes. Hi, my name is Bill Thro. I'm the General Counsel at the University of Kentucky. I'm here on behalf of not only the University of Kentucky, but the Association of Public and Land-Grant Universities, as well as the American Association of Universities.

MS. SMITH: Thank you all for being here. We are very excited to hear what you have to share with the Office today, and let's get started. I think, if the first topic is to start on broader issues, I would like to direct the first question to the Copyright Alliance who submitted a survey and response to this study.

So I'm wondering, Mr. Madigan, could you
please describe the methodology towards the survey, and provide a short summary of the key conclusions that you have gotten regarding the prevalence of infringements by states?

MR. MADIGAN: Sure. Absolutely. So, in response to the Copyright Office's NOI back in June, the Copyright Alliance launched a public survey, which included many of the same questions listed in the NOI. We solicited feedback from copyright owners on their experience with infringement by state entities. But we designed the survey in a way that we believed would solicit the most sort of accurate responses from creators and copyright owners who may not have a legal background.

We also conducted interviews with a number of Copyright Alliance members and individual creators who have experienced infringement by state entities and have either been unable or deterred from exercising their rights due to state sovereign immunity.

Overall, we compiled what we believe is compelling evidence showing that the remedies against infringement are inadequate, or non-existent, and that state copyright infringement is a growing trend that is increasingly threatening the goals of the copyright
And just to talk a little bit more specifically, I guess, we had our survey open for a few weeks, we had about 600 and -- I think it was 657 total responses. Well over 100 of those responses said that they had encountered infringement by a state entity, but I think it's important to note that, of those respondents, over 50 percent said that they had experienced multiple instances of infringement. So we're not just talking about 115 total, some of the respondents said things like there were multiple instances, they stopped counting, there were dozens, countless, several.

I would also note that over 60 percent of the 657 total respondents to the survey said that they did not have time or resources to monitor for infringement, and so we feel like the numbers of people who found that were being infringed by state entities would be a lot higher if there was more monitoring.

I would also note that the numbers don't account for matters settled confidentially out of court or situations where the owners didn't pursue enforcement due to the perceived sort of futility of remedies available when suing states.
You know, I think it's also important to talk about the responses to our question about the time that the infringement was discovered because there was a clear trend of increasing infringements starting in the mid to late '90s, and then increasing yearly through the 2000s and 2010s, with the most instances occurring in 2019.

I would just say that I think this steady sort of rise over the last 20 years corresponds with the Florida Prepaid and Chavez cases that challenged the validity of the CRCA and may have resulted in states taking sort of a more liberal approach to unauthorized use of copyright-protected works.

I can go on about the survey. I know I'm probably getting to my two minutes here.

MS. SMITH: Yeah. Well maybe I can ask a couple of questions. I think the office has some questions about the survey design, and then I was trying to fit -- to message who would be called on next, and I think we'll turn to Ms. Benson, but I do want to make sure we can ask those questions first to Mr. Madigan.

So one question was about the longevity. It seems to me the trend analysis you just spoke to is not necessarily reflected in the survey. Did the
survey ask questions about the period of time for
infringement, or are you separately contributing that
comment from your other studies?

MR. MADIGAN: No, no. Our survey, one of
our questions was what year was the infringement
detected, and so we have -- in our initial comments,
we have a paragraph or so talking about the results to
that, and we create a graph that shows sort of a
steady few instances through the 1990s, and then,
starting in the late '90s and early 2000s, that's when
they start to go up, and they increase every year up
until when we stopped. The last year was 2019.

MS. SMITH: Okay. Could you speak a little
bit about the survey logistics? So what was the
response rate, or where was it publicized? What was
the completion rate, if you know?

MR. MADIGAN: Well we had, like I think I
mentioned, 657 total respondents, and we did -- we
created the survey through survey monkey. Again, we
drew the questions almost entirely from the Copyright
Office NOI.

There were certain questions we didn't
include that were more directed to state policies that
we just didn't feel -- that wasn't really the
information that we were trying to gather. These were
questions directed more towards individual creators
and copyright owners, so, for the most part, they were
drawn directly from the NOI.

But we didn't include in our initial
comments all of our list of questions, but we're happy
to make those available to the public.

MS. SMITH: I think if you were willing to
share the list of your questions with the Office, that
might be helpful in analyzing that. I also wonder,
would you be willing to submit the individual survey
-- I was thinking last night they were called response
cards but I'm sure that's not the term they use
anymore -- but the individual actual responses?

MR. MADIGAN: Yeah, we'd be happy to do
that. And one of the reasons we didn't attach it is
just because the -- I mean, for some of the questions
that we asked to explain the instance of infringement,
there's 60 page long responses. So it is quite long,
but we're happy -- we're absolutely happy to share
that with everyone.

MS. SMITH: Yes. I think if you're willing
to, that may be helpful. I know that the Court noted
it was important to see if instances could be
corroborated, so we will welcome accepting that into
the record.
Again, just to set up, we're wheeling around you a little more than most, but can you opine, in your opinion from Copyright Alliance, whether the respondents are a representative sample of relevant copyright owners? How should the Office or Congress go about evaluating that?

MR. MADIGAN: Well I think they're certainly representative of the individual creator members that we represent. Most of the people who responded to the survey were small businesses or individual creators. So I would say these aren't really representative of some of the larger organizations that are members of the Copyright Alliance, but I think those organizations were represented through their own comments, and are also represented on this, and other, panels throughout the day.

MS. SMITH: Okay, thank you.

So, Ms. Benson, your comment addressed the survey. Would you like to share your thoughts on the survey, and perhaps the overall approach you would suggest the Office or Congress takes towards analyzing evidence that's pertinent?

MS. BENSON: Yes. Thanks for the opportunity to comment on the survey. One of my concerns about the survey is, of course, and you've
just mentioned this, that the data was not shared openly. I, too, create and conduct surveys and am very aware of proper methodology in terms of information science and just social science, in general.

One of my concerns is the small number of respondents. I understand that 657 total respondents sounds like a large number, but if you're talking about all of the American public who owns copyright, that's a very small number, including myself. I have many copyrighted books, articles, et cetera, educational materials, and I never received this survey.

So I think, unfortunately, I don't feel like it's a representative sample, and I don't feel that it's statistically significant, and I feel like that is an important factor because we are looking, and when broaching sovereign immunity, we need to see evidence of widespread infringement. I don't think that this survey does much to show that.

Some of my other concerns about the survey include whether fair use was considered at all in the survey. I understand that sometimes when people have their work being used by someone else they immediately say that it's infringement, but we, as copyright
experts -- and I'm sure I'm talking to people who are all experts, so I'm not trying to explain it to people, but I think there are a lot of exceptions that apply.

Of course, you know, at university libraries and educational institutions we have a -- quite a few exceptions that apply to copyright, such as Section 108, Section 110, Section 107, and I think, unfortunately, when things are used for educational purposes, sometimes others don't understand that.

And I'm not saying that fair use applies to everything that's educational, please don't take this comment as overstating the case, but I do think it should be included in some sort of descriptor in the survey to make clear that there are some exceptions.

And I know that there's a Ninth Circuit case on point where, when sending a DMCA take down notice, we, as users and creators, should also consider whether the use was a fair use, and I think, in this survey, we should take that into account as well. And we should use a critical eye when interpreting the evidence.

So the evidence that was submitted, I don't see it as evidence yet because I haven't seen the data. So when I conduct qualitative research and
quantitative research, I try to make my data as open as possible and put it into our data repository so that I can see, and others can see, whether the results are replicable, because, to me, good science requires replicability. So I think I'll stop there so others can comment.

MS. SMITH: Okay. I actually may want to ask two follow up questions to you, and I do think it's helpful that Mr. Madigan has signaled that they may share the data. So there's two small questions. First, I mean, you noted, in a sense, we're all copyright owners, we all are creators.

I don't know if that necessarily means the scope of the potential respondents needs to be the entire American public, right? Because, as Mr. Madigan mentioned, his members -- he's more focused on perhaps people who are trying to license or make economic use of their copyrights, and there's certainly a lot in there.

So do you have an opinion as to what would be the proper frame that we would look at to determine potential responses if we think, you know, maybe something a little shy of everyone is the subset?

MS. BENSON: I understand that you're seeing the subset as people who are trying to make economic
use of their works, but that also is a large group of people, because I also make economic use of my works as an educator, and I do a lot of independent consulting, and I have a book published through ECRL, another book coming out through ALA.

So we, at the universities, have a lot of creators, right -- we create scholarship, we create books -- and so I don't believe that that population was included in this survey of folks who are actually creating for educational purposes as well. So I think the survey has to at least include my representatives, right, who are scholars and researchers, and who also create economic value.

So I'm not sure I can define the exact scope of it, but I do know that I feel it's missing a key element.

MS. SMITH: Okay, thank you.

MR. MADIGAN: Can I respond to that?

MS. SMITH: Yes, I think I would like to hear from you.

As the Copyright Office, I was not trying to throw that out as a definition. We're trying to figure out what should be the lens we're looking at to determine whether there is widespread infringement.

So, Mr. Madigan, if you could respond to
that, including maybe how you publicized the survey as well?

MR. MADIGAN: Yeah. So when you dive more into the survey, you'll certainly see plenty of responses from people who create educational materials, so they are certainly represented in the survey.

And if I could just go back to the fair use point for a minute. You know, obviously, limitations and exceptions are an important consideration, but they're not entirely relevant as has been alluded.

I say that because, ultimately, whether we abrogate or adjust state sovereign immunity would have no effect on a state's entity's ability to defend itself by showing fair use or invoking any other limitation and exception, and I believe that's why you didn't see any questions in the Copyright Office NOI directed to fair use.

In fact, if the unauthorized uses are fair, as many of the university commentators have said, then sovereign immunity is really irrelevant, and these types of uses can continue whether or not immunity is abrogated.

And I would also say that the highest number of respondents from our survey that said they found
infringements were photographers, and the organizations and individuals, creators who submitted comments attest to the fact that the unauthorized uses that they encountered were really wholesale reproductions of their works for commercial purposes that are, therefore, unlikely to be fair uses.

And then if I could just say one more thing about the fair use as it relates to sovereign immunity is that the doctrine of state sovereign immunity actually prevents fair use analyses, and it hinders the development of the fair use doctrine.

There may be state entity uses that raise novel and important questions about the boundaries of fair use, questions that may actually benefit users of copyrighted works, but when we sweep those questions aside in the name of sovereign immunity, it actually, I think, does a disservice to all copyright stakeholders by sort of holding back the development of our understanding of fair use.

MS. SMITH: Thank you. One final question: how was the survey publicized?

MR. MADIGAN: How is it publicized? Oh, I mean, we can share it with you all today, if you'd want. It's not public now.

MS. SMITH: No, no, no. I mean, did it --
was it on Twitter, or how did you try to gather responses --

MR. MADIGAN: Oh. Right. Yeah. We blasted it out to our full membership, we tweeted about it, sent it out in emails, through all social media platforms.

MS. SMITH: Okay, thank you.

So I think that the next order, just so people can get ready, is Mr. Thro, then Mr. Sedlik. So, Mr. Thro, I know you have a lot of experience on these issues as well. Could you speak to the general approach you think the Office or Congress should take in evaluating this question, as well as, in your experience, any broad patterns in infringement?

MR. THRO: Sorry. It took me a second to un-mute. I think first, and foremost, as the Copyright Office undertakes this study, it's important to distinguish between an infringement and a constitutional violation. As Ms. Benson said, not all alleged infringements are even infringements, but even if there is an infringement, that doesn't necessarily mean it's a constitutional violation.

As I think the Court has made clear in all of its sovereign immunity jurisprudence, Congress doesn't get to pick what is a constitutional
violation, the Court does, and, in the context of copyright, that would mean a deprivation of property without due process.

Now, what does that mean? Well, for one thing, it means that negligent copyright infringement is not going to count as a constitutional violation. It's going to have to be something that's really close to a taking. It also means that there is a question as to whether there is an adequate remedy at state law. If your state allows you to recover for a regulatory taking, it is possible that that state would also allow you to recover for a regulatory taking that results from the state's policy that deprivies you of your copyright.

So I think you have to really narrow the definition of what you are looking at. Infringements don't matter, constitutional violations do.

MR. AMER: Can I ask a quick follow up on that? And others can weigh in, too. I mean, I think the question for us is how do we, as the Copyright Office, make that assessment? I hear one of the concerns about survey evidence is the fact that there isn't -- it's difficult to know to what extent the claims were meritorious, or to what extent the state may have had a valid fair use claim, or whether, as
you say, the infringement was negligent versus intentional, so do you have thoughts about how we can -- what sort of evidence would be most useful for us in doing the study and making that assessment as to how prevalent these sorts of infringements are?

MR. THRO: Well I think, in terms of assessing a constitutional violation, it's important to look at other areas of the law, and, generally, if a governmental entity isn't going to be found to have violated the Constitution, then the governmental entity has adopted a policy that actually results in a constitutional violation.

If a university, for example, said that African-Americans could not attend, that would clearly be a constitutional violation. So if a university had a policy that we will always violate copyright and never pay any attention to it, that may be a policy.

Similarly, if we took somebody's book and said, hey, this is a really great book, we can make a lot of money off of it, and we took copies of the book and then produced our own copies of the book and sold them without any royalties to the author, that would probably amount to a taking.

But the fact that one in 15,000 employees at the University of Kentucky inadvertently violates
someone's copyright, or even intentionally violates their copyright, does not necessarily mean that the University of Kentucky has committed a constitutional violation.

MS. SMITH: Can I ask a question? I think you have a wealth of experience in public institutions, as well as, you know, the State of Virginia certainly. Do you have any sense as to whether there is a distinction in policies adopted by public institutions compared to private colleges or universities? I don't know if you have -- I would be interested to hear your thoughts.

MR. THRO: Yes. And this is purely anecdotal and is not based upon any survey or anything like that. I think, first, and foremost, it's important to remember, as Ms. Benson said, that universities are creators of copyright and various other intellectual property and all that. We want our employees to do that, and we want to take advantage of that, so we're not going to do anything intentionally to undermine that from happening.

I think the biggest, probably, use of the state for sovereign immunity is if we get a suit that is totally trivial -- and we get a number of those in all kinds of spheres because people perceive that a
state university doesn't like bad publicity and a
state university has a lot of money -- you know, we'll
use sovereign immunity to get rid of the frivolous
suit as quickly as possible, but, overall, I think we
are doing everything we can to support not only
copyright, but intellectual property.

MR. SMITH: Ms. Smith, may I comment?
MS. SMITH: Sure.
MR. SMITH: Thank you.
MS. SMITH: Yes. Mr. Smith?
MR. SMITH: Thank you very much. Because I
am a university administrator, and a librarian, and
I've spent the last 15 years as a copyright advisor in
both a public and a private university, that is,
before I worked for the University of Kansas, I worked
for Duke University, so I can speak directly to are
differences? The answer is no.

I've worked on developing copyright policies
for both of those universities, as well as consulting
with a host of universities on the development of
copyright policies. The one conversation I have never
heard is we don't have to worry about this because of
sovereign immunity.

I have been involved in multiple
developments of policy at both private and public
universities and across the board, those are careful processes that try to observe the legitimate rights of creators for the reason that Ms. Benson stated: We have a campus full of creators. They try to make responsible use of the exceptions, including fair use.

But I have never, ever heard a university adopt a policy or a practice simply because they believed they were insulated from lawsuit by sovereign immunity.

MS. SMITH: Thank you. That is helpful, to hear your experiences.

I'm wondering, to make sure we're sort of zigzagging the two perspectives, could we hear from Mr. Sedlik? Because I think, as Mr. Madigan noted, a lot of the responses the Copyright Alliance received were from visual artists, and you have represented their interests in many associations.

MR. SEDLIK: Sure. Well, in addition, I am a professional photographer, but I also work in academia. I'm a 25 year professor at the Art Center College of Design.

First of all, the individual creators and their trade associations hold a deep respect for the universities and libraries and research institutions, and have no complaints as to legitimate fair use, or
usage under Section 108, et cetera. They understand
the vital role that these institutions and the people
who work with them, and for them, or attend those
institutions play in society.

But at the same time, in my role as a mentor
to my fellow photographers through my trade
association affiliations, I get photographers and
illustrators coming to me requesting advice. They
don't know where to turn. Their works have been
infringed, and sometimes, and increasingly so, this is
by state entities.

I would agree with the comments thus far
that the people who work in the museums and the
libraries are not going out and purposefully
infringing, but, at the same time, even if you look in
the comments that the Copyright Office received, you
will see letters from institutions saying, yeah, we
used it, but, you know, we have immunity. And they're
not relying on fair use, they're relying on immunity
in those responses. These are letters from
institutions, from libraries, et cetera, and from
colleges.

So I would advise the Copyright Office that
you need to consider the universe of discovered
infringements because creators discover only a very
small percentage of the infringements of their works. They're out creating. They don't have the time to scour the universe for all the infringements of their work, and they typically happen upon them or they're advised that there is an infringement, and then they have to address it.

And so those are the only people that I hear from. I don't hear from the people who didn't discover the infringements by state entities, I hear from the people who did. So we have to be careful about when we're talking about numbers.

In addition, I'm an educator who creates, and many of those on this panel and who will be participating today are educators who create, but there is a difference between educators who create while relying on their employment income to feed their families versus creators who rely principally, and only, on their creative licensing income from their creations under copyright law and under the Constitution in order to make use of their works, and in order to sustain their businesses and feed their families, and when their works are used without their knowledge or permission by any entity, it harms them, and injunctive relief alone is not helpful to them.

They need to get the revenue that they
deserve under the Constitution during the copyright life of their work in order to support themselves, their businesses, and their families. These are not greedy people, these are people who are struggling to survive.

And so, in addition, the notion that a taking would solve the problem is also incorrect because the courts, in my understanding, interpret taking to mean that all of the value of that asset is taken.

So it's a real challenge, and what we're finding is that, just in closing, that creators are hesitant to even contact the states, and most certainly very hesitant to bring an action against the states because of recent developments and perceived possibility of liability if they lose, and also the cost of the action.

MS. SMITH: Thank you, Mr. Sedlik.

Actually, I see Ms. Sapiandante. You may have un-muted. Did you want to respond to that before we move to individual perspectives or?

MS. SAPIANDANTE: Yes, I would. I think that it's important that the Copyright Office look at every state because there are some states, especially California, that has adopted statutory authority in
which they have trained -- mandatory training for
their employees and for state agencies, and so there
are states, individual states that have done that.

And it's important to not just take it as a
broad sweep for sovereign immunity, but to look at
what efforts each state has been making to educate,
basically, their employees.

MS. SMITH: Okay. Do you have the
California statutory cite for that?

MS. SAPIANDANTE: I do. It is the
California has is that it mandates that all state
agencies provide an infrastructure for educating their
employees on what actually is copyright, because with
the new era of internet there is a huge -- people
don't know the difference if it doesn't have a
copyright designation, that it's free, anything that's
on the internet, and so I provide a lot of training to
-- across California.

Basically, once you train employees -- and I
think it's the education part that they should look at
more, and statutes that mandate educating employees,
educating state agencies, public entities, things like
that, as opposed to a broad sweep of sovereign
immunity.
MS. SMITH: Okay. Thank you. I think to be mindful of time, next we're going to make sure we get to probe on some more of these individual stories. We know that is something the Court signaled could be helpful. I'm going to pass the mic to my colleague, Ms. Mangum.

MS. MANGUM: Hello. I wanted to start with Mr. Allen, if I could. You described in your comments to the Office's NOI, incidents in Alabama, and then in North Carolina. Can you describe those incidents and how you attempted to enforce your copyrights, and also whether, when you tried to enforce, whether sovereign immunity was offered as a response from the entity?

MR. ALLEN: All right, I'll do the best I can in two minutes. I responded to two specific things. One, the Department of Natural Resources in Alabama pulled an image off my website, removed a copyright mark, and then re-posted it to their website, and I sent them a bill for that work. They sent me a response back that they had taken the work down, but they weren't going to pay the bill. Given the cost of dealing with an infringement, it was not worth the amount of money that I would have made off that relatively small bill that I sent them to even pursue that. And that's a
very common thing. I've had that happen in several
other instances with other institutions, whether they
were government or not.

So cost is a huge issue. I've heard it said
that a typical copyright case costs in excess of
$350,000 to prosecute, and I can assure you that that
number is correct from personal experience.

In the bigger picture, in Allen v. Cooper --
and I'm going to assume that a certain amount of
knowledge already exists on the panelists and everyone
about that -- State of North Carolina violated an
agreement that involved the company that found the
shipwreck Queen Anne's Revenge, Blackbeard the
pirate's shipwreck, and I was a party to that
agreement because I had an agreement with the company
that found the shipwreck.

We went into mediation. The state paid me
$15,000 for copyright violations in that, and within
about a year and a half, the State of North Carolina
passed a law that we like to call Blackbeard's Law,
which converted Nautilus intellectual property into
the public domain.

Within three weeks of that, the State of
North Carolina again published videos that included
Nautilus intellectual property video and images
without my knowledge, permission, or a license, and that's pretty much what led to our lawsuit which we filed in December of 2015.

Now, over that period, as you well know, we've been all the way to the Supreme Court and were unable to enforce our copyright under the Copyright Remedy Clarification Act, and I think I have several frustrations along those lines.

One, I'm the creator of my work. I registered my copyrights in a timely manner. I have defended my copyrights. I've even watermarked the work that's at issue. So I have followed every federal statute and law that I'm required to follow, and I still have no remedy and no way to address the infringement by the State of North Carolina. And so we're five years into the litigation and we have yet to be able to address the actual facts of our case.

So, you know, with all due respect to the academics here, when they talk about state remedies, and that's a big if, there are -- most states do not have remedies, and judges, as you'll see from our panel that's coming up later, always defer to federal issues. They say copyright's a federal issue, this is not a state issue, and that's certainly what we've encountered.
The state's given a long list of why they are not responsible for infringements. As a state entity, they say that the agreement that we signed initially in 2013 in which they paid me $15,000 is void, illegal, and unenforceable, yet they signed it. So that is the reality here.

And I would absolutely echo everything that Mr. Sedlik said. I've experienced the exact same things. And I'm a creator. I only get paid, though, when I work. I don't have a job where I get a paycheck every week, and my intellectual property is a big part of my business. And I've been licensing images and video for 25 years plus, and I depend on that.

I also have the problem that this infringement or copyright violation is an intentional act. In my case, you have two intentional acts which bookend a law that's literally written to take away my intellectual property. So I don't know how you address that, but that is certainly an inequity there.

I guess also, in the case of the UNC press, which is part of the North Carolina college system, they have 4,400 copyrights registered. I looked this up for fun one time. Now, the State of North Carolina can enforce a copyright infringement case against me,
but, right now, I have absolutely no ability to 
enforce a copyright infringement case against them. 

So I'm not asking for, in my case, a special 
rule, I'm just asking for the same rule that everybody 
else has. If they can enforce their copyright 
violation against me, I should have that same right 
and that same equitable ability in court, but I don't 
have that right now. 

And, more than anything, I'm a state 
taxpayer, and states are using my money, in the -- in 
especially my case, to infringe my work, so I'm now in 
direct competition to the state that I pay taxes to, 
and I just don't think that works on any level. 

In the end, as a creator, this is my job, 
this is my work, this is how I pay my bills, this is 
how I pay for equipment, for insurance, mortgage, 
everything that everybody else does, and if the State 
of North Carolina can download one of my videos from 
YouTube, and put it out in the world and monetize it, 
or de-monetize it and take away that value, and I have 
no recourse, that's a real problem. 

So, again, in my case, I just want equity. 
I understand fair use and all that, but I would like 
the ability to have the same legal federal copyright 
protections that a university or a state entity has.
So I really kind of feel like my case, Allen v. Cooper, is the canary in the coal mine, and the predictable outcome of a failure to hold states accountable for copyright infringement, and so this is why we're here.

MS. MANGUM: Thank you, Mr. Allen. We really appreciate those comments.

I want to move to Ms. Johnson of C Math is Easy. I know you had stated in your initial response to our call for roundtable participants that you had an incident with a university in Texas. Can you describe that experience, or that incident, how you believe your rights were infringed, how you attempted to enforce your rights, and then, also, whether sovereign immunity was offered a response to you from the entity?

MS. JOHNSON: Well it all started with helping some students with mathematics. They had asked me, the parents had asked me to help them on a specific test, a state -- a Texas exam, and so I asked the parent what are you using? So the student brought something from school, from Moody high school, and they had -- and I looked.

As I was going through it, there was nothing on the front, it just said TSI math practice test, and
so I was, like, well let me look and see so I can begin to help and begin to tutor the student. But, as I began going through it, all of a sudden, the work starting changing, and then, all of a sudden, I began to notice that some of the work looked familiar.

All of a sudden, I saw Texas A&M University Upward Bound Program, and, all of the sudden, I see many parts of my workbook retyped and -- on -- into this math packet. Our original book is written in 24 font, in color, but now our work was retyped, with typos, in black and white, nine font, and lifted out at least 30, 40 pages of the meat of our workbook, reprinted, and then given to high schools in the district.

This particular program at the university, they go to several of the high schools in the city and other independent school districts, and so I don't even know how far my work has gone and how many times it's been reproduced, and copied, and passed out to whole high schools and so forth.

It was verbatim. We use I guess you can say lay terms when we were writing this workbook. We wanted it to be easy. Anybody can understand it at a glance. And so they just used every word, every math problem, every number that we used, verbatim.
Mathematics is not easy to retype, and so a division problem, a square root was retyped intentionally and put out to schools without our permission, without any kind of contract.

We've been talking with Texas A&M in five or six different apartments for -- since 2015 because we heard about the need. Eighty percent of students were failing this exam. We have been going to the Corpus Christi independent school district since 2016, telling them about our TSI math workshops and boot camps to help them with their issues with mathematics for this particular exam that helps students get into career, and also into college.

The particular test that we deal with, if the student wants to get into dual credit classes, to take dual credit classes, they have to take this exam, but over 80 percent of students were failing the math portion and could not take college math courses. That's where we came into play.

And so, all of a sudden, we realized that we could not be everywhere, so we designed this TSI math workbook, which was seven years in the making. When we put out the book and had a book launching, all of a sudden, our business slowed down, and we were wondering why, and then, months later, we realized
that our work had been retyped and Texas A&M Upward
Bound had put their logo on our work. Even though it
had our logo and it had copyright at the bottom, had
our name on it, they lifted it off and then passed it
as their own.

This was our livelihood that was taken from
us. We decided to step out of the classroom so that
we can help more people, as educators. I came from
middle school, with an engineering background before
that, and my business partner is a university college
professor with seven children, and, all of a sudden,
we are writing books, but then things are no more
because the university has taken our clientele,
passing it to the high schools.

MS. MANGUM: If I can interrupt and ask, how
did you bring this to their attention, or did you
bring this to their attention, and what was their
response? Was sovereign immunity offered as a
response?

MS. JOHNSON: Well when we began to try to
pursue it, COVID happened. And so we discovered it
late January, early February, and so we were asking
around, what can we do, how do we need to approach?

So we were investigating how we could
approach, and so when we were about to begin to let
them know about the issue, everything shut down, so
there was nobody in the Office to even approach
because the doors were closed. They weren't taking
just any kind of phone call and so forth. So the
COVID pandemic really put a damper on trying to reach
people.

And then we pursued 11 -- been through 11
lawyers, and everybody said, oh, sorry, that's Texas
A&M University, we don't want to tackle their system,
and they're under sovereign immunity. And I was like,
there's nothing I can do? And so 11 lawyers turned us
away. Because the very next thing when they called me
back was, they said sovereign immunity, sorry.

MR. AMER: Can I ask just a couple of
clarifying questions? So the book that you produced
is sort of a training or a workbook for high school
students to help them prepare for statewide
standardized math tests?

MS. JOHNSON: Yes. For youth and adults.
Anybody, if you're going to be taking this exam, it
tells you if you can take college-level classes or you
would be thrown into remedial classes, foundational
math classes. That's what our exam is for.

MR. AMER: Okay. And just to clarify, where
did you see this reproduced? What sort of publication
was it that I guess Texas A&M used this material in?

MS. JOHNSON: Yeah, a student at one of the local high schools had handed it to me so that I can look at it to begin helping them. And so, you remember when we're in school and the teacher gave you a practice packet, you know, to go study at home with a little staple on it? That's what we found.

And then, so the last four or five pages was our work, retyped in this student packet to study for this exam, with the Texas A&M University logo on it, with our work underneath it --

MR. AMER: Okay.

MS. JOHNSON: -- retyped.

MS. MANGUM: Thank you so much for your comments, Ms. Johnson. We appreciate you sharing your experience.

I want to move to Mr. Linder from Dow Jones. In your amicus brief filed in support of Mr. Allen, you detail a matter involving the California Public Employees Retirement System. Can you describe what happened in that situation, and, in particular, how Dow Jones discovered the infringement, how it initially attempted to enforce their copyright, and whether sovereign immunity was offered as a response when you attempted to approach that entity?
MR. LINDER: My pleasure. And thanks, of course, for having us today. So, by way of background, as I mentioned, Dow Jones is the publisher of The Wall Street Journal, among other publications, and, through those newsrooms, we maintain one of the largest news-gathering corporations in the world.

