

**Before the
COPYRIGHT OFFICE,
LIBRARY OF CONGRESS
Washington, DC**

Sovereign Immunity Study:
Notice and Request for Public Comment
(FR Doc. 2020-12019; Copyright Office
Docket Number 2020-9)

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**COMMENTS OF THE
NATIONAL WRITERS UNION (NWU)**

September 2, 2020

National Writers Union

256 West 38th Street, Suite 703

New York, NY 10018

212-254-0279

<<https://nwu.org>>

The National Writers Union (NWU) submits these comments in response to the Notice and Request for Public Comment by the U.S. Copyright Office, “Sovereign Immunity Study”, FR Doc. 2020-12019, Copyright Office Docket Number 2020-9), 85 *Federal Register* 34252-34256 (June 3, 2020).¹

The NWU is an independent national labor union that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, academic writers, and multimedia workers.

We thank the Copyright Office and Congress for its interest in the implications for the rights of writers of sovereign immunity, in light of the U.S. Supreme Court’s decision earlier this year in *Allen v. Cooper*, 140 S. Ct. 994 (2020). That decision gives state governments and their instrumentalities (perhaps most significantly state colleges, universities, and libraries) effective impunity for actions that would constitute copyright infringement if engaged in by any other person or entity.

In its Notice and Request for Public Comment, the Copyright Office invites respondents to “Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.”

1. By notice promulgated on June 24, 2020 (85 *Federal Register* 37961-37962, FR Doc. 2020-13725), the deadline for comments in response to this notice was extended through September 2, 2020.

We have identified three such additional pertinent issues which we believe that the Copyright Office should consider as it continues to conduct this study:

1. U.S. obligations pursuant to international copyright treaties.

The Berne Convention for the Protection of Literary and Artistic Works, Article 9, provides that “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”

While certain exceptions and limitations to this right are permitted by the Berne Convention, the Berne Convention does not permit a blanket exception for state actors.

The WIPO Copyright Treaty, Article 14, provides that “(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty. (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty.” As with the Berne Convention, the WIPO Copyright Treaty permits exceptions and limitations, but does not authorize a blanket exception for state actors. The reference in the WIPO Copyright Treaty to “any act of infringement” clearly extends to state actions and actors.

In light of these explicit and unambiguous treaty provisions, we think it is clear that:

(A) Sovereign immunity of state entities from liability for actions that would otherwise constitute copyright infringement is a clear violation of U.S. treaty obligations; and

(B) The U.S. has an immediate, affirmative treaty obligation to enact measures to “permit effective action against any act of infringement” by any entity including any state entity.

We urge the Copyright Office and Congress to take account of U.S. treaty obligations, and to include in this study and legislative debate on sovereign immunity for copyright infringement consideration of what action is required in order to fulfill those treaty obligations.

2. Future infringement by state entities if sovereign immunity continues.

Much of the Notice and Request for Public Comment is concerned with whether, and if so to what degree, state entities have been, or already are, engaged in copyright infringement.

But the decision in *Allen v. Cooper* was issued only recently, on March 23, 2020. Until that time, state entities were, at least theoretically, liable for copyright infringement.² By that time, libraries and educational institutions were already focused on the COVID-19 crisis. While some new state infringements have emerged and others have expanded in the last few months, it is far too soon for the scope of current infringement by state entities to be indicative of the potential consequences of the Supreme Court's decision in *Allen v. Cooper*.

To the extent that state entities had not, before the Supreme Court's decision in *Allen v. Cooper*, engaged in more widespread infringement of writers' copyrights, that is a measure of the extent to which copyright law, until that decision, successfully deterred greater infringement.

Many state entities, particularly state colleges, universities, and libraries, had been waiting to see how *Allen v. Cooper* would be decided before starting or expanding schemes that, in the absence of sovereign immunity, would risk liability for copyright infringement. We

2. In practice, the extreme disparity of financial and other resources for litigation between individual writers and state institutions meant that there was no realistic possibility of redress for any but the most systematic, large-scale infringements. But state institutions, wrongly assuming that writers have resources for litigation comparable to their own, may nonetheless have been deterred from at least the most egregious infringements.

believe that it is almost inevitable that the scope and scale of infringing activity by state entities will multiply by orders of magnitude once state entities have time to incorporate sovereign immunity into their strategic planning and budgets. Why would these underfunded³ state entities pay for copying or usage rights if they are no longer legally obligated to do so?

We believe that it is essential for the Copyright Office and Congress to consider what forms of infringement by state entities are likely to emerge or expand if sovereign immunity for copyright infringement is not ended.

3. Outsourcing of infringing activities from private entities to state entities.

If state entities are allowed to continue to enjoy sovereign immunity from liability for copyright infringement, we reasonably foresee that both current private mass copyright infringers such as the Internet Archive⁴, and other would-be infringers in the private nonprofit sector, will seek to transfer nominal responsibility for their infringing activities to state entities such as state university libraries, using these state entities as fronts and “safe harbors” for infringing activities.

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3. Colleges, universities and libraries infringe our copyrights not primarily out of malice, but because they don't feel they can afford to pay for rights, and because they can get away with not paying writers. If a college doesn't pay food service vendors, students won't get fed. But in practice, there are no comparable adverse consequences to not paying writers for copying our work. The best solution to copyright infringement by these institutions is more public funding for content acquisition by libraries and educational institutions, so that writers – and not merely the librarians and teachers who copy and distribute our work – can be fairly paid. See National Writers Union, “We Need Federal Funding for Distance Learning, During the Pandemic — and After”, April 22, 2020, <<https://nwu.org/we-need-federal-funding-for-distance-learning-during-the-pandemic-and-after/>>.
 4. For an overview of the systematic infringement of authors' copyrights by the Internet Archive and its partners, which is substantially more extensive than those activities the Internet Archive has described as “Controlled Digital Lending” or a “National Emergency Library”, see National Writers Union, “What is the Internet Archive doing with our books?”, April 16, 2020, <<https://nwu.org/what-is-the-internet-archive-doing-with-our-books/>>.

Numerous state entities, for example, already endorse the “Position Statement on Controlled Digital Lending by Libraries”, which purports to justify certain infringing activities.⁵ If this theory is found to be invalid and these practices are found to constitute infringement, as we believe they should be,⁶ we assume that the temptation will be irresistible to transfer these activities at least nominally, even if they continue to be funded by non-state sources, from the Internet Archive and/or other non-state partners to state entities that have already indicated that they think these activities are legitimate and desirable, and which enjoy sovereign immunity.

For these reasons, we believe that it is essential for the Copyright Office and Congress to consider the extent to which sovereign immunity for state entities will provide a “safe harbor” for infringements carried out by state entities on behalf of other partners or sponsors.

We thank the Copyright Office for the opportunity to comment on the terms of reference for its study of sovereign immunity. We look forward to participating in the planned roundtables and to working with Copyright Office and Congress on legislation to address this issue.

Respectfully submitted,

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National Writers Union

Larry Goldbetter, President

Edward Hasbrouck, Co-Chair, Book Division

5. Internet Archive, “Signatories to the Position Statement on Controlled Digital Lending by Libraries”, <<https://controldigitallending.org/signatories>> (visited August 29, 2020).

6. National Writers Union *et al.*, “FAQ on Controlled Digital Lending (CDL)”, February 2019, <<https://nwu.org/book-division/cdl/faq/>>; and NWU *et al.*, “Appeal from the victims of Controlled Digital Lending (CDL)”, February 2019, <<https://nwu.org/book-division/cdl/appeal/>>.