



BEFORE THE U.S. COPYRIGHT OFFICE

**COMMENTS OF THE  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION JOINED BY THE  
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS  
IN RESPONSE TO THE  
U.S. COPYRIGHT OFFICE SOVEREIGN IMMUNITY STUDY: NOTICE AND  
REQUEST FOR PUBLIC COMMENT**

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MICKEY H. OSTERREICHER, GENERAL COUNSEL  
ALICIA CALZADA, DEPUTY GENERAL COUNSEL

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION  
120 Hooper Street  
Athens, GA 30602  
(716) 983-7800

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## **I. Introduction**

The National Press Photographers Association (NPPA) joined by the American Society of Media Photographers (ASMP) are grateful for this opportunity to provide comments on the persistent problem of copyright infringement by state entities which refuse to accept accountability for their actions.

We endorse and agree with the comments of the Copyright Alliance, of which we are members. The findings in the Copyright Alliance survey are robust and demonstrate a pattern of excessive unrestrained infringement by state entities, resulting in thousands of infringements, and costing creators millions of dollars. We believe that Congress is due substantial deference to remedy this problem. NPPA would like to participate in any round tables, particularly virtual ones.

As the Voice of Visual Journalists, NPPA's copyright concerns are focused around the impact of copyright infringement on visual journalists. We often point out that effective copyright policy is the engine of free expression.<sup>1</sup> However, copyright infringement by state entities does more than just threaten the financial success of journalists. It is an offensive violation of the First Amendment right against compelled speech by the government.<sup>2</sup>

## **II. The Copyright Office should include in its report the critical First Amendment impact of unchecked state use of copyrighted works, particularly in the context of photography.**

The *Allen v. Cooper* court was clear that a future abrogation law must “link [] the scope of

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<sup>1</sup> See *Harper & Row Publishers*, 471 U.S. 539, 558 (1985).

<sup>2</sup> See *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a “compulsion to publish” is inconsistent with the First Amendment).

its abrogation to the redress or prevention of unconstitutional injuries.”<sup>3</sup> But we have seen scant attention to the violation of the First Amendment that is caused by state infringement of copyright. The Fourteenth Amendment has long prohibited state action that abridges the freedom of speech embodied in the First Amendment. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015).

The question of whether copyright infringement by a state is unconstitutional is fundamentally different from the same question presented in the trademark and patent context because copyright is so closely linked to the First Amendment. Indeed, “the Framers intended copyright itself to be the engine of free expression.” *Harper & Row Publishers*, 471 U.S. 539, 558 (1985). The Supreme Court has repeatedly drawn connections between the free expression of ideas and the economic incentive supplied by copyright. *See id.* (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quoting same); *Golan v. Holder*, 565 U.S. 302, 326 (quoting same). The<sup>8</sup> *Eldred* Court further held that “patents and copyrights do not entail the same exchange” and discouraged interpreting the constitutionality of the Copyright Act through the same lens used to interpret patent law. *Eldred*, 537 U.S. at 190. “The fortunes of the law of copyright have always been closely connected with freedom of expression” and copyright law seeks to balance “the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 n.12 (1984) (quoting *Foreword to B. Kaplan, An Unhurried View of Copyright* vii–viii (1967)). The Supreme Court has also held that the reward

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<sup>3</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

provided by copyright “is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts,” *Mazer v. Stein*, 347 U.S. 201, 219 (1954), and that the public good is served by the incentive of copyright, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The close connection between copyright and the First Amendment cannot be ignored.

**1. Copyright infringement by state actors is a violation of the First Amendment’s guarantee against compelled speech.**

Photography, videography, and other visual arts are unquestionably First Amendment forms of expressive speech. *See Regan v. Time, Inc.*, 468 U.S. 641, 646 (1984) (finding that a statute banning the use of images of currency based on the purpose of the use was an unconstitutional content-based restriction); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) (“Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”).

