

# United States Senate

WASHINGTON, DC 20510

## VIA ELECTRONIC TRANSMISSION

April 28, 2020

Maria Strong  
Acting Register of Copyrights and Director  
United States Copyright Office  
101 Independence Avenue, SE  
Washington, D.C. 20559

Dear Acting Register Strong:

The Supreme Court's ruling last month in *Allen v. Cooper* created a situation in which copyright owners are without remedy if a State infringes their copyright and claims State sovereign immunity under the Eleventh Amendment of the U.S. Constitution.<sup>1</sup> We are concerned about the impact this may have on American creators and innovators, and we would like for the Copyright Office to research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights. We likewise are asking the Patent and Trademark Office to advise on the pervasiveness and patterns of States' infringements of patents and trademarks.

As you know, *Allen v. Cooper* involved a challenge to the constitutionality of the Copyright Remedy Clarification Act (CRCA),<sup>2</sup> which Congress enacted in 1990 to abrogate State sovereign immunity for copyright infringement and establish that a State would be liable "in the same manner and to the same extent" as a private party under copyright law. The Supreme Court found the CRCA was unconstitutional because it applied to all infringements of copyright by States, not just unconstitutional infringements.

But *Allen v. Cooper* provided Congress a blueprint for how to validly abrogate State sovereign immunity from certain copyright infringement claims. One element the court pointed to was the importance of Congress identifying a pattern of unconstitutional infringement before enactment. Though the Supreme Court found that the legislative record for the CRCA was insufficient despite a 1990 report from the Register of Copyrights titled *Copyright Liability of States and the Eleventh Amendment*, that report turned up only a handful of cases that alleged State infringements of copyright. It is on this point that we request the Copyright Office's expertise and advice.

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<sup>1</sup> See *Allen v. Cooper*, No. 18-877 (Mar. 23, 2020).

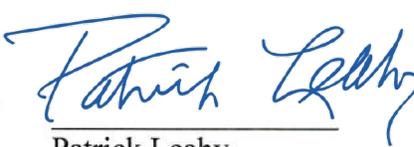
<sup>2</sup> Pub. L. No. 101-553, 104 Stat. 2749 (1990).

We have heard from affected copyright owners that in recent years State infringements of copyright have become much more common. We ask that the Copyright Office study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law. As part of this analysis, the Office should consider the extent to which such infringements appear to be based on intentional or reckless conduct.

So that Congress can evaluate whether legislative action needs to be taken, please provide a public report summarizing the findings of your study, as well as the facts and analyses upon which those findings are based, no later than April 30, 2021. Thank you for your careful attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

  
Thom Tillis  
United States Senator

  
Patrick Leahy  
United States Senator