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**United States Court of Appeals  
for the Fifth Circuit**

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No. 20-20503

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CANADA HOCKEY, L.L.C., DOING BUSINESS AS  
EPIC SPORTS; MICHAEL J. BYNUM,

*Plaintiffs—Appellants,*

*versus*

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT;  
ALAN CANNON; LANE STEPHENSON, IN HIS  
INDIVIDUAL CAPACITY,

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:17-CV-181

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ON PETITION FOR REHEARING

(Filed Feb. 14, 2022)

Before OWEN, *Chief Judge*, SMITH and GRAVES, *Circuit  
Judges.*

JAMES E. GRAVES, JR., *Circuit Judge*.\*

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

IT IS ORDERED that the petition for rehearing is DENIED. The opinion, filed September 8, 2021, is WITHDRAWN, and the following is SUBSTITUTED:

Michael J. Bynum and his publishing company sued Texas A&M University and its employees after they published a part of Bynum’s forthcoming book without permission. Relevant here, the district court dismissed all claims against Texas A&M on state sovereign immunity grounds and those against two Texas A&M employees for failure to state a claim. We AFFIRM.

### **I. Background**

For purposes of this appeal, we accept the factual allegations stated in the complaint as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Michael J. Bynum is a sportswriter and editor that operates his own publishing company, Canada Hockey LLC d/b/a Epic Sports (“Epic Sports”). In 1980, Bynum became interested in the “12th Man” lore while working on his first book about Texas A&M University’s (TAMU) football program. Plaintiffs describe the 12th Man story as follows:

The University’s now famous 12th Man tradition was inspired by the actions of E. King Gill at the 1922 football game known as the “Dixie Classic.” Gill, a squad player for A&M’s football team, who was already training with the university’s basketball team, was up in the press box watching his team face the then

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top-ranked Prayin' Colonels of Centre College, when he was waved down to the sideline before halftime to suit up in case his injured team ran out of reserve players. Gill stood on the sideline, ready to play, for the remainder of the game.

Gill's commitment to step up for his team when in need later became a legend that was passed down from generation to generation of Aggies. Today, the 12th Man tradition is a symbol of the Aggies' unity, loyalty, and willingness to serve when called upon to do so, and is woven into many aspects of life at A&M.

In 1990, TAMU registered "12th Man" as a trademark and has since aggressively enforced it.

Intrigued by the story, Bynum decided to write about Gill and his impact on TAMU's football program for a forthcoming book titled *12th Man*. For many years, Bynum researched Gill and the 12th Man story, including reviewing primary documents, visiting relevant locations, and conducting interviews with personnel in TAMU's Athletic Department. The personnel included Brad Marquardt, an Associate Director of Media Relations, and Alan Cannon, an Assistant Athletic Director for Media Relations. Marquardt reported to Cannon and managed the Athletic Department's official Twitter account dedicated to its football program (@AggieFootball). Cannon handled media relations for all sports programs in the Athletic Department and managed the department's official website. Eventually,

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Bynum hired Whit Canning to write a short biography about Gill (the “Gill Biography”), titled “An A&M Legend Comes to Life,” which Bynum planned to use as the opening chapter of his book.

In June 2010, Bynum emailed Marquardt seeking photographs to include in his book, sending along a draft of the book in PDF form. In the email, Bynum specified that the PDF was “a draft version of the 12th Man Book” and “a work in progress . . . not in final form yet.” The draft contained Bynum’s name, copyright date, an indication that Epic Sports owned the copyright to the book, and a statement that “no part of the book may be reproduced or used in any form or by any means . . . without the permission of the publisher.” The Gill Biography was the opening chapter of the book. Bynum continued to email Marquardt as late as December 2013, asking questions related to the book. Bynum planned to publish his *12th Man* book in the fall of 2014.

In January 2014, TAMU’s Athletic Department directed its staff to find background information on Gill that could be used to promote the 12th Man story and raise money. Marquardt directed his secretary to retype the Gill Biography that Bynum sent to Marquardt in 2010; remove any references to Bynum or Epic Sports; rewrite the byline to read “by Whit Canning, special to Texas A&M Athletics” to suggest that Canning was commissioned to write the Biography exclusively for the Athletic Department; and change the original title of the Biography from “An A&M Legend Comes to Life” to “The Original 12th Man.” Marquardt

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provided the retyped Biography to his work colleagues, including Cannon and Lane Stephenson, the Director of News & Information Services at TAMU, for approval and publication. Stephenson was in charge of TAMU's official Twitter account (@TAMU) and "TAMU Times," which was TAMU's e-newsletter and website.

Soon after, the Athletic Department published the contents of the Gill Biography as an article on its website. Then, on January 19, 2014, both TAMU and its Athletic Department tweeted a link to the article on their respective Twitter accounts. The posts were retweeted and discussed by news sources. The article was also featured in TAMU Times.

On January 22, 2014, Bynum emailed Marquardt and another employee of the Athletic Department requesting immediate removal of the article. Several hours later, Marquardt responded that the article was no longer on the website, apologized for the "mix-up," and asked whether it would "be possible to post the story as an 'excerpt' to [his] book." He also stated: "I asked my secretary to key [the Biography] in for me which she did." Though the article was removed, it was shared by others and reposted on various online forums. The book remains unpublished.

In 2017, Bynum and Epic Sports filed suit against the TAMU Athletic Department, the TAMU 12th Man Foundation,<sup>1</sup> and employees of the Athletic Department. Relevant here, Plaintiffs assert the following

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<sup>1</sup> Pursuant to a joint motion, the appeal as to the 12th Man Foundation was dismissed.

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claims: (1) direct copyright infringement under the Copyright Remedy Clarification Act (CRCA), 17 U.S.C. § 501, against the Athletic Department, Cannon, and Stephenson; (2) contributory copyright infringement against the same; (3) vicarious copyright infringement<sup>2</sup> against the Athletic Department; (4) violation of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202, against the Athletic Department; (5) violation of the Takings Clause of the Texas Constitution against the Athletic Department; and (6) violation of the Takings Clause of the U.S. Constitution against the Athletic Department.

TAMU, on behalf of the Athletic Department, moved to dismiss the claims for lack of jurisdiction on state sovereign immunity grounds under Federal Rule of Civil Procedure 12(b)(1). Cannon and Stephenson moved to dismiss the claims for failure to state a claim under Rule 12(b)(6) and on qualified immunity grounds. In March 2019, the district court dismissed those claims, but later stayed the case pending the Supreme Court's decision in *Allen v. Cooper*, 140 S. Ct. 994 (2020). In September 2020, after *Allen* was decided and additional briefing was submitted, the district

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<sup>2</sup> A direct copyright infringement claim stems directly from the CRCA, but a contributory or vicarious infringement claim does not. Nevertheless, though “[the CRCA] does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (internal quotation marks and citations omitted).

court entered final judgment for TAMU, Cannon, and Stephenson. Plaintiffs appeal.

## II. Standard of Review

“We review de novo a district court’s grant of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because of state sovereign immunity.” *Meyers ex rel. Benzing v. Texas*, 410 F.3d 235, 240 (5th Cir. 2005). A plaintiff bears the burden of proof that jurisdiction exists. *Daniel v. Univ. of Tex. Sw. Med. Ctr.*, 960 F.3d 253, 256 (5th Cir. 2020). While legal conclusions are reviewed de novo, the district court’s factual findings are reviewed for clear error. *Kuwait Pearls Catering Co. v. Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173, 178 (5th Cir. 2017).

We review de novo a district court’s grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 955 (5th Cir. 2020). We accept all well-pled factual allegations as true, viewing them in the light most favorable to the plaintiff. *Id.*

## III. State Sovereign Immunity

State sovereign immunity divests federal courts of jurisdiction over states and their agencies and instrumentalities, unless the state consents to suit or Congress has clearly and validly abrogated the state’s sovereign immunity. See U.S. CONST. amend. XI; *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326 (5th Cir.

2002). “The state need not be the named party in a federal lawsuit, for a state’s Eleventh Amendment immunity extends to any state agency or entity deemed an ‘alter ego’ or ‘arm’ of the state.” *Id.*<sup>3</sup> TAMU is inarguably an arm of the state entitled to sovereign immunity. *See U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm’n of Tex.*, 898 F.3d 497, 501 (5th Cir. 2018).

As noted above, a state’s immunity from suit is not absolute. With respect to abrogation, a federal court may entertain a lawsuit against a nonconsenting state on two conditions: “First, Congress must have enacted ‘unequivocal statutory language’ abrogating the States’ immunity from the suit. . . . And second, some constitutional provision must allow Congress to have thus encroached on the States’ sovereignty. Not even the most crystalline abrogation can take effect unless it is ‘a valid exercise of constitutional authority.’” *Allen*, 140 S. Ct. at 1000–01 (citations omitted).

#### IV. Claims Against TAMU

Appellants argue that the district court improperly dismissed their claims against TAMU on several

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<sup>3</sup> “‘Eleventh Amendment immunity’ is a misnomer, however, because that immunity is really an aspect of the Supreme Court’s concept of state sovereign immunity and is neither derived from nor limited by the Eleventh Amendment. Nevertheless, the term ‘Eleventh Amendment immunity’ has been used loosely and interchangeably with ‘state sovereign immunity’ to refer to a state’s immunity from suit without its consent in federal courts.” *Meyers*, 410 F.3d at 240–41 (citations omitted).



grounds. They assert that the Athletic Department is a separate entity from TAMU and is therefore not an arm of the state entitled to sovereign immunity. But even if it were, the district court should not have dismissed the copyright infringement and takings claims against TAMU. We address each issue in turn.

### **A. Arm of the State**

The district court held that, as a matter of law, the Athletic Department lacks jural authority and therefore has no capacity to be sued under Federal Rule of Civil Procedure 17. Since the “correct party” substitute should be TAMU, the district court held that TAMU, as an arm of the state, was entitled to sovereign immunity.

The parties do not dispute that the Athletic Department lacks jural authority to be sued. However, they disagree as to whether the district court failed to do a full analysis of the Athletic Department’s arm-of-the-state status under the framework set forth in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). In other words, Appellants assert that the *Clark* framework should have been applied, which would have led to the conclusion that the Athletic Department itself can be sued, whereas Appellees contend that a *Clark* analysis was not required because TAMU is the proper party.

We agree with Appellants that under circuit precedent, a court must analyze whether an entity qualifies as an arm of the state as a matter of law under the

*Clark* framework. See *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318–19 (5th Cir. 2001) (“When confronted with a governmental entity asserting Eleventh Amendment immunity as an arm of the state, we apply the test established in *Clark*. . .”) (holding that the district court “erred in failing to properly analyze, under *Clark*, [the entity’s] amenability to suit”). A proper inquiry under *Clark* considers six factors: (1) whether the state statutes and caselaw view the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Clark*, 798 F.2d at 744–45. No one factor is dispositive, though it is well established that the second is the “most important,” while the fifth and sixth are “less so.” *Williams*, 242 F.3d at 319 (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 681–82 (5th Cir. 1999)). “The goal of this test is to determine ‘whether the suit is in reality a suit against the state itself.’” *Providence Behavioral Health v. Grant Rd. Pub. Util. Dist.*, 902 F.3d 448, 456 (5th Cir. 2018) (quoting *Hudson*, 174 F.3d at 682).

The first factor—state law and caselaw—favors treating the Athletic Department as an arm of the state. Neither party points to a statute, case, or a Texas Attorney General opinion relevant to any athletic department of a state university. Texas law, however, suggests that an athletic department of a public

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university is essentially an “auxiliary enterprise” that is an extension of the state. An “auxiliary enterprise” is defined as “a business activity that is conducted at a state agency, provides a service to the agency, and is not paid for with appropriate money.” TEX. GOV'T CODE § 2252.061. Auxiliary enterprises, like athletic departments, do not operate for purely educational purposes. *See* TEX. CONST. art. VII, §§ 17(f)<sup>4</sup> & 18(d).<sup>5</sup> But these enterprises are nevertheless treated as an extension of a public university. *See, e.g., Gulf Reg'l Educ. Television Affiliates v. Univ. of Hous.*, 746 S.W.2d 803, 808 (Tex. Ct. App. 1988) (concluding that group of school districts and parochial schools that produced and broadcast television programming was auxiliary enterprise of University of Houston and had no authority to file suit without university or State Attorney General's permission). Further, courts have treated athletic departments as auxiliary enterprises. *See id.* (noting that the “University defines an auxiliary enterprise as a self-supporting component such as . . . the athletic department”); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224, 226–27 (5th Cir. 1988) (observing unchallenged district court ruling that “athletic departments

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<sup>4</sup> “The funds appropriated by this section [for educational and general activities] may not be used for the purpose of constructing, equipping, repairing, or rehabilitating buildings or other permanent improvements that are to be used only for student housing, intercollegiate athletics, or auxiliary enterprises.”

<sup>5</sup> “The proceeds of the bonds or notes issued under Subsection (a) or (b) of this section may not be used for the purpose of constructing, equipping, repairing, or rehabilitating buildings or other permanent improvements that are to be used for student housing, intercollegiate athletics, or auxiliary enterprises.”

of Texas state universities were auxiliary enterprises”); *see also* Tanyon T. Lynch, *Quid Pro Quo: Restoring Education Primary to College Basketball*, 12 Marq. Sports L. Rev. 595, 607 n.89 (2002) (“Most Division I-A athletics departments are considered ‘auxiliary enterprises’ and, as such, are expected to generate revenues sufficient to cover costs.”). Since an athletic department of a state-supported university is like an auxiliary enterprise, the Athletic Department is similarly an extension of TAMU and thus an arm of the state.

The second factor—source of funds—favors treating the Athletic Department as an arm of the state. Though we consider the source of general operating funds for the entity, because a principal goal of the Eleventh Amendment is to protect state treasuries, the most significant factor in assessing an entity’s status is whether a judgment against it will be paid with state funds. *Williams*, 242 F.3d at 320 (citing *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997)). Texas law prohibits any public funds to be used for intercollegiate athletic programs, as it requires these programs to be fully self-supporting. *See* TEX. CONST. art. VII, §§ 17(f) & 18(d); Tex. General Appropriations Act, 86th Leg., R.S., art. III, § 9 (“[N]o educational and general funds appropriated may be used for the operation of intercollegiate athletics.”). Thus, the Athletic Department relies wholly on outside funding. For instance, in the fiscal year of 2016, it generated approximately \$194 million in revenue from, *inter alia*, ticket sales, contributions, sale of media rights, and advertisements. It

receives \$0 in student fees, direct state or other government support, direct institutional support from TAMU, and indirect facilities and administrative support.