It is also well-settled that the government cannot *compel* speech; the First Amendment protects creators’ rights to decide what to say and when to refrain from speaking. *See Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018) (“We have held time and again that freedom of speech ‘includes both the right to speak freely and the right to refrain from speaking at all.’” (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and *Harper & Row*, 471 U.S. at 559)); *Riley v. Nat’l Fed’n of Blind of N. C., Inc.*, 487 U.S. 781,

796–797 (1988) (“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.” (emphasis in original)); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974) (holding newspaper editors and publishers cannot not be compelled “to publish that which reason tells them should not be published”).<sup>4</sup>

Therefore, when the University of North Carolina (UNC) repeatedly infringed the copyright in a photograph of four civil rights activists in Greensboro, it forced that photographer to speak the message associated with UNC’s chosen use—in that case, promotion of UNC’s football program. *See Hairston v. N. Car. Agric. & Tech. State Univ.*, 1:04 CV 1203, 2005 WL 2136923, at \*2, (M.D.N.C. Aug. 5, 2005). When the Memphis Convention & Visitors Bureau made a professional photograph of a Memphis-area landmark “available to the general public for use in e-cards and virtual postcards” on various commercial sites, it forced the photographer to speak the message of the Bureau. *See Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 666 (W.D. Tenn. 2010). And when the North Carolina Department of Natural and Cultural Resources published Frederick Allen’s work without his consent, the heart of the *Allen v. Cooper* case, it violated his inextricably intertwined First Amendment rights. *See Miami Herald Publ’g Co.*, 418 U.S. at 258.

Conversely, at least two copyright cases dismissed under the sovereign-immunity defense involved the state’s destruction of works by a government entity—resulting in the government silencing speech. *See, e.g., Romero*, 2009 WL 650629, at \*1 (state destroyed a mural in violation

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<sup>4</sup> *See also, Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999) (“The decision to air the interview of one person but not another is at heart an editorial decision.”); *Baltimore Sun Co. v. State*, 340 Md. 437, 453 (1995) (“[A] judicial order conditioning access to a juvenile proceeding upon the required publication of specific material is unconstitutional to the same extent as an order conditioning access upon a restraint from publication.”); *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1558 (D.C. Cir. 1984) (“[G]overnmental coercion [to publish a column] gives rise to a confrontation with the First Amendment.”).

of the Visual Artists Rights Act or VARA, 17 U.S.C. § 106A); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410, 412 (D.P.R. 2006) (sculpture destroyed in violation of VARA). The First Amendment protects against this kind of state interference with speech as well.

Simply put, with state sovereign immunity for copyright infringement, states are free to present and promote their messages by using copyrighted works against the wishes of the journalists and artists who created them. A state that opposes same-sex marriage, for example, could use the images taken by a wedding photographer to promote its position on “family values.”<sup>5</sup> Each infringing use of imagery, if committed by a state actor, would amount to unconstitutional forced speech. *See Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (holding that “compelling individuals to speak a particular message, [] alter[s] the content of their speech” and violates their First Amendment rights).

This is no small issue. As Professor Silbey explained, photographers see control over their copyrighted works as a way to protect not only their property interests, but also their identity and what they say.<sup>6</sup> As Sibley reports, photographers expressly draw a link between unauthorized reuse of photographs and compelled speech, and “seek assurance that, as authors, they are not seen to be saying something they did not intend with their own photos.”<sup>7</sup>

## **2. For journalists, protection from abuse of their work by state actors is particularly important.**

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<sup>5</sup> See e.g., *Hill v. Pub. Advocate of the United States*, 35 F. Supp. 3d 1347, 1352 (D. Colo. 2014) (declining to dismiss copyright infringement lawsuit in which a photo of a same-sex married couple was used without permission in a campaign mailer maligning the marriage); *SPLC Sues Anti-gay Hate Group Over Defilement of Couple’s Engagement Photo*, Southern Poverty Law Center (September 26, 2012), <http://www.splcenter.org/get-informed/news/splc-sues-anti-gay-hate-group-over-defilement-of-couple-s-engagement-photo>.

