No. 18-877

IN THE
Supreme Court of the United States

FREDERICK L. ALLEN, ET AL,

Petitioners,

v.

ROY A. COOPER, III, GOVERNOR OF NORTH CAROLINA, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE COPYRIGHT ALLIANCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Copyright Alliance is dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization. It represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations across the entire spectrum of creative industries, including graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers, as well as the small and large businesses that support them.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, their members, or their counsel made such a monetary contribution. Counsel for all parties consented to the filing of this brief.

What unites the individuals, small businesses, and other companies that make up The Copyright Alliance, as well as the millions represented by the U.S. Chamber, is their mutual reliance on copyright law to ensure that they have the opportunity to receive just remuneration when their copyrighted works are used by others. This requires a copyright system that allows a creator to seek redress in court, regardless of whether the infringement of the copyright is perpetrated by a State or by a private actor. The Copyright Alliance and U.S. Chamber thus have a significant interest in ensuring that creators are not thwarted by an uneven playing field that Congress sought to level.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Copyright Remedy Clarification Act ("CRCA") in 1990 to promote the goals of copyright and to remedy a due process harm. More specifically, Congress eliminated a fundamental unfairness in the operation of our copyright law by which States could avail themselves of copyright remedies against others, including monetary damages for infringement, but could block private parties from doing the same against them.

Congress sought to ensure, consistent with Congress's authority under the Intellectual Property Clause of Article I, that authors would be protected from copyright violations of their works (and would therefore have incentives to continue to create), regardless of whether the infringer was a private entity or a State. Congress also acted, consistent with Section 5 of the Fourteenth Amendment, to document the

widespread intentional taking of intellectual property without due process by States, and to remedy and prevent that infringement going forward.

In other words, the CRCA is constitutional, twice over. Ill-considered lower court rulings, however, have effectively nullified that federal statute. The result is what Congress foresaw and sought to prevent: rampant and unchecked copyright infringement by various States affecting a wide variety of industry sectors, including computer programming, college textbooks, motion pictures, music, and others.

Congress recognized that allowing States to infringe copyrights with impunity undermines the basic objectives of copyright law. Copyright protections aim to "secure a fair return for an author's creative labor," and to "stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). But authors are less likely to create—and the public less likely to benefit from their creations—if States are released from copyright liability, despite being key users of copyrighted works.

Exempting a broad category of infringers from monetary liability also disrupts the *mechanisms* of copyright law. This Court has made clear that "Congress may grant to authors the exclusive right to the fruits of their respective works," such that "its effects are pervasive" and "no citizen or State may escape its reach." *Goldstein v. California*, 412 U.S. 546, 555, 560 (1973). But rights are not "exclusive" if States can invade them at will. Relatedly, the Framers expected that intellectual property protections would be "national in scope." *Id.* at 555. But without a federal

remedy for copyright infringement by States, authors are at the mercy of a patchwork system, contrary to the Framers' intent.

Congress compiled substantial "evidence of a pattern of constitutional violations on the part of the States" when it enacted the CRCA. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003). In advance of the Act's passage, the Register of Copyrights documented numerous instances of uncompensated copyright infringement by State actors, and concluded that copyright owners would "suffer immediate harm" without the ability "to sue infringing states in federal court for money damages." Congress also heard extensive testimony demonstrating that copyright infringement by State actors "critically impairs creative incentive and business investments."

With the nullification of the CRCA by lower courts, copyright infringement by State actors has escalated as Congress predicted. Roughly a decade after the CRCA's enactment, Congress heard extensive testimony reporting many instances of egregious copyright abuse by States. And a recent compilation identified more than 150 copyright cases filed against States since the year 2000.

Those lawsuits represent only a fraction of the problem. Many small businesses and independent creators lack the resources to detect instances of copyright infringement in the first place. And with no real prospects for the recovery of monetary damages in light of lower court decisions since *Florida Prepaid*, even identified instances of infringement are typically

handled out of court or simply not pursued. Although comprehensive statistics are thus impossible to compile, there is nevertheless compelling evidence that copyright infringement by States is a widespread phenomenon.