But while the source of the Athletic Department's operating funds is private, it is unclear whether a judgment against the Athletic Department would be satisfied with private or state-allocated funds. Appellants have the burden to demonstrate that the Athletic Department will be responsible for its judgment and debts, not the State. Because they fail to satisfy their burden in this respect, this factor supports a finding that the Athletic Department is an arm of the state. *See Daniel*, 960 F.3d at 258 (concluding second factor favors finding immunity because plaintiff failed to satisfy burden of showing that entity would be responsible for judgment and debt, not the state).

The third factor—degree of autonomy—favors treating the Athletic Department as an arm of the state. The record shows that the Athletic Department is a department within, and governed by, TAMU. Scott Woodward, the Director of Athletics at TAMU, averred: “I report directly to the President of Texas A&M University, Michael K. Young. President Young and I stay in frequent contact regarding how the Athletic Department is performing.” The organizational chart provided by TAMU indicates that Woodward is part of the TAMU President's cabinet and reports directly to the President. *Cf. Gulf*, 746 S.W.2d at 806–07 (concluding that auxiliary enterprise was part of state university where enterprise was managed by university

employees who reported through chain of command that went up to the university’s president). Moreover, policy statements issued by the TAMU System Board of Regents demonstrate that TAMU exercises oversight over the Athletics Department. For example, the Board requires TAMU to “create and maintain an Athletic Council, made up of faculty, staff, students, alumni, and community members, to advise the president in the development and administration of the intercollegiate athletics program,” and that “all intercollegiate athletics programs be maintained in an academically and fiscally accountable manner with full compliance with conference and national rules.” TAMU also requires athletic agreements over \$100,000 to be authorized by a university official—generally the University Contracts Officer, the Chief Financial Officer, or the President. Further, all athletic coaching employment agreements must be authorized by the President, and, if over \$500,000, with additional approval by the Board of Regents. Considering TAMU’s oversight and financial regulation, the Athletic Department does not operate with a level of local autonomy to consider it independent from the State.

The fourth factor—scope of problem—favors treating the Athletic Department as an arm of the state. Education is a statewide concern, *see Sissom v. Univ. of Tex. High Sch.*, 927 F.3d 343, 349 (5th Cir. 2019), and though athletic programs do not operate for educational purposes, anyone who plays a sport managed by the Athletics Department is a student at TAMU, which belongs to the statewide TAMU System. *See United*

*States ex rel. King v. Univ. of Tex. Health Sci. Ctr.-Hous.*, 544 F. App'x 490, 495 (5th Cir. 2013) (finding that University of Texas Health Science Center addressed statewide concerns of education and research, although its facilities were all in Houston, as the center belonged to the greater University of Texas System which had locations throughout the state). Further, the Athletic Department engages in intercollegiate athletics—i.e., competes with other schools—and derives financial support from students, alumni, and fans throughout Texas. *Clark's* fourth factor therefore supports finding the Athletic Department as an arm of the state.

The fifth factor—ability to sue and be sued in its own name—favors finding the Athletic Department as an arm of the state. Neither party points to a case in which the department was a named party in a lawsuit.

The sixth factor—right to hold and use property—favors treating the Athletic Department as an arm of the state. The Board of Regents retains ultimate control of money collected at TAMU, including “receipts from school activities.” TEX. EDUC. CODE § 51.002; see *Kneeland*, 850 F.2d at 226–27 (observing unchallenged district court ruling that funds generated by athletic departments of state universities were “public funds belonging to the State of Texas”). The Athletic Department does not own or purchase real property, and any real property used by the Athletic Department is managed by the Board of Regents. TEX. EDUC. CODE § 85.25 (“The board is vested with the sole and exclusive

management and control of lands and mineral interests under its jurisdiction and that may be acquired by it.”).

All six *Clark* factors weigh in favor of finding that the Athletic Department is entitled to arm-of-the-state status. Accordingly, we conclude that the Athletic Department is a part of TAMU and therefore enjoys state sovereign immunity.

## **B. Copyright Infringement Claims**

Having concluded that the Athletic Department is an arm of the state, we must next address whether its sovereign immunity is abrogated from the copyright infringement claims. Because the Athletic Department is an extension of TAMU, we will now refer to the entity as TAMU.

### ***i. Abrogation***

In *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Supreme Court recently addressed whether the Copyright Remedy Clarification Act (CRCA) validly abrogated the states’ immunity from copyright infringement suits.<sup>6</sup> The CRCA provides that a state “shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from

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<sup>6</sup> The Fifth Circuit addressed this question many years ago and concluded that the CRCA was not a valid abrogation of state sovereign immunity from copyright infringement suits. See *Chavez v. Arte Publico Press*, 204 F.3d 601, 605 (5th Cir. 2000).



suit in Federal court” for copyright infringement. 17 U.S.C. § 511(a). Though Congress used clear language to abrogate immunity, the Court held that Congress had no authority to do so under Article I, which empowers Congress to protect copyrights, or Section 5 of the Fourteenth Amendment, which authorizes Congress to enact “reasonably prophylactic legislation” aimed at preventing states from violating the Fourteenth Amendment. *Allen*, 140 S. Ct. at 1004 (citations omitted). With respect to Section 5, the CRCA failed the “congruence and proportionality” test because the evidence of actual constitutional injury—that is, willful copyright infringement by states—was “exceedingly slight.” *Id.* at 1007. Congress therefore lacked authority to broadly abrogate the states’ immunity from copyright infringement suits.

Appellants argue, however, that *Allen* did not foreclose abrogation of sovereign immunity from copyright infringement suits where a state’s violation of the CRCA independently constitutes an *actual* violation of the Fourteenth Amendment. Specifically, they allege that TAMU committed two independent violations of the Fourteenth Amendment: (1) deprivation of property without due process, and (2) takings. Appellants cite to *United States v. Georgia*, 546 U.S. 151 (2006), which held that “insofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *Id.* at 159 (emphasis in original)

(reviewing whether state violated prisoner’s Eighth Amendment right to be free from cruel and unusual punishment, which is incorporated in the Due Process Clause of the Fourteenth Amendment).

Thus, *Georgia* arguably set forth two categories of abrogation: (1) where a statute validly abrogates sovereign immunity for *all* claims, and (2) where a statute is not a valid prophylactic abrogation of all claims, but does abrogate sovereign immunity for those claims based on conduct constituting an actual violation of the Fourteenth Amendment, for the statutory remedy would be congruent and proportional *as applied* to that case. *See id.* (directing lower courts to determine “on a claim-by-claim basis, (1) which aspects of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid”). Appellants contend that this case falls in the second category.

In support of their position, Appellants cite to *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia* (“*NABP*”), 633 F.3d 1297 (11th Cir. 2011), where the Eleventh Circuit applied *Georgia* in a copyright infringement suit, observing that “[i]t is well established that § 5 grants Congress the authority to abrogate state sovereign immunity for violations of the Fourteenth Amendment.” *Id.* at 1315 (citing *Georgia*, 546 U.S. at 158). There,

however, the court ultimately rejected the plaintiff's claim that the copyright infringement amounted to a violation of procedural due process, concluding that a pre-deprivation process was not feasible under the facts alleged and that adequate post-deprivation remedies were provided by the State. *Id.* at 1318–19. Appellants also point to oral argument in *Allen*, where the State of North Carolina conceded that even if the Supreme Court held that the CRCA was not a valid prophylactic abrogation of state immunity, *Georgia* would still provide a remedy for copyright infringement constituting an actual violation of the Fourteenth Amendment. See Transcript of Oral Argument at 39–40, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877) (“[W]henever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court’s *Georgia* decision, they can bring a direct constitutional claim. We don’t dispute that.”). Further, after *Allen* was decided, the district court on remand recently held that the plaintiffs’ copyright infringement claim could still proceed because “[a]lthough the Supreme Court ruled that the CRCA was unconstitutional insofar as it attempted to abrogate sovereign immunity prophylactically . . . the statute remains whenever plaintiff alleges both a constitutional violation as well as a statutory violation. Therefore, plaintiffs can still use the CRCA as a basis for its *Georgia* claim [alleging that defendants’ conduct amounted to an unconstitutional taking].” *Allen v. Cooper*, \_\_\_ F. Supp. 3d \_\_\_, 2021 WL 3682415, at \*11 (E.D.N.C. Aug. 18, 2021).

***ii. Actual Violations of the Fourteenth Amendment***

We need not decide whether *Georgia* extends to copyright infringement cases, because even assuming it does, Appellants fail to allege that TAMU's conduct constitutes an actual violation of the Fourteenth Amendment.

First, the copyright infringement claim against TAMU for deprivation of property without due process cannot survive dismissal. To come within the reach of the procedural requirements of the Due Process Clause, a violation must (1) be "intentional, or at least reckless," and (2) lack adequate post-deprivation state remedies. *Allen*, 140 S. Ct. at 1004. For due process purposes, copyrights are a form of property. *Id.* Appellants sufficiently allege that the infringement was intentional—Marquardt directed his secretary to retype the Gill Biography, remove any copyright information, and change its title and byline to indicate that TAMU owned the work, and then shared it with his colleagues for approval and publication.

However, meaningful post-deprivation state remedies are available to redress the injury. Though no tort remedies are available under Texas law,<sup>7</sup> Appellants

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<sup>7</sup> Texas has not waived its immunity from tort claims arising out of copyright infringement allegations. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1) (providing for limited waiver of governmental immunity for claims of property damage, personal injury, or death proximately caused by wrongful or negligent conduct of governmental employee arising out of (1) use of publicly owned motor-driven equipment or motor vehicle, (2) premises defects, and (3) conditions or uses of certain property).

have a viable takings claim against TAMU for copyright infringement under the Texas Constitution. More expansive than the federal Takings Clause, the Texas Takings Clause provides: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.” TEX. CONST. art. I, § 17. The Clause itself waives sovereign immunity for a valid takings claim brought in state court. *Texas v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). Though the Texas Supreme Court recently held that a public university’s single act of copyright infringement—i.e., displaying a photograph on its website without the owner’s authorization—did not constitute a *per se* taking, it nevertheless left the door open for a copyright owner to bring a regulatory takings claim against the State for infringement. *Jim Olive Photography v. Univ. of Hous.*, \_\_\_ S.W.3d \_\_\_, 2021 WL 2483766, at \*9 (Tex. June 18, 2021); *see also id.* (Busby, J., concurring) (“Nothing in the Court’s opinion should be understood to indicate a view on [whether a state’s copyright infringement could in some circumstances require compensation] because Olive has alleged no claim under the ‘damaged’ or ‘applied’ prongs of the Texas Takings Clause.”). Accordingly, because Appellants are not foreclosed from pursuing a takings claim in state court, TAMU did not violate their procedural due process rights. *See McClure v. Biesenbach*, 355 F. App’x 800, 805 (5th Cir. 2009) (“Post-deprivation process is adequate if it allows the prospect of compensation for the loss.”) (citing *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327, 330–31 (1986)).

Moreover, the copyright infringement claim against TAMU for its taking of property fails to survive dismissal as well. The Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V. The Takings Clause is made applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (citing *Chicago Burlington & Q.R.C. v. Chicago*, 166 U.S. 226 (1897)). The Supreme Court has not addressed whether copyrights are a form of property protected by the Takings Clause.<sup>8</sup> And we need not decide this issue because Appellants have failed to plausibly allege a taking.

The Supreme Court has explained that a “basic distinction” exists between “individual torts” and “appropriations of a property right.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021); *see also, e.g.*,

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<sup>8</sup> The Supreme Court, however, has recognized that other forms of intellectual property are protected by the Takings Clause. *See Horne v. Dep’t of Agric.*, 576 U.S. 350, 359–60 (2015) (patents); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets). And, a handful of sister circuits have suggested that copyrights are protected by the Takings Clause. *See CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (“[A] rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.”); *Lane v. First Nat’l Bank of Boston*, 871 F.2d 166, 174 (1st Cir. 1989) (suggesting if state remedies do not afford just compensation for copyright infringement, “the Takings Clause of the federal Constitution might at that point enable [owner] to pursue a damage remedy in federal court”).

*Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922) (“[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence.”).

This court has illuminated the principle that not all torts (i.e., infringements) rise to the level of a taking. In *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973), where the widow of Lee Harvey Oswald sought compensation for the taking of property by the United States, we held:

We turn finally to the question whether Mrs. Porter can recover for the diminution in value of Oswald’s writings attributable to their publication in the Warren Commission Report. It is, of course, quite plain that the recovery sought here is for infringement by the government of Mrs. Porter’s common law copyright interest in Oswald’s writings. Such infringement is not a “taking” as the term is constitutionally understood. Rather, it has always been held that infringement of copyright, whether common law, *Twentieth Century Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (CA 8, 1948), or statutory, *Turton v. United States*, 212 F.2d 354 (CA 6, 1954) constitutes a tort.

Like *Porter*, Appellants have failed to meet their burden that the purported infringement amounts to a constitutional taking: The alleged direct infringement was the public display of the book for four total days, and the indirect infringement likewise stems from

these four days. Appellants have failed to plausibly allege that TAMU continued or repeated any infringement—direct or indirect—such that the claim amounts to a taking for Fifth Amendment purposes. Accordingly, in these circumstances, the copyright infringement claim based on a takings allegation fails.

### C. Takings Claims

We next address whether TAMU’s sovereign immunity is abrogated from the federal and state takings claims, which were pleaded in the alternative to the copyright infringement claims.

A state is entitled to sovereign immunity from a federal takings claim. *Bay Point Props., Inc. v. Miss. Transp. Comm’n*, 937 F.3d 454, 457 (5th Cir. 2019) (affirming dismissal of takings claim against Mississippi on sovereign immunity grounds). Appellants argue, however, that immunity is abrogated when no remedy is available in state court. They cite to *Williams v. Utah Department of Corrections*, 928 F.3d 1209, 1213 (10th Cir. 2019), which suggests that a takings claim is barred only “as long as a remedy is available in state court.” Because we have concluded that Appellants can pursue a claim under the Texas Takings Clause, state sovereign immunity bars the federal takings claim here. *See supra* IV.B.

A state is also entitled to sovereign immunity from a state takings claim brought in federal court. In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 119–21 (1984), the Supreme Court held



that federal courts are barred from hearing state law claims against a state, reasoning that such claims cannot be maintained because supplemental jurisdiction does not abrogate the state’s sovereign immunity. Further, even though the Texas Takings Clause waives immunity for state takings claims brought in state court, “[w]aiver of sovereign immunity in state courts does not waive Eleventh Amendment immunity from suit in federal court.” *Guetersloh v. Texas*, 25 F.3d 1044 (5th Cir. 1994) (unpublished) (citing *Pennhurst*, 465 U.S. at 99 n.9). Accordingly, sovereign immunity bars the state takings claim.

## **V. Claims Against Cannon and Stephenson**

Lastly, we address the direct copyright infringement claim against Cannon, and the contributory copyright infringement claims against Cannon and Stephenson.