<sup>6</sup> See Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 Colum. J.L. & Arts 351, 361 (2019).

<sup>7</sup> *Id.*

In the journalism context, NPPA members, their employers and clients eschew infringement by government for ethical reasons and have used copyright to protect their impartiality and uphold NPPA’s Code of Ethics as well as other journalism ethical codes.<sup>8</sup> The ethics and impartiality of a journalist is essential to the public trust required in a journalist-reader relationship. Thus, even those photographers who consider themselves neutral observers use their copyright as a tool to serve as guardians, protecting the reputations of the subjects, and are often the only line of defense against unauthorized uses that could injure the subject.<sup>9</sup>

Under the rule against compelled speech, “the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This rule applies well beyond news organizations and other professional publishers. The protection against compelled speech applies to businesses, both large and small, as well as individuals. And it applies regardless of the level of sophistication of their expression. *Id.*; see also *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (state cannot require citizens to display state motto on their license plates).

Without accountability for copyright infringement, states will be free to communicate their own approved messages through the misappropriation of copyrighted works of photographers who do not want their works used for this purpose. This is true whether the misappropriation is documentary footage of Blackbeard’s pirate ship or one of the more than fifty infringements identified in a recent Copyright Alliance amicus brief, for which state entities rebuffed attempts

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<sup>8</sup> See *Code of Ethics*, National Press Photographers Association, <https://nppa.org/code-ethics>; see also *SPJ Code of Ethics*, <https://www.spj.org/ethicscode.asp> (“Avoid conflicts of interest, real or perceived.”).

<sup>9</sup> See Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 Colum. J.L. & Arts 351, 357–59 (2019).

from Getty Images to get payment.<sup>10</sup> And states will have limitless use of images for the purpose of promoting those messages—even when the messages relate to government statements that the photographer or artist disagrees with, or that the subject in the image would be defamed by. “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

In the first of two other recent examples, a staff photographer for the *Miami Herald* noticed that a local politician had used one of his photographs as part of his political campaign. In addition to the cease and desist sent by the *Herald*, the photographer also posted the photo on his Facebook page with the comment “Please don’t rip off my photograph and use it on a campaign ad. I don’t care what party you are affiliated with, it’s still stealing.”

In another case, it was [reported](#) that the Trump campaign used an unauthorized and altered Iowa City Gazette photo, taken in 2019 (in Iowa) as part of a political ad to depict Biden hiding in his Delaware basement. The photo did not show what the ad said it showed. Another [report](#) calls out the same ad for misappropriating and altering two other photos in the same political ad without permission. A Gazette Editor’s note reads: “Facebook removed the Trump campaign’s ad on Thursday after The Gazette filed a copyright violation report. The Gazette made a similar request of Twitter on Wednesday; the ad still is available on that platform.” While these are examples of political campaigns misappropriating images, it is not hard to imagine a state actor

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<sup>10</sup> See *Allen v. Cooper*, No 17-1522, Doc. 44-1 (4th Cir. Oct. 20, 2017), Brief of the Copyright Alliance as Amicus Curiae Supporting Appellees, at 7, <https://copyrightalliance.org/wp-content/uploads/2017/10/2017-10-20-Amicus-Br-of-Copyright-Alliance-Allen-v-Cooper-4th-Circuit.pdf>.

doing the same thing and thus being immune from a copyright infringement claim by a visual journalists whose work was compelled for use in ways that were never intended and for which permission would have never been granted.

When Congress enacted the CRCA, the record did not include a recognition of the nexus between copyright and free expression. The record this time around should address and reflect this concern extensively.