Recognizing that legislation enacted under authority of Section 5 of the Fourteenth Amendment must reflect "congruence and proportionality" between the injury and the adopted means, Congress crafted a limited remedy to address a significant constitutional problem. The direct impact of copyright infringement awards is limited for a variety of reasons, including the existence of specific liability limitations and carve-outs that Congress has fashioned. Contrary to the Fourth Circuit's characterization, then, the CRCA did not expose States to "sweeping liability." *See* Pet. App. 30a. Instead, the CRCA placed States on a footing akin to that of other users of copyrighted works and provided a remedy that is limited to the circumstances it deemed appropriate.

Because Congress enacted the CRCA in furtherance of its enumerated powers, and in order to remedy an ongoing pattern of copyright infringement by State actors that continues to this day, the Act is doubly valid. The decision of the court of appeals should be reversed.

ARGUMENT

I. Exemption of State Actors from Infringement Liability Undermines the Economic Incentive of Copyright and the Exclusive National Right of Creation.

The Constitution instructs Congress "[t]o promote the Progress of Science and useful Arts," and to do so "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" U.S. Const. art. I, § 8, cl. 8. To implement those directives, Congress has developed a nationally uniform system of exclusive copyright protections. Both the objectives and mechanisms of that regime are compromised, however, when actors can infringe without penalty. That is no less true when the infringers are States.

A. Exempting States from damages for copyright infringement undercuts the foundational objectives of copyright law. While copyright protections "secure a fair return for an author's creative labor," their "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works[.]"). But authors are less likely to create—and the public less likely to benefit from their creations—if a broad class of copyright infringers, such as State actors, is released from liability. That is particularly true for small businesses and individual creators. *See* U.S. COPYRIGHT OFFICE, A REPORT

OF THE REGISTER OF COPYRIGHTS: COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT (June 1988) ("Register's Report"), at 6, *available at* https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf ("[S]mall companies do not have the resources to battle states[.]").

Excusing a broad category of infringers from liability for copyright damages has effects that go beyond harm to particular creators. Indeed, a state's uncompensated use of copyrighted material may breed confusion and undermine legitimacy that could lead to additional copyright infringement by others. As former Register Barbara Ringer explained to Congress, "loophole[s]" that offer "a free copyright ride" create "a miasmic atmosphere of disorder and lawlessness that tears the fabric not only of the copyright law but of the disciplines and enterprises involved." Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong. III (1989) ("H.R. Hearings"), at 96.

That basic sense of unfairness is compounded when the *infringers* of some copyrighted content are also the *holders* of other copyrights. It is inequitable to "tolerate a situation in which some participants in the intellectual property system get legal protection, but are told they do not have to adhere to the law themselves"—i.e., where "[t]hey can get the benefits with none of the obligations." Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Judiciary Comm., 107th Cong., 2d Sess.

(2002), at 2 (testimony of Hon. Patrick J. Leahy); *see also Georgia, et al., v. Public.Resource.Org, Inc.*, No. 18-1150, Petition for Certiorari, at 2 (citing "longstanding arrangements of Georgia and numerous other states that rely on copyright's economic incentives"), *cert. granted*, 2019 WL 1047486 (U.S. June 24, 2019). The harm that infringing activity inflicts on copyright owners, and the cost that such activity exacts from public respect for copyright, is the same regardless of the nature of the entity doing the infringing.

B. Effectively greenlighting copyright infringement by States also disrupts the fundamental mechanisms of copyright law. To foster innovation, the Framers envisioned that authors would have the ability to obtain "exclusive Right[s]" to their creations. U.S. Const. art. I, § 8, cl. 8. Consistent with that text, this Court has made clear that "Congress may grant to authors the *exclusive* right to the fruits of their respective works," such that "its effects are pervasive" and "no citizen or State may escape its reach." *Goldstein v. California*, 412 U.S. 546, 555, 560 (1973) (emphasis added). But a right cannot at once be "exclusive"—as the Constitution mandates—and subject to invasion by the expansive set of infringers known as States.