At Dow, we're in the business of creating, collecting, and communicating information to people, but that's a very expensive undertaking, and the --

MS. MANGUM: Mr. Linder, you're a little in and out. If you could adjust maybe your mic?

MR. LINDER: Let's see. I'm a little closer. Is this any better?

MS. MANGUM: That's better.

MR. LINDER: Okay. The undertaking that the Dow Jones does with our journals, it's a very expensive endeavor, and it's an endeavor that, in our digital day and age, is particularly susceptible to copyright infringement, so, as a result, at Dow Jones, you know, we take steps to police unauthorized use of our work, as many copyright holders do, but even we were surprised at the systematic nature and the brazenness of the infringement that was undertaken by CalPERS, which is a state retirement fund, a pension fund, that used instrumentality of the California
So what did CalPERS do? Between 2009 and 2017, CalPERS used, without authorization, approximately 9,000 articles from *The Wall Street Journal*, 250 articles from *Barron's*, and 560 articles from Dow Jones news wires and Dow Jones --

(Away from microphone.)

MR. LINDER: All told, CalPERS reproduced approximately 53,000 separate articles from approximately 4,500 publishers. These were full text reproductions on a publicly-accessible website. CalPERS also compiled a daily email, full text articles, sent it to hundreds of recipients both inside and outside the agency.

Now we first became aware of this in June of 2017 when a blogger who focuses on the financial industry publicly reported the existence of this repository. At that point, we began our own investigations from the blogger's reporting, and began conversations with CalPERS. CalPERS invoked sovereign immunity, I should say, almost immediately.

Now the case law that existed at the time, by which I mean that, frankly, there wasn't -- there had not been the Allen v. Cooper proceeding -- meant that we were able to reach a settlement both on our
copyright claims and on the liability we had. But, candidly, it's a settlement that, you know, severely undervalued the work at Dow Jones.

At the time, Dow Jones charged approximately $360 to reproduce a single article in an email to 300 people, which is what CalPERS did on an industrial scale, and we also charged approximately $1,900 to display a single article on a publicly-available website per year. Now, if you mapped those numbers onto CalPERS activity, that would have resulted in actual damages of approximately $22 million, or minimum statutory damages of about $7.3 million at the $700 statutory rate.

I should also mention Dow Jones routinely registers all of the articles that appear in the print edition of The Wall Street Journal, as well as the print edition of Barron's. Like other copyright holders, we have not yet figured out an official way to register all of the only online works, but that's a separate conversation for the Office.

But that means that, you know, we were in a position to be able to assert our rights against CalPERS. We have a very large library of registered copyrights. So, again, that should have resulted in a really significant settlement, and the settlement that
we agreed to with CalPERS was valued at $3.4 million, split between cash and the purchasing services.

Now, candidly, we were satisfied with that settlement, given the state of the law, but I think we all have to acknowledge that, in the cold light of day, Allen v. Cooper changes the analysis for an agency. So, following the Allen v. Cooper decision, if we were to present our claims to CalPERS today, I think you would hear a much firmer invocation of sovereign immunity, along with a dismissal of our claims.

And I can tell you that because we are negotiating right now, dealing right now with another entity in a different state that has similarly engaged in what I would call the industrial reproduction of Dow Jones' articles without any conceivable fair use, pointed, as you can expect, directly to sovereign immunity from the Allen v. Cooper case.

MS. MANGUM: Can you tell us what state that is?

MR. LINDER: It is an entity in Texas. And following Allen v. Cooper, there's very little to stop a state agency with the mentality that has the desire to engage in wholesale copyright from doing just that. Even if a state, as some do, allow for suits against
themselves or agents, those waivers generally only apply to federal court -- I'm sorry -- state court, and, of course, federal court is the exclusive home for copyright remedies.

Section 301 may further preempt state law claims that look like copyright claims, and inverse condemnation taking claims, those are, at best, unproven. Now we've seen some cases in different states where -- that have cast some doubts on the viability of these suits.

So what that means is copyright holders, like Dow Jones, are left holding the bag when state entities are able to use sovereign immunity as a shield, while also separately enforcing their own copyrights with the sword, and that's a system that strikes me as inherently unjust.

This is about copyright willful systematic infringement. It's not about accidental infringement, it's not about incidental infringement, and it's not about fair use, as I think Mr. Madigan mentioned earlier. This is about making sure that state entities that engage in systematic industrial-scale copyright infringement are held responsible for that -- those actions, just as a private actor would be.

MS. MANGUM: Thank you so much, Mr. Linder,
for sharing.

I want to move to Mr. Munter because the News Media Alliance addressed this CalPERS situation in their comments to the Office and in response to our NOI. You described this incident as a systematic violation that lasted for years and involved thousands of copyright owners. Can you describe or expound on that? Who were the other copyright owners that were impacted, and were they able to obtain remedy, to your knowledge?

MR. MUNTER: Sure. So News Media Alliance represents about 2,000 news media organizations in the United States and internationally, ranging from national titles to small, local newspapers. And what is common with all of our members is that they all provide reliable and trustworthy information to their communities, keeping decisionmakers in check, and supporting a healthy democracy.

That is a vital function that is currently -- far too many newspapers are struggling currently. News deserts are spreading across the U.S., and news publishers rely on robust copyright protections. When we approached this study and these comments, we asked our members for examples and the CalPERS case was the one that was mentioned most often as the most severe.
instance lately.

It is worth noting that this is -- probably is -- quite possibly, only the tip of the iceberg. News especially, if you think about it, is very hard to -- it's very easy to infringe. You only need to have one subscription, and then you can copy a full article, paste it in an email or on a website, and send it potentially to thousands of people, which is exactly what happened here, in CalPERS.

So, in addition to Dow Jones over 9,000 articles copied, there were at least -- almost 6,900 from the New York Times, over 5,500 from the Los Angeles Times, almost 3,900 from the Sacramento Bee, which is owned by McClatchy, and almost 2,000 from Washington Post, and these are just some of the biggest ones. We were unable to secure the full list of all of the newspapers whose content was infringed.

And we are aware that, according to public reporting, at least two of these newspapers reached settlements with CalPERS in addition to Dow Jones, but, other than that, we were unable to ascertain as to how most of these were resolved or whether they were resolved.

MS. MANGUM: And, to your knowledge, from your members, do you know whether there have been any
other instances involving any other state entities and
whether sovereign immunity was offered as a response
when they attempted to enforce their rights?

MR. MUNTER: There are certainly, we have
heard, like, of individual, like, instances of, like,
a -- like, single instances of infringement, but
that's not what we're -- like, that's not what's
cause economic harm to newspapers. That's not what
we're concerned about here, like, a professor
uploading a news article to a course portal or
something like that. So those ones, we've received
just anecdotal, like, instances of infringement like
that.

With regards to large-scale infringement
that we are really concerned of, CalPERS was the only
one that we heard about.

MS. MANGUM: Thank you, Mr. Munter.

I will pass it back to Ms. Smith.

MS. SMITH: Thank you, Ms. Mangum. The
third key area we'd like to focus on is how the Office
and Congress can determine if acts of infringement are
intentional or reckless, and so I think, on the one
hand, we certainly appreciate the key importance that
exceptions and limitations like fair use play, we
appreciate the Supreme Court opinion noting that
there's some instances of honest mistakes that may not provide sufficient background to move forward, but I also hear, for example, I think it was Mr. Linder who said we're focusing on -- I wrote it down -- industrial reproduction without any conceivable fair use defense.

I think we're trying to understand how we can separate out these examples to determine where there may be examples of intentional and reckless infringement, on the one hand, from other acts, and how should we go about that. So I don't know who would like to speak to the general approach. If you want to just raise your hand then, and we'll try to go that way.

(No response.)


MS. BENSON: I believe that, and we've noted this before, it's not just a few bad actors that we're looking for here. And I do have a lot of empathy for the folks who have spoken today. My husband is actually an artist, so I feel you. I think that the issue, though, is not widespread enough to merit constitutional concern, and we did note some evidence in our comments.

I was joined by Douglas Shontz from our
Office of General Counsel, where he noted that we have three to six complaints that rise to his office per year of infringement, and our first response is to take it down immediately, and our second response is to reach out and talk to the person who has made that complaint, and then, in most instances, we will reach an agreement and a settlement with the person. We don't assert sovereign immunity in that instance at all, and I know Kevin Smith brought that up as well.

So I'm trying to point out that there are good actors out here, and we are not part of that cohort, and so I think it's not as widespread as to raise constitutional concerns.

MS. SMITH: So I appreciate that. Whether something is widespread is slightly different, as well as how a state might respond in remedies is slightly different to the question of whether the initial act might have been reckless or intentional.

Do you know, in terms of the three to six complaints you may receive a year, do you have any insight into the nature of those complaints or how we should evaluate these complaints that go all the way to court and get a judgment? Because we see that in some cases it may not happen with sovereign immunity used as a backup.
MS. BENSON: I can't speak to those three to six complaints, I think Douglas could, but I do think that when you're talking about people removing watermarks and intentionally taking off things that are proprietary, to me, that would demonstrate intent, so that would be one of the instances I think we could look at to see whether something is intentional.

Unfortunately, it's hard, from the perspective of the person who -- if their work was taken from them, they might feel like every act is intentional, right, because they're saying this is mine and then you took it, but that doesn't necessarily mean that people understand what's going on, right, because, unfortunately, there's a lot of misunderstanding. And part of my job is to educate people about, yes, everything on the internet is not free for you to take, right?

And so I think that we would have to look for those kinds of intentional acts, and removing protective watermarks and copyright notices, to me, is one way to demonstrate that.

MS. SMITH: Thank you.

Mr. Allen, I can see you wanted to respond. Do you agree in the sense that removal of watermarks or copyright management information might be a good
standard to look at in terms of conduct for
intentionality or recklessness?

MR. ALLEN: No, in just listening to Ms. Benson, I mean, first off, when you write a law to
abrogate somebody's intellectual property rights, that's an intentional act, and it doesn't just affect
me, it affects everyone who comes under that law, so you have addressed, you have created a law against
multitudes of people in that case.

Further, as I understand it, it's a basic principle in copyright that if it's not yours, ask the
copyright owner for the use. And if somebody misuses a video or a picture of mine, it didn't just magically
appear on their website, it didn't just magically get posted to their YouTube channel, they had to
physically go and move it. You can't have an accidental infringement in that case. So there is
intent there.

So the argument that, oh, we didn't mean to do it, well you may have been uninformed or uneducated, but you did physically mean to do it, and you did actually do it. So I think it's a specious argument.

MR. AMER: Well, so that raises --

MS. SMITH: Correct.
MR. AMER: Dean Smith, I see you, and so
maybe let me just ask this, and if you want to weigh
in on it as well, please do. What is the proper
standard for intentional infringement?

I mean, we've been talking about examples.
Ms. Benson, your example involved an entity removing a
watermark. In that situation, it seems clear that
we're talking about -- willfulness, I think, is the
right description. Someone knows that their conduct
is unlawful, but they do it anyway.

Is that what we need to look for, or is it
enough that a state entity might intend to do the act,
but they might have a good faith but ultimately
erroneous view that that activity is fair use? Does
that sort of conduct fall within the standard of
intentional conduct under the Supreme Court's
jurisprudence?

MR. SMITH: Well I don't know if you were
asking me or inviting me to speak, but I will, just
briefly. I wanted to return to what Mr. Thro had been
telling us because, throughout this conversation, I
think we've lost the emphasis on what is -- and you're
asking exactly this question -- what is the evidence
we should be assessing?

Mr. Allen talks about being treated fairly.
That state entities can enforce their copyright and he can't enforce his copyright against the state entity. I think that's only partially true. But I also just want to emphasize that there is a reason that there is a sovereign immunity doctrine, and there has been for 200 years. It is a fundamental part of our system of federalism. So the standard of evidence has to be very high.

I do believe that intentionality is the standard you should be looking at, and a lot of the examples that we've seen today, heard today, and a lot of the examples that we saw in the comments simply don't rise to the level that we would need them to be sufficient evidence -- which is the language used by the notice of information -- sufficient evidence for the abrogation of a constitutional privilege that is a fundamental part of our federalist system.

MS. SMITH: Can you answer more directly my question, which I think Mr. Amer has -- you know, we're trying to drill down as a copyright law professor. How do we determine whether an act of infringement should be reckless or intentional? Does it need to be willfully and knowing infringement absent state sovereign immunity? Mr. Allen has said, for example, you know that you are copying. What
would you say is the appropriate standard for us to
look at this time?

MR. SMITH: I think it does have to be
willful and intentional. I think, again, I should
probably just let Mr. Thro speak because I think he
said this correctly. You would have to find state
policy. You asked about policy earlier, and I think
that was the correct question. You would have to find
policy that was intentional that enabled infringement.

MS. SMITH: One thing I'll just say, maybe
you could address, and -- is I don't quite see that in
the Court's opinion, right? It is looking at specific
examples of infringements, whether discussing the Oman
report, and whether those acts of infringement
themselves are intentional and not a state policy
behind what may be behind an infringement, and it
could be that they did not have the details presented
to them in the report, but if you could connect that
to the opinion, I would be help -- be grateful for
that.

MR. THRO: Sure. I'll be happy to attempt
to. I think it's important to note that there is
never any such a thing as an unintentional
constitutional violation. You have to have the level
of intent, but I think, to echo Dean Smith, you have
to go beyond merely intent.

A university has thousands of employees and those employees do not always do what they are supposed to do or behave, okay? This is why I have job security is misbehaving employees and misbehaving students. But there is a difference between something that the university does as a policy or something that a state agency does as a policy and the actions of what I'm going to describe as a rogue employee.

I think we see this in some of the police misconduct cases, to use a different analogy. If a cop does something wrong, that cop can be, and should be, sued for his, or her, intentional violations, but it's very hard to impose liability on the city that employed that cop unless you can show that the city has a policy of not training or giving the wrong training.

I would think that to rise to a constitutional level that would justify abrogation against the states, it would actually have to be almost a policy or practice. Certainly intentional, but also a policy or practice that has the full blessing of the state.

MS. SMITH: That is actually interesting. I think a slight pivot, since you provided that analogy.
Do you have experience as to under what circumstances a copyright owner might recover damages by filing a 1983 suit against a state official in their personal capacity, and can you speak to whether state organizations might typically indemnify employees to perhaps make recovery more meaningful to a potential plaintiff in that instance?

MR. THRO: I'm not aware of anything in either Virginia, or Kentucky, or Colorado when I was working in those states where an individual -- a copyright owner filed a Section 1983 claim against an individual. I think that would -- that is, theoretically, possible, and, assuming you could prove infringement, the individual would be personally liable.

As to whether the state would indemnify, that's going to be an open question in terms of state law. We do not indemnify if you're clearly and unambiguously acting outside the scope of your employment.

But the question of indemnification in a 1983 suit against someone in their personal capacity is totally unconnected to sovereign immunity. The individual is going to be held personally liable. The indemnification question is merely a fact -- question
of whether their employer will pick up the tab.

And I do think that is a realistic mechanism

to go after what I'll call the rogue employee who

engaged in copyright infringement without the express

authorization, and, in fact, contrary to the

directions of his, or her, employer.

MS. SMITH: Okay. So thank you. I do think

that qualified immunity, it might, we've seen in other

contexts, as you raised, present a hurdle in some of

the instances. And I think, copyright-wise, we might

be sort of gingerly just adopting that, given some of

the discussions in other contexts this year, but it is

good to consider.

Mr. Allen, did you want to respond?

MR. ALLEN: Yeah. Just real quickly, in our

case, we have filed a 1983 claim, a motion for

reconsideration, on that. As you can imagine, the

state has said that they are not liable, so we'll see

how that turns out.

MS. SMITH: Mr. Sedlik?

MR. SEDLIK: On the question of

intentionality or recklessness, you know, I do work at

a college, and I have had the opportunity, by working

as an expert witness, to kind of look behind the

curtain at a number of institutions, including state
institutions, and how they operate, and how they control, or do not control, the intellectual property that is in their possession.

I'm not talking about any institution that anybody on this panel is involved with, but there are works that are stored on professors' hard drives that they've obtained from Google images, there are open servers that staff and students can access without any knowledge of the IP policies.

There is a lack of supervision to ensure adherence to IP policies, there's a lack of training of staff and students on IP policies, there's works that are used without a fair use analysis, and there are digital asset management systems that are not set up to include the rights information for the works that are stored in them, such that people accessing those digital asset management systems don't know whether or not they can make use of the work, and they may make use of the work regardless. And that is reckless disregard, which is the equivalent of intent.

MS. SMITH: Okay. So we are going a little bit over on this panel, which was a regular length schedule. It's to stop at 11:30 because we got a bit of a late start. Our panel two starts 11:45, so we're kind of heading in for a break, but I want to ask a
couple of questions on recklessness or intentionality
to give people an opportunity to speak on that issue
if they have not already.

I don't know, Mr. Madigan, do you have
thoughts about, absent courts, the best way that the
Copyright Office should evaluate some of the survey
responses to determine whether conduct was intentional
or reckless?

And, particularly, I think one thing that
would be helpful, we've really appreciated hearing
from all of the educational entities here today, but
if there is also anyone who can speak to outside of
the educational context, other state actors, or ways
we might evaluate those questions, I think that would
be helpful to us.

MR. MADIGAN: Sure. Well I'd have to go
back and look at some of the specific responses, but I
think that there were -- there was a pattern shown in
the responses to our survey that showed at least
non-negligent examples of infringement.

There were situations described where
attorneys' warnings or cease and desist letters were
ignored. As Mr. Allen was talking about earlier,
copyright management information, or watermarks, or
copyright marks on the works were either ignored or
removed. And then there were also instances in which
the use of a work continued after a license expired
when the institute was aware of that license expiring.

So, you know, while I'm sure there are
plenty of inadvertent infringements, there does appear
to also be intentional, non-negligent instances of
infringement, which I know some of the authors and
creators can attest to. So I think those are some of
the things we want to consider.

MS. SMITH: Thank you. One housekeeping
matter.

Ms. Johnson, you had put in the chat, you'd
reported that you sent some letters. Could you say
that on video so we can get them in the record because
the chat itself is not being transcribed, as well as
anything else you'd like to speak on this topic.

MS. JOHNSON: We did send out cease and
desist letters just recently, and so we did get a
response from Texas A&M University that they were
looking into it, but we have not yet got a response
back from the Corpus Christi independent school
district.

Even though we had many visits with several
principals in the area, we had met with counselors,
particularly at one particular high school we met with
counselors, we met with the principal, we met with
math teachers, we were moving forward dealing with our
TSI math program, and then -- suddenly, we -- they
never -- they would not return our phone calls after
we had met with them.

And then we found out later on that our
book, and pieces of our book were being passed out at
certain high schools. And this high school is
actually on the list that the university helps and
works with, so we're thinking possibly -- even though
because -- we were in talks with them, that -- all of
a sudden the talks just halted.

So we're thinking that they got a hold to
some of the material and began using it as their own
through the university because the program works with
-- between the two of them. And so, just all of a
sudden, things no longer were being negotiated and
talked about, and contracts weren't made. As a
result, I'm feeling when -- our materials start being
passed out freely through the local district and other
districts.

MS. SMITH: Well I think that's a perfect
way to segue to how this is affecting negotiations.
Ms. Mangum?

MS. MANGUM: Thank you, Ms. Johnson.
I want to talk to Mr. Madigan, as a representative of the copyright owners. To what extent do you know that licensing terms differ when the licensee is a state entity, and what is the basis for concluding that these differences, any differences, are because of sovereign immunity?

MR. MADIGAN: Sure. So in our survey results we had about -- only about 14 percent of respondents said that they license to state entities. We asked whether they provide different payment licensing -- for licensing terms and transactions with state entities. We had 23 percent answer yes, with 56 percent answering no.

Out of those respondents, 68 percent of copyright owners responded that they believed they'd lost revenue or licensing opportunities due to state infringement. Only 10 percent responded that they did not believe that they had lost licensing or revenue opportunities.

Many of the respondents who answered yes went on to describe the losses they incurred, including things like lost book sales, lost subscriptions, and licensing fees for photographs and video footage, but also more intangible losses, such as careers cut short due to lost revenue or time spent...
trying to, you know, stop the infringement.

MS. MANGUM: Mr. Munter, I believe you wanted to respond?

MR. MUNTER: I didn't have anything planned, but, yes, it's important to remember, especially, like, in the news context, that these are copyright holders whose works are used by states for their own purposes, as in, like, they stay up to date on what is happening in their communities, in addition to the newspapers keeping communities themselves informed.

In the CalPERS case -- in some cases, as Mr. Linder noted, the damages -- the potential licenses were worth millions, and that is a lot of money for newspapers, especially small, local newspapers who are connected to their community and depend on a very limited group of subscribers. So to see state entities infringe the copyright of these newspapers is especially disheartening.

MS. MANGUM: Thank you so much.

I wanted to ask either Mr. Thro, or, Ms. Benson, you could respond, how often do state entities, to your knowledge, offer to pay a fee, or a licensing fee once an alleged misuse of copyright is brought to the entity's attention, and if these fees aren't paid, are there situations where there's
another remedy for the creator? Mr. Thro?

MR. THRO: Yes. Ms. Benson may have more specifics. I note that she just said that the University of Illinois spends $16 million a year on licenses for various copyrights. I think, and this is purely anecdotal, it would depend upon the situation.

If we get something where there -- where, in our analysis, there is a clear violation, and reasonable people will disagree on the contours of fair use and whether or not something is, or is not, a violation, but if we get something that is a clear violation, we will either cease using it immediately, or, if it's something that we actually do need, we would negotiate an appropriate licensing arrangement.

In talking to my peers at other institutions, I think that's probably standard among large state universities.

MS. MANGUM: So, to clarify, a fee isn't offered even if it's a clear intentional violation. Unless the agency or entity doesn't need the work in the future, there's no fee offered, generally?

MR. THRO: I mean, if it's something that we don't need, we would, obviously, cease and desist using it. If it's something that we need going forward, we would work out a licensing agreement.
There may be circumstances where, particularly if it has been a longstanding infringement, we might offer some sort of fee or reimbursement.

But, as Ms. Benson and others have said, universities are in the business of creating, and it's very important to us to preserve not only our copyrights, but our intellectual property. We're not going to intentionally violate, we're not going to do something on a large-scale industrial level. Occasionally, people will violate. When those come to our attention, we will stop that, negotiate out a -- if we need it, some sort of licensing agreement.

MS. BENSON: If I may, I just wanted to add that our library is one of the largest in the world. We spend $16 million in licensing fees. I'm curious as to why we would pay such an enormous amount of money to license databases and electronic works if we are intentional infringers. To me, that is an enormous amount of money that we're spending. And we do take it very seriously. I actually work with our patrons who are doing mass downloads for text analysis, for instance. If it violates terms of service, they will contact me and I will work with a vendor to come up with an agreement because we do not wish to violate our licensing
agreements, and to lose our relationships with our
vendors, of course, because we are customers of our
vendors.

So I do think that when we do have an
instance where we know we've infringed and it comes to
our counsel -- again, that's very limited amounts --
they will work with the person, and, often, it will
result in a payment. We don't assert sovereign
immunity, we will stop using that item. That is my
understanding from talking to our general counsel's
office. I'm not the one who they talk to directly.

MS. MANGUM: Mr. Linder, did you want to
respond?

MR. LINDER: Yeah, I just wanted to respond
to the notion that state agencies being presented with
relevant infringement claim will stop using the work
that's been infringed, and if they want to use it in
the future and negotiate a proper license -- that's
the state of the law right now, right?

Even after Allen v. Cooper, a copyright
holder who finds that a state agency is misusing their
work can obtain an injunction against -- to cease the
work and against future use of that work, which is why
I think it's so important that we understand the sort
of standard-setting aspect of the law, because the
notion that a state agency will stop and then only pay money if they want to continue to use the content is the law is now.

If, as Congress had I think attempted, and intended, that was not the state of the law, then the state agency is in a very different position.

MS. SMITH: Mr. Sedlik, would you also want to speak to this? We're entering last call.

MR. SEDLIK: Yes. In my experience, the license terms employed by visual artists in contracting with the states are no different than the license terms they use when contracting with other parties. When those agreements are breached, of course they do have injunctive relief, but even Congress said in passing the CRCA in 1990, I believe they said that injunctions are an incomplete remedy. And that's very true because the artists can't get remuneration, they can't get their lost profits, and -- there are lost licensing opportunities.

If a state takes one of my photographs and puts it on the cover of a book, I can never license that photograph for another book cover during the copyright life of the work, because no publisher will take it for a book cover if it has previously been featured on a book cover.
MS. SMITH: Yeah. Just to be very clear, you're saying once you experience an infringement by a state actor, it is affecting the market for that work with others who may not be state actors, correct?

MR. SEDLIK: That's right.

MS. SMITH: Thank you.

So, Ms. Johnson, I think you have also said -- if you would like to share your experience about your additional products, and then I think we may be wrapping up. If anyone wants to say one last thing, raise your hand so we can get you; otherwise, we will be concluding. We'll go Mr. Madigan next after Ms. Johnson. Thank you.

MS. JOHNSON: Because of the infringement that we have experienced, we have been reluctant to put out our nursing math workbook because we're afraid that it might be also lifted because it's in the same style in which -- we know very much so that they like the style in which we're designing our books.

So we have not purposely put it out on the market because of the fear of copyright infringement, and maybe not be able to get our worth that we have put into this next book that we have waiting and ready to be put out, but the fear that someone's going to lift it also.
So it hasn't been a good place to be a creator when you know that people are stealing your work. And you know that they like it. I'm glad that they like it, but we're not getting any payment for what they do like.

MS. SMITH: Thank you, Ms. Johnson, for sharing your experience.

I think, Mr. Madigan, you can have the final comment. If you could try to be relatively brief because we are running a bit late.

MR. MADIGAN: Yeah, just a real quick closing thought. So there's this obvious back and forth going on between us and those who are opposed to abrogating state sovereign immunity who say there's no sufficient record of infringement, and then those of us who say there are, but I think it's important to understand that there's no magic number of infringements or a bright line that would trigger congressional action.

In Turner Broadcasting v. FCC, the Supreme Court held that Congress can use its legislative authority to make predictive judgments that further important government interests, and I believe that the evidence offered at these roundtables and in the comments period creates a record supportive of a
decision by Congress to make a predictive judgment on
the extent of harm caused by state copyright
infringement, and to take actions that further the
goals of our copyright system.

So I would just suggest that we sort of
consider sovereign immunity in a little bit of a
broader context of whether it really serves the goals
of the copyright system.

MS. SMITH: Thank you. And thank you all
for contributing to the panelist discussion. That is
a wrap for this one. We're going to take a brief
break for a sound check. So if you are on panel one,
you can turn your video off. If you are on panel two,
you can turn your video on. Let's try to start around
11:50. We'll do the best we can, and thank you.

(Whereupon, a short recess was taken.)

MR. AMER: Welcome back, everyone. Again,
my name is Kevin Amer. I'm Deputy General Counsel
here at the Copyright Office. We're really grateful
to have all of you here participating with us. We're
going to start session two, which is another panel on
evidence of state infringement.

Before we do, just a couple of housekeeping
reminders. First, for the panelists, if you could
just please remember when you're not speaking to mute
your microphone to avoid any extraneous noise.

Secondly, just a reminder for those watching on the public link, we are -- if you are interested in signing up to participate in the open mic session at the end of the day, you can do so at the link that should be provided in the chat here shortly on Survey Monkey, and then, at the end of the day, you'll be able to come back using the same public link to make comments as part of the open mic.

So let's get started. This panel, as I mentioned, has to do with evidence of infringement. It's going to follow, roughly, the same roadmap that the first session this morning did. First, we're going to I think talk in a broader way about the types of evidence that the Copyright Office should consider, what type of evidence, broadly, is relevant to assessing this question. Then I think we're going to move towards more specific examples that folks have raised in terms of identifying claims of infringement against states.

Then we would like to talk about the standard that the Court articulated in terms of what it means for infringement to be intentional -- what level of intent is required to satisfy the constitutional standard. And then, finally, we're
going to talk about any effect that sovereign immunity
may have in your experience on licensing negotiations
involving copyright owners and states.

So just to kick things off, if we could --
if I could ask all of the panelists to introduce
themselves. Let's start with Dr. Bell, please.

DR. BELL: My name is Dr. Keith Bell, and
I'm in private practice.

MR. AMER: And, Mr. Bynum, are you on the
phone?

(No response.)

MR. AMER: I see your name. I'm not sure if
Mr. Bynum is on.

(No response.)

MR. AMER: Let's go to -- is it -- I hope I
pronounce -- forgive me. Is it Laiho? Mr. Laiho?

MR. LAIHO: You got it. Good morning, my
name is Devin Laiho. I'm a senior assistant attorney
general with the Colorado Attorney General's Office.
we advise executive branch state agencies, except for
some of the higher educational institutions in the
state. I just need to make a disclaimer that any
comments that I make today are not made on behalf of
any of our clients or state agencies.

MR. AMER: Great. Thank you.
Ms. Levine?