**III. The Copyright Office should help Congress outline how the due process deprivation of property applies because copyright infringement is typically an intentional act, not a negligent one.**

The Copyright Office and Congress should clarify in their reports and conclusions that copyright infringement is typically an intentional act, not a negligent one. The *Allen v. Cooper* Court held that copyright is a form of property that can be implicated by the due process clause, but qualified its assertion with the holding that “a merely negligent act does not ‘deprive’ a person of property.” *Allen v. Cooper*, 140 S.Ct. 994, 1004. It added “[s]o an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause.” *Id.* Despite the fact that in *Allen v. Cooper* there can be no doubt that the state was aware of the copyright in Mr. Allen’s work, the CRCA was invalidated in part because the Oman Report provided by the Copyright Office in 1990 “nor any other part of the legislative record” addressed the Due Process clause.<sup>11</sup> This time around, the Due Process clause must not be ignored, and essential to that is the question of whether these infringements are intentional or reckless. The Copyright Office should clarify in its reports to Congress that under modern copyright law, if attempts aren’t made to license an image, that infringement is typically intentional, or at a minimum, “reckless” and “willful.”

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<sup>11</sup> *Allen v. Cooper*, 140 S.Ct. 994, 1006.

The Fourth Circuit, for example, has summarily disposed of the false notion of “merely negligent” infringement in cases of intentional copying, holding that even when an infringer believes that an image is freely available, that belief is not reasonable given that “all contemporary photographs are presumptively under copyright.” *Brammer v. Violent Hues Prods., LLC*, 922 F. 3d 255, 266 (4th Cir. 2019). See also [17 U.S.C. § 302\(a\)](#). The *Brammer* court further noted that “[a]s a basic matter, copyright infringement is a strict liability offense, in which a violation does not require a culpable state of mind.” *Id.* at \*5. Notably, the economic harm to creators and their clients occurs regardless of whether an infringement is willful. Indeed, other courts also consider infringing conduct willful if a defendant “has recklessly disregarded the [copyright], or upon a showing that the defendant knew or should have known it infringed upon a copyrighted work.” *Lance v. Freddie Records, Inc.*, 986 F.2d 1419 (5th Cir. 1993) (per curiam); see also *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005) (holding infringement is willful when “the defendant’s actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights”). The circuits generally agree that “a party may act recklessly by refusing, as a matter of policy, to even investigate or attempt to determine whether particular [works] are subject to copyright protections.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017); *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016) (failing to explicitly inquire or seek information about the copyright status of a work amounts to “recklessness or willful disregard, and thus willfulness.”); *BMG Rights Mgmt. (US) LLC v. Cox Commc’n Inc.*, 881 F.3d 293, 312 (4th Cir. 2018) (“copyright infringement is willful if the defendant recklessly disregards a copyright holder’s rights”). And knowledge that a use is infringing “need not be proven directly but may be inferred from the defendant’s conduct.” *N.A.S. Imp., Corp. v.*

*Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992). Thus, the failure to exercise due diligence or investigate the copyright status of a work supports a finding of willfulness in copyright caselaw and the Copyright Office and Congress should include in its analysis of sovereign immunity the fact that absent other factors, copyright infringement that occurs without inquiry as to the copyrightable status of a work is an intentional infringement, or at least “reckless”.

#### **IV. Other Specific Responses to NOI**

##### **1. To what extent does state sovereign immunity affect licensing or sales of copyrighted work to state entities.**

The dynamics of visual-media licensing are complex. Most visual journalists license their works on a “rights-managed” basis and/or allow licensing for editorial uses only—that is, for publication for non-fiction news purposes, and not for advertising or other commercial purposes. In rights-managed licensing, clients get the right to use images in specific ways, in specific locations, and for specific durations.<sup>12</sup> Royalty-free licenses under which the licensee pays a flat fee for the non-exclusive right to use images for a wide variety of purposes are a small part of the image licensing market.<sup>13</sup> Sometimes a license is exclusive. A publication may pay for the exclusive right to use an image in a story, and that right may be exclusive for a period of weeks or months, providing a higher level of value to the client. Advertising clients may also want the competitive advantage of such exclusivity so that their market presence is unique.<sup>14</sup>

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<sup>12</sup> See, e.g., *Rights-Managed Images, Excellence, Exclusivity and Control*, Getty Images, <https://www.gettyimages.com/creative-images/rightsmanaged> (last viewed May 8, 2019); Susan Carr, *Understanding Licensing – The Key to Being a Professional Photographer*, in *Prof'l Bus. Practices in Photography* 3 (7th ed., 2008).