Furthermore, the Framers expected that intellectual property protections would be not only exclusive, but also "national in scope." *Goldstein*, 412 U.S. at 555. A nationally uniform system of copyright protection "eliminates . . . the expense and difficulty" inherent in a state-by-state system, and "provide[s] a reward greater in scope than any particular State may

grant." *Id.* at 556. Similarly, Section 301(a) of the Copyright Act "accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). Without a federal remedy for copyright infringement by States, authors are at the mercy of a patchwork copyright system, defined by State-specific and inconsistent remedies, protections, and settlement agreements (or their absence). That set of circumstances is directly contrary to the intent of the Framers.

By abrogating the sovereign immunity of States and making them accountable as infringers of copyright, Congress acted to further the constitutional objectives and mechanisms of copyright law. That regime will be undermined if States are given a license to infringe.

II. The CRCA Remedied a Pattern of Escalating Copyright Infringement by States that Supports Abrogation Under Both the 14th Amendment and Article I.

To abrogate the sovereign immunity of States under Section 5 of the Fourteenth Amendment, Congress may rely on "evidence of a pattern of constitutional violations on the part of the States in [the relevant] area." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003). Preventive rules are also appropriate where there is "a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

And based on the Intellectual Property Clause authorizing Congress to abrogate State sovereign immunity under Article I as Petitioners demonstrate, *see* Pet. Br. at 20–38, pursuant to the Necessary and Proper Clause, the "means chosen" by Congress must be "reasonably adapted" to "the attainment of a legitimate end." *United States v. Comstock*, 560 U.S. 126, 135 (2010) (internal citation omitted).

Congress met both the Article I and Fourteenth Amendment abrogation standards when it enacted the CRCA. Prior to the CRCA's passage, Congress documented many instances of copyright infringement by States. And the post-CRCA record confirms that Congress accurately predicted—and prudently sought to remedy and prevent—an escalating pattern of State copyright infringement in a variety of contexts. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (noting that "courts must accord substantial deference to the predictive judgments of Congress" when "reviewing the constitutionality of a statute" (internal citation omitted)).

A. Congress Passed the CRCA Based on a Record of Escalating Infringement by State Actors.

The record before Congress when it enacted the CRCA showed that States had engaged in a pattern of disrespecting copyright owners' rights. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 658 n.9 (1999) (Stevens, J., dissenting) (suggesting that CRCA is valid Section 5 legislation even under *Florida Prepaid* since "[t]he

legislative history of [the CRCA] includes many examples of copyright infringements by States—especially state universities.").

Well in advance of the Act's passage, Congress tapped Ralph Oman, Register of Copyrights, "to assess the nature and extent of the clash between the Eleventh Amendment and the federal copyright law," including "whether copyright enforcement problems have arisen because of states' immunity." Register's Report, at ii; *see also* Brief for Ralph Oman as *Amicus Curiae* Supporting Petitioners. The resulting Register's Report documented numerous instances of uncompensated copyright infringement by State actors, including a State-operated nursing home copying and selling a publisher's educational materials; a local hospital association sponsoring a "lending library" using copied material; and, as reported by Copyright Alliance member the Motion Picture Association of America (MPAA), correctional institutions over a range of States holding unlicensed public viewings of motion pictures. *Id.* at 7–9. The report concluded that copyright owners would "suffer immediate harm" without the ability "to sue infringing states in federal court for money damages." *Id.* at vii.

In addition to the Register's Report, Congress heard extensive testimony demonstrating that copyright infringement by State actors "critically impairs creative incentive and business investments," including by "the creators and producers of computer data bases, software, scholarly books and journals, textbooks, educational testing materials, microfilm, educational video materials, music and motion pictures." The Copyright Clarification Act: Hearing on

S. 497 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 101st Cong. III (1989), at 1, 53. Among numerous other examples, Congress found "particularly disturbing" a case that "involved copying of the computer program of a small, entrepreneurial software company with revenues of less than $250,000 by a large State entity." S. Rep. No. 101-305 (1990), at 11.