MS. LEVINE: My name is Melissa Levine. I direct the Copyright Office at the University of Michigan library. I also am a lecturer for the University of Michigan School of Information, where I teach a course on intellectual property information law, and want to mention that I'm part of -- I'm a founding member of a working group that established rightsstatements.org, which is geared towards providing relevant intellectual property information for educational and cultural needs.

MR. AMER: Thank you.

Mr. MacDonald?

MR. MACDONALD: Good morning, everybody, my name is Angus MacDonald. I work at the University of California's Office of General Counsel. I handle copyright matters for the entire University of California system, which comprises 10 UC campuses, five medical centers, and three affiliated national laboratories. I just want to thank the Copyright Office for hosting this roundtable to discuss this significant constitutional issue. Thank you.

MR. AMER: Thank you.

Mr. Molnar?

MR. MOLNAR: My name's Isaac Molnar. I am
intellectual property counsel for the Ohio Attorney General. In Ohio, the attorney general is required by law to represent every state entity, and, as IP counsel, all copyright claims, cease and desist letters, et cetera, come to me, so I have a pretty good idea of copyright infringement issues in Ohio.

MR. AMER: Thank you.

Ms. Murphy?

MS. MURPHY: Hi, I'm Kristen Murphy. I'm the director of the American Chemical Society's Examinations Institute, and I'm also a professor of chemistry and biochemistry at the University of Wisconsin, Milwaukee.

MR. AMER: And, finally, Mr. Wassom?

MR. WASSOM: Hi, I'm a private practitioner in a law firm based in Michigan. I am here today on behalf of the American Intellectual Property Law Association, the AIPLA, and, as Mr. Laiho did, I'm going to just disclaim that I'm not speaking today on behalf of myself, my firm, or my clients, but rather, on behalf of the AIPLA.

MR. AMER: Great. Thank you all again. So, as I mentioned, I would like to start at sort of a higher level and talk to you about what sorts of evidence is relevant, and I actually -- Mr. Wassom,
I'd like to start with you if I could.

In AIPLA's submission, you listed a number of copyright infringement suits that have been brought against states in the past I believe two decades. Mr. Bynum also submitted a lengthy list of infringement actions brought against states. I'm wondering if you could talk a bit about your view in terms of what we can draw from that sort of evidence in terms of assessing the prevalence of infringement by states.

MR. WASSOM: Sure. Thanks, Kevin. So in AIPLA's submission, we identified 19 different written decisions from litigated cases that are available online and in publicly-available databases. What's interesting about the cases themselves is the breadth of works and of state agencies that were involved in the cases.

So the works themselves include such diverse examples as photographs, video recordings, standardized tests, books, book chapters, graphic designs, paintings, software, databases, teaching materials, and research reports, which speaks to the wide swath of creators and creative institutions that are impacted by this sort of activity.

The defendants in these cases included state-sponsored commissions, institutes, foundations,
boards, bureaus, educational institutions, and hospitals, again reminding us that when we speak of abstract terms, like the state, it really encompasses a broad range of entities with whom creators may interact and entities that may otherwise use copyrighted materials that non-state actors would need to pay a license fee for or face recrimination for infringing.

Our members, which include both private practitioners, in-house counsel, counsel for public entities, but a wide -- a large number of private practitioners who are in the trenches day in and day out fighting these cases, strongly suspect that this is really only the tip of the iceberg.

As any practitioner understands, the number of cases filed versus the number that actually result in a public opinion, there's a wide discrepancy between the two, and the number of unreported, settled, or never filed lawsuits is almost inevitably much higher than what we see from these 19 different cases.

In addition, the cost of litigation and the obvious futility of bringing infringement claims against the state entities, we suspect, and we understand anecdotally, would deter a number of cases
that might have otherwise been filed.

It's important to remember here that, as the Supreme Court itself explained in the Allen decision, the writing has been on the wall for the CRCA for at least two decades before the Court finally acknowledged its death.

The vast majority of lower Court decisions had already decided that the CRCA was unconstitutional, and practitioners know that, so not only the number of creators understand that the remedy is futile, but the attorneys who had otherwise filed those cases on behalf of the creators understood that those cases were futile.

To sum up, these 19 cases, we believe, are the tip of the iceberg on the infringement that is actually occurring.

MR. AMER: So that's an interesting point, I mean, because you're right. And one of the points that we've heard in the comments is the fact that, as the Court said in the Allen v. Cooper decision, the law after Florida Prepaid was fairly clear that sovereign immunity precluded copyright claims against states, so, in some ways, it seems surprising that there would continue to be significant numbers of cases.
Were you able to determine to what extent these cases involved claims for damages against states, as opposed to, for example, claims for injunctive relief brought against individual state officials?

MR. WASSOM: So we didn't drill down to that level of specificity in terms of gathering hard data and numbers, but our read of these cases is that each of them, the plaintiffs sought damages, and that would have been something that they sought, but for the fact that they were stymied by immunity.

MR. AMER: And is it your understanding, just from having looked at those cases, that, essentially, they were efforts to distinguish the CRCA from the Patent Remedy Act that was addressed? I mean, were they essentially trying to make the argument that, notwithstanding Florida Prepaid, sovereign immunity did not apply?

MR. WASSOM: Again, the level of legal analysis and the strategies used vary from case to case, but all of them, in one form or another, were trying to get the relief that CRCA otherwise would have provided.

MR. AMER: Mr. MacDonald, looks like you've raised your hand. Would you like to weigh in on the
I'd just like to provide a little bit of context because I did review the AIPLA submission. In response to the -- question one about specific instances, as Mr. Wassom pointed out, there are 19 examples, but it was over the span of 36 years. If you look at the first bullet -- one of the earlier cases that's bullet pointed in the AIPLA submission, it's from 1984, and it goes through instances of 2020. Nineteen examples over the course of 36 years does not seem like an overwhelming amount so -- that would necessitate abrogating constitutionally-protected sovereign immunity.

I also think that these examples, these bullet points, are not entirely probative for the Copyright Office's inquiry. I haven't heard, and I haven't seen, anything in the AIPLA submission, or in other submissions, that -- of any proof, or evidence, or a determination that, setting aside 11th Amendment sovereign immunity, the state defendants did not have meritorious, or at least plausible, defenses that, had they been fully litigated, they may have prevailed.

I think it's going to be that level of inquiry that's going to be required based on whatever
is available in the public record on these various matters, most of which did get dismissed at an early stage because of sovereign immunity.

There's another reason why I just think that this bullet pointed list is not entirely probative. It simply purports to identify how state entities responded in response to a copyright infringement lawsuit: by relying on their constitutionally-protected sovereign immunity, among other defenses. It doesn't actually establish that any of these alleged infringements, at the time of the alleged infringement, were done with intentional or reckless intent, and that's the standard that we're talking about.

I think it's going to be far more probative to actually look at fully-litigated cases, cases involving public entities that, for whatever reason, sovereign immunity didn't apply. I'm sure the Copyright Office and others on this panel are aware of the Georgia State litigation where the publishers ended up losing on almost all the counts and having to actually pay the costs of Georgia State, or the Authors Guild v. HathiTrust matter involving the University of Michigan, the University of California, and other state institutions. I'll pause right there.
MR. AMER: Thank you. Now, so you've raised a number of important points that I want to sort of take in turn here. You first mentioned the number of cases. I guess there were 19 in the AIPLA's submission.

If Mr. Bynum is on the phone, I would like to invite him to weigh on in this question of the number of cases that are relevant here. Mr. Bynum, are you there?

(No response.)

MR. AMER: Okay, I guess not.

Well let me turn it back to you, Mr. Wassom. What I was going to ask Mr. Bynum, I was going to ask him about this list of, I think it's almost 160 cases that he provided to us. Mr. Wassom, AIPLA's submission was I guess a subset of that longer list. Did you intend that to be just sort of a representative sample, or was there a reason that you limited your submission to 19 cases rather than the full 160?

MR. WASSOM: Oh, by no means did we intend it to be an exhaustive list. It is, in fact, a representative sample. To Mr. MacDonald's point, there's certainly more analysis that could be done of those decisions, and we wanted to dig deeper into each
one and talk about what the relevant issues are. I'm sure some are going to be more probative than others. That's fine.

It's not meant to be a smoking gun, but it's certainly indicative, we feel, of the state of the law and the state of infringement activity that's going on. The cases are all there. They're all accessible in public databases for the world to read and the Office to study as well. Certainly, if the Office would invite AIPLA's further submission and analysis of those cases, that's something that we could provide.

I would say, though, that 19 issues -- 19 cases on an issue that ought to have already been so clear, as a matter of constitution law, I think -- Kevin, to your point though, you kind of -- I read a suggestion in your initial comments that that's actually a fair number of cases compared to what the understanding should have already been.

As a litigator, I know that there are a number of issues that I wish someone else would have spent hundreds of thousands of dollars litigating fully all of the various possible defenses so that we would have a robust public record of what the merits of each case are, but we can't expect another party to
do that.

MR. AMER: Well, right. So just to maybe

turn back to you, Mr. MacDonald, and I want to bring

others in, too, I mean, you made an important point, I

think, in noting that it's not clear from just the

fact that these cases were filed to what extent the

states may have had other valid defenses, whether the

copyright owners ultimately would have prevailed.

I think, from our standpoint at the

Copyright Office, the question is what other evidence

-- I mean, the problem with us using those cases is

the fact that they've -- the merits are not able to be

addressed because of sovereign immunity, right? So

the cases don't really provide a vehicle for us to

assess whether there were meritorious defenses, et

cetera.

So do you have thoughts about other sorts of

evidence or ways that we can use these sorts of cases

to make this assessment?

MR. MACDONALD: Yes, I do. Well, as I

mentioned, there are some fully-litigated cases where

sovereign immunity, for whatever reason, was not at

issue or did not preclude a decision on the merits,

and I cited a couple, and there is an extensive record

in the Georgia State litigation, as well as in the
Authors Guild v. HathiTrust litigation.

I do think that that -- those cases are going be far more probative than, you know, 19 cases that have been dismissed at a motion to dismiss level. That's point number one.

The second point that I think -- in terms of looking at evidence -- and I do respect and admire, and I think it's going to be a significant project for the Office to really get into the evidence, but one of the questions in the notice of inquiry, which is Question 1-F, is whether the infringement was committed pursuant to a state policy.

I have looked at most of the initial comments, as well as the reply comments submitted in response to the notice of inquiry. I saw no evidence whatsoever of state policies that -- where the state institution had a policy of we're just going to infringe and not worry about it and rely upon sovereign immunity.

I think we heard from Mr. Thro of the University of Kentucky who provided some elucidation about what is really required here. It's a de facto policy, or a pervasive pattern or practice of infringement. Again, I don't see that.

The third point is that I really do think
it's going to require going into the public record for
a lot of these cases and a lot of the points that Mr.
Bynum and AIPLA had submitted to see what is raised in
the motion to dismiss. Was it purely sovereign
immunity, or were there meritorious other defenses
that were raised?

Just by way of example, I did carefully look
at the AIPLA submission, and I did look at Mr. Bynum,
and I was looking specifically for the University of
California, and there was a reference to a 1987 case
called B.V. Engineering v. UCLA, and in the second
paragraph of the District Court's decision, which, of
course, granted sovereign immunity, it specifically
said that the defendant regent's motion is based on
various grounds, including a claim that defendant is
entitled to immunity from suit under the 11th
Amendment.

And then in the -- two sentences later, the
Court says it does not reach the remaining issues
posed by the parties on their motions for summary
judgment, the point being is there are typically many
meritorious defenses that are raised, at least in my
own practice and from what I've observed with other
state institutions, aside from the sovereign immunity,
and I do think that those need to be carefully looked
at.

MR. AMER: Thank you.

Mr. Wassom, I see you've raised your hand so I'm going to go back to you quickly, and then I would invite, particularly, folks from states to weigh in on this question, too. I mean, I would say, at least on its face, the fact that we have evidence of up to 160 cases filed against states since 2000 for copyright infringement seems noteworthy, and so I wonder if other state representatives agree with Mr. MacDonald that we sort of need to look at those cases on a more granular level to determine whether there's this sort of a pervasive issue. But, Mr. Wassom, you wanted to respond?

MR. WASSOM: Thank you. Two quick points and I'll pass the mic. The first is it's the number of cases that either were never filed or were filed at the complaint stage and abandoned which are -- the data that's provided so far suggests that number is going to be orders of magnitude higher than the number of cases we can actually identify with decisions that were reached.

The second being Mr. MacDonald's point is a great one that there -- that state entities have wide variety of other defenses available to them, and once
the state -- once -- if, in fact, the CRCA, that remedy was re-adopted and sovereign immunity no longer became an issue, now we'll be able to actually litigate those and be able to determine their merits, and the availability of those defenses is a great reason for state entities to not fear that the sky is falling just because the CRCA is reinstated.

They have a wide variety of other defenses to fall back on, so the impact on those state agencies is likely to be muted by those.

MR. AMER: All right, thank you. Mr. Laiho?

MR. LAIHO: Yes. One of the things that I wanted to comment on is that -- is the number of cases and the number of allegations that we get of infringement. So while it's true that state agencies do occasionally receive emails or letters alleging that they've infringed on authors' work, when I say occasionally, I'm talking about a handful of allegations over a multi-year period.

I've been in our office for over 20 years, and, on average, our office receives maybe one infringement allegation per year, and that's across all of the different state agencies that we represent. So I think it's really important to understand that. This isn't some pervasive pattern of even allegations
that the state agencies are infringing authors'
content.

MR. AMER: Yes, Mr. Molnar?

MR. MOLNAR: Yeah, I would just follow up.

As IP counsel for State of Ohio, I've been since 2012,
so going on nine full years, and I have -- I went back
and counted how many cease and desist letters I've had
to deal with for all our state entities: two year
colleges, four year colleges, state agencies, and it
amounted to seven over the course of nine years. Just
cease and desist letters.

And, of those seven, we actually -- there
two or three that were meritorious, and we settled.
We paid the -- paid out some judgment, and that's a
matter of public record. So they just don't come up
very often. They really don't. At least in my
practice. Like I said, I think this is consistent
with what Mr. Laiho said, I'd expect to see a cease
and desist letter maybe once or twice a year.

MR. AMER: So you mentioned paying out
settlements, or paying damages.

MR. MOLNAR: Yeah.

MR. AMER: Is that the state's typical
practice when presented with an infringement claim? I
mean, do you undertake an assessment of the merits,
and, if you find it meritorious, try to work out a financial settlement, or is it typical that you will assert sovereign immunity?

MR. MOLNAR: I don't know what the law is in the other states, but in Ohio there's a pretty easy workaround to allow for immunity, so the state will be, potentially, on the hook regardless of whether or not we assert 11th Amendment immunity or not.

That is, you can sue -- if you can obtain a public records request, find out the individual who's actually responsible for the copyright infringement, sue them in a personal capacity, and, under Ohio law, we represent them, and then indemnify them. So we have to be very cognizant of that risk.

So we really assess the merit of claims, and where we've had meritorious claims, like, clear copyright infringement, we've settled, period. And then, we're also the chief state law enforcement officer, and it's not a particularly good look, in our opinion, to use the 11th Amendment the way this -- you know, as a technicality to avoid following the law. So we have two different approaches, but they work in, I think, the same way.

MR. AMER: So you were talking before about, I assume, 1983 suits against the state officials in
their personal capacity? Was that what you were --

MR. MOLNAR: Well, you can sue an individual
in their personal capacity for copyright infringement.
Just a copyright claim against that individual. We've
had to deal with that case. We had a case where our
agency, it was the Department of Natural Resources,
was sued, and we dismissed that on 11th Amendment
grounds because it was not a proper suit, but they
brought the suit again.

We told them if you know who did it, if you
have a name of an individual, which they did, then you
need to sue them in their personal capacity, and they
did.

MR. AMER: But I'm talking about situations
where the state employee is acting pursuant to state
policy or acting in their capacity as a state
official. In that circumstance, you would need to
bring the action under 1983, I gather, right, and the
official would be entitled to qualified immunity?

MR. MOLNAR: So I'm not sure you would bring
it under 1983. I mean, the claims that I've seen and
where this has come up, it's been a claim for
copyright infringement. Now, district courts that
have considered it have said qualified immunity
applies in that case.
MR. AMER: Okay. Mr. MacDonald, you raised your hand.

MR. MACDONALD: Yes. Thank you for again allowing me the opportunity. The answer is, yes, we do pay from time to time. I don't have any sort of specific numbers, but, in response to credible, meritorious claims of copyright infringement where our own defenses, separate from sovereign immunity, are, in my opinion, not very strong, I do recommend some payment to settle the matter because we respect copyrights.

We have various policies that require us to adhere to copyrights. We're subject to the Higher Education Opportunity Act which requires annual copyright disclosures or, potentially, our federal funding is withheld. So, yes, we do pay on occasion. I would say it's certainly less than 50 percent, but certainly greater than zero percent.

And in a few instances we have settled on, sometimes in addition to payment or sometimes in lieu of payment, to take corrective measures with the aggrieved copyright owner. One such example was where a college radio station had to impose some educational requirements to all of their new employees about copyright, and copyright infringement, and the balance
of fair use. So those are some of the examples where
we do take measures, including payment, in response to
credible copyright infringement claims.

MR. AMER: Great. I do want to turn to some
of the copyright owners who have raised specific
allegations of infringement that they've experienced
by states.

Dr. Bell, I'd like to start with you, if I
could. You have submitted comments through the
Copyright Alliance alleging numerous infringements by
multiple state entities. I was wondering if you could
just give a brief sort of overview of those
situations, and the types of infringements that you're
claiming, and how the states have responded.

DR. BELL: Okay. Well, again, I think this
is just the tip of the iceberg, but I've identified
more than 130 universities, public universities, who
have infringed or whose employees have infringed upon
my copyright. Now the question of whether it's
meritorious, we probably would disagree on many of
them, but that's something I'd like to see happen in
Court rather than just not being able to go after them
because of sovereign immunity.

In Ohio, I wrote a cease and desist, and the
only responses I got was we claim sovereign immunity.
University of Texas is particularly of interest to me. It's a great university, and I got my Master's there and my Doctorate, and did post doc there, and worked there.

They have a very strong brand, make a fortune on licensing their works, and are well-respected in the community with what their policies are, but when I had multiple infringements by employees of the University of Texas, the only response I got was sovereign immunity.

MR. AMER: Let's just back up. So you are -- you have a number of books that you've published --

DR. BELL: Yes.

MR. AMER: -- correct? Could you describe sort of the nature of the infringements that you're experiencing? What are the states actually doing with your works?

DR. BELL: So I've written 11 books, 10 of them on sports psychology and human performance psychology. I have a copyright on the book Winning Isn't Normal, and a separate copyright on the name -- the heart of the book, the main passage that I wrote the book around, also called Winning Isn't Normal.

All of my books have been infringed upon, but Winning Isn't Normal particularly has been hugely
infringed upon. It's been distributed, disseminated by -- out to -- disseminated out to, literally, millions of people without any kind of remuneration from them. Some of it is very clearly infringement. The University of Louisville, for example, each of their -- eight of their sports infringed on my copyright, gave attribution to anonymous. And at least one of those stories had prior warnings from the national governing body in that sport, and yet the infringement continued.

MR. AMER: So what, exactly, was the infringement? What did they do?

DR. BELL: Well, first of all, they infringed upon my right to how it's used. So, for example, I have a number of -- I have, particularly derivatives, of a passage specifically that has a copyright on that is going, or being distributed widely right now.

It has a phrase in there that's illiterate and nonsensical, and that's really very embarrassing to me, as an author, right? That bothers me. They distributed unbelievably widely. I have one particular derivative that has been copied and disseminated millions of times.

A very important part of my concern with
this is that because of all the infringing on my works, I stopped writing. I was very prolific in getting a bunch of books out in a fairly short number of years, but the amount of sales that's gone on makes it very difficult for me to collect and stop people stealing my work, and particularly if it's the state. I think that hurts society, that people sort of just stop writing.

MR. AMER: I know you've filed -- you've asserted claims in a number of courts, infringement suits, and so, in those cases, is the typical response, or is sovereign immunity one of the defenses that states have typically raised?

DR. BELL: I don't think so. I'm not sure, but I don't think so in those particular cases. There are hundreds of cases that I haven't pursued because of sovereign immunity. I can't afford to do that, and I can't afford to take them to trial.

I think that my goal in sending a cease and desist is to get them to stop, but I also want there to be a deterrent effect to stop other people. So, for example, I've had multiple infringements from Northeastern State University, and they did it over many of their sports, and their recruiting office, and some of the other administrative offices, and I just
couldn't go after them with sovereign immunity.

The universities license their brands, their trademarks, their patents, and their copyrights, and they make sure that even their own employees -- they own what their own employees do a lot of the time, and if their employees on their own then go use it, then they go after their own employees. They also punish students for that kind of behavior. I find that appalling.

MR. AMER: Thank you. That's helpful.

I do, just in the interest of time, want to move to -- I believe -- Mr. Bynum, are you there now?

(No response.)

MR. AMER: One of these times this will work, but apparently not yet. Okay. I would like then to turn to Ms. Murphy. You've talked about infringements of various pieces of intellectual property that the American Chemical Society has produced. Could you talk just generally about what sorts of infringements by states you've experienced?

MS. MURPHY: Of course. Thank you. So just so everyone's clear, I'm actually part of the Division of Chemical Education, which is a technical division of the American Chemical Society. Of that, we have an entity called the Examination Institute, and that's
what I lead. We're a very small group, unlike our parent organization, ACS. We've been around since 1934, and we produce standardized tests in chemistry. These are used by many institutions -- currently, over 2,500 institutions use our exams in some capacity -- and we hold secure copyrights on our test items.

Because many of our tests are used for final exams, our test lifetime is actually quite long, depending on the area. So a general chemistry or organic chemistry test might only live from -- as a released or active test for maybe four to six years, a physical chemistry test might live for 10 to 12 years because it takes so long to develop these exams.

The types of infringement that we've experienced over the number of years that I've been director, and that's a little over five years, have included actions by employees of institutions, where they have either photocopied our tests or they've translated our materials into either study materials or their own exams using learning management systems or directly using paper tests, most commonly using learning management systems.

And then the other component of this is where the secure site that is supposed to be set up in
which the tests are administered is not, in fact, as secure as it needs to be, and students then are the ones that either take pictures of the exams or they remove tests from the site, and then, obviously, that comprises our items.

We've had a fairly good experience being able to work with institutions that infringe that are private that are not part of state institutions, and we've been able to seek some damages and be able to -- really, the more important thing -- not the damages, but the more important thing is to be able to correct actions so that the infringement doesn't continue.

We have many entities that are a part of state institutions. Sometimes they're actually state universities, sometimes they're connected to state universities, and it does get murky, where we have come up against sovereign immunity almost immediately.

In fact, I'm a chemist, not a lawyer, so I apologize for not being well-versed in what so many of you are, but the lawyers that we work with oftentimes will tell us that we're simply not able to pursue things simply because it's a state institution, and we stop at that point.

We certainly make every effort to be able to have the materials removed, but, oftentimes, that
falls to us then. Because there's nothing we can do, we have to recall tests. Hundreds of thousands of dollars are spent on our side, and, like I said, we're a very small group. We have 60 products that we're trying to protect with about five people.

MR. AMER: Okay. Let me just jump in. It sounds to me like we have some background noise, so if everyone who is not speaking could --

MR. GRAY: Kevin, I think that may be Mr. Bynum, actually.

MR. AMER: Oh, wait. Let me just --

MR. GRAY: Mr. Bynum, can you hear us?

MR. AMER: I think I can mute him. Okay.

Thank you, Ms. Murphy. I just want to ask a couple of clarifying questions. So you produce -- are they model exams? I'm interested in sort of what your normal marketing practices are. You know, who are your customers for these sorts of materials? What's the normal business practice?

MS. MURPHY: So our customers are actually faculty and instructors in departments. So to go to a procurement model or license for a university just doesn't fit our product because it's simply not widespread use by a university, it's only used by chemistry departments. The customers range from high
schools all the way through R1 universities.

MR. AMER: So I wasn't totally clear. Have you encountered situations where you've contacted states, or a municipality, or a state entity and brought an infringement to their attention, and what has their response been?

MS. MURPHY: We have been told that, under sovereign immunity, that we have no recourse, and, at that point, we've dropped it.

MR. AMER: Can you tell us what state, or states, have said that?

MS. MURPHY: I don't think I can disclose that. Some of these things are actually ongoing investigations at this time, so I'm sorry --

MR. AMER: No --

MS. MURPHY: -- I'm just trying to be very careful.

MR. AMER: -- I understand. And have the states said that they intend to keep using the materials?

MS. MURPHY: Okay. So, and that's where it comes to we're looking for corrective action primarily. It's less about getting damages and more about correcting the action so that our items stay secure, and that's been somewhat successful in terms
of being able to work with the faculty to provide a secure environment so that it doesn't continue to happen.

And we do get corrective action in terms of if it was a willful act by an instructor, to have it removed, but that's too late at that point. We have to recall the test, and we are the ones that have to pay the costs associated with that. And we can only sustain so much. I mean, we are a very small entity.

MR. AMER: Okay, thank you.

I'm going to try one more time with Mr. Bynum. Are you there, Mr. Bynum?

MR. BYNUM: Yeah --

(Away from microphone.)

MR. AMER: Mr. Bynum, are you there?

MR. BYNUM: Yes. Yes. It --

(Away from microphone.)

MR. AMER: Mr. Bynum, are you there?

MR. BYNUM: Hello?

MR. AMER: Yeah, we can barely hear you.

MR. ANDREADIS: Mr. Bynum, you may need to change your audio to call in. I will try to help you offline in the -- by IM'ing you directly, so -- if you can't do that yourself.

MR. BYNUM: Yes, I would appreciate your

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MR. AMER: Okay. Yeah, I think we may have to wait until we get that sorted out because I'm just not able to hear you, unfortunately.

I want to now turn to the issue of intentional infringements, and to what extent there is evidence that infringements by states are rising to the level of intentional infringement articulated by the Court, and I'm going to turn it over to my colleague, Mark Gray, to ask some questions about that.

MR. GRAY: Thanks, Kevin. So, as Kevin mentioned, in Allen v. Cooper, one of the things the Court was concerned about is whether copyright infringement was being done intentionally, recklessly, or negligently, and so to understand how we, at the Office, should think about that while we're going through the study, one of the things we are trying to figure out is, generally, when infringement claims are brought to a state, how does the state respond?

And so I think we already heard from Mr. MacDonald a little bit to this, and just a minute ago from Prof. Murphy, but, Dr. Bell, could you speak a little bit more? You mentioned that there was one instance where they said -- they raised immunity, but
could you speak to any others? I believe you are muted.

DR. BELL: Can you hear me now?

MR. GRAY: Yes. Perfectly. Thank you.

DR. BELL: So one of the things I wanted to comment on was -- that I missed before was that I have a tremendous number of infringements from public schools, and way more than from public universities, and I haven't gone after them because of sovereign immunity, although I have a few where they have responded to cease and desist by claiming sovereign immunity.

Particularly cogent, I think, in this case was one of the school districts in Michigan which claimed that it was state policy that -- to say that sovereign immunity was state policy in Michigan. Because of that, it's really had me cut back on the number of claims I've made to public schools in Michigan.

A couple other things that are of concern is being able to -- other people, private schools, private universities, vendors, teams, all who buy multiple copies of my books, are -- can't really compete with that. It's not fair to them.

And for me, one of the problems with
copyright law right now is that there are cases where many people claim, oh, geez, it's infringement, and that -- and I'd like to be able to litigate that, but it's really difficult if we're doing that.

They have the right to go make proposals, or try and argue fair use or things like that, but it's a situation now where a lot of them go and say it's all over the world, my work. There are millions and millions of copies of it out there. All anyone has to do is claim that they got it from an illegal source to muddy the waters on the merits of that copyright.

They'll claim innocent infringement, which we -- I'm happy to litigate, but I don't think it's just innocent infringement just because they got it from an illegal source instead of getting it directly from me.

MR. GRAY: So if I can ask two quick -- oh, sorry. Can I ask two quick questions about that, actually?

DR. BELL: Yeah.

MR. GRAY: So when you say, "illegal source", do you mean that they're claiming that they obtained it from a school district or another state entity?

DR. BELL: Sometimes, yes.
MR. GRAY: Okay.

DR. BELL: Sometimes they don't know where they got -- whose it was. It's just all over the internet without any attribution, or inappropriate attribution, misstated attribution, or anonymous, or no attribution at all, and so they say, well, gee, you know, I couldn't possibly have known, and, of course, they can. They have at least constructive knowledge that it's my work. It's very easy to find that out.

MR. GRAY: Great. And then my second question is you mentioned a Michigan school district saying that it was the state policy of Michigan. Could you give a little bit more examples of that? Do you mean they adopted your work as part of a curriculum, or what kind of policy?

DR. BELL: What I was told by that entity was that there was something, and it was state policy, and they gave me some number. I can't remember the number of it right now. But they told me it was policy.

MR. GRAY: Okay. In that case, I think Mr. MacDonald actually wanted to respond really quickly, so would you go ahead, Mr. MacDonald?