<sup>13</sup> *What are Royalty Free Images? Best Guides to use Royalty Free Photos!*, Stock Photo Guides (Jun. 16, 2016), <https://www.stockphotoguides.com/use/royalty-free/what-are-royalty-free-images>.

<sup>14</sup> Because exclusivity carries the most value to clients, exclusive licenses constitute the most lucrative licensing market for visual creators. For example, graphic artists surveyed on organizational identity design report that for logo design alone, fees range from \$25,000–\$75,000 for a national/global client. Similarly, illustrators report flat

But if the competitor is an infringing state actor that claims sovereign immunity from copyright infringement, the licensee has no remedy, and its license is exclusive in name only. In such a case, both licensor and licensee are harmed. The licensee does not receive the exclusivity it paid for, and the licensor's financial and contractual efforts, as well as its reputation, are damaged.<sup>15</sup> In addition, the licensor risks losing future business because potential clients are much less likely to pay for the "exclusive" right to use images that are being used freely by a competitor, especially if that competitor is an infringing state that is free from liability.<sup>16</sup> For this reason, unrestricted copyright infringement by state actors effectively destroys the creator's licensing market for any image the state actor appropriates.

Further, infringers have an unfair advantage over businesses that pay to license images. It is self-evident that a business will have greater profits if it steals the images it uses than if it pays for them—the lower the costs, the higher the profits. This fact is just as true for a state actor as it is for a private business entity. When a state actor enters the marketplace to use an unlicensed image, they are now in the same arena as the business next door. To allow an entire class of intellectual property to be effectively free not only destroys the image licensing market but damages the norms of commercial exchange.

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fees of \$1,800–\$5,000 for cover editorial illustration for major publications, and sales of the original artwork at an additional 100-300% of that flat fee. *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, *Comparative Fees for Graphic Design* 156, and *Comparative Fees for Editorial Illustration* 256 (15th ed. 2018).

<sup>15</sup> See Copyright Alternative in Small Claims Enforcement Act of 2017, H.R. 3945: Hearing Before the House Comm. On the Judiciary, 115<sup>th</sup> Cong. (2018) (Statement of Jenna Close, Commercial Photographer), avail. at <https://www.youtube.com/watch?v=GuiQUasmxno>. See also, Former National Board Chair Close Urges House Judiciary Committee to Enact CASE Act, American Society of Media Photographers (Sept. 27, 2018), <https://www.asmp.org/advocacy/former-asmp-national-board-chair-close-urges-house-judiciary-committee-to-enact-case-act/>; Jenna Close, *Advocacy is a Verb: My Testimony on The Hill*, American Society of Media Photographers (Oct. 17, 2018), <https://www.asmp.org/advocacy/advocacy-is-a-verb-my-testimony-on-the-hill/>.

<sup>16</sup> See *Royalty Free or Rights Managed? Best Comparative Guide*, Stock Photo Guides (July 16, 2016), <https://www.stockphotoguides.com/use/royalty-free/royalty-free-or-rights-managed> (“[royalty-free images] are also often in use by different people, companies and brands at the same time”).

**2. What remedies are available for copyright owners when states infringe their works? And does the availability of injunctive relief provide an adequate remedy to address the needs of copyright owners in response to instances of state copyright infringement?**

The answer to the second question is an unequivocal – No. For most visual journalists, there is a brief window where their work has its highest level of value. That window is almost always during the initial period of publication, whether that publication is authorized or unauthorized. The value of using a news photograph is primarily recognized during that brief window of newsworthiness. Additionally, the cost of obtaining an injunction typically far exceeds the value of the infringement for any one use of a news photograph.