Based on this pattern of copyright infringement by State entities, Congress reasonably concluded that the extent of the infringement was underrepresented by the examples before it and would worsen with time. *See, e.g.*, H.R. Hearings, at 96 (testimony of Barbara Ringer, Former Register of Copyrights) ("And, of course, the longer the situation continues the worse it gets and the harder it is to change.").

In short, when enacting the CRCA, "Congress had before it significant evidence of" copyright infringement by the States, which was "weighty enough to justify the enactment of prophylactic . . . legislation." *Hibbs*, 538 U.S. at 722.

B. Congress Accurately Predicted Further Escalation of Infringement by State Actors.

As Congress predicted, copyright infringement by State actors has escalated. This post-CRCA history, now spanning nearly three decades, confirms the wisdom and prescience of Congress and the Framers. Because copyright is a matter of national import, it should be enforced uniformly through federal protections. Enshrining State authority over that system in

the face of the post-CRCA record is a recipe for continued, rampant infringement.

Roughly a decade after the CRCA's enactment, and in the wake of *Florida Prepaid*, Congress received oral and written testimony from well over a dozen witnesses on the intersection of sovereign immunity and intellectual property. *See* Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm., 107th Cong., 2d Sess. 91 (2002). That testimony included reports of egregious copyright abuse by States.

For example, the Software & Information Industry Association (SIIA), a trade association of the software and information industry "represent[ing] over 800 high-tech companies," undertook a review that uncovered "77 matters involving infringements by State entities" in the span of over just six years. *Id.* at 91–92. The infringement was carried out by State colleges and universities, hospitals, public service commissions, and other State actors. *Id.* at 92.

SIIA also provided an example involving "the piracy of hundreds of computer software programs on computers owned by" a Baltimore-based State hospital. *Id.* An "audit revealed several hundred thousand dollars['] worth of unlicensed software," and the hospital at first conceded liability and began negotiating towards settlement. *Id.* Then the hospital reversed course. Asserting sovereign immunity, it sent a letter "refus[ing] to pay any monetary damages." *Id.* A similar situation arose from software piracy by a New Hampshire State entity. *Id.*

The Regional Director of a Kansas-based business that "developed the first self-supporting online access to State Government" also testified before Congress, and recounted a similar tale. *Id.* at 27. The company worked with roughly 15 States, plus a number of counties and cities, "to create and maintain Internet-based portals" that "deliver[] electronic government services to constituents." *Id.* On the final day of a five-year contract with Georgia, however, the State claimed ownership over the company's software, in a manner that was "completely inconsistent with [the relevant] contract." *Id.* at 28. When an expensive lawsuit ensued, "Georgia fought with virtual impunity, while [the company was] forced to fight with one hand or two tied behind [its] back." *Id.* at 29.

Congress heard many similar accounts. The Professional Photographers of America "offer[ed] the stories of three photographers who ha[d] been the victims of [State] infringement": Illinois had used "images of a state resort park" without permission and without offering payment; an employee of Western Michigan University had been instructed to illegally copy "professionally made high school senior portraits"; and the University of Southwest Louisiana had pirated images of a football game for use on the next season's tickets. *Id.* at 90–91.

Instances of State copyright infringement have hardly abated in recent years. Indeed, the evidence suggests the opposite. A recent compilation identified more than 150 copyright cases filed against States since the year 2000—*i.e.*, since *Florida Prepaid* and subsequent lower court decisions annulling the CRCA. *See* Brief of Ralph Oman as *Amicus Curiae*

Supporting Petitioners, Addendum. That list includes a suit arising from the decision of one of the country's most prominent State universities, UCLA, to stream copyrighted educational content online, *see Ass'n for Info. Media & Equip. v. Regents of the Univ. of California*, No. 2:10-CV-09378-CBM, 2012 WL 7683452 (C.D. Cal. Nov. 20, 2012), and another involving one of the country's largest public school districts, the Los Angeles Unified School District, which benefited from sovereign immunity as an arm of the state under California law, and distributed without authorization a copyrighted electronic book about health instruction to hundreds of recipients, *see Fodor v. Los Angeles Unified Sch. Dist.*, No. CV-12-08090-DMG, 2013 WL 12130260, at *1–*2 (C.D. Cal. Mar. 1, 2013).