MR. MACDONALD: Thank you, Mark, and I promise to be brief. I appreciate your repeated
indulgences in allowing me to speak. I just want to briefly respond to Dr. Bell. Winning Isn't Normal, I actually read the heart of that book, the passage that has been copied on, according to Dr. Bell, numerous instances. It's a powerful statement. It was inspiring to me to read it. I have, and the University of California has, great respect for authors. In my professional capacity and pro bono work, I represent many of these authors.

However, with due respect to Dr. Bell, I think it's a very curious case study for the Copyright Alliance to highlight Dr. Bell in its submission. And in the APLU and the AAU reply submission it talks about Dr. Bell's recent track record of litigated matters that have, unfortunately for him, not fared very well.

He mentioned the school district in Michigan. There is a school district in Ohio, the Worthington City School District, where he lost on a litigated matter, not sovereign immunity, on fair use. It's referenced in the Copyright Office's fair use index: Southern District of Ohio, June 2, 2020, a fair use decision in favor of the school district, where the Court specifically talked about how it was not addressing the other arguments raised
by the defendants, including de minimis infringement, innocent infringement, and no vicarious liability.

Also, in 2019 Dr. Bell again lost his case, with prejudice, in the Bell v. Magna Times case in the District of Utah, April 29, 2019. Again, fair use.

In the most recent case, in my jurisdiction, the Northern District of California, Dr. Bell, on October 14, 2020, this year, less than two months ago, was ordered to pay $120,000 in attorneys' fees to a small non-profit pool club, and $2,000 in costs to the defendant. There were a lot of statements about exorbitant settlement demands, extortionate settlement demands, and not advancing the purposes of the Copyright Act.

MR. AMER: Let me just jump in. I certainly take the point that we want to look carefully at the merits of all the cases that folks are alleging. I don't want to go sort of too far down the road of assessing specific claims in fine detail. I don't know that we have time for that today.

I do want to ask sort of the broader point that we discussed a bit during the first session, which is what does it mean -- what sort of evidence should we be looking towards in deciding whether infringement activity by states is intentional?
Does that mean that the state actor has to know what they're doing is unlawful and they do it anyway, or can intentional mean that they intended to do the conduct but they may have a reasonable basis for concluding that something is fair use or it's otherwise lawful?

MR. MOLNAR: Yeah, so I would view it more as more towards the former, and I'll just give you an example of what we do in Ohio. And this is for every state agency and anyone who asks.

We have a fair use assessment where if someone wants to use a work in some way, whether it's for a class, even for a public records disclosure because we are, in fact, reproducing -- potentially reproducing someone's copyrighted work for a public record disclosure, even for that we go through and assess, or they'll have me assess whether or not -- what we think in terms of whether it's fair use or not and make a determination. Some of them are close calls and some of them are clearly fair use, in my opinion.

But, to me, that's being careful. I don't think that's being intentional, I think that's the state showing a respect for copyright laws and not necessarily just willfully going out and infringing
someone's copyright.

MR. GRAY: Yes, Mr. Laiho?

MR. LAIHO: You know, earlier I had mentioned the small number of complaints that we've seen over the many years, but the other thing that I think is notable that goes to the question you're asking right now is the intent issue. The occasional violations that we've seen are typically the result of a lack of familiarity with copyright principles, or it could be confusion related to the scope of licenses that either the state or a vendor may have.

I'm not personally aware of a single instance, even of the small number of instances of alleged violations we've seen, where an agency intentionally violated an author's intellectual property rights.

One thing I wanted to go to as well because I think it's important is, in the first panel, one of the speakers mentioned a situation where copyright information had been removed from an image, and that the entity had then used this image with the removed copyright information, and that was a subject of discussion for several minutes.

I think it's important to understand that the copyright information may have been removed by a
completely different entity and then placed on a website where that website may even be attempting, through the internet, to get people to search, for example, free images online that -- and I think it's much more likely that a state employee is going to be searching free images, finding something that may, in fact, be a copyright image that they're not authorized to use, but they think they are because the search they did was for free images of whatever it is that they're trying to post on their website.

I think it's important to understand that even in instances like that where it may appear on its face that there was intent because copyright information had been removed from an image, that it's often the case that it is not the -- a state employee who's actually done that removal, and that they've innocently obtained the image from a different website.

MR. GRAY: Thank you. I guess in the hypothetical instance -- let's speak purely in hypotheticals -- if a state employee did infringe intentionally and you figured that out during your investigation, what kind of penalties would that person face sort of in the employment context?

MR. LAIHO: If the question is coming back...
to me on that one, I'm --

MR. GRAY: Yes.

MR. LAIHO: -- not involved with the employment context. Typically, what we do -- what we've found, though, is that -- when we've identified infringement is that the content is immediately taken down. But, from the employment side, I don't have any information I can share on that.

MR. GRAY: And, Mr. MacDonald, do you have any experience with that either?

MR. MACDONALD: I do not. I have no experience whatsoever about an employee that has intentionally infringed and what the consequences are because we've never gotten to that point. Hypothetically, if there were a situation like that, that would be deemed, at the very least, as a violation of our university policy, which has the same force and effect of state law, and so appropriate sanctions might be levied against that individual staff member or faculty member.

Moreover, if the decision is to ultimately pay some sort of settlement fee, which I think we probably would in an intentional infringement type of a matter, it would come out of the department funds, and I think the department chair would take
appropriate measures against that particular individual for having to pay for a third party infringement claim.

MR. GRAY: Yes, Ms. Murphy?

MS. MURPHY: Could I just ask a question here? I mean, when it goes to intent, I understand that that's an important component as far as the law goes or, potentially, what you're seeking here, but it doesn't change the fact that the copyright gets violated. And, in some cases, the -- what might be perceived as I'm following copyright law and I'm using this, whatever material in a fair use setting, if it destroys the value of the materials, does it really matter what intent is?

I mean, the cost to the copyright holder is still the same. The materials are now destroyed, and they have to go back, and they have to create something new.

MR. AMER: Yeah, I mean, I think what we're trying to get at here is the constitutional standard that the Supreme Court was talking about in the Allen case where it talked about the fact that not every copyright infringement necessarily rises to the level of a constitutional violation, and that intentionality is relevant to that analysis.
Could I just go back quickly to you, Mr. Wassom? Just to preview, we're going to then ask about licensing practices, and, Mr. Bynum, I know you've been patient, and so we're, I think, probably going to direct the first question on that topic to you.

But just quickly, Mr. Wassom, I know in your comments you did discuss this question about what intentionality means in this context and whether it can be distinguished from willfulness. Could you describe your view on that question and whether you think that -- what showing you think is required to establish intentionality here?

MR. WASSOM: Sure. Very briefly, I would refer you to our written comments where we do have a discussion on the fact that there can be daylight between intent, meaning to commit copyright infringement, and negligence. There can be a degree of intentionality that rises to a cognizable level that ought to be taken into account without it being an intent to break the law, especially where the law here is so unclear.

But there is case law to support that, and I'd refer you to the written comments for a more in-depth explanation.
MR. AMER: Great. Thank you. I think now we would like to talk about licensing practices, and so I'm going to turn it over to my colleague, Melinda Kern, to -- Dr. Bell, did you have --

DR. BELL: Yeah. I just wanted the opportunity to respond to Mr. MacDonald. So in the case in California that he spoke of, the judge in that case said very clearly that I may very well have a very good case, but he did -- I think the judge did what he was supposed to do because it was a failure on my attorney's part to put any evidence to the courtroom.

We all know that there's some great people in every field, and some people who don't do very well in every field, and we, copyright holders, have to depend a lot on the attorneys who handle matters for us, and it's not easy to get -- necessarily get the best since attorneys become expensive.

And in the case in Ohio also, my attorneys filed against the wrong party and some other factors like that, and those things are going to be cleared up, and there are going to be some bad decisions, but there's also been a lot of clear-cut issues and better settlements in cases.

MR. AMER: Okay, thank you. I think we are
going to move on to licensing practices, so, Ms. Kern, you can start with that.

MS. KERN: Thank you. So the first question that I want to address is, basically, what role do sovereign immunity and other potential defenses play in choosing whether to negotiate with copyright owners, and I'd like to start with Mr. Laiho, Mr. Molnar, Mr. MacDonald, and then finish with Ms. Levine.

MR. LAIHO: So, from a licensing perspective, I mean, I think it's important to keep in mind that state agencies, it's very important to make sure that we protect authors' rights, and our office works with state agencies in Colorado to ensure that other agencies are not violating authors' intellectual property rights.

We do license a lot of content through various state agencies because it's important to recognize the value that these authors put into their works.

MR. MOLNAR: Yeah, in Ohio I -- we would say close to none. I mean, I can't think of an example in an actual business to business licensing situation between a state agency, or a university, or two year school where we have suggested, or said that we are
not going to pay as much because if -- of 11th Amendment immunity. That's not something that would enter the calculation.

MR. MACDONALD: Oh, it's my turn. I would echo those other comments, which is sovereign immunity plays no role, as far as I'm aware, on our licensing practices. I did some research systemwide at the University of California. We pay approximately $100 million every year in library content. Why would we pay such exorbitant sums if we would just intentionally infringe or have a policy of infringement? Some campuses pay well into the tens of millions of dollars a year.

This is just library content. This is separate from a lot of other content that we license for. But, again, I'm not aware of sovereign immunity every playing a role in our licensing practices or getting a discount on our licenses.

MS. LEVINE: Hi. I can only echo what some of my colleagues have said. And I want to refer back to the previous panel when Dean Smith mentioned that, in working both in public and private institutions, he never had an experience where sovereign immunity was discussed as a strategic component of a decision regarding a particular situation.
I've been at the University of Michigan library for a little over a decade. I've worked at Florida International University, another state university. I've also the privilege of working at the Library of Congress and the Smithsonian, federal agencies. Never in any of those situations has sovereign immunity come up as a strategic tool for blocking otherwise bad behavior.

Michigan, currently, in our library, we spent in the range of $29 million on collections, meaning things that we license and purchase. It's gone up over $10 million in the years that I've worked there. That does not include software, licenses, performance licenses, and the millions of other dollars worth of intellectual property that we purchase and license.

This has come up in several themes throughout this conversation, but the university environment, like the state, is an ecosystem. I'm not aware of any state policy encouraging or permitting violation of copyright by public school districts. I find that quite surprising. The school districts also spend lots of money on these materials, and there's not -- it doesn't make sense that there's intentional infringement that's reckless or widespread.
University of Michigan's Ann Arbor campus embodies in the range of 100,000 people, so we have about just shy of 32,000 undergrads currently, just shy of 17,000 graduate students, and about 51,000 employees, all of whom are subject to the law of the state and of the nation, all of whom can either be fired, dismissed, disciplined, expelled under employment rules under our university policies. I just don't, I don't see the larger issue vis-a-vis sovereign immunity.

MS. KERN: Thank you. Thank you for those comments.

So the next question I'd like to ask -- Mr. Wassom, I'll reference one of the statements in AIPLA's comments, basically, that said that state sovereign immunity detracts from content owners' bargaining power to license works to state entities because a large percentage of U.S. educational institutions are public, or at least partially-funded, state-funded, so, collectively, those institutions have substantial market power to drive down the licensing fees.

So I'll start with you. My question is kind of a three part question. Can you provide any specific examples on these practices? Do you believe
that the negotiation table is slanted before parties even reach that table? And then, relatedly -- and I believe some of the panelists before touched on this -- is there any evidence of how licensing terms for states differ in terms of those offered to private entities? I will start with you, and then if we could hear from Prof. Murphy, and Dr. Bell, and if Mr. Bynum is on, we'll hear from him as well, too.

MR. WASSOM: Sure. Thank you, Ms. Kern. In the interest of time, I'll collapse your questions into one answer, and that is we don't have specific data that AIPLA specifically has gathered on that. These are conclusions based on the case law that we've discussed and the anecdotal information we have available to us, and a logical extrapolation from that data.

But, no, we don't have specific case examples to add to the conversation on that point.

MS. MURPHY: In the case of Exam Institute, we don't actually seek licenses. We don't go through the procurement offices to be able to do that simply because we operate in such a small area. We're only in chemistry, and so, therefore, I've been informed that our ability to be able to seek such a license is likely not to be effective. So we don't go that
MS. KERN: And, Dr. Bell, did you have anything to add or? I believe you're muted. I believe you're muted, sir.

DR. BELL: I offer very reasonable licenses to institutions to use my work. The problem is social media. An institution can license my work for less than the cost of a poster or a book that I sell. Most often, I get from universities are -- teams, right? Coaches that are using my work to inspire performance, to motivate performance.

But instead of sending it out to 12 people on the wrestling team, or 30 people on the basketball team, or 120 on the football team, they put it on social media and send it out to millions. And it's made it so, I just can't -- It's too damaging for me to license to -- for social media work, right? But that's what they're using it for.

And when they do, of course they're violating their contracts with Twitter or Facebook. And those contracts are not with me, they're with them, but I'm harmed by those, right? So when they misrepresent that they own my work to social media platforms, I'm tremendously damaged from that, right?

I'm happy to offer licenses, and I offer
deep discounts for licenses for honest use of my work, right? But if they're going to put it out to a million people, I can't afford to license and make them buy it most of the time without it being hugely damaging to both of us.

MS. KERN: Thank you.

MR. AMER: Could I ask a quick follow up question I guess primarily to the representatives of states? So, I mean, the clear theme, I think, that you're expressing is that it's either exceedingly rare or almost unheard of for states to assert sovereign immunity in licensing negotiations.

Is there a little bit of a disconnect between that and the fact that states certainly have not hesitated to assert sovereign immunity in litigation? I mean, North Carolina, obviously, took the issue all the way to the Supreme Court, there have been numerous other cases that have been brought to our attention where states have asserted sovereign immunity, so I wonder what your thoughts are in terms of how common and how important the defense is in practice for states in responding to copyright claims.

MR. MOLNAR: So I think, at least from my perspective, that, in the context of a licensing negotiation, we've already entered into that
arrangement pre-supposing or kind of acknowledging that the work we're trying to use is of a value to a state. That if we're going to use it otherwise, it would be copyright infringement.

Where we've asserted the 11th Amendment immunity has been in cases where the cease and desist letter is brazenly just of no merit, and that's where we tend to use the 11th Amendment as a way to avoid having to litigate a case that is just -- lacks merit.

Where there's been meritorious claims, as I said, we've settled. Paid $120,000, we paid $10,000. Recently, we just paid $1,000 for example of someone who downloaded a picture that didn't have any attribution so they thought it was okay. They used it. We got a cease and desist letter, we paid it out.

So I think the 11th Amendment, from my perspective, as a defense is against -- is a way for the states to save money against frivolous litigation.

MR. AMER: Mr. MacDonald?

MR. MACDONALD: Thank you, Kevin. That's a great question. I see no disconnect, and here's why. Public universities are copyright stewards. We are copyright owners, large copyright owners, copyright creators. We have lots of faculty that publish. We need to be good adherents to copyright law, which is
why we pursue such vast licensing programs and have
such a high volume of staff that are devoted to
licensing.

I see no disconnect between that and in
litigation, assuming that settlement discussions have
not produced a settlement and a litigation occurs, to
cite and rely upon sovereign immunity, among other
defenses, because, in addition to being copyright
stewards, we are financial stewards, we are public
trusts, and if there is a way to articulate sovereign
immunity as a basis for dismissing the action when
there are other meritorious defenses, as opposed to
going through the cost of discovery and going through
a summary judgment phase, financially, from -- as a
financial steward, we have to, we have a fiduciary
duty to raise a constitutionally-protected immunity.

And so, for that reason, I just don't see
any disconnect.

MR. AMER: Mr. Wassom?

MR. WASSOM: Two points real briefly. The
first is that the troubling aspect of the defense we
just heard is that it's the sovereign deciding when
the lawsuit, when the claim is frivolous or not. All
other defendants have to have the court decide that
for them. What we're hearing is that we'll offer you
what we think is fair, and if you don't like what we
think is fair, then we'll exercise our trump card with
sovereign immunity.

The second point, too, is that we're hearing
from a lot of representatives of state agencies that
do have very defensible, and very noble, and honorable
policies, but, back to my original point was the case
law encompasses a wide variety of state agencies that
aren't universities, that don't have that copyright
respect for creators. The Allen v. Cooper case, of
course, was a state board of tourism or some such
thing.

There are commissions, foundations, bureaus,
all sort of other agencies out there that perhaps
don't have the same respect for copyright that a
university would.

MR. AMER: Anyone else like to respond to
that issue? Yes, Ms. Levine?

MS. LEVINE: The sovereign has to agree
to --

MR. AMER: Oh, I'm sorry, I think you cut
out for a sec on the line. Could you say that again?

MS. LEVINE: The sovereign has to agree to
be sued. That's how sovereign immunity works. We are
still all bound, as attorneys, if we're attorneys, to
faithfully apply the law, and, as Mr. MacDonald said -- I'm not a litigator, but there's a responsibility to raise available and legitimate defenses as part of your responsibility as an attorney.

MR. AMER:  Mr. Molnar, did you have a response?

MR. MOLNAR:  Yeah. I mean, representing state agencies, we certainly, in Ohio, respect copyright law through our -- all of our state agencies. And, again, just to circle back to a point I made at the very beginning, I would read, it's a case, 57 F. Supp. 3d 985, from District of Minnesota that outlines how sovereign immunity applies to suits against a state, how it applies to suits against individuals in their official capacity, and how it applies to suits against individuals in their personal capacity.

I would recommend, especially as an IP attorney, become very familiar with suing someone in their personal capacity. That is your way around 11th Amendment immunity full stop.

MS. KERN:  And then, Kevin, do we have time for one quick follow up question?

Mr. MacDonald, you mentioned towards the beginning of this panel how, I believe you said -- you
quoted it as corrective measures in terms of when you
saw that there was infringement with a radio station,
and in, I'm not sure if it was in lieu of payment or
what, there was education provided. Do you have any
other examples of corrective measures that you've
taken when there is infringement?

MR. MACDONALD: Sure. And your recounting
is correct. In that particular instance, it was
actually in lieu of payment. Well, of course, an
injunction, a self-imposed injunction is a corrective
measure that we take. We say we're going to take it
down. We disagree with the merits, but to resolve
this matter swiftly, we'll just take it down. I think
that's a corrective measure. We also make promises,
at times, that we won't ever put it back up again.

And if copyright owners come to us -- and,
again, we are, ourselves, major copyright owners -- if
they come to us and offer other creative solutions,
we'd be happy to entertain them, including financial
payments that are less than the sums that are asked
for, which we think are unreasonable in many
instances.

MS. KERN: Thank you.

MR. AMER: Okay. Well, we are just a bit
over time, but I think we've made up some ground, so I
think we are going to close this session. I'd like to
thank all of you for participating. This was very
helpful. Our next session begins at 2:00, so we will
see everyone then. Thank you very much.

MR. GRAY: And one quick note for the
audience. Please remember that there is a sign up
link that's being pasted in the chat if you want to
speak at the open mic and share comments there, and
that will close at 3:00 p.m. So if you're interested
in speaking, please use that link and sign up soon.

Thanks.

(Whereupon, at 1:20 p.m., the roundtables in
the above-entitled matter were recessed, to reconvene
at 2:01 p.m. this same day, December 11, 2020.)
MR. AMER: Welcome back everyone. We are about ready to start session three of today's roundtable. Session three has to do with state policies and practices to prevent and address infringement. Just to remind everyone again of a few housekeeping matters. Panelists, if you could please remember just to keep your audio muted when you're not speaking. That would be helpful to those watching on the public link. For anyone who is interested in participating in our open mic session at the end of the day, if you could please sign up using the link in the chat by 3:00 today. That would be great. Our open mic session will start at 5:15.

So let's get started on panel three. I'll be primarily asking the questions along with my colleagues Mark Gray and Regan Smith. We're really grateful to all of you for participating. We wanted to have a specific panel that focuses on state policies and practices to address infringement. In this session, we may spend a little more time with each of the panelists to drill down on specific policies. So I just would invite all the other panelists to be patient. We will get to you and we
just want to sort of get as much specific information
as we can about particular policies.

So why don't we combine the introductions
with a brief overview statement, if you would, about
your overall policies and practices in your state or
your entity that are designed both to avoid
infringement and then also to address instances of
infringement when they do arise. Mr. Butler, I'd like
to invite you to start.

MR. BUTLER: Absolutely, thanks, Kevin. So
hi, I'm Brandon Butler. I'm the Director of
Information Policy at the University of Virginia
Library and I'm a copyright lawyer who has been
working with libraries and library groups for more
than a decade now. The bulk of my experience in this
realm is not with any particular institution, but
actually sort of helping multiple institutions,
libraries, educators, and students kind of understand
their rights and frankly, typically, to overcome the
sort of chilling effects of fear of copyright
liability. And so the notion that we feel unleashed
by sovereign immunity always makes me kind of smile.

So I'm very happy to speak to my experience
at UVA, but I'm also here actually kind of with a hat
on for a couple of associations, who play a big role

Heritage Reporting Corporation
(202) 628-4888
in helping to ensure that folks understand copyright and live within it. And so the Association of Southeastern Research Libraries is one group. We filed comments in this proceeding, written comments. And also I'm the law and policy advisor to the Software Preservation Network and that's a group that joined an amicus brief in the Cooper case.

And so to say a little bit about those two organizations in particular, ASERL is a group of libraries in the Southeast Research Libraries and it has a broad array of programs that help ensure that all of its members have access to good information about copyright and so there's a Scholarly Communications Interest Group within ASERL with a Listserv, where people talk to each other about copyright questions they're having.

They're able to compare best practices. We have a webinar series, a really rich webinar series that ASERL hosts where, again, copyright lawyers and experts are a very common fixture in that webinar series with the goal of helping aid in compliance on ASERL member institution campuses.

More specific example, during the -- and the aftermath of the COVID crisis, when all the institutions went on lock down, ASERL hosted a series
of copyright office hours, where some of the resources
-- some of the institutions with the greatest
resources and access to kind of really strong
expertise made themselves available to talk to other
institutions who might not have access to that and so
that there could be again conversations within the
ASERL community about the best way to sort of reckon
with this sort of unprecedented change in
circumstances. And then of course ASERL also joins
amicus briefs in these cases to -- I think cases like
Cooper, to try to make sure again that the law is
consistent with our practices and vice versa, right.

I'll say a couple of words about SPN and
then I'll be done, I promise. The Software
Preservation Network similarly has been really focused
on copyright in part for something I'll talk -- I hope
I get a chance to talk about later, which is the
really, the really powerful chilling effect that
copyright has had specifically on software
preservation and anxiety about copyright and
uncertainty about copyright.

And so one of the first things that the
Software Preservation Network did as a relatively
young organization was to engage with the DMCA
process. So we were aware of how the DMCA affected
software preservation. There was certainly no one who
said, but wait a minute, you know, nine of us are
public institutions. The law doesn't matter, right.
Instead, the response was, well, how do we interact
productively with the legal system.

So we obtained the DMCA exemption. We
developed resources for members explaining the scope
of that rule. So there's literally a sort of
checklist, you know. If you can take all 12 of these
boxes, then you qualify for the exemption. We
publicized that. We held webinars about it. We host
monthly chats similar to ASERL for folks to talk about
the questions that are coming up on their campuses and
how best to resolve them. And again we engage with
court cases. We watch court cases closely and we
engage with them as amicus filers.

And so I guess my overall point with those
two hats on is, you know, this is a world where if we
thought there was no -- this was not a big issue for
us or that we can afford to be lackadaisical about it,
that certainly isn't evidenced in the way that we
coordinate and invest our time together to try to
understand and comply with the law. So, thanks a lot.
It's good to be here.

MR. AMER: Ms. Dooley?
MS. DOOLEY: Hello. My name is Yvonne Dooley and I'm the business librarian and copyright specialist at the University of North Texas. And as far as our policies and procedures with regard to copyright, copyright law, we are very -- we have very strong policies outlining our copyright compliance. We have a copyright compliance policy that specifically states what kind of -- where we outline the law, we give examples in compliance with the U.S. copyright law, and we also outline copyright infringement and what that means in various criminal penalties, as well as disciplinary actions that UNT can take place in.

So my overall statement is just that as a university, we respect copyright law. We try to instill that in our faculty, staff, and students. And that's what I'm here to demonstrate today.

MR. AMER: Thank you. Mr. Evans? Oh, I think you're muted, sir.

MR. EVANS: Did you not hear me?

MR. AMER: No. We can hear you now though.

MR. EVANS: Oh, I'm sorry, my apologies. I had to switch to the headphones because I was having some audio problems earlier. I'm the Associate Vice President, Legal and Research for the University of North Texas.
Arkansas system, which is comprised of 20 campuses and our unit is probably more than 50,000 student and faculty and staff members. And I'm essentially the in-house intellectual property counsel for the University, you know, and one of my duties is to be a resource for questions about use of copyright materials, you know, particularly in determining whether or not a particular use is fair.

And I, on an annual basis, try to visit as many of those campuses as I can and I have a presentation called Copyright 101, that essentially goes -- is an introduction to copyright law and to advise faculty and staff on what their rights and responsibilities are under the Copyright Act. And one things that I go through is the things that they can and cannot do or should and should not do about to protect their own copyright materials, but to ensure that they do not run afoul of the copyright law. And I explain explicitly to those individuals the possible penalties that may be assessed against them on an individual basis.

You know, the issue of sovereign immunity is really the very last issue that I mention in my presentation because basically it's to impress upon them what their personal liability may be regarding,
you know, their use of materials for which they have not sought permission. And I go through the four factor test for fair use and explain to them just what the limitations are. And to the extent that that damages are part of a claim brought against them, then that is the issue of -- that's when the issue of sovereign immunity does rise.

As the intellectual property counsel for the University, one of the things that I -- that I have to be aware of are the financial resources of the University and really I have no authority to agree to pay damages for anyone. One thing that may not be unique about the state of Arkansas, but that should be understood that the University as a state entity has no authority to pay damages unless those damages have been assessed by the Arkansas State Claims Commission.

So there is a process and a remedy for those who believe that their copyright works have been infringed by a state entity. You know, they can file a claim for damages in the State Claims Commission. So that's one resource that is available to those individuals.

But I, as a legal counsel for the University, have no authority to agree to pay damages to anyone based on claims for infringement. But in
any case our University does make considerable effort
to make those students and staff aware of rights and
responsibilities under the Copyright Act. And that's
sort of the summary of my presentation.

MR. AMER: Thank you very much. Mr. Klaus,
I believe you're the only non-representative of a
state entity here, so we're very much interested in
your perspective.

MR. KLAUS: Well, it's great to be here.
Right, I was just wondering if I was in the right
section. My name is Kurt Klaus. I'm a National
Partner at the law firm of Dunlap Bennett & Ludwig,
PLLC, over here in Washington, D.C., and I lead the
media and entertainment law practice for DBL. And
prior to the practice of law, I actually shot regional
and national TV commercials and I worked in the
production department of feature films.

And, to the extent of my practice, I'm a
commercial attorney, so I do transactions. I'm not a
litigator. So, I'm on the front lines with people
that are producing the media content that you're
seeing or experiencing. We do have occasion to
interact with libraries. We do have occasion to
interact with other state agencies.

A lot of what I do, insofar as going through
processes involving state and local governments, has
to do with access. And to the extent that clients
have asked me, you know, such and such a state is
using my content or is interested in it, or I've seen
a photograph of mine being used by a state or local
government that's not licensed, or something like
that, you know, they want to know what their options
are to be paid for that use.

The typical response from me is, well, you
know, there's this thing called state sovereignty and
I'm not sure that you would want to engage a state.
You might want to. Our first round would be to try to
negotiate some sort of license or at least make them
aware, try to find the responsible party within the
state and make them aware of this usage that's not
authorized. That's all I'm going to say now. So I
hope to get some good questions and be more
responsive.

MR. AMER: Great, thank you very much. I
believe Ms. Lanier is next.

MS. LANIER: Hi. I'm Raven Lanier and I
work at the University of Michigan. I have a split
position that's between the Library Copyright Office
and our Center for Academic Innovation, which works
closely with faculty and teams across the University
in developing online learning initiatives, including both online degree program courses, Teach-Outs, online credit bearing courses and massive open online courses or MOOCs. I've worked at the University for almost two-and-a-half years now. I'm in the major -- my major role in each of my positions is to educate and consult on matters of copyright.

This frequently involves talking to people about how they can lawfully use the works of others either through fair use or another exception or from asking permission to use the work. So I consult regularly with students, faculty, staff, with the library when there are issues, and I'm generally involved with the Center of Academic Innovation whenever there are any copyright issues or concerns that come up there.

MR. AMER: Great, thank you. Ms. Samberg, I believe you're next.

MS. SAMBERG: Thank you very much for this opportunity. My name is Rachael Samberg and I am also a copyright lawyer, as well as the Scholarly Communication Officer and Program Director of UC Berkeley Libraries, Office of Scholarly Communication Services.

My office offers literally thousands of
consultations and thousands of trainings every single year for scholars, faculty, and students on our campus about responsibly using and managing copyright in their research, publishing, and teaching. My office also sets policy for and advises the library and supports other University campus departments regarding the copyright decisions that they and we make on behalf of the University.