### **A. Direct Copyright Infringement**

Direct copyright infringement requires proof of two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *BWP Media USA, Inc. v. T&S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). The purported infringer must have acted with “volitional conduct,” *id.*—that is, “[t]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could

conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.” *Id.* at 440 (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)) (internal quotation marks omitted).

The allegations do not support the reasonable inference that Cannon directly infringed the copyright. Marquardt did the actual recopying—he, not Cannon, retyped the Gill Biography and scrubbed off all copyright information to present it as TAMU’s work. Cannon never received the original work and only received the infringed work from Marquardt. He had no actual or constructive knowledge of the infringement. Accordingly, we affirm dismissal of the direct copyright infringement claim against Cannon for failure to state a claim.

### **B. Contributory Copyright Infringement**

“Contributory infringement is ‘intentionally inducing or encouraging direct infringement.’” *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 798 (5th Cir. 2017) (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)). In other words, “[a] party is liable for contributory infringement when it, ‘with knowledge of the infringing activity, induces, causes or materially contributes to infringing conduct of another.’” *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (citation omitted).

The allegations do not support the reasonable inference that Cannon or Stephenson contributorily infringed the copyright. Again, Cannon had no knowledge of the underlying infringement—he never received the original work and only received the infringing article from Marquardt. There was no intent or even knowledge on Cannon’s part with respect to the infringement. Further, Stephenson also lacked the requisite knowledge or intent to commit infringement. He did not receive the original draft of Bynum’s book, as he only received the retyped article from Marquardt and reasonably assumed it was not an infringed piece of writing. Accordingly, we affirm dismissal of the contributory copyright infringement claims against Cannon and Stephenson for failure to state a claim.

## **VI. Conclusion**

For the foregoing reasons, we AFFIRM.

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App. 28

**United States Court of Appeals  
for the Fifth Circuit**

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No. 20-20503

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CANADA HOCKEY, L.L.C., *doing business as*  
EPIC SPORTS; MICHAEL J. BYNUM,

*Plaintiffs—Appellants,*

*versus*

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT;  
ALAN CANNON; LANE STEPHENSON, *in his*  
*individual capacity,*

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:20-CV-3121  
USDC No. 4:17-CV-181

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JUDGMENT ON PETITION FOR REHEARING  
Before OWEN, *Chief Judge*, SMITH and GRAVES, *Circuit*  
*Judges.*

JUDGMENT

(Filed Feb. 14, 2022)

This cause was considered on the record on appeal  
and was argued by counsel.

App. 29

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

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App. 30

**United States Court of Appeals  
for the Fifth Circuit**

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No. 20-20503

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CANADA HOCKEY, L.L.C., DOING BUSINESS AS  
EPIC SPORTS; MICHAEL J. BYNUM,

*Plaintiffs—Appellants,*

*versus*

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT;  
ALAN CANNON; LANE STEPHENSON, IN HIS  
INDIVIDUAL CAPACITY,

*Defendants—Appellees.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:17-CV-181

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(Filed Sep. 8, 2021)

Before OWEN, *Chief Judge*, SMITH and GRAVES, *Circuit Judges*.

JAMES E. GRAVES, JR., *Circuit Judge*:\*

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Michael J. Bynum and his publishing company sued Texas A&M University and its employees after they published a part of Bynum’s forthcoming book without permission. Relevant here, the district court dismissed all claims against Texas A&M on state sovereign immunity grounds and those against two Texas A&M employees for failure to state a claim. We AFFIRM.

### **I. Background**

For purposes of this appeal, we accept the factual allegations stated in the complaint as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Michael J. Bynum is a sportswriter and editor that operates his own publishing company, Canada Hockey LLC d/b/a Epic Sports (“Epic Sports”). In 1980, Bynum became interested in the “12th Man” lore while working on his first book about Texas A&M University’s (TAMU) football program. Plaintiffs describe the 12th Man story as follows:

The University’s now famous 12th Man tradition was inspired by the actions of E. King Gill at the 1922 football game known as the “Dixie Classic.” Gill, a squad player for A&M’s football team, who was already training with the university’s basketball team, was up in the press box watching his team face the then top-ranked Prayin’ Colonels of Centre College, when he was waved down to the sideline before halftime to suit up in case his injured team ran out of reserve players. Gill stood on

the sideline, ready to play, for the remainder of the game.

Gill's commitment to step up for his team when in need later became a legend that was passed down from generation to generation of Aggies. Today, the 12th Man tradition is a symbol of the Aggies' unity, loyalty, and willingness to serve when called upon to do so, and is woven into many aspects of life at A&M.

In 1990, TAMU registered "12th Man" as a trademark and has since aggressively enforced it.

Intrigued by the story, Bynum decided to write about Gill and his impact on TAMU's football program for a forthcoming book titled *12th Man*. For many years, Bynum researched Gill and the 12th Man story, including reviewing primary documents, visiting relevant locations, and conducting interviews with personnel in TAMU's Athletic Department. The personnel included Brad Marquardt, an Associate Director of Media Relations, and Alan Cannon, an Assistant Athletic Director for Media Relations. Marquardt reported to Cannon and managed the Athletic Department's official Twitter account dedicated to its football program (@AggieFootball). Cannon handled media relations for all sports programs in the Athletic Department and managed the department's official website. Eventually, Bynum hired Whit Canning to write a short biography about Gill (the "Gill Biography"), titled "An A&M Legend Comes to Life," which Bynum planned to use as the opening chapter of his book.



In June 2010, Bynum emailed Marquardt seeking photographs to include in his book, sending along a draft of the book in PDF form. In the email, Bynum specified that the PDF was “a draft version of the 12th Man Book” and “a work in progress . . . not in final form yet.” The draft contained Bynum’s name, copyright date, an indication that Epic Sports owned the copyright to the book, and a statement that “no part of the book may be reproduced or used in any form or by any means . . . without the permission of the publisher.” The Gill Biography was the opening chapter of the book. Bynum continued to email Marquardt as late as December 2013, asking questions related to the book. Bynum planned to publish his *12th Man* book in the fall of 2014.

In January 2014, TAMU’s Athletic Department directed its staff to find background information on Gill that could be used to promote the 12th Man story and raise money. Marquardt directed his secretary to retype the Gill Biography that Bynum sent to Marquardt in 2010; remove any references to Bynum or Epic Sports; rewrite the byline to read “by Whit Canning, special to Texas A&M Athletics” to suggest that Canning was commissioned to write the Biography exclusively for the Athletic Department; and change the original title of the Biography from “An A&M Legend Comes to Life” to “The Original 12th Man.” Marquardt provided the retyped Biography to his work colleagues, including Cannon and Lane Stephenson, the Director of News & Information Services at TAMU, for approval and publication. Stephenson was in charge of TAMU’s

official Twitter account (@TAMU) and “TAMU Times,” which was TAMU’s e-newsletter and website.

Soon after, the Athletic Department published the contents of the Gill Biography as an article on its website. Then, on January 19, 2014, both TAMU and its Athletic Department tweeted a link to the article on their respective Twitter accounts. The posts were re-tweeted and discussed by news sources. The article was also featured in TAMU Times.

On January 22, 2014, Bynum emailed Marquardt and another employee of the Athletic Department requesting immediate removal of the article. Several hours later, Marquardt responded that the article was no longer on the website, apologized for the “mix-up,” and asked whether it would “be possible to post the story as an ‘excerpt’ to [his] book.” He also stated: “I asked my secretary to key [the Biography] in for me which she did.” Though the article was removed, it was shared by others and reposted on various online forums. The book remains unpublished.

In 2017, Bynum and Epic Sports filed suit against the TAMU Athletic Department, the TAMU 12th Man Foundation,<sup>1</sup> and employees of the Athletic Department. Relevant here, Plaintiffs assert the following claims: (1) direct copyright infringement under the Copyright Remedy Clarification Act (CRCA), 17 U.S.C. § 501, against the Athletic Department, Cannon, and Stephenson; (2) contributory copyright infringement

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<sup>1</sup> Pursuant to a joint motion, the appeal as to the 12th Man Foundation was dismissed.

against the same; (3) vicarious copyright infringement<sup>2</sup> against the Athletic Department; (4) violation of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202, against the Athletic Department; (5) violation of the Takings Clause of the Texas Constitution against the Athletic Department; and (6) violation of the Takings Clause of the U.S. Constitution against the Athletic Department.

TAMU, on behalf of the Athletic Department, moved to dismiss the claims for lack of jurisdiction on state sovereign immunity grounds under Federal Rule of Civil Procedure 12(b)(1). Cannon and Stephenson moved to dismiss the claims for failure to state a claim under Rule 12(b)(6) and on qualified immunity grounds. In March 2019, the district court dismissed those claims, but later stayed the case pending the Supreme Court's decision in *Allen v. Cooper*, 140 S. Ct. 994 (2020). In September 2020, after *Allen* was decided and additional briefing was submitted, the district court entered final judgment for TAMU, Cannon, and Stephenson. Plaintiffs appeal.

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<sup>2</sup> A direct copyright infringement claim stems directly from the CRCA, but a contributory or vicarious infringement claim does not. Nevertheless, though “[the CRCA] does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (internal quotation marks and citations omitted).

## II. Standard of Review

“We review de novo a district court’s grant of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because of state sovereign immunity.” *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240 (5th Cir. 2005). A plaintiff bears the burden of proof that jurisdiction exists. *Daniel v. Univ. of Tex. Sw. Med. Ctr.*, 960 F.3d 253, 256 (5th Cir. 2020). While legal conclusions are reviewed de novo, the district court’s factual findings are reviewed for clear error. *Kuwait Pearls Catering Co. v. Kellogg Brown & Root Servs., Inc.*, 853 F.3d 173, 178 (5th Cir. 2017).

We review de novo a district court’s grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 955 (5th Cir. 2020). We accept all well-pled factual allegations as true, viewing them in the light most favorable to the plaintiff. *Id.*

## III. State Sovereign Immunity

State sovereign immunity divests federal courts of jurisdiction over states and their agencies and instrumentalities, unless the state consents to suit or Congress has clearly and validly abrogated the state’s sovereign immunity. *See* U.S. CONST. amend. XI; *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326 (5th Cir. 2002). “The state need not be the named party in a federal lawsuit, for a state’s Eleventh Amendment immunity extends to any state agency or entity deemed

an ‘alter ego’ or ‘arm’ of the state.” *Id.*<sup>3</sup> TAMU is arguably an arm of the state entitled to sovereign immunity. *See U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm’n of Tex.*, 898 F.3d 497, 501 (5th Cir. 2018).

As noted above, a state’s immunity from suit is not absolute. With respect to abrogation, a federal court may entertain a lawsuit against a nonconsenting state on two conditions: “First, Congress must have enacted ‘unequivocal statutory language’ abrogating the States’ immunity from the suit. . . . And second, some constitutional provision must allow Congress to have thus encroached on the States’ sovereignty. Not even the most crystalline abrogation can take effect unless it is ‘a valid exercise of constitutional authority.’” *Allen*, 140 S. Ct. at 1000–01 (citations omitted).

#### IV. Claims Against TAMU

Appellants argue that the district court improperly dismissed their claims against TAMU on several grounds. They assert that the Athletic Department is a separate entity from TAMU and is therefore not an arm of the state entitled to sovereign immunity. But

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<sup>3</sup> “‘Eleventh Amendment immunity’ is a misnomer, however, because that immunity is really an aspect of the Supreme Court’s concept of state sovereign immunity and is neither derived from nor limited by the Eleventh Amendment. Nevertheless, the term ‘Eleventh Amendment immunity’ has been used loosely and interchangeably with ‘state sovereign immunity’ to refer to a state’s immunity from suit without its consent in federal courts.” *Meyers*, 410 F.3d at 240–41 (citations omitted).

even if it were, the district court should not have dismissed the copyright infringement and takings claims against TAMU. We address each issue in turn.

### **A. Arm of the State**

The district court held that, as a matter of law, the Athletic Department lacks jural authority and therefore has no capacity to be sued under Federal Rule of Civil Procedure 17. Since the “correct party” substitute should be TAMU, the district court held that TAMU, as an arm of the state, was entitled to sovereign immunity.

The parties do not dispute that the Athletic Department lacks jural authority to be sued. However, they disagree as to whether the district court failed to do a full analysis of the Athletic Department’s arm-of-the-state status under the framework set forth in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). In other words, Appellants assert that the *Clark* framework should have been applied, which would have led to the conclusion that the Athletic Department itself can be sued, whereas Appellees contend that a *Clark* analysis was not required because TAMU is the proper party.

We agree with Appellants that under circuit precedent, a court must analyze whether an entity qualifies as an arm of the state as a matter of law under the *Clark* framework. See *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318–19 (5th Cir. 2001) (“When confronted with a governmental entity asserting

Eleventh Amendment immunity as an arm of the state, we apply the test established in *Clark*. . . .”) (holding that the district court “erred in failing to properly analyze, under *Clark*, [the entity’s] amenability to suit”). A proper inquiry under *Clark* considers six factors: (1) whether the state statutes and caselaw view the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Clark*, 798 F.2d at 744–45. No one factor is dispositive, though it is well established that the second is the “most important,” while the fifth and sixth are “less so.” *Williams*, 242 F.3d at 319 (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 681–82 (5th Cir. 1999)). “The goal of this test is to determine ‘whether the suit is in reality a suit against the state itself.’” *Providence Behavioral Health v. Grant Rd. Pub. Util. Dist.*, 902 F.3d 448, 456 (5th Cir. 2018) (quoting *Hudson*, 174 F.3d at 682).

The first factor—state law and caselaw—favors treating the Athletic Department as an arm of the state. Neither party points to a statute, case, or a Texas Attorney General opinion relevant to any athletic department of a state university. Texas law, however, suggests that an athletic department of a public university is essentially an “auxiliary enterprise” that is an extension of the state. An “auxiliary enterprise” is defined as “a business activity that is conducted at a

state agency, provides a service to the agency, and is not paid for with appropriate money.” TEX. GOV’T CODE § 2252.061. Auxiliary enterprises, like athletic departments, do not operate for purely educational purposes. See TEX. CONST. art. VII, §§ 17(f)<sup>4</sup> & 18(d).<sup>5</sup> But these enterprises are nevertheless treated as an extension of a public university. See, e.g., *Gulf Reg’l Educ. Television Affiliates v. Univ. of Hous.*, 746 S.W.2d 803, 808 (Tex. Ct. App. 1988) (concluding that group of school districts and parochial schools that produced and broadcast television programming was auxiliary enterprise of University of Houston and had no authority to file suit without university or State Attorney General’s permission). Further, courts have treated athletic departments as auxiliary enterprises. See *id.* (noting that the “University defines an auxiliary enterprise as a self-supporting component such as . . . the athletic department”); *Kneeland v. Nat’l Collegiate Athletic Ass’n*, 850 F.2d 224, 226–27 (5th Cir. 1988) (observing unchallenged district court ruling that “athletic departments of Texas state universities were auxiliary enterprises”); see also Tanyon T. Lynch, *Quid Pro Quo: Restoring Education Primary to College Basketball*, 12

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<sup>4</sup> “The funds appropriated by this section [for educational and general activities] may not be used for the purpose of constructing, equipping, repairing, or rehabilitating buildings or other permanent improvements that are to be used only for student housing, intercollegiate athletics, or auxiliary enterprises.”