In another high-profile case, Georgia State University crafted an online course reserve system that encouraged professors to make available for download entire unlicensed chapters and large segments of course books. *See Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1201 (N.D. Ga. 2012). The State university's policy resulted in infringing distribution of nearly 100 copyrighted works in just a single academic year. *Id.* at 1201, 1203–04. Unlike most individual and small business authors, the publishers of the copyrighted works have had the resources to mount a challenge against this State university policy. *Id.* at 1205. Notably, the court found that, based on the extensive record before it, "unlicensed copying of excerpts of copyrighted books at colleges and universities is a widespread practice in the United States" and "many schools' copyright policies allow more liberal unlicensed copying than does Georgia State's [policy]." *Id.* at 1221.

Another egregious case involving Copyright Alliance member and *amicus curiae* Oracle arose when the State of Oregon passed legislation eliminating a State entity's liability for infringing Oracle's copyrighted software. *See Oracle Am., Inc. v. Oregon Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018, 1021, 1027 (D. Or. 2015); *see* Brief of Oracle America, Inc. as *Amicus Curiae* in Support of Petitioners, at 12–17.

Getty Images—a Copyright Alliance member that compiles and distributes photographs and film footage created by thousands of individual creators—assists in tracking and addressing instances of unauthorized use. Recently, Getty Images identified more than 50 instances, including 16 in the last several years alone, where State entities asserted sovereign immunity in response to claims of copyright infringement. *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. The typical result in such cases is no compensation for past unauthorized use.

As the district court observed below, the sheer number "of suits filed against allegedly infringing states in recent years, even despite little chance of success, demonstrates the extent of the issue." Pet. App. 53a (collecting cases).

Because the vast majority of infringement matters never reach court, however, such lawsuits form only a small fraction of the infringement phenomenon. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-811, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS 13 (2001), available at

https://www.gao.gov/assets/240/232603.pdf ("GAO Report"). Many small businesses and independent creators lack the resources to detect instances of copyright infringement in the first place. Even when infringement is identified, it is typically handled "administratively," going no further than a cease-and-desist letter, or being "dropped or settled . . . prior to a decision." *Id.* at 7–8. Litigation is even less likely now, following *Florida Prepaid* and lower court decisions nullifying the CRCA.

It is also often difficult to *identify* instances of State copyright infringement, even when they are brought to court. For example, "underlying accusations" of infringement may be styled as contract breaches or some other "state-recognized cause of action." *Id.* at 8. Relatedly, it is not always clear whether a given party is actually a State entity, since many "organizations not carrying the state name (e.g., Auburn University) are nevertheless entities of the state." *Id.* Finally, there are cases that do not feature State entities as parties but nevertheless implicate States. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 & n.3 (2d Cir. 2015) (case arising from "Google's Library Project," which "involve[d] bi-lateral agreements between Google and a number of the world's major research libraries," including State institutions such as the University of Michigan, the University of California, and the New York Public Library, to make millions of books available for copying).

And of course, with no real prospects for recovering monetary damages for the unauthorized use of their copyrighted works under current law, authors

reasonably may be deterred from creating new works in the first place.

C. The CRCA Constitutes a Tailored Remedy for a Limited Range of Conduct.

The determination of whether Congress has selected an appropriate remedial measure calls for an assessment of the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

With the CRCA, Congress sought to remedy and prevent the injury of copyright infringement by States by abrogating sovereign immunity in a limited category of cases. Contrary to the Fourth Circuit's characterization, that approach did not expose States to "sweeping liability." *See* Pet. App. 30a. Rather, due to a number of State-friendly safe harbors, copyright standards are less onerous for States. Furthermore, copyright infringement is an inherently circumscribed cause of action for *any* party. *See Chavez v. Arte Publico Press*, 157 F.3d 282, 297 (5th Cir. 1998) (Wisdom, J., dissenting) ("The means chosen by Congress to achieve its objective are modest; [the CRCA] is not the type of 'general legislation' rejected by the Court in *City of Boerne*."). Several distinct features make copyright liability a relatively limited cause of action compared to other types of liability, such as patent infringement.