One of the cores of questions in the roundtable is whether or how copyright-related behavior is undertaken by the University, as opposed to individual employees. So I think it will be helpful today to understand what offices like mine across the country actually try to inform and to educate and guide campus units and departments on copyright-related decision-making.

I'm going to address that today by dividing policies and procedures for two categories of purported state actors. One, the individual researchers, instructors, and students; and, two, the state institution, itself, so departments, units, or programs or university-created policies that guide individuals to take action. And in doing that I'll underscore that we not only don't see credible evidence of widespread or reckless infringement, but
in fact the policies that we actually have and the
procedures that we undertake prevent and address any
potential infringement.

MR. AMER: Thank you. And Mr. Shontz, I
think you were last, but not least.

MR. SHONTZ: Thank you. Thanks all for the
opportunity to be here today. My name is Douglas
Shontz. I'm the Chief Intellectual Property Counsel
for the University of Illinois. I'm also here today
part of representing the Association of Public and
Land-Grant Universities of which the University of
Illinois is a member.

And, you know, I'm speaking -- in terms of,
you know, policies and practices, I'm speaking about
my home University's policies and practices, not the
Association. But I can tell you that in addition to
what we do specifically here at the University of
Illinois, that my counterparts and fellow members of
the APLU also are generally extremely diligent about
having policies and practices to comply.

You know, our policies, you know, across the
board comply with copyright law. We all, you know,
collectively spend, you know, millions of dollars in
license fees each year. We have contracting offices
that handle license agreements. We have dedicated
copyright librarians. We have posted policies. And I think Ms. Samberg was actually making an excellent important distinction that some of the folks listening on the roundtable today might not be aware of is that, you know, we, as universities, we have duties to our institution in terms of institutional work, but that we also have a large population of students and faculty who are largely independent actors and we still spend hundreds of hours and, you know, put tremendous resources into helping them comply with copyright law as well.

For example, our copyright librarian here at the University of Illinois probably had in the neighborhood of 200 plus individual one-on-one consultations over the course of the last year with students and faculty, talking about how to comply with copyright law for their work. She also gives about 50 workshops a year to students, faculty, and staff across campus. We have a website laying out, providing resources and guidance to people about both their roles as faculty and students for complying with copyright law, as well as for institutional work for staff and for research purposes.

So, you know, in general, as I think Ms. Samberg said and you probably heard from folks
throughout the day so far, is that we really are -- we really put a lot of effort into compliance with all intellectual property law including copyright law and that our practice is to address each allegation of infringement in the same manners, that we examine it, we take it seriously, and we address it as we believe appropriate and in compliance with the law.

MR. AMER: Great, thank you. That's a very helpful overview from all of you and you've identified several issues that I think we're going to drill down on. I think I wanted to start by just asking a little bit about what the bases for your adherence -- for your handling of intellectual property cases -- may be.

You know, we saw in some of the comments that there's a strong set of informal institutional norms among state libraries and universities. We've heard today how important it is that universities are themselves generators of lots of copyrighted works and active participants in the intellectual property system. I'm wondering to what extent your copyright policies are governed by those sorts of norms or whether there are sort of more formal laws or policies that we should be aware of as well. Yes, Ms. Samberg.

MS. SAMBERG: So I know that a lot of us can
build on that, so I'll just take one piece of what you
asked and I'll talk about policy that's set by campus,
different campus department and specifically the
library.

So one way in which the library utilizes or
consumes copyrighted content is through special
collections digitization or making our collections
materials available online. We've expressly set
policy regarding the workflows and guidance on how to
do that responsibly, our responsible access workflows.
They are to expressly comply with copyright law
whenever we review collections or materials for
digitization and online hosting. Thus, with that
express policy, there's no intentionality of
infringement, much less a widespread effort to
infringe.

Importantly, we also have a policy on what
happens if we make a mistake. Again, this is a public
policy set by the library. To the extent that we err
in the research we do about a collection or make an
incorrect fair use determination or at least one that
someone disagrees with anyway, we have something
called a community engagement policy that invites
people to contact us if they think we've gone astray
in our assessment. And under that policy, we
expressly take materials down or other remedial measures as appropriate, including with respect to metadata and other materials.

We do not, as part of that policy, and have not ever resulted to relying on sovereign immunity to stand on keeping the content available. Again, we take it down, review it for copyright if we ever receive such a complaint. But in the five years I've been at UC Berkeley, we have not even had to take anything down because we've never even received a takedown request based on purported copyright infringement.

I also want to point out that these policies that I just mentioned are adoptable and adaptable by other institutions and have already been adopted and adapted by other U.S. cultural heritage institutions and state institutions, so that they can also understand how to provide responsible online access to research collections. I can keep going, but I'll turn it over to others to add more about their policies, too.

MR. AMER: Thank you very much. Would others like to weigh in?

MR. BUTLER: I could just echo Rachael. We have very similar policies at the University of
Virginia. We have a policy for folks who find something in our digital collections that they believe shouldn't be there. There's a contact point that's routed to a set of people within the library, including me. The item is taken down immediately. We vet that claim and we resolve it.

And similarly we've just adopted a new digital collections workflow and again I was involved in writing that policy and the policy puts a very high premium on confidence about the status of the works that we're digitizing and whether we can make them lawfully accessible. And then I'm on -- I'm also on the team that evaluates proposals and so when somebody says, here's a collection I want to digitize, that doesn't make it past the post until I say, yes, that's okay.

And so those are the kinds of policies that I think actually you'll find fairly common. And thanks to, you know, super heroes like Rachael and some other leaders in the field who write these policies and publish them, there are standards that folks are I think adopting, so that we're all kind of doing similar stuff because we work together and talk to each other about those things.

MR. AMER: Thank you. And so just to
clarify, is the policy you're referring to, you know
-- it sounds like it's sort of written at the library
level. Is it then sort of ratified at the university
level or does it have some sort of an official effect?

MS. SAMBERG: So different departments have
different policies throughout the University.
However, they are governed at a super structure by
systemwide and campus-wide, at least within the
University of California system, so systemwide
copyright policy and a campus-wide university policy.
And that campus-wide policy provides similar guidance
and instruction and repercussions for complying with
copyright law in various contexts, so for example use
of materials in instruction, use of materials in
research.

Our policy at the library was created in the
specific context of some activities that the library
needs to undertake. So we both adhere to the
systemwide policy, but we have these extra additional
policies we've created to govern -- that comport with
the University policy to govern specific needs that
our department has.

MR. BUTLER: Yeah, precisely. We have an
umbrella policy at the highest level and, you know --
I mean to give you a sense, it took us -- it was, you
know, as these things do, many months of multiple stakeholder convenings to develop this kind of a policy and then kind of promulgate it within the library, you know, taking the digitization policy as an example.

So, you know, it's a serious thing that is taken very seriously and now that it's in place, it is followed because it took a lot of time to make it. But, you know, it's an internal policy, so you won't find it on, you know, on our website, but it governs how we operate internally in terms of what we're going to digitize.

MS. SAMBERG: And our policies at our library are online. We've made them available expressly to be used and adopted by other institutions. Again, I'll just give one example of the policies we set around digitization. I'm happy to provide other policies we've set such as related to course -- electronic course content material or duplication of library materials. We have again set policy to support copyright compliance with respect to other library-specific functions as well.

MR. AMER: Thank you. That's helpful. One thing I wanted to ask about and others will have the opportunity to talk about specific policies, but I did
want to ask a question that we were discussing during
the last panels, which is that we really heard a very
clear message from the state representatives, who have
been here, and that sovereign immunity is not
something that they assert very frequently. You know,
it's sort of a last resort, I think people have
mentioned.

So I wonder -- but at the same time there's
a lot of concern that we've heard in the comments
expressed about the idea that sovereign immunity could
be taken away. So I wonder, if you could talk a
little bit about sort of what role you see sovereign
immunity playing in terms of your institution's
ability to carry out their work. And, you know, I
think you can tell what I'm getting at. You know, if
it's something that is rarely if ever asserted, does
that -- how do you reconcile that with the idea that
it's a threat to take it away?

MR. SHONTZ: Well, I think -- go ahead, Mr.
Evans, sorry.

MR. EVANS: No, no, I was just going to say
that, you know, I sort of see it as a catastrophic
insurance policy to prevent tremendous damage to the
treasury of the State of Arkansas, but more
specifically to the financial resources of the
University of Arkansas and its various campuses.

The thing that I mentioned before though that may be different about the State of Arkansas is that we do have a State Claims Commission. So if an individual does feel aggrieved by an action of a state entity and particularly of the University of Arkansas, that then that claim can be brought in the State Claims Commission. You know, I've been representing the University, both inside and outside, for 35 years and so I've seen the kinds of complaints and actions taken against the University.

But there have been very -- well, there's been only one federal lawsuit brought against the University of Arkansas for copyright infringement. It was in, I believe it was in 2007 and the damage portion of the claim was dismissed on sovereign immunity grounds, but the injunctive part was allowed to go forward. And the federal district court at the time had noted that that same plaintiff had brought a claim in the State Claims Commission and had been awarded $15,000 for infringement of copyright, so the court basically dismissed the entire case because the judge took the position that the issue had been resolved within the State Claims Commission.

But over the years the claims that we have
received have been almost always involving a student who has downloaded a video game. In fact I get those probably on a biweekly basis where some student -- or for some reason in recent years Sims 4 has become very popular amongst students on a particular campus. But our position on that -- those come to me because I'm the designated agent under the DMCA and so I get all of those.

And so I refer those as soon as I get them to the person in charge of our Information Technology Department on the respective campus and that person deals directly with the students and usually their computer privileges are suspended for a period of time as a deterrent. And if the person continues to do it, their privileges are terminated and that student may be subject to other disciplinary actions under the student conduct policy. So those are the kinds of the things that that we're dealing with.

There have been a few instances where I've received claims of infringement because of the inadvertent use of a photograph on a newsletter. In fact the most recent one was a newsletter that had been published by our agriculture extension service, where we immediately took that down and responded to the individual and explained the actions taken.
Now to the extent that a license fee is demanded if we want to continue the use of the photograph, we pay the license fee. But when it's presented to us as a damage claim for past use, we have no authority to do that unless the individual brought -- presents a claim to the State Claims Commission.

MR. AMER: And I -- I'm sorry, go ahead.

MR. SHONTZ: I was going to say that I think one of the things I would start by pointing out is what we're talking about here is abrogating a foundational constitutional right and that should never be taken lightly. It should never be treated in the manner that should be sort of -- should be a very, very high standard probably to the point of beyond a reasonable doubt in the same way if you were going to contemplate legislation that's going to impinge or abrogate parts of First Amendment rights or any other -- you know, Fourth Amendment rights. I mean this is a constitutional right for states that we're talking about here. So there should be a very, very high bar to it.

And what the -- what I'm hearing over this -- over the course of the multiple panels is -- and I think what Mr. Evans was just laying out is a great
example of it, is that the injunctive relief went
forward. The harm that was alleged was taken care of.
What was not permitted to go forward was -- was a
large damage claim.

And what seems to -- the theme that I'm
hearing throughout these panels during the course of
the day is really that folks are upset that they don't
get to pursue statutory damages, that there isn't --
there isn't a big payday associated with it. But the
realty is in my time -- I'm not aware of any lawsuits
against the University of Illinois for copyright
infringement. But what I am aware of and have dealt
with personally are instances of, you know, claims
that there was a misuse of a photograph or something
of that nature and we address those and there have
been times when we've settled for what were reasonable
licensing fees.

You know, we always take -- as a first step
we -- the fact is we look at it -- as I said, we
investigate it, we look as whether to there is a basis
for an infringement claim. You know, generally, it's
a very -- we're very quick to take down something that
appears to infringe even if it -- even if there might
be a fair use basis for it at the time. You know,
we're very -- we're very quick to respond to copyright
owners and then investigate it and work with them.

And if there is -- if there is a basis for, you know, a claim of licensing fees, there have been times when the University has settled for that. And that's really what we're talking about here is making the copyright owner whole and to get to abrogate a bedrock constitutional right for the states, just for the purposes of allowing people to pursue statutory damages, that seems like that should be a very, very, very high bar.

MR. BUTLER: Yeah. Can I answer things, real quick? One is, one of the trends in my work almost for the last decade has been I've engaged in a lot of dialogues with different practice communities in an academic context and over and over again what we find is what we call a permissions culture and they -- academics generally are afraid to engage in anything they think might come within a mile of something unlawful.

A part of that, part of that is they're lawful people and universities are conservative places, believe it or not, and they don't want to do things that are crazy. But part of it is that the word of statutory damages has traveled fast over the last couple of decades and people are aware of things
like the Jamie Thomas-Rasset case. They feel that the stakes in copyright can be extraordinarily high and that chills them.

And a part of what we've tried to do and the work that a lot of us have done on campuses is to help people understand that they have rights and that they should feel comfortable exercising those rights and they shouldn't be afraid that a troll is going to show up and shake them down.

And that's the other point I wanted to make, which is I think a part of what state sovereign immunity seems demonstrably to do is to reduce the incentives to go chasing after big paydays by suing folks, institutions and folks who work at our institutions. And it wouldn't take too many stories about that to have a chilling effect again on lawful activity, things that are clearly fair use. You get a nasty letter and everyone in that academic community knows that someone in their community got a nasty letter when they tried to publish a screenshot from a video game or when they tried to -- and that really shapes practice and really chills teaching and scholarship.

Even now with sovereign immunity in place and with not a huge amount of lawsuits as a result, I
really fear what would happen if the threshold came
down and the folks with opportunistic lawsuits came
out to play.

MS. SAMBERG: You're muted.

MR. AMER: Thank you. Do you think that
state institutions, universities and libraries in
particular, are more susceptible to the sorts of
lawsuits that you're describing or threats that you're
describing compared to private institutions? Because
it seems to me that a similar concern could be
expressed by private institutions, but they are
certainly subject to copyright suits when they do
infringe.

MR. BUTLER: That's a good question and it's
a part of the kind of puzzle here that honestly I
think the front-line practitioners in those private
institutions do not behave as if -- or rather the
front-line practitioners in public institutions don't
behave as if they have carte blanche to infringe and I
think that largely explains the difference. Everyone
is behaving more or less responsibly and so I think
that is a major part of why the entire community has
similar kind of outcomes in terms of behavior.

MR. AMER: Ms. Samberg?

MS. SAMBERG: Yeah. Picking up on Brandon's
point, the reputation of the university is at stake whenever the university is taking action with respect to its policies and decision-making on copyright.

So before coming to UC Berkeley, I was six years at Stanford University and while I was in a slightly different role, I can say that we have the same kind of responsible behavior without formally calling them responsible access workflows or policies because universities as a whole are interested in their public relations and their community relations and they're very visible and high profile members of the community and take that seriously, which is why you see so much of proliferation of copyright policies regarding what people can do with other people's materials, what you can do with your own materials, what individual departments can do, and that isn't necessarily going to change private versus public.

But I will say that if we thought we were going to be sued constantly, every single time we made a decision, we wouldn't be able to make as robust uses of state resources as we are currently able to make to support scholarship. So for example, I mentioned the responsible access workflows. If we thought we were going to be sued constantly -- our responsible access workflows depend on having good information about the
collections that are in our possession or that we steward and the information that we have isn't always perfect.

But we have the ability to rely on the metadata that we have, as well as exceptions like fair use or where applicable to make informed decisions. If we felt though that we were going to get sued every single time and risk fair use or risk 108, then we would absolutely choose not to make this content available for the community and that harms the advancement of science and the useful arts. So taking away our sovereign immunity is directly in direct contravention to the purpose of the Copyright Act.

MS. SMITH: If I could jump in for a second. I'm struggling with trying to figure out if there's not really a difference in actions between private and public universities, what role states' sovereign immunity is playing in ensuring that productive uses and fair uses and such continue to be enabled. And I also would like to understand any specific evidence of actions that may have been chilled because I think we're trying to get data here to consider. Thank you.

MS. SAMBERG: I can give you two examples, one from when I was in a private context and one in a public context, which is in a private context at
Stanford, because we lacked certain information about a collection, we chose not to make that content available for research. And now because we have responsible access workflows and have good metadata at UC Berkeley and know that we have some level of protection to make -- not for us to rely on sovereign immunity, but to make us less attractive potential litigants, that we can go forward and make more content available for research.

MS. SMITH: Did you feel that fair use was not sufficiently reliable in the Stanford example to proceed with the project?

MS. SAMBERG: It was -- sorry, it was part of an overall examination and it deterred us from embarking kind of systematically on a digitization project.

MR. AMER: Ms. Lanier, I think you raised your hand.

MS. LANIER: Yeah. I think another important distinction to remember between private and public universities is that the things that we do at public universities are all FOIA-able and they're very transparent and we are accountable to both our constituents in Michigan and also to the broader public. So we need to make smart decisions about
copyright not only because we want to follow the law
and it's the correct thing to do, but because what we
do is very transparent and people can look into the
agreements we've made, the things that we've done, and
it can all be under public scrutiny.

I think it's also important, sovereign --
you haven't seen large changes in the behavior of
public universities when it comes to sovereign
immunity because we're -- I think that we're all aware
that there is a line there of widespread intentional
and reckless copyright infringement that we don't want
to cross.

Sovereign immunity is important because
emboldens us and our faculty and students to take
advantage of our -- the rights given to us in the
Copyright Act and it kind of insulates us in ways that
help us make, to feel more comfortable relying on the
various analyses of our faculty and staff and we don't
want to lose that. And so we're very careful that
we're not intentionally and recklessly infringing
copyright because we are aware that if there is
widespread intentional and reckless copyright
infringement, which we do not believe that there is,
that the sovereign immunity can be abrogated by
Congress.
MR. BUTLER: And to the point about failures, just really quickly and I apologize, I think we've seen some comments earlier in the roundtables that show the differences of opinion about the scope of that, right, and that we can't rely on our rights holder friends to agree with us about what is willful infringement, what is even infringement at all. And so, you know, there's sort of what we believe very strongly to be fair use and then there's whether we think it's going to draw a lawsuit and how devastating will that lawsuit be.

And I do know there's, you know --
anecdotaly I can say private institutions do tend to be a little more conservative. There's none of them on the panel here, but I believe that that's true to their detriment; that is not that they're less crazy, but rather that they're less able to take full advantage of their rights because there is a penumbra of litigation fear that pushes them back from the line of where the Copyright Act actually wants them to go because it's not worth incurring the ire of folks like Dr. Bell.

MS. SMITH: I'm not sure we're going to be inclined to say that the need to resort to the judicial system sometimes to figure out fair use -
because certainly people can have their day in court -- means there's an inability to exercise rights I mean on either side, right. But I think if you're stating that public universities are making uses that private institutions may not, it would be helpful to understand some examples of what those uses may be. Is that what you're saying?

MR. BUTLER: That's what I'm saying and I think -- I mean one example, I think if you look at the participation of different institutions in the HathiTrust Digital Library in the early days, right, I think that if I'm remembering correctly, and you can go and look, the private institutions were more conservative in terms of what were they willing to place into that collection, which was ultimately vindicated as a fair use activity.

You had institutions that were private and institutions from countries that didn't have a fair use doctrine, but that were going back and saying, you know, we're only going to put in materials that are clearly public domain even though again ultimately that was a lawful use that was blessed as a lawful use. And so those institutions weren't able to participate as fully because they feared the litigation risk more than public institutions did.
MS. LANIER: And I don't think -- I totally agree with Mr. Butler's points, but I don't think that this is a question of public universities can do different things that private institutions can't. It's not like I can and cannot. It's a will and won't. Like public universities and private universities can do the same things. What the difference is what they will do and I think HathiTrust is a clear example there that Mr. Butler brought up.

MS. SMITH: Yes. We're talking about judgments that public universities may make, that private universities wouldn't because they have the benefit of sovereign immunity, which might deter litigation for better or for worse; right? So, Mr. Evans, did you want to chime in on that?

MR. EVANS: Yes, well, yeah, yeah. I wanted to jump in on something that Ms. Lanier had mentioned earlier in terms of being subject to the Freedom of Information Act. Well, I think it actually goes beyond that because the thing is, public universities have additional bosses beyond their presidents or their chancellors or their board of trustees. They also have bosses in the state legislature. And that's what we have to deal with.

You know, the state legislature would be
very concerned if any of the institutions were subject
to paying damages for copyright infringement. We get
into the political realm at that point in terms of
what some congressman who -- I'm sorry some state
legislation who is in the district where one of our
campuses is located and that particular campus with a
major copyright infringement lawsuit literally has to
throw -- and things like -- and those kinds of
instances. So public universities have to be very
certain about taking actions that will upset members
of the state legislature, who control the purses of
those institutions. So it's being conservative not in
terms of the uses of copyright materials. It's being
conservative in damaging the financial resources of
the university and those financial resources are
controlled by the state legislature.

MS. SMITH: This is my last question, but is
there evidence of lawsuits or patterns of lawsuits or
cease and desist letters, or other types of
enforcement activities against private institutions
that you are aware of to set a basis for the
alternative behavior you're describing to by public
institutions?

MS. SAMBERG: I think that goes back to some
of what -- the great point that Raven made about the
will and the won't, which is far more eloquent than I was able to do with respect to our decision-making when I was at Stanford, which is that you're less likely to undertake the activities if you're worried about the result or outcome when you're at private institutions. And so I saw the same kind of -- although again I was in a different role, I saw the same kinds of complaints against individual actors, so again want to make sure we distinguish between people doing things that maybe they shouldn't do themselves versus what the institution does. But the institution as a whole or in itself doesn't make certain decisions because it fears statutory damages.

MR. SHONTZ: I think also --

MS. SMITH: It does sound like perhaps a no, in terms of being aware of litigation or cease and desist letters or specific things received by private institutions, but -- okay.

MR. SHONTZ: I also, I guess I have to object a little bit to the premise of the question because what we're talking about here is a discussion about abrogating a bedrock constitutional right and so the threshold should be extremely high. So rather than sort of a research study, which no one apparently here is aware of or has undertaken, comparing public
and private institutions, which I don't even know how
you would begin to conduct such a study since we keep
-- the private institutions are going to keep quiet
about their settlements and the like in that domain.

What we're talking about is abrogating a
constitutional right and so it should really be a
discussion about what can be demonstrated that the
public agencies, the states are misbehaving in the
realm of copyright.

And the answer is that there really is no
evidence that we've seen and in fact is to the
contrary to what we've seen is that we have dedicated
staff, dedicated resources, hundreds of person hours
per year consulting with people on our campuses, on
our -- my counterpart's campuses and deep, thorough
investigation into allegations of copyright to the
point of almost sometimes being afraid of our own
shadows.

And it's not just -- it's not just images on
a website. I mean I'm consulted by our -- we operate
two performing art centers. We have multiple
departments of fine arts, music, theater, dance, et
cetera and all of those departments are very careful
about the issues around copyright. They come to our
office to consult about it. They come to our
copyright librarian to consult about it. And so it
really seems to be just kind of a red herring to try
to make a comparison in a vacuum between --

MS. SMITH: Thank you, thank you. I think
we need to move on because sort of the time, Mr. Amer.

MR. AMER: Yes. Well, I would like to get
Mr. Klaus's perspective on this, just as someone who
has worked with state entities. I wonder what your
perspective is in terms of how central a role or not
sovereign immunity plays in your dealings with the
state either in negotiations, litigation, or other
areas.

MR. KLAUS: Okay. I've been fascinated
listening to the conversation. It's encouraging to
hear about the extent of, the degree of I guess you
could say that libraries go to -- various established,
esteemed libraries go to, to comply with copyright law
to reduce their -- mitigate their risk related to
potential litigation. My experience has not been so
much with libraries, although licensing materials to
libraries, content to libraries certainly.

It's been more with other agencies involving
the states and those who may not be as educated or
have as solid of policies in place. And, I know
you're looking for specific data and specific examples
and I can't share those for a couple of reasons. One is because, maybe as I suggested earlier, the inquiries that I receive sometimes are pretty fleeting. They're like, you know, what's my potential here. What can I do to stop this. And people have already mentioned, look, cease and desist letters, try to negotiate a license agreement.

One of the things that was brought up in a previous panel was, you know, sounds like the libraries are pretty good with taking down potentially infringing materials. It's an ephemeral issue. But one of the panels brought up -- and I've represented photographers, so it's like what if my photograph is used and the market for that photograph is eviscerated.

Then suddenly do the libraries still stand up and say, well, look, we're going to plead for mercy and if that doesn't work, then we're going to invoke the sovereign immunity. I mean at what point -- at what point is there value seen in a -- let's say even a minor work that's affected majorly for the content creator.

MR. AMER: That's an interesting point. I mean, you make a good point in suggesting that it may well be -- it seems reasonable to think that
libraries, university libraries are more well-versed
and perhaps careful with respect to copyright than
other state entities. Do you have experience working
with or dealing with other state entities that in your
experience would suggest that maybe there's a
difference between libraries and universities compared
to other state entities?

MR. KLAUS: Well, nothing directly upon
observation, okay, so -- and having talked with other
attorneys that work in this space and other content
creators there have been materials that, for example,
photographs is probably the easiest example that
states sometimes post hey, come see Tennessee a
national photograph and it winds up, okay, so what's
the agency that's responsible for that.

There's also sometimes misunderstandings;
the public might see a photograph on the state site or
something like that and they'll assume that since the
government is posting it, it's public domain. I mean
I've had that question asked to me a lot. So there's
a lot -- I think even within the library system, but
potentially more so outside the library system within
states.

It's an education and a uniformed
understanding that has to be I guess proliferated
across and that's a big task, right, that has to be
proliferated across state agencies relative to
copyright. Because I can tell you that if I had a
conversation with a sheriff's department in Alaska
about copyright versus University of Berkeley, you
know, Berkeley, California, it's going to be an
entirely different conversation because the knowledge
is just not there and I guess the resources are less
available to folks outside of the major content users,
which in my -- from my point of view is universities
among other agencies, but especially universities.

MR. AMER: Ms. Samberg?

MS. SAMBERG: Mr. Klaus, I want to give you
some good news. It's not a complete panacea to the
problem, but the some good news is that we within
libraries at universities are involved in national
organizations that provide training beyond
universities to other state agencies and institutions.
And I agree, it is not as robust to the non-university
community because we ourselves, are employed in a
certain context and only have so many hours of the day
and I would love to see more state funds devoted to
the education for other agencies.

But I, myself, am on a -- am part of a
national group that goes around and provides training
on scholarly communication and copyright. There are
-- and maybe Brandon can talk about this too, there's
a copyright training program for HBCUs and for school
districts. So we are there providing that beyond just
a university community.

But I do want to just make -- correct one
thing. I don't think it was necessarily wrong, but
just to clarify it a little bit that you said, which
is that you refer to the decisions acknowledging that
the libraries are very responsible about the decisions
we make, which I agree. But I want to just clarify
that we're not just making decisions for ourselves.
We are providing this training for our campuses and
for the public.

So we do it for the public through robust
online content and through our consultations, which as
a state university we provide not just to UC Berkeley
requesters, but also to the public. So we're
educating the public through those consultations and
through our presentations.

Just to give you a sense of scope, in 2019
to 2020, my office provided 1,380 consultations
regarding copyright. That's 62 percent of all our
consultations, we're these people, and that
represented an increase of close to 60 percent over
the previous year and 1,239 percent since our first
year, showing that we are reaching a good deal of
campus and also that they are aware of their copyright
responsibilities and that we're available to help.

MS. SMITH: So what percentage of those
consultations were outside of UC Berkeley to the
general public or to other parts of California?

MS. SAMBERG: I don't have that statistic on
hand, but many of the ways in which the general public
requests come up are because people want to utilize
materials we have in our collections and their
scholarship. And I can dig for -- I separate out that
data and I can find more data for that if you'd like.

MR. BUTLER: One thing I wanted to mention
is that it sort of cuts both ways; that is if -- and I
agree, I think -- I agree with Rachael and with Kurt,
that libraries do a great job handling copyright and
educating our communities about copyright. And the
flip side of that is that libraries and campuses are
really heavy users of copyrighted material and we're
the ones that rely on fair use a lot and rely on 108 a
lot and rely on 110 and 121, right, accessibility.

I've worked in the accessibility community
and they are terrified of copyright to the point again
of, you know, they need to learn -- they're working on
learning more about their rights and not being so afraid. And so it would be a bad outcome and not proportional or tailored, as Cooper requires, I think, if what happens is, you know, state sovereign immunity is abrogated in a way that has a colossal -- that has an effect on the folks who are responsible users, who are the heaviest users because of, you know, the less heavy users, who are more likely to make a mistake or whatever, right. So we have to think about that too when we think about proportionality and tailoring.

The reason we're all here is that we have so much at stake.

MR. AMER: Great, thank you. There's a fair amount of overlap in these topics, but I think that we wanted to ask a few questions about the processes that are in place for addressing infringement claims by state institutions when they do arise. So I'm going to turn it over to Mark Gray to ask some questions on that.

MR. GRAY: Sure. Thank you, Kevin. So one of the things I was curious about, I mean I think we spoke to it more in the last panel, but we've talked a little bit already today about the volume of consultations, but I'm curious for people who are coming from the state university side what is the
Mr. Evans, you mentioned that you get a lot of DMCA claims just by virtue of being the DMCA designee for your university. But outside of that in terms of claims involving your university rather than student activity, what is the relative volume there and maybe some details about kind of what are common patterns you might see?