<sup>5</sup> “The proceeds of the bonds or notes issued under Subsection (a) or (b) of this section may not be used for the purpose of constructing, equipping, repairing, or rehabilitating buildings or other permanent improvements that are to be used for student housing, intercollegiate athletics, or auxiliary enterprises.”



Marq. Sports L. Rev. 595, 607 n.89 (2002) (“Most Division I-A athletics departments are considered ‘auxiliary enterprises’ and, as such, are expected to generate revenues sufficient to cover costs.”). Since an athletic department of a state-supported university is like an auxiliary enterprise, the Athletic Department is similarly an extension of TAMU and thus an arm of the state.

The second factor—source of funds—favors treating the Athletic Department as an arm of the state. Though we consider the source of general operating funds for the entity, because a principal goal of the Eleventh Amendment is to protect state treasuries, the most significant factor in assessing an entity’s status is whether a judgment against it will be paid with state funds. *Williams*, 242 F.3d at 320 (citing *Richardson v. S. Univ.*, 118 F.3d 450, 452 (5th Cir. 1997)). Texas law prohibits any public funds to be used for intercollegiate athletic programs, as it requires these programs to be fully self-supporting. See TEX. CONST. art. VII, §§ 17(f) & 18(d); Tex. General Appropriations Act, 86th Leg., R.S., art. III, § 9 (“[N]o educational and general funds appropriated may be used for the operation of intercollegiate athletics.”). Thus, the Athletic Department relies wholly on outside funding. For instance, in the fiscal year of 2016, it generated approximately \$194 million in revenue from, *inter alia*, ticket sales, contributions, sale of media rights, and advertisements. It receives \$0 in student fees, direct state or other government support, direct institutional support from

TAMU, and indirect facilities and administrative support.

But while the source of the Athletic Department's operating funds is private, it is unclear whether a judgment against the Athletic Department would be satisfied with private or state-allocated funds. Appellants have the burden to demonstrate that the Athletic Department will be responsible for its judgment and debts, not the State. Because they fail to satisfy their burden in this respect, this factor supports a finding that the Athletic Department is an arm of the state. *See Daniel*, 960 F.3d at 258 (concluding second factor favors finding immunity because plaintiff failed to satisfy burden of showing that entity would be responsible for judgment and debt, not the state).

The third factor—degree of autonomy—favors treating the Athletic Department as an arm of the state. The record shows that the Athletic Department is a department within, and governed by, TAMU. Scott Woodward, the Director of Athletics at TAMU, averred: "I report directly to the President of Texas A&M University, Michael K. Young. President Young and I stay in frequent contact regarding how the Athletic Department is performing." The organizational chart provided by TAMU indicates that Woodward is part of the TAMU President's cabinet and reports directly to the President. *Cf. Gulf*, 746 S.W.2d at 806–07 (concluding that auxiliary enterprise was part of state university where enterprise was managed by university employees who reported through chain of command that went up to the university's president). Moreover, policy

statements issued by the TAMU System Board of Regents demonstrate that TAMU exercises oversight over the Athletics Department. For example, the Board requires TAMU to “create and maintain an Athletic Council, made up of faculty, staff, students, alumni, and community members, to advise the president in the development and administration of the intercollegiate athletics program,” and that “all intercollegiate athletics programs be maintained in an academically and fiscally accountable manner with full compliance with conference and national rules.” TAMU also requires athletic agreements over \$100,000 to be authorized by a university official—generally the University Contracts Officer, the Chief Financial Officer, or the President. Further, all athletic coaching employment agreements must be authorized by the President, and, if over \$500,000, with additional approval by the Board of Regents. Considering TAMU’s oversight and financial regulation, the Athletic Department does not operate with a level of local autonomy to consider it independent from the State.

The fourth factor—scope of problem—favors treating the Athletic Department as an arm of the state. Education is a statewide concern, *see Sissom v. Univ. of Tex. High Sch.*, 927 F.3d 343, 349 (5th Cir. 2019), and though athletic programs do not operate for educational purposes, anyone who plays a sport managed by the Athletics Department is a student at TAMU, which belongs to the statewide TAMU System. *See United States ex rel. King v. Univ. of Tex. Health Sci. Ctr.-Hous.*, 544 F. App’x 490, 495 (5th Cir. 2013) (finding that

University of Texas Health Science Center addressed statewide concerns of education and research, although its facilities were all in Houston, as the center belonged to the greater University of Texas System which had locations throughout the state). Further, the Athletic Department engages in intercollegiate athletics—i.e., competes with other schools—and derives financial support from students, alumni, and fans throughout Texas. *Clark*'s fourth factor therefore supports finding the Athletic Department as an arm of the state.

The fifth factor—ability to sue and be sued in its own name—favors finding the Athletic Department as an arm of the state. Neither party points to a case in which the department was a named party in a lawsuit.

The sixth factor—right to hold and use property—favors treating the Athletic Department as an arm of the state. The Board of Regents retains ultimate control of money collected at TAMU, including “receipts from school activities.” TEX. EDUC. CODE § 51.002; see *Kneeland*, 850 F.2d at 226–27 (observing unchallenged district court ruling that funds generated by athletic departments of state universities were “public funds belonging to the State of Texas”). The Athletic Department does not own or purchase real property, and any real property used by the Athletic Department is managed by the Board of Regents. TEX. EDUC. CODE § 85.25 (“The board is vested with the sole and exclusive management and control of lands and mineral interests under its jurisdiction and that may be acquired by it.”).

All six *Clark* factors weigh in favor of finding that the Athletic Department is entitled to arm-of-the-state status. Accordingly, we conclude that the Athletic Department is a part of TAMU and therefore enjoys state sovereign immunity.

## **B. Copyright Infringement Claims**

Having concluded that the Athletic Department is an arm of the state, we must next address whether its sovereign immunity is abrogated from the copyright infringement claims. Because the Athletic Department is an extension of TAMU, we will now refer to the entity as TAMU.

### ***i. Abrogation***

In *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Supreme Court recently addressed whether the Copyright Remedy Clarification Act (CRCA) validly abrogated the states' immunity from copyright infringement suits.<sup>6</sup> The CRCA provides that a state “shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court” for copyright infringement. 17 U.S.C. § 511(a). Though Congress used clear language to abrogate immunity, the Court held that Congress had no authority to do so under Article I, which

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<sup>6</sup> The Fifth Circuit addressed this question many years ago and concluded that the CRCA was not a valid abrogation of state sovereign immunity from copyright infringement suits. See *Chavez v. Arte Publico Press*, 204 F.3d 601, 605 (5th Cir. 2000).

empowers Congress to protect copyrights, or Section 5 of the Fourteenth Amendment, which authorizes Congress to enact “reasonably prophylactic legislation” aimed at preventing states from violating the Fourteenth Amendment. *Allen*, 140 S. Ct. at 1004 (citations omitted). With respect to Section 5, the CRCA failed the “congruence and proportionality” test because the evidence of actual constitutional injury—that is, willful copyright infringement by states—was “exceedingly slight.” *Id.* at 1007. Congress therefore lacked authority to broadly abrogate the states’ immunity from copyright infringement suits.

Appellants argue, however, that *Allen* did not foreclose abrogation of sovereign immunity from copyright infringement suits where a state’s violation of the CRCA independently constitutes an *actual* violation of the Fourteenth Amendment. Specifically, they allege that TAMU committed two independent violations of the Fourteenth Amendment: (1) deprivation of property without due process, and (2) takings. Appellants cite to *United States v. Georgia*, 546 U.S. 151 (2006), which held that “insofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *Id.* at 159 (emphasis in original) (reviewing whether state violated prisoner’s Eighth Amendment right to be free from cruel and unusual punishment, which is incorporated in the Due Process Clause of the Fourteenth Amendment).

Thus, *Georgia* arguably set forth two categories of abrogation: (1) where a statute validly abrogates sovereign immunity for *all* claims, and (2) where a statute is not a valid prophylactic abrogation of all claims, but does abrogate sovereign immunity for those claims based on conduct constituting an actual violation of the Fourteenth Amendment, for the statutory remedy would be congruent and proportional *as applied* to that case. *See id.* (directing lower courts to determine “on a claim-by-claim basis, (1) which aspects of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid”). Appellants contend that this case falls in the second category.

In support of their position, Appellants cite to *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia (“NABP”)*, 633 F.3d 1297 (11th Cir. 2011), where the Eleventh Circuit applied *Georgia* in a copyright infringement suit, observing that “[i]t is well established that § 5 grants Congress the authority to abrogate state sovereign immunity for violations of the Fourteenth Amendment.” *Id.* at 1315 (citing *Georgia*, 546 U.S. at 158). There, however, the court ultimately rejected the plaintiff’s claim that the copyright infringement amounted to a violation of procedural due process, concluding that a pre-deprivation process was not feasible under the

facts alleged and that adequate post-deprivation remedies were provided by the State. *Id.* at 1318–19. Appellants also point to oral argument in *Allen*, where the State of North Carolina conceded that even if the Supreme Court held that the CRCA was not a valid prophylactic abrogation of state immunity, *Georgia* would still provide a remedy for copyright infringement constituting an actual violation of the Fourteenth Amendment. See Transcript of Oral Argument at 39–40, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (“[W]henever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court’s *Georgia* decision, they can bring a direct constitutional claim. We don’t dispute that.”). Further, after *Allen* was decided, the district court on remand recently held that the plaintiffs’ copyright infringement claim could still proceed because “[a]lthough the Supreme Court ruled that the CRCA was unconstitutional insofar as it attempted to abrogate sovereign immunity prophylactically . . . the statute remains whenever plaintiff alleges both a constitutional violation as well as a statutory violation. Therefore, plaintiffs can still use the CRCA as a basis for its *Georgia* claim [alleging that defendants’ conduct amounted to an unconstitutional taking].” *Allen v. Cooper*, \_\_\_ F. Supp. 3d \_\_\_, 2021 WL 3682415, at \*11 (E.D.N.C. Aug. 18, 2021).

***ii. Actual Violations of the Fourteenth Amendment***

We need not decide whether *Georgia* extends to copyright infringement cases, because even assuming



it does, Appellants fail to allege that TAMU's conduct constitutes an actual violation of the Fourteenth Amendment.

First, the copyright infringement claim against TAMU for deprivation of property without due process cannot survive dismissal. To come within the reach of the procedural requirements of the Due Process Clause, a violation must (1) be “intentional, or at least reckless,” and (2) lack adequate post-deprivation state remedies. *Allen*, 140 S. Ct. at 1004. For due process purposes, copyrights are a form of property. *Id.* Appellants sufficiently allege that the infringement was intentional—Marquardt directed his secretary to retype the Gill Biography, remove any copyright information, and change its title and byline to indicate that TAMU owned the work, and then shared it with his colleagues for approval and publication.

However, meaningful post-deprivation state remedies are available to redress the injury. Though no tort remedies are available under Texas law,<sup>7</sup> Appellants have a viable takings claim against TAMU for copyright infringement under the Texas Constitution. More expansive than the federal Takings Clause, the Texas

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<sup>7</sup> Texas has not waived its immunity from tort claims arising out of copyright infringement allegations. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1) (providing for limited waiver of governmental immunity for claims of property damage, personal injury, or death proximately caused by wrongful or negligent conduct of governmental employee arising out of (1) use of publicly owned motor-driven equipment or motor vehicle, (2) premises defects, and (3) conditions or uses of certain property).

Takings Clause provides: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.” TEX. CONST. art. I, § 17. The Clause itself waives sovereign immunity for a valid takings claim brought in state court. *Texas v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). Though the Texas Supreme Court recently held that a public university’s single act of copyright infringement—i.e., displaying a photograph on its website without the owner’s authorization—did not constitute a *per se* taking, it nevertheless left the door open for a copyright owner to bring a regulatory takings claim against the State for infringement. *Jim Olive Photography v. Univ. of Hous.*, \_\_\_ S.W.3d \_\_\_, 2021 WL 2483766, at \*9 (Tex. June 18, 2021); *see also id.* (Busby, J., concurring) (“Nothing in the Court’s opinion should be understood to indicate a view on [whether a state’s copyright infringement could in some circumstances require compensation] because Olive has alleged no claim under the ‘damaged’ or ‘applied’ prongs of the Texas Takings Clause.”). Accordingly, because Appellants are not foreclosed from pursuing a takings claim in state court, TAMU did not violate their procedural due process rights. *See McClure v. Biesenbach*, 355 F. App’x 800, 805 (5th Cir. 2009) (“Post-deprivation process is adequate if it allows the prospect of compensation for the loss.”) (citing *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327, 330–31 (1986)).

Moreover, the copyright infringement claim against TAMU for its taking of property fails to survive

dismissal as well. The Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V. The Takings Clause is made applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (citing *Chicago Burlington & Q.R.C. v. Chicago*, 166 U.S. 226 (1897)). The Supreme Court has not addressed whether copyrights are a form of property protected by the Takings Clause,<sup>8</sup> but this is not a question of first impression for this circuit.<sup>9</sup> In *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973), where the widow of Lee Harvey Oswald sought compensation for the taking of property by the United States, we held:

We turn finally to the question whether Mrs. Porter can recover for the diminution in value

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<sup>8</sup> The Supreme Court, however, has recognized that other forms of intellectual property are protected by the Takings Clause. See *Horne v. Dep’t of Agric.*, 576 U.S. 350, 359–60 (2015) (patents); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets).

<sup>9</sup> We recognize that a handful of sister circuits have suggested that copyrights are protected by the Takings Clause. See *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) (“[A] rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.”); *Lane v. First Nat’l Bank of Boston*, 871 F.2d 166, 174 (1st Cir. 1989) (suggesting if state remedies do not afford just compensation for copyright infringement, “the Takings Clause of the federal Constitution might at that point enable [owner] to pursue a damage remedy in federal court”).

of Oswald's writings attributable to their publication in the Warren Commission Report. It is, of course, quite plain that the recovery sought here is for infringement by the government of Mrs. Porter's common law copyright interest in Oswald's writings. Such infringement is not a "taking" as the term is constitutionally understood. Rather, it has always been held that infringement of copyright, whether common law, *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (CA 8, 1948), or statutory, *Turton v. United States*, 212 F.2d 354 (CA 6, 1954) constitutes a tort.