**3. To what extent are there state law causes of action. Are there state court cases in which a copyright owner has been awarded a judgment on such a claim?**

More than one federal court has opined that copyright holders wronged by state infringement should pursue a takings claim against the state, although others have clearly held that an infringement is not a takings.<sup>17</sup> In more than one case, that avenue of relief has thus far been rejected. In 2017, photographer Jim Olive filed suit against the University of Houston in state court for the unauthorized use of his photograph. The University claimed that it was immune from suit for copyright infringement because of sovereign immunity, so Olive sued asserting an unconstitutional taking. The First Court of Appeals of Texas held that “a governmental unit’s copyright infringement is not a taking”. *Univ. of Houston Sys. v. Jim Olive*

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<sup>17</sup> . See, e.g., *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) (holding that the CRCA record did not reflect that “it considered the adequacy of state remedies that might have provided the required due process of law”); *Romero v. Cal. Dept. of Transp.*, CV 08-8047PSG(FFMX), 2009 WL 650629, at \*4 (C.D. Cal. Mar. 12, 2009) (listing takings claims as “other possible remedies in state courts”). Similarly, in 2000, the Register of Copyrights testified that “an action for the uncompensated taking of private property” might be a viable claim against infringing states, but noted that this was an untested theory. Marybeth Peters, Register of Copyrights, State Sovereign Immunity and Protection of Intellectual Property: Address Before the U.S. Senate Comm. on the Judiciary, Subcomm. on Intell. Prop., 109th Cong. (July 27, 2000), <https://www.copyright.gov/docs/regstat72700.html>.

*Photography*, 580 S.W.3d 360, 363 (Tex. App.—Houston [1st Dist.] 2019, pet. filed).<sup>18</sup> A petition for review was filed and the Supreme Court of Texas has agreed to hear the case on the merits and briefing is currently underway. However, even if Jim Olive wins and gets the value of the license taken by the state entity, it is unlikely that he will ever be compensated for a takings at the same level that he might be were the state subject to statutory damages for copyright infringement.<sup>19</sup>

#### **4. To what extent, if any, have instances of actual or threatened infringement by states increased since *Allen v. Cooper*?**

The *Allen v. Cooper* decision arrived in the early weeks of a worldwide pandemic which disrupted governments and economies throughout the nation and put those governments in a posture of upheaval. The six months that have followed have not been enough time to evaluate the impact on licensing, and instances of infringement since *Allen v. Cooper* likely could also not be segregated from an increase in infringements caused by disruptions in government procedures and infringements undertaken as a result of pandemic accommodations. NPPA recommends that instead the Copyright Office examine trends since the CRCA was found to be unconstitutional by the Fifth Circuit in *Chavez v. Arte Publico Press* in light of the Supreme Court's voiding of the Patent Remedy Act (PRA) in *Florida Prepaid*.<sup>20</sup>

#### **B. Additional issues not raised in the NOI**

Having addressed at the beginning of this comment what we consider to be the primary

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<sup>18</sup> The Texas First Court of Appeals' opinion is available at:

<http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=81afd9fc-c724-4626-856d-db960fc06ae4&coa=coa01&DT=Opinion&MediaID=3b380b6a-3fda-4c6a-9f39-54e792b34b42>

<sup>19</sup> Similarly, in 2005 a North Carolina federal district court held that a Fifth Amendment takings claim was barred by sovereign immunity. See *Hairston v. N. Car. Agric. & Tech. State Univ.*, 1:04 CV 1203, 2005 WL 2136923, at \*7, \*9 (M.D.N.C. Aug. 5, 2005) (citing cases holding that the Eleventh Amendment bars Fifth Amendment takings claims).

<sup>20</sup> *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). See also, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

issues not discussed in the NOI, we turn our attention to the additional issue of compliance with the Berne Convention below.