Mr. Evans: Outside of the, you know, the claims of infringement from -- and they're primarily coming from one association. I think it's, you know, the Entertainment Software Association regarding the -- you know, some of our students that are rather enthusiastic about certain video games. We get very few claims and almost invariably they relate to illegal software download by a student.

Occasionally, claims regarding, you know, a photograph that was used without permission, but those have been very rare. I get maybe one or two of those a year and those are usually resolved very amicably by agreeing to remove the allegedly infringing photograph once an investigation has been determined that the use was not fair. You know, we take immediate action regarding those kinds of claims. But beyond that,
it's almost always been an illegal download of
software by a student.

MR. GRAY: And then maybe as one quick
follow-up question, you talked earlier about the State
Claims Commission. Is that sort of like a quasi-state
court proceeding? Is that more of an administrative
proceeding? What's the flavor of that?

MR. EVANS: Well, actually it falls under
the jurisdiction of the state legislature.

MR. GRAY: Okay.

MR. EVANS: It was created, and I can't
remember the exact date, but it was created really to
address the use of primarily contract and injury
claims against the state because of sovereign immunity
and you have an injured party not being able to sue in
either federal or state court because Amendment 20 to
the Arkansas State Constitution basically says that
states should never be a defendant in its courts. So
we have sovereign immunity both at the state and at
the federal level.

In response to that, the legislature created
the State Claims Commission to provide some redress to
those who believe they have somehow been injured both
physically and financially by a state agency.

MR. GRAY: That's very interesting. Thank
you.

MR. EVANS: And the Commission has authority to -- well, it's a three-person panel that makes the decision regarding whether or not an award of damages should be made to the complainant.

MR. GRAY: And then anyone else?

MR. SHONTZ: I'll just jump in and say, you know, my experience is probably very similar to Mr. Evans is. The volume of alleged copyright infringement demands that we get in the course of a year is extremely low. We're talking single digits. But, again, we take them all very seriously. That's kind of the point is we're stewards of the public resources and we have a duty to comply with the law. A duty to provide educational services to disseminate knowledge and we have to balance all that. And so we take all of these claims and allegations very, very seriously and in each case we look at them. In some cases there have been settlements for reasonable license fees.

And that actually makes me want to go back to something Mr. Klaus has said and it's a little bit of a red herring to say that posting a photograph on a state website eviscerates the value for the photographer because the state would have had to pay a
license fee to that photographer for that use. And so
to claim that somehow the value is eviscerated, that
the photographer can't get any more value out of that
photograph anymore is just a red herring.

I mean we could have paid a reasonable
license fee in the instances where there were an
intentional unlicensed use of a photo, but a lot of
times when these allegations come in they are making
demands for expenses well over the purchase price of
all the rights for the photograph and that's just
completely unreasonable.

MR. GRAY: So in the last panel we actually
had someone bring up the photograph issue, I think it
was Mr. Wassom, in the context of a book cover, right.
Like the idea being that if a very recognizable
photograph has already been on one book cover, no one
is going to want their book to have the exact same
cover. It's a different book. Do you see that as
different from kind of the website issue? Mr. Shontz?

MR. SHONTZ: Oh, sorry, I saw Ms. Samberg
stick her hand up, so I was going to give her an --

MR. GRAY: Oh, I'm sorry. I've got a lot of
things to keep track of. I missed you, Ms. Samberg,
I'm sorry. We can get to you in a second.

MR. SHONTZ: I didn't hear the particular
example about the book cover, so if someone else heard
that, that come up in an earlier panel, I would defer
to them to provide some input.

MS. SAMBERG: I just wanted to add that when
that comment was made in the earlier panel, there
wasn't any suggestion that I heard anyway, and I
apologize if I misheard, but there was not a
suggestion or evidence that the use of an image on a
book was done by a state agency institution or actor.
It seems very unlikely to me that in commercially wide
publications, that a state actor like a university
press would use images for books without paying a
license fee.

I work very closely with the University of
California Press and know what their policies are and
I don't know of a single University Press that
wouldn't license images to put on a book cover. So
I'm not sure the question really has a good factual
basis.

MR. KLAUS: Right. And then I was using
that as an example. That was from a previous panel
and it was a book context, not the website. But the
question that Mr. Shontz brought up is value and
making a qualitative decision about the value of the
creative product or the end product being, you know,
the market -- the value of a person's creativity as expressed in content of course is what the market will bear.

And if there's a wrongful user of that content, I don't see why -- and I'm not talking about statutory damages -- I don't see why under copyright they are not allowed to seek the highest value for that content as possible. I mean isn't that part of the contract? And if the value is eviscerated, whose call is that? I mean is it the university's right to make that call? I don't think so. I mean it's just -- it's a rhetorical question and I'm just kind of throwing it out there.

MR. GRAY: Thank you. And then I guess as a next question, again, to keep -- going back to the last panel where I was also moderating, we heard the last panel from representatives from Colorado and Oklahoma about how when a copyright claim comes in, it gets routed to the AG's office specifically. Obviously, Mr. Evans, you mentioned there's kind of the Claims Commission process, but for everyone else how are claims routed, you know, to which office and generally how long does that time take to route? Ms. Samberg?

MS. SAMBERG: So, in our institution, as Mr.
Evans said, he's the DMCA agent of his. We have a DMCA agent at ours. And I can say that out of the five years that I -- for the first three years, I was actually a separate DMCA agent for the library until the rules changed on that and now we just use the main university one. Out of the five years, we have received zero claims. So I can't tell you the time it takes between receipt of the claim for when we will take it down. But through DMCA take downs, we've received zero claims. For all of the content that we make available online, zero in five years.

We've received requests to take down content for other reasons, such as people asserting privacy or other things and again our community engagement policy addresses that, but zero related to copyright.

MR. BUTLER: My experience is exactly the same. Since I've been at the University of Virginia, I have not seen any claims of copyright -- of DMCA or otherwise come across my desk, but the routing is the same. Our DMCA agent is in our general counsel's office and he vets all those claims and the word I got from him echoes what we've heard today. You can count the alleged infringements he's seen in the last five years on, you know, one hand.

MS. SMITH: And Mr. Butler, just to make
sure I understand, I think I understand what you were saying, but you were saying that it's university-wide and not specific to the library programs?

MR. BUTLER: (No verbal response.)

MS. SMITH: Yes, I see nodding for the court reporter. Thank you.

MS. LANIER: At the University of Michigan, our office works closely with our Office of General Counsel, who has someone on staff who handles copyright concerns, and we -- like I said, we work closely with them. So in talking with him and preparing for this meeting, it seems like our office has a lot of inquiries, but a lot of them are misunderstandings, like maybe misunderstandings about a license the University had purchased or how a creative comments license had worked. But we work -- our OGC works with potential complainants and sovereign immunity does not come up when dealing with those issues.

MR. SHONTZ: In similar fashion, how it is with the University of Illinois that our -- part of the routing of the things depends on what the entry point is for the allegation of infringement because the person claiming infringement may go to -- may contact a sort of general email box for the
University.

They may try to contact an individual staff member, who they think is linked to the website that has the purported infringement material and, you know, so it's the -- but once a human being put eyeballs on a letter saying University has infringed my copyright, please pay me x thousands of dollars in damages, they're very, generally very quick to get something over to our Office of University Counsel and then it will end up very quickly in my inbox to handle.

MR. GRAY: Great. And then Ms. Dooley, do you have anything to add as well?

MS. DOOLEY: I do not, I'm sorry.

MR. GRAY: That's perfectly fine. And then, Mr. Klaus, you mentioned that there may be a distinction between universities and then other types of maybe non-educational state agencies. Have you noticed any peculiarities or differences in things like response time or routing of concerns between different types of agencies?

MR. KLAUS: Well, again, this is not strictly in the context of copyright. It's more in the context of production, right, and the production -- I was the former Director of Business and Legal Affairs at National Geographic Channel and so I've got
it both from the inside, in-house point of view and outside counsel point of view. The response time varies.

It really depends upon the interest of the agency and what you're doing or what you're proposing. So, if you don't have their attention, they're slow to respond. And so it's -- in the context of a copyright issue, I have no direct experience, like challenging an agency in that regard. But everything else is like, if they're on board, they're very attentive.

But what I can say, however, that when topics do turn to copyright besides access, involving, you know, for example, a channel or a producer is going to own all the footage and there's no review rights of the materials and we're not going to give you the materials, that's where questions arise because that becomes a negotiating point, right, not so much a direct copyright infringement or a copyright control issue, but more of if you want access, then we want access to your materials. So that arises at some point and you have to be careful about how they can use those materials once you deliver them, if you deliver them.

MR. GRAY: Great. And then one more question and if no one has experience on this, that's
totally fine. But are any of you with the state institutions aware of any sort of insurance contracts or sort of similar agreements that might cover inadvertent or intentional hypothetical infringement?

MR. SHONTZ: Sorry, just to clarify, the question was whether any of the state institutions have insurance policies against infringement? Is that what --

MR. GRAY: Yeah, that would cover these sorts of -- yeah, these sorts of claims.

MR. SHONTZ: I'm not aware that our university has one.

MR. BUTLER: I'm not either.

MS. SAMBERG: I can't speak to that either, but it's an opportunity I think to talk about a related policy which is -- that the University of California has, which is that the University will defend in litigation, scholars or faculty who have made good faith fair use decisions in compliance with University policy.

MR. GRAY: Does that include indemnification or just defense?

MS. SAMBERG: As far as I know just defense.

MR. GRAY: Okay.

MR. SHONTZ: And, also, I should point out
the University of Illinois, at least, and I imagine my
counterpart universities are the same, we have a self--we're largely covered by our self-insurance policy,
so something like this, which is a very low level
activity, like I said, no more than single digits in a
year or allegations wouldn't even rise to the
necessity of like a separate third-party insurance
coverage.

MR. EVANS: Yeah. Our state law does cover
the indemnification of employees who are acting in
good faith in the course of their duties and
responsibilities to the state entity.

MR. GRAY: Great. Okay. Well, if no one
else has anything else on that, I think I'm going to
kick it back over to Kevin to get ready to wrap up.

MR. AMER: Great. I don't think I have any
further questions. Does anyone else from the
Copyright Office have any additional questions?
(No Response.)

MR. AMER: Okay. So I think we can wrap
this session up a few minutes early. Thank you all
very, very much for your participation. It really is
extremely valuable. We will be back at 3:45 for
session four. Thank you very much.
(Whereupon, a brief recess was taken.)
MS. RUBEL: Hello everybody. My name is Jordana Rubel. I am Assistant General Counsel at the U.S. Copyright Office and I will be leading this panel along with my colleague, Jalyce Mangum. Before we begin the session, just a couple of quick reminders. If you're not speaking, please keep yourself muted, so that we minimize any extraneous noise and raise a hand either physically or with the raise hand button if you'd like to contribute. We'll do our best to call on you. We do ask that you keep your comments short, just to ensure that you and your fellow panelists are able to contribute to the discussion. And we'll ask probing questions as we're able to and time permits.

This session here is going to focus on existing remedies for infringement of copyrights by state entities. The topics that we hope to cover during this session include the existing remedies in federal court, the possibilities of bringing claims in state courts, and what are some of the obstacles to bringing claims like those, the types of damages available for claims brought in state court, and then the types of damages that are available -- sorry, and then the risk of concern about frivolous claims that might be brought either in federal or state court. So hopefully we'll get to all of those topics.
Before I ask the first question, I'm just going to ask each of you to introduce yourselves and let us know your affiliation, if any. Mr. Madigan, can we start with you?

MR. MADIGAN: Sure. Hi, everyone. I'm Kevin Madigan. I'm VP, Legal Policy and Copyright Counsel at the Copyright Alliance.

MS. RUBEL: Thanks. And Mr. Vockell?

MR. VOCKELL: Hello. I'm Marc Vockell. I'm Assistant General Counsel for Intellectual Property Law for the University of Texas System, which is a university system of eight academic and six research institutions. By the way, two of those institutions include those that have contributed to the mRNA vaccine for COVID, so we're pretty proud of that. And I'm also speaking on behalf of the Association of American Universities and the Association of Public and Land-Grant Universities.

MS. RUBEL: Thank you. Mr. Bynum, let's make sure we have addressed your issues. Hopefully, you're there and can speak.

MR. BYNUM: Yes, I'm here. Thank you for being patient.

MS. RUBEL: Sir, can you just quickly introduce yourself?
MR. BYNUM: Yes. My name is Michael Bynum. I am from Birmingham, Alabama. I am a book editor. I am currently involved in the biggest copyright lawsuit in the country against Texas A&M University, which is now at the 5th Circuit.

MS. RUBEL: All right. And we'll give you a chance to talk a little bit more about that this afternoon, we promise.

MR. BYNUM: Thank you.

MS. RUBEL: Mr. Band?

MR. BAND: Hi. I'm Jonathan Band. I represent the Library Copyright Alliance, which includes the American Library Association, the Association for Research Libraries, and the Association of College and Research Libraries. I'm also an adjunct professor at Georgetown, where I teach copyright law.

MS. RUBEL: Thank you. Ms. Olson?

MS. OLSON: I'm Darcee Olson. I'm Copyright and Scholarly Communications Policy Director at Louisiana State University.

MS. RUBEL: Thank you. Ms. Xu?

MS. XU: Hi. I'm Yuanxiao Xu. I'm a Copyright Specialist at the University of Michigan Library Copyright Office. Our office provides
MS. RUBEL: Thank you. And Ms. Calzada?

MS. CALZADA: Hi. I'm Alicia Calzada. I'm the Deputy General Counsel for the National Press Photographers Association. Our organization is a trade organization that represents visual journalists of all mediums, digital, newspaper, print, and video as well.

MS. RUBEL: Thank you, everyone. Hopefully, you'll see that we have a good mix of people representing copyright owners, as well as state entities here, and I'm going to do my best to zigzag where possible, so that we get to hear the views of those different stakeholders throughout this session.

I want to start off by talking about the remedies that are available in federal courts currently, if there's infringement of a copyright by a state entity. You're probably aware that the Ex parte Young doctrine allows federal courts to hear claims against state entities if the only remedy that is sought is injunctive relief. So my first question is, and we'd like to hear both sides of this, why or why not -- why is an injunction a sufficient remedy or why is it not a sufficient remedy for copyright
infringement? And we'll go ahead and start with Mr. Bynum, if he wants to weigh in on that issue.

MR. BYNUM: Well, I think Justice Breyer and Justice Kavanaugh said it best at the Allen v. Cooper hearing back in November last year, that if you don't the day before or the week before and store it all, it doesn't matter after the fact to get any type of an injunction because the damage is already done and that is the problem that I've had against Mr. Vockell's argument, is that after they came and stole my book, I don't have any other thing to be able to protect because they've already stole it and after the fact doesn't do any good.

So the only way I can go after them is to try to seek some type of proper damages and every time we've tried to do that, whether it's going after them in state court or federal court, there is -- they keep waving sovereign immunity and, you know, you can't have it both ways.

MS. RUBEL: Thanks, Mr. Bynum. Mr. Vockell, why don't we jump to you?

MR. VOCKELL: Okay, thank you. And I should point out at the outset, of the institutions that are within the University of Texas System, Texas A&M is not one of them. There's a separate University of
Texas A&M System, a separate University of Houston System, and others within the State of Texas. I'd say that the injunction remedy has received kind of -- it's been minimized. But I think you shouldn't minimize the value of injunctions in a lot of intellectual property matters. In the patent context, for example, when the Supreme Court in 2006 ruled in the eBay case that injunctions were going to be much more difficult to get for patent owners, patent owners litigated as hard as they could. They tried to engage with Congress because they didn't have the leverage, that they wanted values, settlement values in patent cases dropped precipitously and a lot of patent owners actually filed suits voluntarily in the International Trade Commission where the only remedy is an injunction. So while there may be situations like Mr. Bynum mentioned, the Justice Breyer example where there are some situations where the injunction might not be the complete remedy to all harms, in a lot of situations it's a very strong remedy and it can drive good behavior and can drive high settlements.

MS. RUBEL: Ms. Calzada, do you want to weigh in on this question?

MS. CALZADA: Sure. I'll just say that with
respect to photographers, an injunction doesn't remedy
the harm to the market that's occurred when someone
has used your photograph and those that want to
license your work suffer a market harm because they
haven't had to pay -- or they have paid for it and
their competitors, which are sometimes state entities,
don't pay for it. And additionally, it harms the
relationship that the photographer has with the client
when their client pays for their work, pays to use
their work and they see other people using it for free
or in violation of an exclusivity license.

Add that particular with photography,
copyright can be a bit of a whack-a-mole problem. You
know, you get one down and another one pops up. And a
lot of photographers talk to us about how they feel
like they're really playing whack-a-mole. Playing
whack-a-mole in federal court is an expensive
proposition and it's really not something that most
photographers have the resources to engage in or the
willingness or interest in engaging.

These are people that do very hard work and
any time they spend on infringement takes away from
their business model. And so when they can't get
compensated for their work, it's a huge business harm
to them and their paying clients.
MS. RUBEL: Ms. Olson, would you like to weigh in on the question of injunctions? Please make sure to unmute yourself.

MS. OLSON: One of the things that was brought up earlier in addition to injunctive recourse under Ex parte Young, to bring claims against individuals. If you aren't going to bring a claim against a university, I believe that's Mr. Bynum's situation, is that the athletic department was deemed not to be responsible and he's now in a situation where he's claiming against a single individual for harm.

I would think that there would be in addition to injunction in his case, non-disclosure agreement that I presume would be in place and so there would be contract remedies. So, again, I think there's a panoply of things under state law that would provide adequate remedies if we're just looking for a remedy to a harm, as opposed to statutory damages that go beyond what the actual harm was.

MS. RUBEL: Yeah, those are good points and we will definitely hit on both of those as well. We'll talk to Mr. Bynum in just a moment about the possibility of bringing a suit against an individual in his personal capacity, so let's put a pin in that
for just a moment.

Mr. Madigan, let's jump to you. I will point out as I'm passing the mic to you, looking at the survey evidence, I believe that the survey indicated that 50 percent of the participants said they would be willing to sue for an injunction only and nine percent said they would not be willing to sue for an injunction only and there were a substantial number of respondents who said they didn't know. So hopefully you can touch on the survey responses when you opine on this question.

MR. MADIGAN: Yeah, I'd be happy to. I actually just really quickly want to first comment though briefly on the last panel because I don't think there were a lot of copyright owners represented on the last panel. We heard from university representatives about the compliance programs and robust copyright education programs that they have. And I have no doubt these programs and policies are mostly adhered to.

But the problem is that infringement does happen and just because the programs exist or because universities are engines of creativity, it doesn't mean that they shouldn't be held accountable or to a lesser standard when infringement does happen. You
know, these policies sound positive, but we also heard
hostility towards basic elements of copyright, such as
the availability of statutory damages, as if they were
something that was undeserved or predatory. So I just
wanted to point that out.

But as to injunctions yes, those are the
results of our survey. But when we then asked the
folks who would not be willing to pursue injunctions,
why they wouldn't, we heard a lot about how expensive
they are, how they only offer prospective relief, how
they do nothing to remedy for past injuries. As Ms.
Calzada said, the injunctions don't make up for lost
market share or lost licensing opportunities and they
require ongoing monitoring to ensure compliance.

And I just say as to Ex parte Young
scenarios, while an injunction may stop infringement
by an individual actor, it does nothing to prevent
another state official from engaging in the same
infringement down the line. And so I just don't feel
that injunctions alone are adequate remedies at all.

MS. RUBEL: Ms. Xu, do you want to add
anything on this point?

MS. XU: Yes. First, I would like to note
that the Fourteenth Amendment doesn't guarantee
people's right to statutory damages. And I think Mr.
Madigan mentioned how injunctions, that it doesn't
discourage states from behaving badly, so to speak.
But for example, in the Georgia State case, they are
the prevailing party and they still had to pay three
million dollars defending their claim, while the
plaintiff only had to pay a little more than $100,000.

And to name another case that was on Mr.
Bynum's list, one of the two cases in the past 20
years filed against the University of Michigan. That
case in 2015, they wanted only $500 from us and we
spent more than $10,000 defending ourselves because we
perceived them as a bad actor. They still wanted us
to pay when we already had a license. So the fact
that injunctive relief is available is a deterrent to
states infringing.

MS. RUBEL: Okay. And we will get back to
specifically talking about statutory damages because
that does seem to be a point that people on both sides
are quite concerned about appropriately. So we will
touch on that in greater detail a little later in the
conversation.

Let's talk about the second part of types of
relief that are available in federal court, which Ms.
Olson touched on a few minutes ago, which is the
ability to sue an individual in their personal
capacity. Of course the standard requires that you're only able to do that -- or they would only lose their qualified immunity if you can show that they violated clearly established law.

I know that Mr. Bynum has brought claims against at least one individual in his personal capacity. Maybe you can describe to us what was the process of identifying that individual and why did you seek to go that route and why you believe or maybe don't believe that suing an individual in their personal capacity could be a sufficient remedy, as I think Mr. Molnar was pointing out in the last panel that this was sort of the answer the problem. So I'd appreciate your response to that.

MR. BYNUM: Well, in my situation the person that did -- that was heading up the actual PR -- athletic department PR department that was the main culprit in the stealing actually sent me an email and admits to everything that he did and the process of what they went through and how it ended up on the Internet. It was all very black and white. And so that part was easy. And we got a court and the judge ruled that government immunity got to go. He stripped him of it.

And then a year-and-a-half later, he decided
he doesn't like that idea and so he decided that he
wants to file to the Fifth Circuit and try to get his
government immunity back. Well, you know, you wait
too late and don't deal with that, then that becomes a
big problem. But he's now trying to claim that he
does have his immunity and that it's -- back to that
whack-a-mole problem is that every time you turn
around, everybody tries to keep claiming some type of
immunity.

But when he admits to you in black and
white, yes, I put this on the Internet, yes, I had my
secretary retype this into our computer system, you
know, when they admit everything in black and white
and then they go out and lie to the court, you know,
it gets crazy. It's just like it's some story that
you would never believe in real life that could
happen, but it does.

MS. RUBEL: Any other copyright owner side
want to respond to the argument made by Mr. Molnar in
the previous panel that, you know, basically this is
the solution to the problem of sovereign immunity?
And then Mr. Vockell, I did see you. I'll make sure
we get you on this point as well.

(No Response.)

MS. RUBEL: All right. Seeing none, we'll
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go to Mr. Vockell.

MR. VOCKELL: Yes. So like I said, I'm not
litigating Mr. Bynum's case, but I wanted to just make
sure some facts that are on the public record, the
litigation record, are also on the record before the
Copyright Office. Mr. Bynum's demand of Texas A&M was
$780 million. So it is the type of case that we
discussed earlier, where sovereign immunity is
important to protect taxpayers and the state and the
state's role as a public steward.

And, secondly, with regard to the
litigation, there is a live bonafide dispute as to who
is the owner of the copyright and the actual author of
the material is not in the case. So I just want to
make sure that's on the Copyright Office's record as
well.

MS. RUBEL: Thank you. Mr. Band?

MR. BAND: I wanted to add that obviously in
all these cases of infringement or alleged
infringement, one never wants to go to court, right?
Going to court should be the last resort. It's
expensive. It's time consuming. And even if you have
the facts on your side and the law on your side, it's
still slow. That's the way the judicial system works.

And what we've heard on the previous panels
is that state agencies generally, but libraries and
universities in particular, are extremely responsive.
So you don't have to go to court to get an injunction,
whether it's under Ex parte Young or some other
mention. You simply let people know that this is a
problem and all the evidence that has been presented
thus far shows that universities, libraries, and state
institutions generally are extremely responsive and
stop the infringement.

Now that doesn't take care of all problems,
but it takes care of a lot of problems. And so I just
wanted to make that point, that there is something
that happens before litigation and that again there's
been no evidence that there is widespread disregard of
the rights of rights holders when people say, yeah,
there's a problem here.

MS. RUBEL: Yeah, I do hear that and I think
that university and libraries have been quite well
represented in this panel and in also the previous
panels. But we have noticed that they really are the
most active participants from the state side and it
raises the question about whether there are other
state entities that are as familiar with or as -- who
have policies that are as robust and are doing as good
of a job as all the people who have spoken from the
state side have presented.

Because we have heard examples this morning and throughout the day of people whose copyrights are being infringed and that when they do raise the issue, they're not -- they are coming up against responses that point to sovereign immunity perhaps among other possible defenses or limitations.

MR. BAND: We did hear from at least two attorneys, who represent the state, right? They're from the Attorney General's Office, not from universities. So they're responding to the breadth of claims against the entire state. One was the State of Ohio. The other was the State of Colorado. So we're not talking about just universities, but the states as a whole. And again all of the evidence we've been receiving is this very scanty anecdotal evidence.

Even the Copyright Alliance survey, they say they represent 1.8 million rights holders and they received, what, 150 examples of infringement. Google, in their transparency report indicates that they receive 90 million DMCA takedown notices every month, 90 million. What we've heard is that an entire university receives maybe five takedown notices an entire year and some of the libraries receive no takedown notices. So again if the issue here is
widespread harm, widespread infringement, I mean this is in 2020, the amount of infringement we're talking about here is negligible.

MS. RUBEL: I appreciate your comments, Mr. Band, but I do want to keep us focused on our current topic, which is remedies. We have discussed that point and other similar to that this morning. So I'm happy to let somebody respond to that, if they feel like they have something they want to add, but then I'm going to focus us on talking about remedies. Mr. Madigan, do you want to jump in quickly?

MR. MADIGAN: Yeah. No, it sounds to me like Google facilitates a lot of infringement. But, you know, I talked about the survey already today. I don't think we need to spend much more time on it. But out of those 150 responses, you know, people were identifying several instances, sometimes hundreds each. So we can talk about that if we want.

But, you know, just to go back to the Ex parte Young, I mean these have been recognized over the years by congressional hearings and by the Copyright Office as really incomplete remedies. I mean they don't compensate for past wrongs and it's unclear whether they deter future infringement. And I think these injunctions, they have to be coupled with
the other available remedies under the Copyright Act, otherwise copyright owners are being deprived of their rights.

MS. RUBEL: Okay. One more question about existing remedies before we move to state courts. A few of the comments raised the DMCA as a set of procedures through which copyright infringement issues are resolved. Does anybody want to talk about either side of the issue, whether how the DMCA takedown procedures weigh in to whether there are currently sufficient remedies for copyright infringement by state entities?

MS. CALZADA: Well, I can state that while we haven't surveyed our members specifically on DMCA and state entities, just generally speaking we hear a lot of responses about the DMCA being inadequate and I know there's completely different Copyright Office studies and projects on exploring that. But I think you can't bring that up in this context without recognizing the general inadequacy of the DMCA to provide relief to copyright holders.

And I thought of one more thing to mention about the injunction question, which is that as journalist, we work in the First Amendment space a lot and whenever there is an injunction that relates to
speech, it is always very, very specific and tailored because courts are very reticent to issue broad injunctions related to speech prospectively.

You know, they are generally of the opinion that speech that is harmful from the past can be punished, but they don't like to prospectively punish or ban future speech. And so any kind of injunction that you're going to get that relates to speech, which copyrighted works are speech, they're going to be very specific and tailored.

And so the ability -- again, I haven't studied this issue, but I would question the ability to get broad injunctions about a state using a work or the works of a particular person. You know, I think it would probably have to be very specific. Maybe somebody else has examples that contradict this thinking, but to me you're not going to get a court to say the University of Houston can no longer commit copyright infringement.

You're going to get a court -- if you sue for a successful injunction, you're going to get a court to say they're going to have to stop using this specific work. And it might not even be the whole state, it will be a specific -- whoever that specific defendant is and perhaps even in specific ways. And
so I think you really have to be cognizant of the fact that an injunction like that would be a minimal remedy in terms of preventing future harm.

MS. RUBEL: Does anybody want to respond to that or to the DMCA issue? Mr. Band?

MR. BAND: Just quickly on the DMCA issue, it is a very powerful tool for rights holder, so in another capacity, I represent publishers and when I send a takedown notice, the material comes down right away and the publishers are very happy that it happened so quickly. So it is a very powerful tool. Again, it doesn't take care of all situations, but certainly if materials are online and it again is a way of getting relief without having to go to court and without even having to send a cease and desist letter. You just send a DMCA takedown notice and the material disappears. My clients think I'm brilliant, but it's really very easy.

MS. RUBEL: Mr. Madigan?

MR. MADIGAN: Yeah. I disagree that the DMCA gives copyright owners a powerful tool to deal with alleged say infringement or any infringement for that matter. The Copyright Office's recent 512 report and a continuing DMCA focus hearings before Congress have all made it abundantly clear that the notice and
takedown system is not an effective mechanism for copyright owners to combat infringement. Similar to an injunction, it may allow a copyright owner to stop one specific instance of infringement, but it doesn't compensate for harm done or it doesn't deter against future infringement. And the notice and takedown system is a constant uphill battle for copyright owners as to recurring infringement. And I just disagree that it's a powerful tool to combat and deter infringement.