We see no reason to deviate from *Porter*, so we conclude that copyrights are not a form of property protected by the Takings Clause. Accordingly, the copyright infringement claim based on a takings allegation fails here.

### C. Takings Claims

We next address whether TAMU's sovereign immunity is abrogated from the federal and state takings claims, which were pleaded in the alternative to the copyright infringement claims.

A state is entitled to sovereign immunity from a federal takings claim. *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 457 (5th Cir. 2019) (affirming dismissal of takings claim against Mississippi on sovereign immunity grounds). Appellants argue, however, that immunity is abrogated when no remedy is available in state court. They cite to *Williams v. Utah*

*Department of Corrections*, 928 F.3d 1209, 1213 (10th Cir. 2019), which suggests that a takings claim is barred only “as long as a remedy is available in state court.” Because we have concluded that Appellants can pursue a claim under the Texas Takings Clause, state sovereign immunity bars the federal takings claim here. *See supra* IV.B.

A state is also entitled to sovereign immunity from a state takings claim brought in federal court. In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 119–21 (1984), the Supreme Court held that federal courts are barred from hearing state law claims against a state, reasoning that such claims cannot be maintained because supplemental jurisdiction does not abrogate the state’s sovereign immunity. Further, even though the Texas Takings Clause waives immunity for state takings claims brought in state court, “[w]aiver of sovereign immunity in state courts does not waive Eleventh Amendment immunity from suit in federal court.” *Guetersloh v. Texas*, 25 F.3d 1044 (5th Cir. 1994) (unpublished) (citing *Pennhurst*, 465 U.S. at 99 n.9). Accordingly, sovereign immunity bars the state takings claim.

## **V. Claims Against Cannon and Stephenson**

Lastly, we address the direct copyright infringement claim against Cannon, and the contributory copyright infringement claims against Cannon and Stephenson.

### **A. Direct Copyright Infringement**

Direct copyright infringement requires proof of two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *BWP Media USA, Inc. v. T&S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). The purported infringer must have acted with “volitional conduct,” *id.*—that is, “[t]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.” *Id.* at 440 (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)) (internal quotation marks omitted).

The allegations do not support the reasonable inference that Cannon directly infringed the copyright. Marquardt did the actual recopying—he, not Cannon, retyped the Gill Biography and scrubbed off all copyright information to present it as TAMU’s work. Cannon never received the original work and only received the infringed work from Marquardt. He had no actual or constructive knowledge of the infringement. Accordingly, we affirm dismissal of the direct copyright infringement claim against Cannon for failure to state a claim.

## **B. Contributory Copyright Infringement**

“Contributory infringement is ‘intentionally inducing or encouraging direct infringement.’” *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 798 (5th Cir. 2017) (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)). In other words, “[a] party is liable for contributory infringement when it, ‘with knowledge of the infringing activity, induces, causes or materially contributes to infringing conduct of another.’” *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (citation omitted).

The allegations do not support the reasonable inference that Cannon or Stephenson contributorily infringed the copyright. Again, Cannon had no knowledge of the underlying infringement—he never received the original work and only received the infringing article from Marquardt. There was no intent or even knowledge on Cannon’s part with respect to the infringement. Further, Stephenson also lacked the requisite knowledge or intent to commit infringement. He did not receive the original draft of Bynum’s book, as he only received the retyped article from Marquardt and reasonably assumed it was not an infringed piece of writing. Accordingly, we affirm dismissal of the contributory copyright infringement claims against Cannon and Stephenson for failure to state a claim.

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**VI. Conclusion**

For the foregoing reasons, we AFFIRM.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CANADA HOCKEY LLC;	§	
dba Epic Sports, <i>et al.</i> ,	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. 4:17-CV-181
TEXAS A&M UNIVERSITY	§	
ATHLETIC DEPARTMENT,	§	
<i>et al.</i> ,	§	
	§	
Defendants.	§	

**ORDER**

(Filed Sep. 4, 2020)

Plaintiffs Michael J. Bynum and Canada Hockey LLC (collectively, “Plaintiffs”) filed this case in January of 2017. (Doc. No. 1). They sought monetary damages against the Texas A&M University Athletic Department (the “Athletic Department”), the Texas A&M University 12th Man Foundation (the “Foundation”), Brad Marquardt (“Marquardt”), Alan Cannon (“Cannon”), and Lane Stephenson (“Stephenson”) (collectively, “Defendants”). (Doc. No. 15). Plaintiffs’ amended complaint pleaded claims for: (1) copyright infringement against all Defendants except the Foundation; (2) contributory copyright infringement against all Defendants; (3) vicarious copyright infringement against the Foundation and the Athletic Department; (4) violations of the Digital Millennium Copyright Act, 17

U.S.C. § 1202 (“DMCA”) against Marquardt and the Athletic Department; (5) takings claims under the Constitution of the State of Texas against the Athletic Department; and (6) takings claims under the Constitution of the United States against the Athletic Department. (*Id.* at 24–32).

In March of 2019, the Court granted Defendants’ motions to dismiss on all claims, except for Plaintiffs’ claims against Marquardt. (Doc. No. 96). Nearly four months later, Plaintiffs filed a motion for reconsideration. (Doc. No. 102, the “First Motion to Reconsider”). In that motion, Plaintiffs asked the Court to reinstate the claims for copyright and takings under the Constitution of the United States against Texas A&M University (“A&M” or the “University”) (the “correct party” substitute for the Athletic Department). (*See* Doc. No. 96 at 14).

The Court stayed the case until the Supreme Court of the United States decided *Allen v. Cooper*, 140 S. Ct. 994 (2020), which addressed the issue of whether the Copyright Remedy Clarification Act of 1990 (“CRCA”) validly abrogated the Eleventh Amendment for copyright infringement claims. (Doc. No. 111). In a unanimous decision, the Supreme Court held that the CRCA’s purported abrogation of sovereign immunity was constitutionally invalid. *See Allen*, 140 S. Ct. at 1007. That is the same conclusion this Court reached in the earlier dismissal order (Doc. No. 96 at 17–18). Thus, the Court lifted the stay and denied Plaintiffs’ First Motion to Reconsider as to their copyright claims against A&M (through the Athletic Department). (Doc.

No. 121). The Court, however, ordered the parties to file briefs concerning whether the Eleventh Amendment also barred Plaintiffs' federal takings claims. (*See id.*). The parties complied. (Doc. Nos. 125 and 126).

Plaintiffs then filed a motion for the Court to reconsider its partial denial of the First Motion to Reconsider. (Doc. No. 128, the "Second Motion to Reconsider"). The University filed a response in opposition (Doc. No. 138) and Plaintiffs filed a reply (Doc. No. 142). Plaintiffs also filed a motion for reconsideration and/or motion for leave to file a second amended complaint. (Doc. No. 131, the "Motion for Leave to Amend"). Defendants filed responses in opposition (Doc. Nos. 141 and 144), Plaintiffs filed replies (Doc. No. 145 and 146), and the Foundation filed a sur-reply (Doc. No. 147).

Finally, in the Foundation's response in opposition to Plaintiffs' Motion for Leave to Amend, it filed a cross motion for the entry of final judgment under Rule 54(b). (Doc. No. 141, the "Cross Motion"). In response, Plaintiffs filed a brief in opposition (Doc. No. 149), the Foundation filed a reply (Doc. No. 156), and Plaintiffs filed a sur-reply (Doc. No. 159).

Having carefully considered all of the arguments in the various briefs filed concerning the motions identified above, the applicable law, and the record in this case, the Court hereby denies the First Motion to Reconsider, the Second Motion to Reconsider, the Motion for Leave to Amend. The Court also grants the Cross Motion. Lastly, the Court severs Athletic Department,

the Foundation, Cannon, and Stephenson from this case, and enters final judgment under Rule 54(b) against Plaintiffs' claims against these defendants.<sup>1</sup>

**I. Summary of the Amended Complaint  
(Doc. No. 15)**

This Court's prior order covering the motions to dismiss stated, in detail, the factual allegations that Plaintiffs pleaded in the amended complaint against the Defendants. (*See* Doc. No. 96). Accordingly, it only provides a selective summary here.

Bynum allegedly spent more than a decade researching E. King Gill and the history of the A&M "12th Man" story. (Doc. No. 15 at 9). Eventually, Bynum hired Whit Canning to produce a biography about Gill (the "Gill Biography") that Bynum planned to use as the opening chapter to his forthcoming 12th Man book. (*Id.*). Bynum allegedly owns the copyright to the Gill Biography.

In mid-2010, Bynum allegedly emailed Marquardt asking for assistance locating additional photographs to include in the 12th Man book. (*Id.*). Bynum's email included a PDF draft of the book that also contained copyright management information, including Bynum's

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<sup>1</sup> The Court acknowledges that Marquardt and Plaintiffs have filed cross motions for summary judgment. (Doc. Nos. 143 and 169). Likewise, the Court recognizes that Marquardt filed a motion to strike the declaration of Whit Canning. (Doc. No. 165). These motions, however, will be addressed by a separate order.

name, the copyright date, and a warning against using or reproducing the work. (*See id.* at 10–12).

Beginning in January of 2014, A&M allegedly initiated a “campaign to promote its ongoing claim that it is the true owner of the [concept of the] ‘12th Man.’” (*Id.* at 14). Plaintiffs allege that, to further this campaign, the “Athletic Department and the Foundation directed staff at the . . . Athletic Department, including at least Marquardt and Cannon, to find background information on Gill that could be used to promote the 12th Man story and solicit more donations.” (*Id.* at 15). Around this time, Bynum learned that a “near verbatim copy” of the Gill Biography appeared as the feature story of the University’s e-Newsletter, which included a hyperlink to a page on the Athletic Department’s website displaying the infringing copy of Bynum’s Gill Biography. (*Id.* at 16).

Moreover, Plaintiffs contend that, during this time period, Stephenson was in charge of the University’s website and was responsible for the content in the e-Newsletter and the University’s official Twitter account “@TAMU.” (*Id.* at 5). Stephenson supposedly assisted Marquardt in distributing the allegedly infringing work by publishing it online and dispersing the hyperlink via email and Twitter. (*See id.* at 20–21).

## **II. Summary of the Court’s Prior Dismissal Order (Doc. No. 96)**

The Defendants filed motions to dismiss the amended complaint. (Doc. Nos. 33 and 34). The Court

granted in-part and denied in-part the motions and dismissed all claims, except those asserted against Marquardt. (Doc. No. 96). First, the Court held that the Athletic Department “has no capacity to be sued,” and that the “correct party” substitute for the Athletic Department is A&M. (*Id.* at 12–14). Since the University is an arm of the State of Texas, the Court proceeded to analyze issues of sovereign immunity. (*Id.* at 14). *See also Eustice v. Tex. A & M Univ.*, No. 4:15-cv-03180, 2016 WL 8710444, at \*3 (S.D. Tex. Sept. 30, 2016) (“[A & M] is an arm of the state and, therefore, immune from suit.”); *see also* Tex. Educ. Code § 86.02. The Court concluded that Congress had not abrogated state sovereign immunity for copyright causes of action. (Doc. No. 96 at 14–18). *See also, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). Consequently, the Court held that substitution of the University would be improper (or pointless) for the copyright claims. (Doc. No. 96 at 18).

The Court then turned to the state and federal takings claims pleaded against A&M—who, again, should have been the proper party as opposed to the Athletic Department. First, the Court found that the claims based upon the Texas Constitution are barred by the Eleventh Amendment. (*Id.* at 18 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984))). The Court held that Plaintiffs’ claims brought under the Constitution of the United States for monetary damages are also barred by the Eleventh

Amendment.<sup>2</sup> (*Id.* at 19 (first citing *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994)); and then citing *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993)). Alternatively, the Court found that Plaintiffs failed to exhaust their state law remedies under *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and that failure precluded the Court's entertaining those claims. (*Id.* at 19–21).

Next, the Court found that Plaintiffs did not plausibly plead claims against the Foundation for contributory infringement and vicarious infringement. (*Id.* at 21–23). It also granted Cannon's and Stephenson's motion to dismiss under qualified immunity; alternatively, the Court held that Plaintiffs had insufficiently pleaded those claims under Rule 12(b)(6). (*Id.* at 27–31). The Court, however, denied the motion to dismiss as to Plaintiffs' claims against Marquardt (*Id.* at 23–26).

The case was therefore dismissed as to the Athletic Department (or, more accurately, A&M), the Foundation, Cannon, and Stephenson. The case was to proceed as to Plaintiffs' claims against Marquardt.

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<sup>2</sup> The Court noted in the prior dismissal order that the Fifth Circuit has held that sovereign immunity does not bar federal takings claims for plaintiffs seeking prospective injunctive relief under the *Ex Parte Young* exception to the Eleventh Amendment. (Doc. No. 96 at 19 n.13) (citing *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009)). Plaintiffs did not, however, seek prospective injunctive relief. (*See generally* Doc. No. 15). Therefore, the *Ex Parte Young* exception was not applicable.

### **III. Plaintiffs' First and Second Motion to Reconsider (Doc. Nos. 102 and 129)**

On July 26, 2019, Plaintiffs filed the First Motion to Reconsider, in which they asked the Court to allow Plaintiffs to pursue their copyright and federal takings claims against A&M. (Doc. No. 102). Plaintiffs highlighted the Supreme Court of the United States' opinion in *Knick v. Township of Scott*, which overruled *Williams County's* exhaustion prerequisite. *See Knick*, 139 S. Ct. 2162, 2179 (2019). The First Motion to Reconsider also argued that the Court's sovereign immunity analysis for the copyright claims should be reexamined due to the Supreme Court granting certiorari in *Allen*.

As stated above, the Court stayed the case until the Supreme Court announced its decision in *Allen*, which was on March 23, 2020. (Doc. No. 111). *See generally Allen*, 139 S. Ct. 2664. On April 8th, having determined that the Supreme Court's opinion in *Allen* confirmed this Court's ruling that the copyright claims against A&M are barred by the Eleventh Amendment, the Court lifted the stay and denied Plaintiffs' First Motion to Reconsider as to the copyright infringement claims. (Doc. No. 121). Supplemental briefs were submitted by the parties concerning sovereign immunity and the federal takings claims. (Doc. Nos. 125 and 126).

Approximately one month after the order denying the First Motion to Reconsider as to the copyright claims, Plaintiffs filed the Second Motion to



Reconsider. (See Doc. No. 129).<sup>3</sup> Simply put, the remaining issues in the First Motion to Reconsider concern Plaintiffs’ takings claims and the Second Motion to Reconsider relates to their copyright claims. The Court addresses each separately, beginning with the copyright claims.