**1. Absolving states of the obligation to comply with copyright law gives states a royalty-free compulsory licensing system, a violation of the Berne Convention.**

When Congress enacted the CRCA, the record did not include a discussion of the importance of copyright law to our international obligations. But NPPA believes that the Copyright Office and Congress should include these obligations in their reports. A system that does not require states to license copyrighted works effectively creates a royalty-free, common-law, compulsory licensing system for government use of visual and written works. Compulsory licensing for these works exists in other countries through reprographic rights organizations (RROs) that establish set fees for government entities.<sup>21</sup> Individual U.S. authors have collectively been paid millions of dollars from the fees collected by foreign RROs.<sup>22</sup> These same creators will earn nothing from the use in the United States by state actors, due to sovereign immunity. And further, the new ability of state actors to freely infringe the works of foreign authors with impunity violates the Berne Convention for the Protection of Literary and Artistic Works. Parties to the convention are required to recognize the exclusive reproduction rights of copyright holders from other parties to the convention. *See* Berne Convention for the Protection of Literary and

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<sup>21</sup> *See, e.g., Digital Business Models*, International Federation of Reproduction Rights Organizations 8–12 (2010), [http://www.ifro.org/sites/default/files/ifro\\_brochure\\_web.pdf](http://www.ifro.org/sites/default/files/ifro_brochure_web.pdf) (outlining the general terms of various collective licensing systems for digital uses of copyright works in certain countries); John-Willy Rudolph, Executive Director, Norwegian Reproduction Rights Organization (KOPINOR), *The Establishment and the Role of a Reproduction Rights Organization*, World International Property Organization National Seminar on Copyright and Related Rights for Lawyers and Judges (Apr. 27, 28, 2005), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=47561](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=47561) (outlining the relationship between the obligations of the Berne Convention and RROs); *Individual Author Distributions, Frequently Asked Questions*, Author’s Coalition of America, LLC (2019), [http://www.authorscoalition.org/individual\\_author\\_distributions/faq.html](http://www.authorscoalition.org/individual_author_distributions/faq.html).

<sup>22</sup> *See, e.g., Individual Author Distributions*, Authors Coalition of America, LLC (July 29, 2019), <http://www.authorscoalition.org/> (“To date, ACA has paid out over \$2.75 million in reprographic royalties to individual American creators.”).

Artistic Works, art. 9, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended on Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986).<sup>23</sup> But if states are immune from liability for infringement, they cannot be held liable for infringing foreign copyrights, which would clearly violate Berne. *Id.*; see also *Golan v. Holder*, 565 U.S. 302, 308 (2012) (each country must afford the minimum level of protection specified by Berne). Although many foreign copyright holders are not citizens of the United States, Section 1 of the Fourteenth Amendment does not distinguish—all persons are entitled to due process.

Congress enacted the Berne Convention Implementation Act of 1988 to promote the constitutional goal of diffusing knowledge through adherence to Berne. See *Golan v. Holder*, 565 at 327 (holding that § 514 “falls comfortably within Congress’ authority under the Copyright Clause. Congress rationally could have concluded that adherence to Berne ‘promotes the diffusion of knowledge.’”). In short, the United States does not have a compulsory collective licensing system for visual or written works, and it is appropriate for Congress to exercise its authority by preventing the uncompensated use of foreign copyrighted works that violate international obligations. See *Eldred v. Ashcroft*, 537 U.S. at 212 (“It is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”).

## **V. Conclusion**

NPPA, joined by ASMP, is grateful for the opportunity to be a part of this process and reiterate their interest in participating in discussions going forward, as well as our availability to assist the Copyright Office in its important mission of righting this legal issue facing photojournalists.

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<sup>23</sup> Exceptions such as RROs are only allowed in “special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” See *Berne Convention*, art. 9.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

By

*Mickey H. Osterreicher*

Mickey H. Osterreicher, General Counsel

716.983.7800

[lawyer@nppa.org](mailto:lawyer@nppa.org)

*Alicia Calzada*

Alicia Calzada, Deputy General Counsel

210.825.1449

[advocacy@nppa.org](mailto:advocacy@nppa.org)