MS. RUBEL: Ms. Xu?

MS. XU: Mr. Madigan repeatedly mentioned how many instances of infringement there are. I wonder if they are actual infringement cases because in our own experience, we receive dozens of threats of claims each month and 90 percent of them are just frivolous claims. I know we will get to that later on, but I just wanted to address this now because of those, the majority from our experience, we already have a license. The companies representing the rights holders are not aware of those licenses and they assume we are infringing, but actually we're not. And then a lot of the other cases, we're relying on strong fair use. And we all know that fair use is a user's right and if you're using something
based on fair use, we're not actually infringing even if we're doing it without permission. So I just wanted to question if those instances you refer to are actual infringement cases.

MR. MADIGAN: Sure. You know, we talked about this a lot already in the first session, but just to say it again, I think, you know, we don't know if all the allegations are completely legitimate, but fair use would not be affected one way or the other, whether state sovereign immunity is adjusted or abrogated. Those limitations and exceptions will continue to exist regardless of what happens.

So, you know, I've heard a lot today from universities that, oh, what we're doing is fair use and, you know, that's fine and nothing that happens in the future with state sovereign immunity will affect the universities or other state entities right to invoke that defense.

MS. RUBEL: Ms. Olson, did you have a comment on this point?

MS. OLSON: Yeah. Within sort of DMCA adjacent, within our vendor contracts, there's always a provision that allows us to -- or requires us to act swiftly if there's any kind of impropriety detected, any kind of misuse, whether it's an infringement,
whether it's excessive downloads, that we will shut
off a user's account. And when we get to this
instance recently was spider hacking and I got an
inquiry whether spider hacking was a copyright
infringement because nobody was quite sure what it
meant.

It's a way for hackers to overload a server
and it turns out that if you're a grad student and you
put a search term into your research, you pull up a
list of articles and as you click to open the articles
in Google, they each open in a separate tab. If you
go back through and you open the tab, scan it, close
it, open the next one, scan it, close it, it will
trigger this spider hacking server overload report
back to the vendor, who then contacts us, and
apparently this is something that within IT is a
pretty common occurrence.

There's nothing being done wrong. The
student is doing legitimate work, using resources that
the library has licensed. It's a technical issue that
crops up, but it results in students and faculty
having their research stopped because the University
doesn't want to risk that anything is going on. And
again, this is built in to our vendor contracts.

MS. RUBEL: I think I'll jump around a
little bit because we did hit on some of the state
care about litigation. So let's go ahead and
touch on some questions related to that and then we'll
go back to some of my other topics related to claims
that can be brought in state court.

We did hear in the last panel and has
already been addressed a little bit in this panel as
well some concern from state entities that there would
be a chilling effect, particularly on legitimate
activities of state research institutions, if they had
to worry about claims for damages being brought in
federal court. So I would like to hear from state
currency representatives, if you can be as specific as
possible, we did hear in the last panel about the
HathiTrust case and I think we've heard a little bit
of other discussion about digitization efforts, but
whether it's those kind of digitization efforts or
other kinds of specific research activities that
you're fearful might be chilled if sovereign immunity
were abrogated.

MR. VOCKELL: I can speak to that.

MS. RUBEL: Mr. Vockell?

MR. VOCKELL: I mean I think it goes beyond
huge new initiatives to day-to-day instruction. And I
know there was a discussion on the last panel, "well,
it does not apply to private institutions." But there's a whole different deal with state institutions versus private institutions. I mean we're created by the state constitution.

We're governed by a board of regents appointed by the governor. We have very specific rules. We're open to public records. So there are certain things that we have to do or we're restricted from doing because we're state entities. We have a public charge. We're seen as -- a lot of institutions in my system serve historically undeserved communities, first generation students.

So, for example, when we had to go online with COVID, there was a huge need to put a lot of our instruction online and if -- it would have been a huge problem if our institutions would have thought, "Well, we can't do this online research out of, you know, the fear of copyright infringement." So I think it is important just in a day-to-day operation not to have our activities and serving as state institutions chilled.

MS. RUBEL: Ms. Olson?

MS. OLSON: I also at the beginning of COVID got a landslide of questions from faculty, who were terrified as they were trying to move down-based
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courses online because they knew that the rules for
what they could hand out in class -- what they could
use as an in-class handout, they would run into
problems with -- in making materials available online.
They knew that students had gone home for spring break
and then been told don't come back. So students who
would purchase textbooks didn't have access to the
materials they had purchased and faculty were frankly
afraid to make them available because of the risk of
being accused of infringing if they photocopied a
chapter of a book and sent it to a student, so that
they can keep up with their work.

And again as Mr. Vockell said, this was a
tremendous problem and something that left faculty
very afraid.

I've received a lot of questions about is
something safe to use, is something within fair use.
I have never, ever had a faculty member come to me and
say, hey, can I get away with this under sovereign
immunity. It's just not -- it's not where any of them
are thinking. It's not something that's going to help
any of them with promotion and tenure. That is
faculty's goal, how do they get the promotion and
tenure and it's not by bringing a lawsuit on to a
university.
MS. SMITH: Ms. Xu?

MS. XU: So following that train of thought, frankly, I don't think we will see a lot of behavior changes at first at least from state actors because we already act very conscientiously and responsibly because of what Mr. Vockell mentioned. We are very transparent. Our record is transparent. We're subject to the state legislature. We have to act responsibly. We can't just go about infringing copyrights or we wouldn't even get any funds from our state legislature anymore. People will be upset with us. There are lots of responsibility, accountability that only state institutions are subject to.

And I think realistically what we will see is a lot more misguided complaints by copyright holders, not even because they're copyright trolls, just because lots of people are uneducated on what copyright is. And that's what we already see. And right now people tend to be reasonable when we try to talk to them about why we're using something or if we made the mistake we negotiate a reasonable licensing fee.

But I'm afraid that if we abrogate sovereign immunity, people will be lured by this promise of statutory damages and they will be more prone to just
keeping their suit going even though it's not a good suit and you know how expensive it can be for us to defend those suits. So we have to worry about the extra burden to taxpayers this is going to cost.

MS. RUBEL: Yeah. That leads directly into my next question, which have to do with another concern that we sort of discussed in the comments and here today about concerns about frivolous litigation and that maybe what was driving that concern is this dangling carrot of statutory damages or what's perceived as a prize of statutory damages. So I'm interested in additional -- in hearing additional thoughts about that point on both sides. You know, do we think realistically this is a realistic fear that will unleash a flood of frivolous litigation or do we think that maybe this is a little overblown? Mr. Band?

MR. BAND: So I think the fear of copyright trolls is real. Most of the lawsuits that are brought in this country are in fact by what many would consider to be copyright trolls. And the lure of statutory damages is significant and it really does drive much of the behavior on both sides, meaning it incentivizes rights holders to initiate litigation or to make unreasonable demands. We've heard many
examples of that throughout the day.

On the other hand, the fear of statutory damages does have a chilling effect. I routinely counsel clients and, whether it's a technology company or private universities or public universities and when I start counseling, I do say, and, oh, by the way, if you're thinking of doing x or y, you do have the possibility of statutory damages--obviously not right now, if it's a state entity. But if it's a private entity or private university, the threat of statutory damages is enormous.

We're dealing -- again, we're in 2020. We're dealing with digital -- we're in the digital age with the number of works we'll talk about as vast. And so I filed an amicus brief for the Library Copyright Alliance, and Brandon Butler mentioned this before, also for the Software Preservation Network in Allen v. Cooper, and we were talking about the chilling effect statutory damages would have on digital preservation efforts.

In the collections of libraries and archives, we're talking about hundreds of millions, if not billions of items and digitizing those, if we start doing the numbers, it gets very big very quickly and it's very scary. And if you are a general
counsel's office at a university and the library comes
and says, well, we want to engage in this digitization
effort and you start doing the numbers on the back of
the envelope, you'll say, well, gee, that's all very
well and good, but what you're proposing will subject
us to a trillion dollars of damages, I don't think so.
Or, start with the public domain stuff and then maybe
you can work your way up to 1930 or 1940, but forget
about 1950 or 1960. So it's a very real threat.

MS. RUBEL: Mr. Madigan?

MR. MADIGAN: Yes. So I'm not aware of
frivolous claims or the lure of statutory damages
currently chilling the work or progress at private
universities who have no sovereign immunity, nor is
the fear of statutory damages chilling their ability
to progress and do good work. You know, for
universities to say that we can't reach our -- I'm
sorry, state universities to say that we can't reach
our full potential without, you know, bending the
rules to the detriment of people who copyright is
meant to protect, you know, it's an argument that can
be made by anyone or any private organization.

You know, a for-profit online user generated
content platform could reach its full potential by
finding holes in the law and bending the rules, but we
try to stop that from happening.

And I'm not sure that private universities are really being held back from reaching their full potential because they're required to play by the rules. And to the example of HathiTrust, I'm not sure if choosing not to participate in a project that at the time wasn't clear whether it was fair use or not is really an example of keeping private universities from reaching their full potential.

MS. RUBEL: Ms. Calzada, did you want to weigh in here?

MS. CALZADA: Yeah. I heard a lot of commentary earlier about, and I don't know if you would call it testimony, but a lot of people speaking about how these universities are taking work down, but they're not compensating for past use. So I don't hear fear of statutory damages. I hear fear of even just paying what it is worth to use a copyrighted work. So it's hard for me to accept the statutory damages worry when I don't hear people even willing to pay what a work is worth.

MS. RUBEL: Mr. Vockell?

MR. VOCKELL: Yes. I heard a lot of the institutions replying to Ms. Calzada, who said like our institution, that if there's a case where there
was an actual infringement and compensation is appropriate, we will negotiate and we will pay a fee. So I don't think there was anybody saying that universities should never engage in paying anybody retrospectively when they inappropriately used copyrighted material.

MS. CALZADA: I heard several say that when they were notified of an infringement, they took it down and if they wanted to use it in the future, that they would pay for it, but that they weren't settling on the value of the previous use. And I'll add that with sovereign immunity taking any level of a stick out of the equation, the normal market force of offering something that has value and negotiating over what that value is, is completely gone. You know, in a sense, all that's left is to say, I guess we're going to have to take whatever is offered and that's not really market forces.

MS. RUBEL: Mr. Bynum, do you want to speak at all about the importance of being able to obtain statutory damages from the perspective of a copyright owner?

MR. BYNUM: Well, first of all, I have a tremendous amount of respect for libraries. I've spent probably 25,000 hours in libraries doing
research during my career and libraries are like a big part of any community, any university. It's the center of what's important. And most of the time that I've seen regarding libraries are rarely the ones that have done anything wrong.

But the real damages should be -- like for example, in my friend Jim Olive's case against the University of Houston, they not only put his photograph on four different websites, they supplied that photograph to be used in an advertising campaign to support the University of Houston's Business School. I mean I don't know how far I've seen you can go in doing something, yet the University of Houston does not want to stand up and pay Jim for the illegal use of his photographs, which is the only proper thing to do.

And, you know, so there has to be some accountability owed, whether it's a university or a state agency or somebody accountable. And the case that's most, you know, unique about this is the case against the Houston Interscholastic School Board that recently -- there was a $9.2 million judgment and the only reason that case got as far as it did is that the law firm representing the Houston School Board forgot to claim sovereign immunity.
But at least in that case, we were able to find out how the Houston School Board did all this amazing amount of copying and that school principals and other people that you should hold to account were not worried about sovereign immunity. And they just let people be reckless.

You know, so there are stories like that everywhere. The State of Texas, for example, is the number one intellectual property infringer in the country for the last 20 years. There was more infringement against the State of Texas entities from 2015 to 2019 than for the past 20 years against the State of California, the number two infringer.

You know, people have to be held accountable when things go amuck and we need to let them know that there are consequences. And that's what I've been fighting for, it's what Jim Olive has been fighting for, it's what Rick Allen has been fighting for and other people like that across the country. We're just trying to stand up and say, no, you cannot do that. This is not right.

MS. RUBEL: Thank you, Mr. Bynum. Ms. Xu, did you want to add something else with respect to statutory damages?

MS. XU: Not directly on that point. But I
noticed that some people have repeatedly mentioned how
the university libraries are over represented, so to
speak here. I think I can explain that quickly. It's
because we are by and large in charge of licensing
materials. For example, our library last year spent
$29 million on licensing materials. That's not
including software and all the other school's
individual licenses. I think that's why when we talk
about university infringing, we, as the library, feel
personally, you know, involved in this topic. It's
not just that the libraries have good -- we have good
behavior, so we can stay out of this kind of thing.
And I'm not sure what topic we were on right
now. I thought we were on frivolous claims. Are we
past that point or can I go back to my --

MS. RUBEL: No, you're welcome to make
another point about that.

MS. XU: Okay. So I mentioned briefly
earlier about the Campinha-Bacote case. I'm not sure
how to pronounce that. That's listed in one of the
cases in I think Mr. Bynum's spreadsheet.

MR. BYNUM: I'm familiar with that, yes.

MS. XU: Yeah. So that case, I think they
actually filed against seven institutions and they
were demanding $500 from us, even though we already
had a license to use their material. So when we learned they are just throwing these threats against all these, our sister institutions, we decided to defend the case. And that case, even though we only hired a local law firm instead of a leading national firm, it still cost us more than $10,000. So to me that's a good example of a frivolous lawsuit.

MS. RUBEL: Mr. Vockell, did you have another comment?

MR. VOCKELL: Yes. I was just going to -- I believe Mr. Bynum was speaking about the DynaStudy case that was on his list. It was DynaStudy --

MR. BYNUM: Yes --

MR. VOCKELL: -- versus --

MR. BYNUM: -- DynaStudy, yes.

MR. VOCKELL: Thank you, sir. You can see that case at 325 F.Supp 3rd at 767 out of the Southern District of Texas from 2017. That's a case where sovereign immunity was not a defense. And under Texas law, I think that's something we need to consider, you know, state to state. There are different laws and it kind of goes to the issue of state remedies, that the Texas legislature has different kinds of governmental immunity for different types of subdivisions. So a school district is not considered an arm of the state.
And so, you know, that's a case and several of the independent school district cases by DynaStudy on the list are ones where there were settlements, as Mr. Bynum noted, nearly an eight-figure settlement.

MR. BYNUM: When you stop and look, Houston School Board a year-and-a-half earlier won another case because they did use the sovereign immunity defense and that was a case decided by Judge Rosenthal, the chief judge in Houston, and she wouldn't make a mistake and if she ruled that that was a sovereign immunity case, she knew what she was doing. And a year-and-a-half later in the other case, the Bracewell law firm forgot to do that and that's what came up later. After the decision was made, all the hullabaloo came out and the stink, what happened on that school board, how it is allowed to happen like this.

You know, the lady in Marble Falls that won the case, she got lucky and I'm glad it worked out good for her. But, you know, as her attorneys explained to me, you know, in all likelihood, if they had been doing -- the Bracewell firm had been doing their job properly, they would have filed the sovereign immunity just like the other case done by another law firm on behalf the Houston school board.
and they won. Bracewell didn't do that and they lost when they got faced with the facts. That's the real story. And when we go to court in New Orleans, your friends and colleagues are going to find out what the real story is.

MS. RUBEL: I think this is a good segue to talking about asserting claims in state courts, so I guess we're backing up in some ways. We have talked about available remedies in federal court. A lot of the comments did mention that there are remedies potentially available in state court. But I want to walk through some of the potential obstacles to bringing claims in state court and hear a little bit about folks' experience trying to assert those types of claims or anecdotes that they might have heard from copyright owners trying to assert claims in state courts.

So I want to start with preemption, which I think is probably the biggest obstacle. To what extent does preemption affect the ability to bring claims that are similar in substance to copyright infringement claims in state court?

MS. CALZADA: I can speak to that.

MS. RUBEL: Ms. Calzada?

MS. CALZADA: Yeah. So and before I get
into the detail of that, I just want to say the term copyright troll has kind of gotten out of control as a pejorative way to describe copyright owners, who have chosen to pursue their rights. And I think it's important to think about copyright owners as people who have ownership of intellectual property and have rights. What I wanted to talk about, NPPA filed an amicus brief in the case of Jim Olive v. the University of Houston. In that case, Jim Olive is an aerial photographer. These particular photos, he had to rent a helicopter and he suspended himself from the helicopter with a harness to take these very unusual and unique photographs.

They were infringed by the University, which removed the copyright and attribution information and used it on several web pages promoting the business school. So this wasn't a library or scholarly use. This was marketing, something that every business entity in the state uses or does on some level. So there's no fair use question here.

And the Fifth Circuit at the time had already held that sovereign immunity protected state entities from copyright infringement suits. And so he filed a state law takings claim and the state did file a plea to the jurisdiction, arguing that the claim was
preempted by the Copyright Act and it wasn't a valid

takings claim.

The district court initially denied the
jurisdiction, but an intermediate appellate court
concluded that copyright infringement was not a
takings claim and they had an extensive discussion in
the opinion about preemption and how copyright applied
to this case and how sovereign immunity fit into a
copyright infringement claim against a state entity
and ultimately held that it was not a takings claim.

MS. RUBEL: Yeah, that's a great example and
we will discuss that specific case and the
availability of a takings claim in just a moment. Mr.
Band?

MR. BAND: Yes. So preemption is not a
problem in the vast majority of cases and that's
because in the vast majority of cases -- again we're
talking about we're in 2020, in the vast majority of
the cases, the content is licensed by the state
entity, whether it's a college, university, a state
government, whatever it is, they're licensing the
material and so there's always a contract action. And
even though I might disagree with some of the
preemption jurisprudence with respect to shrinkwrap
licenses and click-on licenses and -- browser app
licenses, and so on, courts typically, especially in an interaction when consumers aren't involved, courts are not preempting those claims.

They're finding that there is an extra element and so there is a contract action. And so many of the cases we've talked about today, there was a contract action. We heard about the American Chemical Society and these tests, well, those tests were licensed and so there is a license action that can be brought, a contract action in so many other cases.

We are talking about some of these cases like the photographer hanging out of a plane. I mean that is the oddball. That is the exception. That is the outlier case in 2020, and in 2020 -- I wouldn't be surprised if 95 percent of the content that ultimately is the subject of what might be disputed is licensed and could be resolved or could be addressed in state court or in federal court even under a breach of contract theory, so no preemption.

MS. RUBEL: That is a theme that we saw in the comments, the notion that the increased digitization of copyright works made it less likely that a claim would be entirely preempted because of the availability of a breach of contract claim. So --
MR. BYNUM: Jordana, can I note one thing, please?

MS. RUBEL: Yes, please.

MR. BYNUM: Yes. All right, the most famous copyright case in the last 25 years is the Denise Chavez case against the University of Houston's Artpublico Press Division and it made three trips to the Fifth Circuit. But at the end of the day, her attorney, David Gunn, who is with the Beck Redden firm now, but he represented her in all three cases and today, he will tell you that case should have been no more than a breach of contract case.

It never should have been blown up and got to the Fifth Circuit three times because at the end of the day, the University of Houston kept wanting to reprint her little book, 2,000 copies at a time, because it was a Hispanic book that was selling well. And she didn't do a lot of designing the book and not making changes to it, you know, and she wanted somebody else to publish the book. And they had a big dispute over her contract and she kept saying, no. And at some point, you got to respect, you know, when somebody says, no, I don't want you to reprint this book.

And that was what that fight was all about.
And the Chavez case turned out to be the biggest copyright lawsuit in this country for the last 25 years regarding sovereign immunity and everything has evolved around that. But at the end of the day, that case was nothing more than a breach of contract case. It should have been handled in a state court and moved on.

MR. BAND: And I'll just add that Allen v. Cooper is also really a contract case. There was a contract that the parties disagreed on and things spun out of control. But I think part of the reason why this --

MR. BYNUM: I agree, I agree with you and I think Rick Allen would also agree with you. But the problem is the State of North Carolina won't sit down and have a proper discussion about the breach of contract.

MR. BAND: Well, what I --

MS. RUBEL: Let's let Mr. Band finish, please.

MR. BAND: Yeah. My point is I think again every case is different, but the appeal for plaintiffs and the reason why they prefer copyright as opposed to contract is the possibility of statutory damages.

Under a contract claim, you don't get statutory
damages. You're limited to the actual damages or
whatever the damages are in the contract, whereas if
you get statutory damages, gee, of course that's much
more attractive.

MS. RUBEL: Anybody from the copyright owner
side want to respond?

MS. CALZADA: Yeah. I'll just say that some
courts do look at a contract case and say, no, this is
about copyright. This belongs in federal court and
they will reject contract claims that are at their
core about copyright violation. And so you can't say
that you can just bring a contract claim when there's
a copyright question and you'll get relief. That just
doesn't always happen.

MS. RUBEL: Yeah. I have seen examples,
especially when you're talking about states that
aren't familiar -- that aren't in the regular practice
with handling copyright cases and they're looking for
an opportunity to pass it off to somebody else, where
the analysis might not always be consistent with the
preemption jurisprudence. Any other points about
preemption?

MR. VOCEKEL: Oh, I'm sorry.

MS. RUBEL: Yeah, Mr. Vockell?

MR. VOCEKEL: I would just agree with what
Mr. Band and Mr. Bynum said about contract can be an appropriate remedy a lot of times. And just to share for your record, for example, Section 2260 of the Texas Government Code abrogates sovereign immunity for contract claims and has a process to handle it. So, yeah, so software licenses, copyright licenses, all those can be litigated.

MS. RUBEL: And just because you point -- and not to put you on the spot here, but is there any limitation on the kinds of damages that can be obtained or any cap or is that fully subject to being litigated?

MR. VOCKELL: Yes. There is -- on the contract claims, there is a cap of $250,000 that can be raised by legislative action, which is somewhat more routine than you would think.

MS. RUBEL: Yeah. I think it's quite common to have caps at somewhere in that neighborhood or even lower. Ms. Xu?

MS. XU: Yeah. So when you bring claims in the State Claims Board, Commissions, whatever they are called, you don't have to worry about preemption. I think in the previous session this was mentioned briefly. So for example in Michigan, if you have a claim under $1,000, you can bring it in the State
Administrative Board. If it's above that amount, you can bring it in the Court of Claims. And I think most other states, if not all of them, have something like that. For example, in Arkansas, there was a case called Infomath v. University of Arkansas, where their claims commission awarded them $15,000 damages against the state.

And I also want to mention that we also represent copyright holders. Most of our students and faculty create copyrighted works and we care very much about their copyright. And if people were to infringe their rights, no matter if the infringer is a state or individual, we will try to help them as much as we can. I just noticed you referred to the other side as "the copyright holder." But we're also copyright holders.

MS. RUBEL: Understand, thank you for clarifying that point.

MR. BYNUM: And, Jordana, I wanted to note one last thing, if I could, that you started out talking about getting these injunctions against people, so something doesn't happen again and also in trying to tie in the breach of contract part of it. There was a case just like this that had both parts of this. It was a case against the University of Georgia.
about 10 or 12 years ago. And in that case, there was

a professor that was teaching students how to take

pharmacy, the national pharmacy test, except he was

using old tests to help teach his students with and

the National Pharmacy Board said, no, you're doing

this the wrong way.

They ended up suing him for copyright

infringement. They ended up -- did get an injunction

because the professor had said he was not going to do

this again, signed the contract, and then came back

and was teaching the class again. So they did get an

injunction against him to stop him from doing that in

the future. And then they went to state court and

ended up getting a $300,000 settlement against the

University of Georgia for breaching their first

contract.

So there are some merits in an injunction

for certain things and I will agree with that with any

of the other folks. There is a certain merit to that

and there's also certain merits of taking some of

these cases to getting the small claims court -- not

small claims, but getting the breach of contract part

of it dealt with in state court.

But in my case, for example, I never had a

contract with Texas A&M. They were just people that
came in the middle of the night and took my work and
posted it out to 350,000 people. It's those type of
people and the type of people that take Jim Olive's
stuff and do all the stuff they did with his
photographs, you know.

It's just when you have people like that out
there doing really bad stuff, they're the people you
got to hold -- be able to hold up and hold them
accountable, you know, because that is real
intentional effect. When you have people doing lesser
things, there should be lesser remedies, you know, to
hold them accountable.

And I don't want to hold libraries
responsible because libraries are great places. They
do so many good things. But occasionally one may do
something wrong. But if you look at all the legal
cases in the last 30 years, you will find very few
lawsuits against libraries because they're not the one
causing all the mischief. It's some of these other
people out there, they're causing the real difficult
stuff, and that's the reason why we need to be able to
hold states accountable for when they cross that line
and do the real stupid stuff and don't want to deal
with it and try to get it sorted out.

MS. RUBEL: Thanks, Mr. Bynum.
MR. BYNUM: Thank you.

MS. RUBEL: Another point, another issue that might arise when one tries to assert a claim in state court is state immunity. And I know a panelist from Arkansas discussed this previously and there may be other states that have similar laws that either, you know, entirely restrict the ability to bring a claim against the state in state court of set caps or other limitations on the type of claim that may be brought against a state.

I know Ms. Xu just talked about another avenue for bringing claims up to a certain dollar amount in her state. Others might have other experiences. I'd be interested in hearing if anybody has comments on the issue of state immunity in state courts.

MS. XU: Just a quick note, I don't think there's a cap in Michigan for the Court of Claims.

MS. RUBEL: Oh, I'm sorry, I thought you said that you were able to bring a claim --

MS. XU: Oh, that's for State Administrative Board.

MS. RUBEL: I see. Mr. Vockell?

MR. VOCKELL: Yes. So there is a process in Texas for if there's a case where the state has full
sovereign immunity, wouldn't be able to be served, it would be a case that would make Mr. Madigan very upset because he doesn't like sovereign immunity -- that you can get a legislative waiver if it's a unique case where sovereign immunity shouldn't bar the claim.

And you all can look, there's a case, the Railroad Commission v. Gulf Energy from the Supreme Court of Texas in 2016. So that is, you know -- it's not the most common remedy, but it's a remedy. Allen v. Cooper talked about is there due process, well, here's a process for egregious cases.

MS. RUBEL: Do you know if that has been raised in Mr. Olive's case in Texas?

MR. VOCKELL: I don't. To the best of my knowledge, Mr. Olive's case is pending before the Texas Supreme Court on the specific issue of whether a takings claim is cognizable for a breach of copyright. So he may have a -- there may be a state remedy, you know, for takings in Texas after the Supreme Court rules on that.

MS. RUBEL: Any other comments on state immunity or other procedures through which one can sue a state?

(No Response.)

MS. RUBEL: All right. Let's talk about
takings claims then. We've talked a little bit just
now about Mr. Olive's claim against the University of
Houston. In that case, as Mr. Vockell just summarized
and Ms. Calzada talked about this as well a few
minutes ago, the Texas Court of Appeals held that
there was no takings claim available under the Texas
state constitution or the U.S. Constitution for
copyright infringement. And my question is, do you
think that case was correctly decided?

MS. CALZADA: Well, we filed --

MS. RUBEL: Ms. Calzada?

MS. CALZADA: We filed an amicus brief
urging that the intermediate court holding be
overturned, so I guess we would have to say no, we
don't believe that was correctly decided. Part of the
intermediate court's argument was that, the discussion
was that because they didn't take the whole copyright,
it wasn't a takings in the way other takings would be
considered and they compared it to other sort of
interferences and, you know, meaningless trespasses.

I have the term right here, hang on, the
specific term used was transitory invasion, you know,
so something along the lines of the state walking
across your land. I think that that ignored the
damage, as I discussed earlier, the market damage that
happens when an infringement takes place.

Remember, this was a unique image of the City of Houston and so a photographer is going to license their work in various genres and sometimes will offer exclusivity. And you're definitely not going to want two universities in Houston to use the same photograph. And so if he had a private university that wanted to license his work, they're not going to want to license it because a competing university is using the work. And so to just sort of say, "well, he still owns his copyright, it's not like they took the copyright from him," ignores the damage to his intellectual property.

And we talked extensively in our briefing about how using a work without permission does damage the intellectual property. It damages the rights and relationships that you have with licensees and it damages exclusivity or the potential for -- I mean even the potential for exclusivity is limited when people know that someone can come along and infringe with impunity and so it's very difficult to offer exclusivity when you know that that's not really possible.

And so I think it's really -- I'm hopeful that the Supreme Court of Texas will understand that
there is more to the value of intellectual property
than just owning it and that the use of it has a value
and when it's taken, it's taken a piece of it, a chunk
of it and sometimes a very valuable chunk.

MS. RUBEL: Ms. Olson, did you want to say
something about that?

MS. OLSON: We've talked a lot about
exclusivity and I was -- two competing thoughts came
up in this. One is, I know Mr. Olive allowed a
newspaper to come into his studio and take photographs
of a dozen or so of his works. Would the newspaper
running an article sympathetic to Mr. Olive featuring
fairly decent size reproductions of his work
jeopardize exclusivity? And seriously, I really don't
know if that would that be something that -- how that
would impact. And then there was a comment that was
made in an earlier session that I also -- I'll stop
with the question I asked exclusivity first.

MS. RUBEL: All right. We'll come back to
you. Ms. Calzada, did you want to respond to that?