### **A. Plaintiffs’ Copyright Claims Against A&M**

Plaintiffs argue that—despite the holding in *Allen*—the CRCA *does* abrogate sovereign immunity in this case because Plaintiffs pleaded actual violations of their constitutional rights. (See *id.* at 3). Specifically, relying on *United States v. Georgia*, 546 U.S. 151 (2006), Plaintiffs assert that they “have alleged that the same conduct that violated the Copyright Act also amounted to *both* an uncompensated taking and a deprivation of property without offering *any* remedial process—both of which are actual violations of the Fourteenth Amendment.” (*Id.* at 5 (emphasis in original)). Accordingly, Plaintiffs claim that the allegations in the amended complaint are “sufficient to allow Plaintiffs to rely on the CRCA’s abrogation of immunity, notwithstanding *Allen v. Cooper*’s rejection of that statute’s *prophylactic* application to conduct that did

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<sup>3</sup> Plaintiffs initially filed Document Number 128 as the motion to reconsider. Document Number 129, however, is entitled “Corrected Motion for Reconsideration” and appears to be substantially similar to Document Number 128. Accordingly, the Court treats the latter document (Doc. No. 128) as being superseded by the former (Doc. No. 129). Therefore, Document Number 128 is denied as moot.

not necessarily rise to an actual constitutional violation.” (*Id.* (emphases in original) (citing *Georgia*, 546 U.S. at 158–59)).<sup>4</sup>

*Georgia* involved a prison inmate who filed a pro se complaint asserting, among other things, claims under Title II of the ADA and Eighth Amendment claims under § 1983 against the State of Georgia and other state defendants. *See*, 546 U.S. at 154–55. The district court and the Eleventh Circuit determined that the prisoner’s ADA claims for money damages were barred by sovereign immunity. *Id.* at 156. The Supreme Court reversed because the prisoner’s claims were based on alleged conduct “that independently violated the provisions of § 1 of the Fourteenth Amendment.” *Id.* at 157. As the Court explained:

Section 5 [of the Fourteenth Amendment] authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States. Thus, insofar as Title II [of the ADA] creates a private cause of action for damages against

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<sup>4</sup> To help distinguish the Supreme Court’s holding in *Allen*, the Second Motion to Reconsider cites to the oral argument transcript in *Allen* where the attorney for the petitioner—who was arguing that sovereign immunity was abrogated by the CRCA—answered two questions by saying his client was not making a *Georgia* argument, which Plaintiffs believe means that “the Justices clearly believed that no claim under *United States v. Georgia* was before the Court.” (Doc. No. 129 at 5 & n.4, 9; *see also* Doc. No. 129, Ex. 1).

the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.

*Id.* at 158–59 (emphasis in original) (citations omitted).

Plaintiffs argue that *Georgia* changes the legal landscape dramatically and that this Court should not rely on past legal precedent concerning sovereign immunity.<sup>5</sup> Plaintiffs interpret *Georgia* to say that any plaintiff who sufficiently pleads facts that a defendant violates statutory scheme (e.g., the Copyright Act or the ADA) and a violation of the Fourteenth Amendment (e.g., a taking under the Fifth Amendment or, if cruel and unusual punishment was involved, the Eighth Amendment), then sovereign immunity is automatically abrogated for the statutory violation. The Court finds that Plaintiffs’ understanding of and reliance on *Georgia* is misplaced.

First, the concept that Section Five of the Fourteenth Amendment permits Congress to enact legislation to abrogate state sovereign immunity for actual violations of the Fourteenth Amendment was not new

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<sup>5</sup> For example, George Washington University Law School Professor Ralph Oman’s *amicus curiae* brief in support of the Second Motion to Reconsider states that “*United States v. Georgia* is a ‘game-changer’” (Doc. No. 140 at 5). Professor Oman also asserts that, under *Allen v. Cooper*, “a district court judge, using his or her full measure of discretion, can tailor a remedy that [is] . . . ‘congruent’ and ‘proportional’ to the harm done and the nature of the infringement [, which] will pass constitutional muster.” (*Id.* at 14).

or disputed when the Supreme Court decided *Georgia*. See *id.* at 158 (“[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.”) (first emphasis added; second emphasis in original); see also, e.g., *Tennessee v. Lane*, 541 U.S. 509, 518 (2004); *id.* at 559–60 (Scalia, J. dissenting). Indeed, the Supreme Court often attributes the first recognition of that concept to its decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). See, e.g., *Allen*, 140 S. Ct. at 1004 (“Congress can permit suits against States for actual violations of the rights guaranteed in Section 1 [of the Fourteenth Amendment.]”) (citing *Fitzpatrick*, 427 U.S. at 456); *Georgia*, 546 U.S. at 158–59 (similar); *Lane*, 541 U.S. at 518 (similar); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636–37 (1999) (similar); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996) (similar). It, therefore, appears to this Court that *Fitzpatrick* is probably the seminal case concerning the abrogation of sovereign immunity for actual violations of the Fourteenth Amendment, not *Georgia*. Thus, the Court rejects the argument that it must reconsider its reliance on cases that were decided before *Georgia* (i.e., *Chavez*). (See Doc. No. 129 at 7 n.8; see also Doc. No. 102 at 15).

The argument that *Georgia* materially altered sovereign immunity jurisprudence is also weakened when one scrutinizes the extent courts have cited that case, and in what context the case has been used by

courts. In the 14 years since the Supreme Court decided *Georgia*, it has only cited the case, in any capacity, *three* times. See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 585 (2013) (Ginsburg, J., dissenting); *Haas v. Quest Recovery Servs., Inc.*, 549 U.S. 1163, 1122 (2007) (Ginsburg, J., concurring); *United States v. Neb. Dep't of Health & Human Servs. Fins. & Support*, 547 U.S. 1067 (2006) (summary reversal). Similarly, the Fifth Circuit has only cited *Georgia* 17 times; and it has *never* discussed the case outside of the context of Title II of the ADA. See, e.g., *Block v. Tex. Bd. of Law Exam'rs*, 952 F.3d 613, 617 (5th Cir. 2020) (stating that *Georgia* established a three-part test for determining whether Title II of the ADA validly abrogates states' sovereign immunity); *Smith v. Hood*, 900 F.3d 180, 184 (5th Cir. 2018) (same); *Hale v. King*, 642 F.3d 492, 497–98 (5th Cir. 2011) (same). Further, a cursory review of the other circuit courts suggests that only two cases have actually analyzed *Georgia* concerning an alleged statutory violation that does not involve the ADA; and only *one* of those resulted in abrogation of sovereign immunity. See *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1315–19 (11th Cir. 2011) (discussing *Georgia* in connection with copyright infringement, but holding that the amended complaint failed to allege a due process violation); *Alaska v. EEOC*, 564 F.3d 1062, 1067–71 (9th Cir. 2009) (applying *Georgia* and abrogating sovereign immunity as to sexual harassment and retaliation claims under the Government Employee Rights Act of 1991). Accordingly, the Court is not persuaded that *Georgia* dramatically changed sovereign immunity

jurisprudence such that this Court can depart from binding authority that the Eleventh Amendment bars suing a state for claims of copyright infringement. *See Allen*, 140 S. Ct. at 1007; *Chavez*, 204 F.3d at 607–08.

Moreover, in *Georgia* itself, the Supreme Court made clear that the power to abrogate sovereign immunity lies with Congress, not with litigants.<sup>6</sup> *See*, 546 U.S. at 158 (“Section 5 authorizes *Congress* to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights.”) (emphasis added); *see also Allen*, 140 S. Ct. at 1003 (“Section Five of the Fourteenth Amendment, unlike almost all of Article I, can authorize *Congress* to strip the States of immunity.”) (emphasis added).<sup>7</sup> Put differently, sovereign immunity did not bar the prisoner in *Georgia* from suing the State of Georgia under Title II of the ADA *only* “insofar as Congress created a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment.” *Georgia*, 546 U.S. at 159 (emphasis omitted). If, hypothetically, the Supreme Court had concluded that Congress, by virtue of the ADA, did not create a claim for actual violations of the Fourteenth Amendment, then the prisoner’s claims against the State of Georgia might

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<sup>6</sup> Likewise, there is nothing in the Fourteenth Amendment or Supreme Court case law that gives *federal courts* the authority to abrogate sovereign immunity. *Cf. supra*, note 5 (citing Doc. No. 140 at 14).

<sup>7</sup> As *Allen* illustrates, the congressional record of the CRCA cannot support a finding that Congress intended to abrogate sovereign immunity under Section Five of the Fourteenth Amendment. *See*, 140 S. Ct. at 1006–07.

have been barred by the Eleventh Amendment. *See id.* Plaintiffs' interpretation of *Georgia*, on the other hand, allows any creative litigant to plead away sovereign immunity under Section 5 of the Fourteenth Amendment. The Court finds no basis in *Georgia* or any other case to support the ability to plead around the Eleventh Amendment.

Lastly, and most importantly, in *Allen* the Supreme Court discussed Congress's ability to abrogate sovereign immunity for actual violations of the Fourteenth Amendment. *See Allen*, 140 S. Ct. at 1004 (citing *Fitzpatrick*, 427 U.S. at 456).<sup>8</sup> Additionally, the Supreme Court explained that, although permissible, Congress did not create a cause of action against states for actual violations of the Fourteenth Amendment.

When does the Fourteenth Amendment care about copyright infringement? Sometimes, no doubt. Copyrights are a form of property. And

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<sup>8</sup> *Allen* could be reasonably interpreted to state that the congruence and proportionality test applies to any abrogation under Section 5 of the Fourteenth Amendment (i.e., for both "actual violations" and "prophylactic" measures). *See Allen*, 140 S. Ct. at 1004 ("Congress cannot use its 'power to enforce' the Fourteenth Amendment to alter what that Amendment bars. . . . That means a congressional abrogation is valid under Section 5 *only if* it sufficiently connects to conduct courts have held Section 1 to proscribe.") (emphasis added); *see also id.* ("Always, what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to 'enforce.'") (emphasis added). If that interpretation is correct, then the Ninth Circuit's ruling in *Alaska v. EEOC*—which is the only circuit court opinion that held a statute outside of the ADA abrogated sovereign immunity under *Georgia*—incorrectly skipped the congruence and proportionality analysis. *See EEOC*, 564 F.3d at 1068.

the Fourteenth Amendment bars the States from “depriv[ing]” a person of property “without due process of law.” But even if sometimes, by no means always. Under our precedent, a merely negligent act does not “deprive” a person of property. So an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause. And more: A State cannot violate that Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of “due process.” That means within the broader world of state copyright infringement is a smaller one where the Due Process Clause comes into play.

*Id.* at 1004–05 (citations omitted); *see also id.* at 1007 (“In this case, as in [*Florida Prepaid*], the statute aims to ‘provide a uniform remedy’ for statutory infringement, *rather than to redress or prevent unconstitutional conduct.* And so in this case, as in that one, the law is invalid under Section 5.”) (emphasis added) (quoting *Florida Prepaid*, 527 U.S. at 647).

Thus, the Supreme Court concluded that the CRCA did *not* “create[] a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment.” *See Georgia*, 546 U.S. at 159; *see also Allen*, 140 S. Ct. at 1007. Accordingly, the CRCA did not “validly abrogate[] sovereign immunity.” *See Georgia*, 546 U.S. at 159; *see also Allen*, 140 S. Ct. at 1007.

Twenty years ago, the Fifth Circuit held that Congress had not abrogated the Eleventh Amendment for



copyright infringement claims asserted against States. *See Chavez*, 204 F.3d at 603. A few months ago, the Supreme Court of the United States reached the same conclusion. *See Allen*, 140 S. Ct. at 1007. Despite these unambiguous decisions, Plaintiffs argue that—relying on a case that has never been applied outside of the context of the ADA by the Supreme Court or the Fifth Circuit—their copyright infringement claims against A&M are not barred by sovereign immunity because their amended complaint alleges that A&M’s conduct also violates the Fourteenth Amendment of the United States Constitution. A district court must follow the controlling precedent of the Supreme Court and of the Circuit Court for its circuit. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (“The Supreme Court . . . has admonished the lower federal courts to follow its directly applicable precedent . . . and to leave to th[at] Court the prerogative of overruling its own decisions.”) (internal citation and quotation omitted); *Peregoy v. Amoco Prod. Co., a Div. of Standard Oil of Ind.*, 742 F. Supp. 372, 375 (E.D. Tex. 1990) (“[A Texas district] court is bound by decisions of the Court of Appeals for the Fifth Circuit.”), *aff’d sub nom. Peregoy v. Amoco Prod. Co.*, 929 F.2d 196 (5th Cir. 1991). While this Court finds Plaintiffs’ argument to be creative, it is bound to follow existing precedent.

For the reasons stated above, the Court rejects Plaintiffs’ argument for reinstating their copyright claims against A&M. Accordingly, the Court denies Plaintiffs’ Second Motion for Reconsideration (Doc. No. 129) and reiterates that their copyright infringement

claims against A&M are barred by the Eleventh Amendment. (See Doc. No. 96).

### **B. Plaintiffs' Takings Claims Against A&M**

As explained above, Plaintiffs' First Motion to Reconsider urged the Court to reinstate their federal takings claims against A&M because of the Supreme Court's decision in *Knick*. (Doc. No. 102). *Knick* overturned *Williamson County*'s rule that a federal takings claim is not ripe "until a state court had denied [the plaintiff's] claim for just compensation under state law." See *Knick*, 139 S. Ct. at 2167, 2179; see also *Williamson Cty.*, 473 U.S. at 194. Plaintiffs accurately note that most of the Court's analysis in the prior dismissal order concerning the federal takings claims focused on their failure to comply with *Williamson County*. (See Doc. No. 96 at 19–21). The Court did, however, state in that order that "[t]he Fifth Circuit has held that takings claims against a state for monetary damages under the Fifth Amendment of the United States Constitution are barred by the Eleventh Amendment." (*Id.* at 19 (first citing *Mauro*, 21 F.3d at 674; and then citing *McMurtray*, 11 F.3d at 504)). Thus, when the Court lifted the stay following the Supreme Court's decision in *Allen*, it also gave the parties an opportunity to file briefs concerning Plaintiffs' federal takings claims. (*Id.* at 2).

Plaintiffs argue that sovereign immunity has been abrogated for their federal takings claims. (Doc. No. 102; Doc. No. 126 at 2–4). Alternatively, Plaintiffs

assert that the State of Texas has waived sovereign immunity for federal takings claims. (Doc. No. 126 at 4–6). Lastly, Plaintiffs’ supplemental brief states that the Court has jurisdiction because “sovereign immunity does not bar [their] state law takings claims or prevent the exercise of diversity jurisdiction over such claims.”<sup>9</sup> (*Id.* at 6 (citing *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 385–86 (5th Cir. 2001))).