First, copyright applies to a circumscribed range of works. It is limited to certain subject matter, such as "dramatic works" or "sculptural works." 17 U.S.C.

§ 102(a); *see Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008 (2017) ("A valid copyright extends only to copyrightable subject matter.").

And copyright protection extends only to the particular expression of a work, *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (citations omitted) (observing that, under the idea/expression dichotomy, an author may copyright only "expression[s]," not "facts or ideas"), "fixed" in a particular "tangible medium of expression . . . in a material object from which the work can be perceived, reproduced, or otherwise communicated." *Star Athletica*, 137 S. Ct. at 1008 (internal punctuation omitted). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. § 102(b); *see* 17 U.S.C. § 101 (excluding "utilitarian aspects" from copyright protection). Indeed, under copyright's merger doctrine, even original expression is not protected where there are only limited ways to convey an idea. *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1143 (11th Cir. 2007) (denying protection to image centered in middle of circle with line through it, "[s]ince there are effectively only a few ways of visually presenting the idea that an activity is not permitted").

Second, unlike some other forms of intellectual property, copyright infringement liability does not apply where a second comer "did not copy as a factual matter, but instead independently created the work at issue," "even when two works are substantially similar." *Airframe Sys., Inc. v. L-3 Commc'ns Corp.*, 658

F.3d 100, 106 (1st Cir. 2011) (quoting 4 Nimmer & Nimmer, Nimmer on Copyright § 13.01[B], at 13–10); *accord United States v. Anderson*, 741 F.3d 938, 946 (9th Cir. 2013) (observing that copyright "liability requires the general intent to copy").

Third, copyright liability is subject to a robust fair use defense. Under 17 U.S.C. § 107, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Where they deem it appropriate, courts find State uses protected under the fair use doctrine. *See, e.g.*, *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982) (fair use of film by local government in nuisance abatement action); *Whipple v. Utah*, No. 2:10-CV-811-DAK, 2011 WL 4368568, at *30 (D. Utah Aug. 25, 2011) (fair use of privately produced tourism guide where author "received all commercial value from the advertising"); *Ass'n of Am. Med. Coll. v. Cuomo*, 928 F.2d 519, 524 (2d Cir. 1991) (fair use of MCAT test materials in government analysis of test results).

This list of limitations goes on. *See, e.g.*, Pet. Br. at 55 (State causes of action preempted); *id.* at 61 (no protection for stock elements under scènes à faire doctrine).

Finally, even with the enactment of the CRCA, States have exemptions from copyright liability that are not equally available to private parties. That follows because Congress has crafted numerous statutory carve-outs that effectively immunize or remit damages for particular State conduct from

infringement liability. For example, copyright infringement generally does *not* apply to: "the performance or display of a work . . . in the course of face-to-face teaching activities of a nonprofit educational institution," 17 U.S.C. § 110(1); "the performance of a nondramatic literary or musical work" in connection with "the systematic mediated instructional activities of a governmental body," 17 U.S.C. § 110(2); the "performance of a nondramatic musical work by a governmental body . . . in the course of an annual agricultural or horticultural fair or exhibition," 17 U.S.C. § 110(6); the "performance of a nondramatic literary work . . . primarily directed to blind or other handicapped persons" from a governmental facility, 17 U.S.C. § 110(8); the use of a variety of works by research libraries and archives, 17 U.S.C. § 108; or the reproduction of works by educational institutions, libraries, and archives, 17 U.S.C. § 504(c)(2). These provisions refute the Fourth Circuit's assertion below that the CRCA "impos[es] sweeping liability for *all violations* of federal copyright law." *See* Pet. App. 30a (emphasis in original).

In short, due to a number of statutory exemptions and limitations applicable to governmental entities—and because copyright infringement is an inherently limited cause of action—the scope of liability for States under the CRCA is limited. But within that scope, holding State actors liable for infringement is essential to the fundamental purpose of copyright law—to promote the creation of new works. The CRCA was an eminently appropriate response by Congress to a widespread pattern of copyright abuse by States that has only escalated in recent years.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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