MS. CALZADA: Yeah, sure. No, because you
don't have a company that is in the business of
marketing the university, that is using it for the
purpose of marketing the university, that is competing
with an existing client. And also, you have -- I mean
that was with permission, you know. If he had
exclusivity concerns, he chose to let them in. He has
control over that.

You know, there's certainly a fair use
argument when you're reporting about a lawsuit that
involves a photograph. And so there's other questions
there, but I think that's a disingenuous question to
say that that's threatens exclusivity, reporting on
the lawsuit. To me, they're two different -- they're
in separate columns of use and questions.

MS. RUBEL: Mr. Band?

MR. BAND: So when Ms. Calzada was talking
about the trespass, I just wanted to mention one more
thing related to trespass and also preemption because
I don't know the list of legal theories you're going
to get to. So I just want to mention that one of the
other state theories that can be applicable if the
fact situation doesn't allow for a contract action
would be trespass to chattels. So if a university
doesn't have a license to the content, but let's say
is going on to someone's server -- again we're talking
in the year 2020 and this happens, where people
someone might go on to a server and get access that
way to the photo without a license, there can be a
trespass to chattels action.
Similarly, a lot of states have state versions of the Computer Fraud and Abuse Act, which reached going on to a computer and taking something without authorization. That, too, would not be preempted and would be subject to liability under state law. So depending on the fact pattern, there's often a way to get to the state actor who is behaving badly.

MS. CALZADA: Can I --

MS. RUBEL: Sure.

MS. CALZADA: -- add on to that? I think we're twisting ourselves into a pretzel, trying to come up with other ways that we can bring what is in essence a copyright infringement lawsuit when what needs to happen is for copyright remedies to be available. I think we could probably expand -- I mean there's a lot of creative mental energy in this room and I'm sure that we can all expand on different creative ways to approach copyright.

But in the end, it's copyright and a copyright infringement should be addressed as a copyright infringement and we shouldn't have to do somersaults. And these are all theories. None of these have been tested or successfully tested, I should say. And so I think the ultimate question is
why shouldn't a copyright holder have a right to
protect their copyright?

MR. BAND: Well, because the Constitution
says that in this situation, things have to be handled
differently. Take it up with the Supreme Court,
although they've already decided it, okay. So that's
why we're here. That's why we're trying to figure out
what's constitutional.

MS. RUBEL: Mr. Madigan?

MR. MADIGAN: I was going to say, yes, they
already decided it, but obviously they -- I think they
said "something is amiss" and if -- you know, Congress
should act to stop states from acting like pirates.
And it's just sort of, you know, their hands were tied
and I understand we're here to try to provide some
sort of record to help them to see if Congress can
act.

But as I said earlier in an earlier session,
there's no magic number of infringements that is going
to trigger Congress to act. So I think like Alicia
said we should think about these things at a more
fundamental level, like is state sovereign immunity
truly serving the purposes of our copyright system.

MS. RUBEL: I want to just pose one final
question and we'll give you a chance to respond, Mr.
Vockell, to my question or to the one Mr. Madigan just raised. One option that's on the table is for Congress, if it decides that there's a sufficient record, to pass another statute abrogating state sovereign immunity.

There is another -- or there's probably other solutions as well and one possibility that was raised in the Oman report way back when is amending the Copyright Act to take away exclusive jurisdiction of the federal courts to handle copyright infringement claims.

Does anybody have any thoughts about how far that potential solution could go towards addressing some of the issues that we've been discussing today? Mr. Vockell, I'm going to let you jump in because I know you had a comment before and if you want to touch on that question as well, please do so.

MR. VOCKELL: Well, I don't know -- I was going to go off Mr. Madigan's good sound bite that I kind of lost now. He mentioned the Supreme Court talking about states acting like pirates and I think we haven't seen that evidence here. We've seen some disagreements and concerns about what's the effectiveness of the individual remedies. We've talked about in terms of relief DMCA, Ex parte Young
takings, breach of contract, and whether they do or
don't cover everything.

But to eliminate a constitutional right,
like John said, the Eleventh Amendment, there's a high
standard that needs to be reached, a widespread
pattern of intentional or at least reckless
infringement. So I don't think there's been any
evidence that that high standard has been met. And so
I think taking a second shot at the CRCA probably
isn't a good idea. I haven't thought about other --
you know, your other revamp of the entire copyright
litigation system.

MS. RUBEL: Just throwing that out at you at
the last second, Mr. Band?

MR. VOCKELL: I don't think it's necessary
based on what we said about how the system is. You
know, the claims we're hearing from Mr. Bynum, Mr.
Olive, the other panelists are like the tip of the
iceberg. This huge iceberg under the water is what
we've talked about, where our libraries spending $60
million, California spending $100 million, we're
buying all the licenses. The system is working.
That's really the story here.

MR. BAND: Yeah, if I may? I think the idea
of giving state courts jurisdiction over copyright
cases would be disastrous. It's complicated enough where you have conflicts among circuits, and there's a reason, whether it was a great idea or not, patent for Congress to give exclusive appellate jurisdiction for patents to one court.

But to have 50 different state courts interpreting copyright law, I think it would just be such a complete mess especially given that -- and again this gets back to the underlying point -- copyright is complicated. Copyright isn't easy and it's complicated in large measure because of fair use. And fair use, as Justice Ginsburg said, is a built-in accommodation to the First Amendment.

So in many ways, people who don't like fair use or think fair use is messy, well, the problem is the First Amendment, just like the problem here is the Eleventh Amendment and we don't want to get all these state courts starting to interpret the copyright law in 50 different ways.

MS. RUBEL: Ms. Xu?

MS. XU: Yeah. The question was whether we should abrogate sovereign immunity or abrogate preemption and my answer to that is neither, because we don't see widespread, intentional, reckless infringement by state actors. I think it's better to
focus on numbers instead of anecdotes. So last year state actors contributed 11 percent of the total GDP. And how many state infringement do we see? It's far less than one percent. So Congress' effort and energy is better spent elsewhere if it wants to educate the general public on what copyright is and how to contain copyright infringement. State actors are definitely not the big infringer here.

MS. MANGUM: If I may ask one question just in terms of remedy. Is twisting, as Ms. Calzada said, these copyright claims into a breach of contract or tort claims, is that a threat or a danger to the integrity of copyright law and consistency of copyright law application in and of itself? Ms. Calzada, if you can comment on that or Mr. Madigan.

MS. CALZADA: I think that goes to the same, almost the same question about state law, you know. I think it could result in more uneven application of copyright law. We haven't addressed the question of whether giving states jurisdiction over copyright law would solve the sovereign immunity problem.

But we did comment on that in the small claims process very, very early, maybe eight years ago when we were looking for solutions to the problem of small copyright claims and just generally felt that it
was risky to the idea of assurances and consistent 
apPLICATION of copyright law, as you say, which really 
given the stakes and the importance need to be 
consistent. But I think there's no question that the 
system is broken and when a system is broken, you need 
to think outside the box.

And if I could touch for a second on Mr. 
Band's point about the First Amendment. You know, 
again, we represent visual journalists and there is a 
fundamental difference between copyright infringement 
and other intellectual property infringement because 
of this First Amendment point. But when a state 
infringes someone's copyright, they violate the right 
against compelled publication and compelled speech and 
that is also a very important First Amendment right 
that I think hasn't really been talked about here. 
But there is a First Amendment protection against 
compelled speech and when a state takes a photograph 
and uses it against the wishes of a copyright holder, 
they violate that person's First Amendment right. 

Additionally, at least two copyright 
infringement cases where sovereign immunity was held 
related to the VARA and involved the destruction of a 
copyrighted work, which also affects the First 
Amendment. And so I think that it's very important to
consider the balance of the First Amendment interests of the copyright holder, who has a right to decide how their speech is used as a part of their First Amendment right.

MS. RUBEL: Mr. Vockell, we're going to give you the last word because we're just about to be out of time.

MR. VOCKELL: Well, I appreciated Ms. Magnum's question. And to the point of uniformity of copyright, I worked in the private sector and the public sector and here at the -- you know, just at the University of Texas alone, we have over 50 professionals -- librarians, licensing agents -- focusing on making sure we do comply with copyright. So I think concern about the uniformity of applying copyright, we're in a -- state universities probably apply copyright more uniformly than almost any other institution I can think of.

MS. RUBEL: Many thanks to all of you for participating. I think this has been a useful discussion. All four panels were interesting and informative. I'm going to pass the mic over to Regan Smith. I think she's going to talk to Mr. Bynum a little bit more and then we're going to get to public comments. Sorry, Regan, I think you're still muted.
MS. SMITH: All right. Thank you, Ms. Rubel. We're turning to the section of the day that we call the audience participation or open mic participation, but we're going to start with Mr. Bynum, since he was having technical difficulties on an earlier panel he was scheduled to be on. So, Mr. Bynum, this is your opportunity to share for the record any materials that you intended to and did not get a chance to get out yet.

And we'll go through -- we have four others who have signed up for the audience participation segment. And just so people know, when we get to them, it will be Janice Pilch, Jeff Sedlik, Alicia Calzada, and Kevin Madigan. So, Mr. Bynum, are you there?

MR. BYNUM: Yes, I am here.

MS. SMITH: Thank you.

MR. BYNUM: First of all, I very much enjoyed listening to all of the other people on this last panel. They all are very articulate and they bring great views to be considered and discussed. And several of them, I'd probably like to sit down and have a beer with just to hear more of their ideas as we go down the road.

But, you know, most importantly is that, you
know, when you have this type of problem, you know, the one big thing that we've discovered in doing the tremendous amount of research that we had to do for this case is that you don't have a lot of examples of people going out there and doing big time intentional theft. A lot of it starts out with just pure stupid stuff that instead of dealing with it early, it grows and takes on a whole new momentum and it just builds from there.

And I can definitely tell you that Jim Olive would say the same thing. Rick Olive -- I'm sorry, Rick Allen would tell you the same thing. My friend up in Kentucky, a great photographer up here that took on the University of Kentucky when he was having a problem with his photographs being improperly used by their basketball program. He had -- it was largely started with this stupid stuff and the University refused to sit down and work through the problem.

And it's just that when people quit talking to each other and not trying to find a solution to how to deal with it, then you have to find another way to get to the bottom of the problem and that's where all these difficult lawsuits really grow from there. And, you know, and I think that if all of us -- it's when we get to the point where we can't talk to each other
that we need to stop and step back for a minute and think about this because talking through problems deals with 99 percent of the issues in front of us.

And --

MS. SMITH: Mr. Bynum? Mr. Bynum?

MR. BYNUM: Yes.

MS. SMITH: I want to make sure I understand how this connects a little bit closer to the standard the Supreme Court has set out. So in your comment, you have identified 160 cases of copyright infringement since 2000; is that right?

MR. BYNUM: 158, yes, 158.

MS. SMITH: 158, okay. And so the Supreme Court has said that Congress should base future legislation upon the record that is widespread and also demonstrates intentional and reckless infringement. Can you speak a little bit about the 158 cases and whether they represent that or rather, perhaps, honest mistakes, which is another phrase that the Court opinion also touched upon as an alternative situation of potential infringement?

MR. BYNUM: Yeah. When we were trying to round off that list to make it as good as possible, we threw out probably 25 or 30 cases that were marginal, that did have questions and we tried to pick the cases
that were based on real problems. And some were worse than others, but these were real cases and these are all cases that came out since this Chavez ruling in February of 2000. And I --

MS. SMITH: And when you say real problems, just to stop, how did you define a real problem? Did that go through the standard of recklessness and reckless or intentional --

MR. BYNUM: A definable infringement, a definable infringement.

MS. SMITH: Do you know whether fair use was considered in some of these cases or not?

MR. BYNUM: We threw out probably four cases that were marginal that probably could be considered fair use. So we tried to sharpen our knives and get the cases that could stand on their own two feet as best possible. And even out of that 158, there may have been three, four, or five that even they maybe should have been tossed out.

But at the end of the day, there were at least 150 hardcore cases where we felt that these were real copyright infringement. We had a lot of lawyers look at this so it wasn't just me deciding or somebody like me deciding. We had real people with real knowledge about copyright looking at these and they
were the ones telling us, toss that case, toss that
case and that's what we did.

MS. SMITH: So those are cases that are
filed. Do you have a sense for whether that is
representative of the universe out there? Are people
likely to file cases? Or do you think there's a
magnitude of instances where people do not bring
claims, but experience a similar infringement?

MR. BYNUM: Based on conversations that I've
had with other people, a lot of people just didn't
even try to take it to court because they felt like
they knew where the answer was going to be and that
was with a no. And it was the people that were the
most frustrated, the people that felt like they had
the best case possible, those are the ones that, you
know, wrote a check, paid their lawyers, and said
we're going to file this case no matter what. And,
you know, but --

MS. SMITH: All right. Have you seen any --

MR. BYNUM: -- you know, as the total amount
I would imagine that for every case that got filed,
maybe four or five didn't.

MS. SMITH: And is that sort of your hunch
or do you have a more -- or any other explanation for
the basis based on the people you have talked to --
MR. BYNUM: It's just based on the brief conversations I've had with people in the last six years, what they told me what their experiences were.

MS. SMITH: And have you noticed any further change in trends since the Allen v. Cooper decision?

MR. BYNUM: Not -- well, actually what I have noticed in the -- since the Allen v. Cooper case was going to the Supreme Court, there has been a lot less cases filed for copyright infringement against state actors. You know, in the last 18 months or so, the number of cases have pretty much dried up for right now. And that doesn't mean that the problems still aren't ongoing. It's just a lot of people are leery about spending new money, going after new cases until they see will Congress pass a better law this time that will stand up.

MS. SMITH: Mr. Amer, do you have any questions for Mr. Bynum, or?

MR. AMER: No, I don't think I have anything further.

MS. SMITH: Okay. Mr. Bynum, is there anything else you'd like to conclude with in a minute or two that you would have said on panel two, if not for the technical difficulties?

MR. BYNUM: The only thing that I really
wanted to focus on is that when you pursue a case like this, you know, and you're really serious about trying to get to the bottom of what happened, you know, there is a tremendous amount of, you know, mental energy. There's a tremendous amount of cost. I mean I was told that when this case first got started, it was going to cost me $350,000 and I have spent five times that amount.

So when you go to pursue a case like this, you better hitch up your wagon and prepare to fight hard. It's just -- and it shouldn't be that way. It should be when you have somebody that admits to you in an email, yes, I did this, this is how we did this and this is what happened, and when you have that kind of simple confession you should be able to resolve those type of questions real quick and not get to where we've gotten to right now.

And a university trying to hide behind sovereign immunity is ridiculous, especially in a situation like this or in the case of what Jim Olive has had to go through. So I'm just trying to share with others that you've got to really fight for what you believe in and be prepared to fight hard.

MS. SMITH: Thank you. Well, I'm glad --

MR. BYNUM: Thank you.
MS. SMITH: -- we got to hear from you today. Thank you. Thank you for your participation. I think moving on to the others who have signed up to contribute; is Janice Pilch ready to -- yes, I see her.

MS. PILCH: I think -- and hope you can hear me as well. Can you? Great.

MS. SMITH: Yes, we can hear you.

MS. PILCH: Great.

MS. SMITH: Please go head.

MS. PILCH: Great. Good afternoon. My name is Janice Pilch. I'm a member of the library faculty and a copyright specialist at Rutgers University, but I'm speaking solely in a personal capacity as a member of the public. These comments do not reflect or are not associated with any opinion, policy, or practice of Rutgers University. They are based on 20 years of library experience focused on copyright.

Almost half of the participants at today's roundtable are from state-run libraries and universities offering similar views, depicting a broad compliance culture and good faith activity, such that there would seem to be no reason for concern about losing state sovereign immunity, but there appears to be concern. I'd like to raise additional
considerations and I have a five points to make.

On the first point, that state-run universities and libraries and their employees take copyright seriously, are risk adverse, even overwhelmingly cautious and fearful about copyright. I think it's true that some faculty, staff, and administrators continue to adhere to a compliance culture. But what I see and have experienced is that others have veered from it under the influence of a strong push in the last 16 years since the start of mass digitization to move beyond the boundaries of copyright law and to change public perception of it, in particular by promoting new interpretations of fair use.

Such interpretations are promoted by library organizations, working in broad advocacy coalitions with technology companies, civil society organizations, law school centers and programs, and individuals. It's also called and referred to as "drinking the Kool-Aid." This terminology has been used.

Attitudes about copyright are much -- are not as positive as they used to be. In reality, I would say there's a lot of hostility toward copyright, including at state institutions and this affects the
approaches to copyright and practice. Evidence of this can be seen, for example, in the broad support for the Internet Archive's controlled digital lending activity from hundreds of signatories, including state-run universities and libraries and their employees.

That controlled digital lending is viewed by rights holders as illegal and that it directly undermines authors' livelihoods, but is supported by such a large number of state entities and their employees should be evidence of the decreased institutional support for copyright protections. Some institutions have or are apparently implementing CDL initiatives of their own despite the lawsuit.

I think there's no question that state immunity will come into play if or when a state entity faces a similar lawsuit. And it doesn't help when state library administrators do things like characterize the author/plaintiffs in the Internet archive lawsuit as "whining about disrespect for the copyright value chain" and call the lawsuit misplaced and myopic. This type of communication of course makes many feel justified in exceeding the boundaries of copyright law. I would characterize that as a threat to the integrity of copyright law.
Second point, on the matter that infringement by universities is rare and the number of complaints is small. There are lots of reasons why the copyright librarian or the general counsel's office doesn't see infringement, although I have heard broadly for many years anecdotally that it's quite common. Most infringement I think goes unmeasured. It's easy to say, I see no evidence of infringement when one is not looking for it or is unable to access the evidence. Also many rights holders are exhausted. They've just simply given up on takedown notices that don't work, but it doesn't mean that infringement isn't there. How frequently copyright owners claim that a state actor has infringed their rights is one thing. Actual violations are another and I think they're far more difficult to assess. But a culture that widely accepts or promotes infringement even, reframing it as fair use sometimes, will produce more violations.

Third point is, on the matter that faculty and staff of state-run universities and libraries don't intentionally or recklessly infringe copyright law, history shows that on a large scale state universities and libraries do sometimes intentionally exceed traditional interpretations of copyright law
when they're trying to test the boundaries of the law, especially by stretching interpretations of fair use. The Georgia State University case and the Google Books/HathiTrust case have been cited in written comments. The process to control digital lending is the most recent example. On a smaller scale, it's not uncommon for projects to be directed knowingly and consciously exceeding what many consider to be reasonable interpretations of fair use. The ambiguity of fair use, its function now is a belief system, believing that a use is fair sort of makes it fair, provides cover and state sovereign immunity provides an additional shield.

My fourth point is, on the matter that state institutions invest heavily in copyright education and that copyright education is increasing, I would say that much of copyright education today is about expanding interpretations of limitations and exceptions, even veering into outrageous interpretations of fair use that happen just to correspond to the interests of technology corporations to get works online openly and keep them there and to maximize reuse without paying anyone for it and without sufficient regard for anyone's rights.

In recent months, I've heard in copyright
education webinars sponsored by major and national entities and universities. I've heard that once someone has decided that use of a third-party work in an open educational resource is fair, it's fair for all future uses. In other words, that fair use functions like an open license. I've heard that fair use promotes the use of unlawful copies because it doesn't care whether a copy is lawful or not. In other words, that fair use functions as a label.

Stick a label of fair use on an unlawful copy and it somehow magically transforms into a lawful copy. I think this is what was being said. I'm still not sure about it. And I've heard that controlled digital lending is permitted by U.S. law with an implication that it's also permitted in the European Union. So what are people afraid of with the implications that people should just do it because everyone else does? I seriously question the value and purpose of some copyright education initiatives, I think that's my point.

Finally, on the matter of state policies and practices for minimizing copyright infringement and addressing claims, I would say the distance between policies and practices can be wide when it come to copyright. Universities and libraries can have very
good policies in place, while practices are developed
to promote a looser environment to deregulate
copyright by rationalizing uses that harm the interest
of rights holders. Written policies are not where the
action is.

There's a real conflict today. Reasonable
university and library policies can be cited as
evidence of a compliance culture, while anti-copyright
practices are widely promoted to break the law, by
this I mean destroy the effect of copyright law. I
would call this a threat to the integrity of
copyright. Such rationalized practices encourage
innumerable infringements that often go unnoticed,
undetected, or unchallenged due to the expense of
litigation and legal services. They nonetheless
destroy livelihoods and are shielded by state
sovereign immunity.

In conclusion, I think that more needs to be
done to study the cultural and contributory aspects of
copyright infringement, the less quantifiable aspects.
And I think the law needs to evolve beyond its current
form to be fair in all respects. In addition to the
possible abrogation of state sovereign immunity, I
think that Congress needs to consider fair use reform.
Fair use has been weaponized against rights.
Academic and library values have become almost indistinguishable from tech industry values that serve private interests and are being advanced by people at state-run libraries and universities. This is problematic and it doesn't serve the public.

Thank you to the Copyright Office for providing to the public an opportunity to express our views. I'll end here.

MS. SMITH: Thank you, Ms. Pilch. We appreciate the thought and time that went into that contribution in your participation today. I think moving on to the next person would be Mr. Sedlik. And I might ask you to be a bit briefer because I think the remaining speakers have already been on the panel today. So that was our first opportunity to hear from Ms. Pilch. Mr. Sedlik, what would you like to share?

MR. SEDLIK: Three minutes and 15 seconds is all I need, Ms. Smith. Well, I appreciate the excellent work and the respect for artists' rights evinced by my fellow panelists from the museum, library, and education communities today, and by organizations like the ARL, the VRA, the OCLC, and others.

The fact that many institutions demonstrate respect for artists' rights or pay license fees to
some creators for some usages or make other earnest attempts to voluntarily comply with copyright law is wonderful, but provides virtually no protection to creators, whose exclusive rights and remedies with regard to infringements by state entities are effectively negated by sovereign immunity.

Breach of contract is not a sufficient remedy because the vast majority of infringements do not involve a contractual relationship between the rights holder and the state entity. Rather, the state entity may obtain copies from sources such as Google images, social media, websites, and then distributes, displays, and otherwise uses those copies without the creators' knowledge. And with no contract, there are no contractual terms to breach. For the reasons that I described in session one, injunctive relief is also not an effective remedy.

With no right to effective remedies under copyright law, creators' rights are severely prejudiced in their negotiations with states concerning unauthorized usage of their works and the shadow of sovereign immunity, creators find it impossible to secure legal representation on a contingency basis. As creators are unable to afford to retain an attorney on an hourly basis, creators are
left without effective recourse for copyright infringement by state entities.

When independent professional visual artists create new works, they typically do so with the intent to monetize those works throughout the lifetime of their copyrights by offering up their works for licensed use by public and private entities for usage that is not falling under the exceptions of fair use, 108, 110, or 121. Fair use and sovereign immunity are entirely separate legal constructs and must not be conflated.

Much of the legitimate cultural heritage, education, research, and preservation activities of state entities with respect to copyrighted works falls under the exceptions of fair use or under section 108, 110, or 121. Reliance on sovereign immunity can have the unfortunate effect of emboldening state entities to proceed with unlicensed use of protected works without requisite analysis and in a manner that would otherwise require a license from rights holders.

In the earlier sessions, it was suggested that the quantity of 160 copyright decisions in the last 20 years serves as an accurate indicator of the scope of infringing activity by state entities. I disagree. In reality, only a fraction of state
infringements are discovered, only a fraction of 
discovered state infringements are pursued, only a 
fraction of pursued state infringements proceed to 
filing a complaint, and only a tiny fraction of those 
state infringements make it to pretrial, adjudication, 
or tried to verdict or judgment. For these reasons, 
the quantity of 160 decisions is not a reasonable 
measure and it is reasonable to expect that the scope 
of infringing activity by state entities is exponentially greater.

Lastly, my good friend, Mr. Band, suggested 
that we must consider the Constitution. Accordingly, 
Article I of the Constitution, considered in the 
context of Section I of the Fourteenth Amendment, 
presents a compelling foundation for consideration of 
the protections that must be enjoyed by creators in 
order to provide them with an adequate incentive to 
create new works for the ultimate benefit of society. 

Article I, Section 8, Clause 8 of the 
Constitution established that Congress was empowered 
to create a copyright law to promote the progress of 
science and useful arts, by securing for limited time 
to creators and inventors the exclusive right to their 
respective writings and discoveries. In tandem, in 
drafting Section I of the Fourteenth Amendment,
Congress made it clear their intent to act within the spirit of Clause 8 by specifying in crystal clear terms that states may not deprive any person of life, liberty, or property without due process of law.

Thank you for the opportunity to participate today.

MS. SMITH: Thank you and thank you, Mr. Sedlik for participating. I think the next participant is Ms. Calzada. Are you ready?

MS. CALZADA: Yeah. Hi, thanks. I appreciate the chance to talk again, mostly wanted to be available in case you had questions about our First Amendment assertions and maybe expand a little bit on what I was saying earlier about how much of a First Amendment problem it is when the government is using the work of journalists in particular. Journalists have an ethical obligation not to be mouthpieces of the government and when their work is used to promote government ideas or concepts, they bristle more than just a little bit.

You know, I work mostly with journalists and I'm in -- I also have a private practice and a lot of my clients are journalists. And I'll you that news organizations and individual journalists will often look the other way when just an average individual or
a company infringes their work because it's a huge burden on them and they need to get up the next day and do more work. But when they see a politician or a government official violating their copyright, they immediately snap to action and they are concerned about the ethical problem of having government speak with their work. And so I did want to just see if you had any questions or thoughts or wanted me to expand on any of that, Regan.

MS. SMITH: I mean one question is whether there are specific instances that you would like to draw to our attention more than -- in addition to the written comments and testimony, this would be a good time to do that. And Mr. Amer, if you have more questions, please jump in.

MS. CALZADA: So I did make -- well, I'll wait for Kevin.

MR. AMER: No, I had the same question, just if you have any specific examples of the type of situation you're talking about, that would be helpful.

MS. CALZADA: Well, I have seen, like I said, circumstances, some of which relate to clients, where they've seen politicians use their work to try to pursue a specific message. We highlighted several instances in our comments that I would refer you to
just for the interest of time. And really any of
these uses that you see are the government speaking
using the words of the copyright owner.

And so you can really -- Rick Allen was
forced -- was compelled to speak the message of the
State of North Carolina with his work and it was used
in a way that presented their speech, their message,
and he was compelled to speak their message using his
work. And so any of these cases really you can look
at from a First Amendment perspective of how that use
is compelled speech of the speaker.

MS. SMITH: Thank you very much. We
appreciate you elaborating on that. I think that it
was certainly helpful to hear from you. Is there
anything else or if not, it's fine to --

MS. CALZADA: You know, I did have one other
thing to say about the question of intent. In Brammer
v. Violent Hues, the Fourth Circuit kind of disposed
of the false notion of merely negligent infringement
and how that when an infringer thinks that an image is
freely available, that's actually not a reasonable
belief given that all contemporary photographs are
presumptively under copyright and that the presumption
should always be that a work is under copyright until
you find otherwise.
And so I think it's important to, when you have this conversation about is it intentional, to consider the point that all contemporary work should be presumptively under copyright and it's incumbent on the user to find out otherwise.

MS. SMITH: Thank you. Thank you, Ms. Calzada.

MS. CALZADA: I appreciate the opportunity.

MS. SMITH: Thank you and again we really appreciate your thoughtful contribution. Mr. Madigan, do we have you?

MR. MADIGAN: Yep. Can you hear me?


MR. MADIGAN: Yeah, I'll be very brief because I want to give others who maybe haven't had a chance to talk today a chance to chime in. But I just wanted to respond. There was an argument in some of the comments opposed to abrogating state sovereign immunity that said immunity must be preserved to protect taxpayer resources because the public will ultimately foot the bill for defending against meritless lawsuits.

And I would just say that state universities are sometimes massive owners of IP themselves and they use the same public tax dollars to register and
enforce their IP rights. So I just think we need to be clear that it goes both ways. We detail in our comments some of the initial research we did about the amount of copyrights owned by universities and some instances of enforcement against individuals or small businesses.

And I think the tax argument sort of also disregards this sort of long-term benefits to the public that results from copyright laws that respect and protect the rights of copyright owners and creators. And so I just think those things need to be considered alongside any claims that abrogation of state sovereign immunity will harm the taxpaying public.

So that was just what I wanted to get in.

And I also wanted to thank you all so much for hosting this today. I might have to jump off a little bit before six. I just wanted to get that in there now.

MS. SMITH: Well, thank you and thank you for participating and for following up on that issue, we appreciate it. I think though you might be the last speaker. So, we might be at a conclusion now, unless anyone from the Copyright Office side wants to chime in. Going once, twice? No?

(No response.)
MS. SMITH: Okay. So thank you everyone for participating or listening to the session today. Just as a reminder, the transcript will be posted on the Copyright Office website for the Study's docket, as well as a video that will be made available on the Copyright Office's YouTube channel, and any subsequent action in our analysis will also be made public on the study website. So thanks very much everyone and have a good night.

(Whereupon, at 6:00 p.m., the meeting was adjourned.)
REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: Sovereign Immunity Roundtables
DATE: December 11, 2010
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the digital recording and notes reported by me at the meeting in the above case before the Library of Congress.

Date: December 22, 2020

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