The University, on the other hand, argues that the Fifth Circuit in *Bay Point Properties, Inc. v. Mississippi Transportation Commission*, 937 F.3d 454, 456 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2566 (2020)—a case that was decided after *Knick* was announced—confirms that federal takings claims are barred in federal court due to sovereign immunity. (Doc. No. 127 at 2–4). The Court, reluctantly, agrees with A&M.

Prior to Plaintiffs filing this lawsuit, the Fifth Circuit held that Fifth Amendment takings claims against a State for monetary damages are barred by the Eleventh Amendment on at least three separate occasions. *Mauro*, 21 F.3d at 674; *Holladay*, 11 F.3d at 504; *Ysleta Del Sur Pueblo v. Texas*, 207 F.3d 658, No. 99-50656, 2000 WL 122431, at \*2 (5th Cir. 2000) (table opinion). In *Bay Point Properties*, the Fifth Circuit ruled that the Supreme Court’s decision in *Knick* had no impact on

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<sup>9</sup> This argument could be read as Plaintiffs discussing their takings claims under the Constitution of the State of Texas. Although arguably outside the scope of their initial motion to reconsider (*see* Doc. No. 102) and the Court’s order for additional briefing (*see* Doc. No. 121), for expediency purposes the Court will nevertheless address these claims.

its sovereign immunity jurisprudence in this area. *See*, 937 F.3d at 456–57.

In its supplemental briefing, the property owner contends, in effect, that *Knick* overturns prior sovereign immunity law in cases arising under the Takings Clause. But we find nothing in *Knick* to support that claim.

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Nothing in *Knick* alters the[] bedrock principles of sovereign immunity law. To begin with, the [Supreme] Court did not even have occasion to reconsider sovereign immunity law in *Knick*, because that case involved a suit against a locality, and it is well established that local governments are not entitled to the sovereign immunity enjoyed by states.

Nor does anything in *Knick* even suggest, let alone require, reconsideration of longstanding sovereign immunity principles protecting states from suit in federal court. . . .

In other words, to the extent that *Knick* has any effect on suits against state governments, the Court simply put takings claims against state governments on equal footing with claims against the federal government. And nobody disputes that takings claims against the federal government require the waiver of sovereign immunity contained in the Tucker Act.

*Id.* (citation and footnotes omitted).<sup>10</sup> Based on this unambiguous binding authority, the Court must reaffirm its conclusion that sovereign immunity deprives the Court of jurisdiction to hear Plaintiffs’ takings claim under the Fifth Amendment’s Takings Clause. (See Doc. No. 96 at 19).

Plaintiffs’ contention that *United States v. Georgia* abrogates sovereign immunity for their takings claims is not persuasive. (See, e.g., Doc. No. 126 at 3–4). As explained above, the Court finds no basis in Plaintiffs’ interpretation of *Georgia*. Additionally, Plaintiffs’ argument that Congress abrogated sovereign immunity for takings claims under the CRCA is directly contrary to what the Supreme Court said in *Allen*. See, 140 S. Ct. at 1007 (“In this case, as in [*Florida Prepaid*], the [CRCA] aims to ‘provide a uniform remedy’ for statutory infringement, *rather than to redress or prevent unconstitutional conduct*. And so in this case, as in that one, the law is invalid under Section 5.”) (emphasis added).

Plaintiffs also argue that sovereign immunity is abrogated for its federal takings claims against A&M because “Texas has closed its courts to Plaintiffs’ federal takings claim.” (Doc. No. 126 at 3). Specifically, they believe that a decision by the First District Court of Appeals “clearly establishes that copyright holders

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<sup>10</sup> Two other circuit courts have also held, *post-Knick*, that sovereign immunity bars federal takings claims. *Ladd v. Marchbanks*, No. 19-4136, \_\_\_ F.3d \_\_\_, 2020 WL 4882885, at \*4 (6th Cir. Aug. 20, 2020); *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019).

have no recourse against the State of Texas for copyright infringement, whether under the Takings Clause or state tort law.” (Doc. No. 102 at 15). *See also Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 377 (Tex. App.—Houston [1st Dist.] 2019, pet. filed) (holding that a copyright is not “property” for purposes of the Takings Clause in the Texas Constitution or the United States Constitution). Thus, according to Plaintiffs, when the State of Texas commits copyright infringement, the owner of the copyright has no forum available to him or her to seek compensation. (*See* Doc. No. 102 at 15; Doc. No. 126 at 3 & n.1).

The Court is skeptical that a single decision of first impression by one intermediate court of appeals that copyrights are not property subject to the Takings Clause amounts to the entire state “clos[ing] its courts to Plaintiffs’ federal takings claims.” (Doc. No. 126 at 3). *See also Jim Olive*, 580 S.W.3d at 377. That proposition is especially doubtful considering that the petition for review of the *Jim Olive* decision is currently pending before the Supreme Court of Texas (and briefs on the merits have been requested). *See Jim Olive Photography v. Univ. of Hous. Sys.*, No. 19-0605, <http://www.search.txcourts.gov/Case.aspx?cn=19-0605&coa=cossup> (last visited Sept. 4, 2020). Perhaps most significantly, *Jim Olive* was decided on June 11, 2019, some nine months before the Supreme Court of the United States ruled that “[c]opyrights are a form of property.” *Allen*, 140 S. Ct. at 1004 (citation omitted). Obviously, in ruling that copyrights are not property under the Takings Clause of the Fifth Amendment, the

*Jim Olive* Court did not have the benefit of this Supreme Court statement. Had it been available, *Allen*'s discussion of copyrights might have saved the First District Court of Appeals panel its very lengthy and detailed analysis in *Jim Olive*.

Even assuming that Plaintiffs are correct and *Jim Olive* entirely precludes them from pursuing their takings claims in Texas state court, Plaintiffs provide no authority that the Eleventh Amendment is automatically abrogated.<sup>11</sup> Accordingly, the Court finds that sovereign immunity has not been abrogated for federal takings claims.

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<sup>11</sup> There is certainly nothing in *Georgia* to suggest such a self-executing abrogation of the Eleventh Amendment. *See*, 546 U.S. at 154–59. Plaintiffs' supplemental brief cites several cases that suggest that sovereign immunity applies in federal court as long as state courts are available to hear the claims. (*See* Doc. No. 126 at 3 & n.1) (collecting cases). None of these cases, however, actually address what happens if the state court is not available. *See Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (“South Carolina courts have long recognized a right of persons to sue the State for unconstitutional takings.”); *Williams*, 928 F.3d at 1213 (“The parties agree, and our independent research confirms, that Mr. Williams’ takings claim may be brought in Utah state court.”); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 n.8 (9th Cir. 2008) (“The Venture does not contend that the Montana state courts have failed to provide adequate procedures to adjudicate its just compensation claim.”). In fact, the Sixth Circuit’s opinion in *DLX, Inc. v. Kentucky* suggests that the solution for a “closed” state court system is to “open” the state courts, not abrogate sovereign immunity in federal court. *See*, 381 F.3d 511, 528 (6th Cir. 2004) (“[W]here the Constitution requires a particular remedy . . . the state is required to provide that remedy in its own courts, notwithstanding sovereign immunity.”) (emphasis added).

Plaintiffs' remaining arguments for reinstating their takings claims fare no better than their abrogation one. They assert that the State of Texas waived sovereign immunity for federal takings claims in Article I, § 17 of the Texas Constitution. That is a correct statement of law for matters pending in Texas state courts. *See City of Dall. v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011); *see also State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 363 (Tex. App.—Austin 2009, no pet.). It is well-established, however, that waivers of sovereign immunity include both *whether* the State may be sued and *where* it may be sued. *Pennhurst*, 465 U.S. at 99. In other words, “a State’s waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.” *Id.* at n.9 (collecting cases); *accord Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002); *Martinez v. Tex. Dep’t of Criminal Justice*, 300 F.3d 567, 575 (5th Cir. 2002); *Pequeno v. Univ. of Tex. at Brownsville*, 718 F. App’x 237, 241 (5th Cir. 2018); *Guajardo v. State Bar of Tex.*, 803 F. App’x 750, 755 (5th Cir. 2020).

The Court therefore must evaluate whether the State of Texas “unequivocally expressed” its consent to be sued for federal takings claims in federal court. *See Martinez*, 300 F.3d at 575 (citing *Pennhurst*, 465 U.S. at 99). No such expression can be found in Article I, § 17 of the Texas Constitution. Further, the University—as an arm of the State of Texas—has consistently opposed to being a party to this lawsuit since the beginning of this case. (*See* Doc. No. 34). Accordingly, the Court must reject that the State of Texas waived



sovereign immunity to be sued for Plaintiffs' takings claims *in this forum*.

Lastly, Plaintiffs state that “it is clear that sovereign immunity does not bar Plaintiffs’ state law takings claims or prevent the exercise of diversity jurisdiction over such claims.” (Doc. No. 126 at 6 (citing *Vulcan Materials*, 238 F.3d at 385–86)). It is true that the Fifth Circuit held that “a plaintiff may bring a state law takings claim in federal district court if the traditional requirements for diversity jurisdiction are fulfilled.” *See Vulcan Materials*, 238 F.3d at 386.<sup>12</sup> That opinion, however, never discusses sovereign immunity or the Eleventh Amendment. *See generally id.* at 384–91. As noted above, this Court relied on the Supreme Court’s opinion in *Pennhurst* to find that Plaintiffs’ claims under the Texas Constitution were barred by the Eleventh Amendment. (*See* Doc. No. 96 at 18 (citing *Pennhurst*, 465 U.S. at 120)). The Court is aware of no reason why it should not continue to rely on *Pennhurst*.

To the extent the Fifth Circuit’s holding is inconsistent with Supreme Court authority, this Court is bound to follow the latter.<sup>13</sup> Accordingly, the Court

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<sup>12</sup> Even if this Court were to accept this proposition as controlling in this situation, the *Jim Olive* case, as discussed above, has held that copyrights cannot be “taken” as a matter of Texas law. *See*, 580 S.W.3d at 377. This Court, sitting in diversity, would have to follow the only Texas holding on this subject. Thus, Plaintiffs’ state law takings claims would nevertheless have to be dismissed.

<sup>13</sup> Similarly, statutes (such as the diversity of citizenship statute, 28 U.S.C. § 1332) cannot confer jurisdiction beyond what is allowed by the Constitution (such as the Eleventh

finds that the Eleventh Amendment also bars Plaintiffs' state law takings claims brought here, even though the traditional requirements for diversity jurisdiction are satisfied.

In summary, Plaintiffs' arguments in support for reconsidering the dismissal of its state and federal takings claims against A&M are inapposite. The Court therefore denies the First Motion for Reconsideration (Doc. No. 102) as to the takings claims and reaffirms that those claims are dismissed without prejudice. (*See* Doc. No. 96 at 18–21).

#### **IV. Plaintiffs' Motion for Leave to Amend (Doc. No. 131)**

As stated above, Plaintiffs initially filed this lawsuit in January of 2017. (Doc. No. 1). They filed an amended complaint three months later. (*See* Doc. No. 15). In 2018, while Defendants' motions to dismiss as to the amended complaint were pending, Plaintiffs filed a motion for leave to file a second amended complaint. (Doc. No. 61). That motion was referred to a United States Magistrate Judge (Doc. No. 63), who denied the motion "without prejudice to [it] being re-filed or re-asserted following the Court's ruling on the pending dispositive motions." (Doc. No. 74).

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Amendment). *Pennhurst*, 465 U.S. at 98 ("[T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III. . . .").

As previously stated, this Court entered its prior order on the motions to dismiss on March 29, 2019. (Doc. No. 96). On July 26th, Plaintiffs filed the First Motion to Reconsider (Doc. No. 102), which resulted in the Court staying the case from September 18, 2019 through April 8, 2020. (See Doc. Nos. 111 and 121). Plaintiffs filed their Motion for Leave to Amend on May 11, 2020.<sup>14</sup> (Doc. No. 131).

Under Rule 15(a)(2), “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Generally, the language of the rule is liberal and “evinces a bias in favor of granting leave to amend.” *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002)). Whether to grant the motion is entrusted to the district court’s “sound discretion,” but it must have a “substantial reason” to deny a request for leave to amend.

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<sup>14</sup> The motion is entitled “Motion for Reconsideration and/or Motion for Leave to File a Second Amended Complaint.” (See Doc. No. 131). The reconsideration aspect of the motion asks the Court to reconsider either the Magistrate Judge’s denial of the earlier motion for leave to amend (see Doc. No. 74) or its order on the motions to dismiss (see Doc. No. 96). Except for repeating their belief that *United States v. Georgia* abrogates sovereign immunity for copyright infringement and takings claims, the motion is devoid of any reasons to reconsider the two prior orders. (See Doc. No. 131). The Court also finds no error in either the Magistrate Judge’s ruling (see Doc. No. 74) or its order on the motions to dismiss concerning Plaintiffs’ amended complaint (see Doc. No. 96). The Court therefore treats this motion as only one for leave to file an amended complaint under Rule 15(a)(2).

*Id.* In determining whether to grant a party leave to amend its complaint, courts look to five considerations: undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and whether the amendment is futile.<sup>15</sup> *Smith*, 393 F.3d at 595 (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiffs contend that they moved to amend “at the first practicable opportunity following this Court’s adjudication of Defendants’ complex motions to dismiss.” (Doc. No. 131 at 12). The Court disagrees. Plaintiffs could have filed their motion for leave to amend at any time before (or filed it concurrently with) the First Motion to Reconsider, which was filed approximately 118 days after the Court’s dismissal order. (*See* Doc. No. 102). They also had the opportunity to seek leave to amend at any time during the 54 days between filing the First Motion to Reconsider and this Court’s order staying the case. (*See* Doc. No. 111). Finally, Plaintiffs waited 33 days after the stay was lifted before filing the motion now before the Court. In total, Plaintiffs waited over half-a-year (approximately 205 days)—excluding the time the case was stayed—after the Court

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<sup>15</sup> The Defendants do not argue that Plaintiffs acted in bad faith or with a dilatory motive; nor do Defendants claim that Plaintiffs have repeatedly failed to cure deficiencies in prior amended complaints. The Court agrees that those two factors are not applicable in this case.

entered its dismissal order to file its request to file a second amended complaint.

Accordingly, the Court finds that Plaintiffs' motion for leave to amend was untimely. Delay alone, however, is an insufficient basis for denial of leave to amend. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004). Instead, "[t]he delay must be *undue*, i.e., it must prejudice the nonmoving party or impose unwarranted burdens on the court." *Id.* (emphasis in original). Plaintiffs argue that their delay does not prejudice the Defendants, and for the most part this Court agrees. (See, e.g., Doc. No. 131 at 11–12). Nevertheless, they do not address whether their amended complaint, which would change this case from a one defendant, three cause of action case to a six defendant, eight cause of action case, would impose unjustified burdens on the Court.

Regardless of whether the second amended complaint would work a prejudice to any of the Defendants, it is clear that the proposed second amended complaint would "work a massive change in the nature and direction of the case" because it would allow Plaintiffs to litigate claims that have been dismissed for over a year and against defendants who have been dismissed from this case for over a year. See *Mayeaux*, 376 F.3d at 427. The Court also agrees with Defendants that an amended complaint at this time risks causing harm to Marquardt because he would have to delay in having this case fully adjudicated, which amounts to undue prejudice. (See Doc. No. 144 at 9 (citing *In re*

*Am. Intern. Refinery, Inc.*, 676 F.3d 455, 467 (5th Cir. 2012)).

Lastly, and most importantly, the Court considers whether Plaintiffs' proposed second amended complaint is "futile." An amended complaint is considered futile if it "would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000); *accord N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 478 (5th Cir. 2018). Thus, "to determine futility, [courts] will apply the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Stripling*, 234 F.3d at 873 (internal citations and quotations omitted). For the reasons explained below, the Court concludes that the proposed amendment would not withstand a Rule 12(b)(6) motion to dismiss and is therefore futile.

**A. Summary of the Proposed Second Amended Complaint (Doc. No. 131, Ex. 1)**

Plaintiffs' proposed second amended complaint is substantially similar to their amended complaint. (*Compare* Doc. No. 15, *with* Doc. No. 131, Ex. 1). Indeed, the proposed second amended complaint only includes six substantive changes to the alleged facts. First, Plaintiffs claim that A&M, the Athletic Department, and the Foundation promoted an "historically inaccurate" myth that Gill was the only man left standing on the sidelines at the 1922 "Dixie Classic" football game and that A&M began using the phrase "the 12th Man" in the 1920s to bolster its claim as the true owner of

the 12th Man. (*See* Doc. No. 131, Ex. 1 at 10–12, ¶¶ 24–25; *see also id.* at 19, ¶ 42). The second non-formalistic change to the pleaded facts in the proposed second amended complaint is that the Foundation allegedly generated at least \$8.98 million in donations to support the Athletic Department since 2006. (*Id.* at 12, ¶ 27). Similarly, Plaintiffs pleaded that the Foundation “was a source of funding for two of the ten advertisements promoting the pirated story” on the Athletic Department’s website. (*Id.* at 19, ¶ 46).

The last three changes to the factual allegations relate to Plaintiffs’ claims against Stephenson, Cannon, and the Foundation. As to Stephenson, Plaintiffs assert:

On information and belief, Stephenson had actual knowledge or constructive knowledge that [the] copy [of the Gill Biography given to him by Marquardt] was plagiarized based on the fact that the plagiarized copy contained the altered author byline, “by Whit Canning, special to Texas A&M Athletics,” such that Stephenson actually or constructively knew that a third-party had written the article and failed to follow [A&M] policy. That policy required Stephenson to, given the “by Whit Canning” notice that the material was written by a third-party and not a Texas A&M employee, to [sic] inquire as to whether [A&M] had written permission, or approval by the copyright owner to publish the content. As alleged in paragraph 56 below, it was the policy of [A&M] to require its employees to respect

copyright laws and obtain consent for materials used on the website, on social media, or otherwise. An objectively reasonable person in Stephenson’s supervisory position would have, or alternatively should have, known the use of the plagiarized copy of the Gill Biography was unlawful. On information and belief, Stephenson provided hands-on decision making with respect to the activities of . . . [the] Athletic Department Social Media, the [A&M] Times e-magazine and website, and other [A&M] official websites. In addition, Stephenson, with actual or constructive knowledge of the infringing activity, materially contributed to such infringement because he was in a position to stop the activity but failed to do so.

(*Id.* at 22–23, ¶ 53). An identical paragraph is also pleaded as to Cannon (with the obvious difference that “Cannon” replaces “Stephenson” in the paragraph quoted above). (*See id.* at 23–24, ¶ 54). Lastly, as to the Foundation, Plaintiffs’ proposed second amended complaint includes the following allegations:

According to publicly available documents filed in another litigation, on information and belief, the [A&M] President did, and/or does, serve in an ex officio capacity on the Executive Committee of the Foundation pursuant to the Foundation’s Affiliation Agreement(s). In addition, on information and belief, the Head of the Athletic Department . . . , the Athletic Director, and a member of the . . . A&M Board of Regents, serves in an ex officio capacity on the



Board of the Foundation pursuant to the Foundation's bylaws. Moreover, on information and belief, [A&M] employees, including Athletic Department employees, may have and/or may, if agreed upon between the two entities, perform(ed) services for the Foundation pursuant to the Affiliation Agreement(s). Given these entanglements between the two entities, and the Foundation's position of influence as a result of its funding of [A&M] athletics . . . [A&M] and the Athletic Department were in a position to know that the Foundation, in exchange for funding [A&M] athletic programs, wanted [A&M] and employees of the Athletic Department to promote the 12th Man mythology and story in order to encourage donations. Indeed, on information and belief, the Foundation was in a position to exercise control and supervision over [A&M's] efforts to promote the 12th Man mythology, including the infringement at issue in this case, and the Foundation failed to exercise its right and ability to control or prevent the infringing conduct.

(*Id.* at 30–31, ¶ 69; *see also id.* at 34, ¶ 92 (“The Foundation, as financier and advertiser for the . . . Athletic Department, provided the site and facilities for the infringing conduct.”) (emphasis omitted.)).

In addition to all of the claims Plaintiffs sought before, they now request to add DMCA claims against Cannon, Stephenson, and the Foundation. (*See id.* at 36–38). Plaintiffs also desire to include A&M in every cause of action the amended complaint brought

against the Athletic Department.<sup>16</sup> (*See, e.g., id.* at 2, 5, 29, and 35). Lastly, the proposed second amended complaint contains a claim against A&M and the Athletic Department for unconstitutional deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.<sup>17</sup> (*Id.* at 40–41).

## **B. Futility Analysis**

### **1. A&M and the Athletic Department**

Plaintiffs’ claims against both A&M and the Athletic Department fail as a matter of law. The Athletic Department is part of the University; it is not a separate legal entity with capacity to be sued. (*See* Doc. No. 96 at 13–14). Further, A&M is an arm of the State of Texas and is entitled to sovereign immunity under the Eleventh Amendment for claims of copyright infringement and unconstitutional takings in this Court.<sup>18</sup> (*See*

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<sup>16</sup> The Court recognizes that the proposed second amended complaint explains that the Athletic Department is included to retain their rights to appeal the Court’s ruling that the Athletic Department lacks capacity to be sued. (Doc. No. 131, Ex. 1 at 5, ¶ 9). The Court also notes that Plaintiffs’ motion states that they “seek leave to amend their Complaint to substitute [A&M] as a defendant in lieu of the Athletic Department.” (Doc. No. 131 at 10).

<sup>17</sup> This claim is purportedly asserted directly “by virtue of the Due Process Clause of the Fourteenth Amendment and the [CRCA].” (Doc. No. 131, Ex. 1 at 41, ¶ 134).

<sup>18</sup> The Court also notes that the proposed second amended complaint, like the amended complaint, does not seek prospective injunctive relief for their federal takings claims. (*See generally*

*id.* at 14–21). Accordingly, the Court would lack jurisdiction to adjudicate Plaintiffs’ claims against A&M.

Plaintiffs’ new cause of action—“unconstitutional deprivation of property without due process of law”—also fails for the reasons stated above. *See, e.g., supra* note 11. Moreover, the Court finds no basis in Plaintiffs’ argument that claims for denial of due process can be brought against States for money damages by virtue of the Due Process Clause of the Fourteenth Amendment or the CRCA. (*See* Doc. No. 131, Ex. 1 at 41, ¶ 134.). *See also Ysleta Del Sur Pueblo*, 207 F.3d 658, 2000 WL 122431, at \*2 (“Remedies against states under the 14th Amendment are created by legislation, not by other constitutional amendments.”).

Accordingly, the proposed second amended complaint would be dismissed under Rule 12(b)(6) as to the claims against A&M and the Athletic Department. As such, the Court finds that they are futile.

## **2. The Foundation**

Plaintiffs’ proposed second amended complaint seeks recovery against the Foundation for three claims: (1) contributory infringement; (2) vicarious copyright infringement; and (3) violations of the DMCA. (Doc. No. 131, Ex. 1 at 33–38). The Court starts with the contributory infringement cause of action. That claim requires a plaintiff to plead facts that show that

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Doc. No. 131, Ex. 1). As such, the *Ex Parte Young* exception to the Eleventh Amendment still does not apply. *See, supra* note 2.

the defendant, with knowledge of the infringing activity, induced, caused, or materially contributed to the infringing conduct of another. *DynaStudy, Inc. v. Hous. Ind. Sch. Dist.*, 325 F. Supp. 3d. 767, 775 (S.D. Tex. 2017) (citing *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999)).

Plaintiffs previously argued that the amended complaint's allegations that the Foundation's financial contributions to the Athletic Department and close connection were enough to reasonably infer that the Foundation had actual knowledge of the alleged copyright infringement by Marquardt on the Athletic Department website. (*See* Doc. No. 40 at 7–8 (citing Doc. No. 15)). The Court rejected that argument and found that the amended complaint failed to plead facts indicating that the Foundation or any employee thereof had knowledge of the alleged infringement. (Doc. No. 96 at 22). More specifically, the Court concluded that “Plaintiffs do not allege plausible facts indicating that the Foundation had any knowledge that Marquardt had his secretary ‘key in’ the Gill Biography and remove the copyright management information, or that he offered the allegedly infringing work for publication on the University’s website.” (*Id.* (citing *DynaStudy*, 325 F. Supp. 3d at 777)).

The new contributory copyright allegations against the Foundation suffer the same fate as the prior ones. The only additions in the proposed second amended complaint are more allegations that the Foundation has a close relationship with the Athletic Department and that the Foundation provides the

Athletic Department a significant amount of money. (*See, e.g.*, Doc. No. 131, Ex. 1 at 30–31, ¶ 69). These allegations still do not plausibly state that the Foundation had knowledge of the infringement. (*See* Doc. No. 96 at 22).

Plaintiffs also pleaded in the proposed second amended complaint that “the Foundation was in a position to exercise control and supervision over [A&M’s] efforts to promote the 12th Man mythology.” (Doc. No. 131, Ex. 1 at 31, ¶ 69). The Court finds this statement conclusory and not entitled to be assumed true under a Rule 12(b)(6) analysis. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). It is simply too much of a factual leap to say that the Foundation’s supposed close relationship with the Athletic Department and the Foundation’s status as the Athletic Department’s primary benefactor means that the Foundation had dominion over the Athletic Department, such that it had the ability to supervise and control the Athletic Department. Essentially, Plaintiffs would impose an alter ego theory against the Foundation whereby the Foundation is liable for the Athletic Department’s actions. The Court finds no proposed factual allegations (as opposed to conclusions) that would support such a claim.

Accordingly, the Court concludes that the proposed second amended complaint, like the amended complaint, insufficiently pleads facts concerning the Foundation’s knowledge of the alleged copyright infringement. (*See* Doc. No. 96 at 22). Plaintiffs’ amended claim for contributory copyright therefore is futile.

Likewise, Plaintiffs' claim against the Foundation for vicarious copyright infringement does not state a claim for which relief can be granted. That cause of action requires a degree of supervisory authority over the direct infringer, as well as a direct financial interest in the infringing activity. *See DynaStudy*, 325 F. Supp. 3d at 777. Plaintiffs previously claimed that the Foundation had supervisory authority over the Athletic Department and Marquardt because: (1) there is personnel overlap between the Foundation and the Athletic Department; (2) the Foundation directed the Athletic Department to research the Gill story; and (3) the Foundation gave a large amount of money to the Athletic Department. (*See* Doc. No. 40 at 9–10 (citing Doc. No. 15)). The Court disagreed and held that those failed to plead that the Foundation had supervisory authority over any of the allegedly direct infringers. (Doc. No. 96 at 23).

Plaintiffs did not include any new factual allegations in the proposed second amended complaint to change the Court's earlier conclusion. As explained above, the facts alleged concerning the Foundation's relationship with the Athletic Department do not support Plaintiffs' conclusory allegation that the Foundation had the ability to control and supervise the Athletic Departments website. (*See* Doc. No. 131, Ex. 1 at 30–31, ¶ 69). Additionally, the fact that the Foundation provides substantial funding to the Athletic Department—perhaps nearly all of it—cannot support Plaintiffs' conclusory statement that the Foundation *provided* the Athletic Department's website and

facilities. (*See id.* at 34, ¶ 92). Unlike the cases Plaintiffs cite in their reply brief, there is no allegation that the Foundation owned or operated the website where the alleged infringement occurred. (*See* Doc. No. 145 at 8 & n.3). *See, e.g., Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1177 (N.D. Tex. 1997) (finding the owner and operator of a website could be liable for vicarious copyright infringement for alleged copyright infringement occurring on the website). Taking Plaintiffs' allegations as true, the Foundation gave the Athletic Department money, which it then used to obtain facilities and maintain a website. To say that the Foundation provided the ability for the Athletic Department to purchase items and is therefore liable for how the Athletic Department used those items ignores fundamental principles of tort, agency, and property law.

Plaintiffs' new allegations do not cure the defect in pleading that the Foundation had supervisory authority over Marquardt or any of the other allegedly direct infringers. (*See* Doc. No. 96 at 23). The Court therefore also finds that the vicarious copyright claims against the Foundation are futile.

Lastly, the proposed second amended complaint adds a claim that the Foundation violated the DMCA. (*See* Doc. No. 131, Ex. 1 at 36–38). The DMCA prohibits a defendant from knowingly falsifying, removing, or altering “copyright management information” with the intent to induce, enable, facilitate, or conceal copyright infringement. 17 U.S.C. § 1202(a)–(b). In attempt to plead a DMCA claim against the Foundation, Plaintiffs reassert that the Foundation “knew or should have

known of the illegal acts while materially contributing to and/or inducing them, and/or also financially benefited from them while also possessing the right and ability to control them.” (Doc. No. 131, Ex. 1 at 37, ¶ 111). Once again, the Court finds that the proposed second amended complaint fails to adequately plead facts that support the conclusion that the Foundation knew or should have known of Marquardt’s alleged infringement. Thus, this claim also fails to state a claim.

Accordingly, the Court finds that the contributory copyright infringement, vicarious copyright infringement, and DMCA claims Plaintiffs seek to assert against the Foundation would be dismissed under Rule 12(b)(6). Thus, the proposed second amended complaint is futile as to the Foundation.

### **3. Cannon and Stephenson**

Like the allegations in the amended complaint, Plaintiffs’ proposed second amended complaint brings claims against Cannon and Stephenson for: (1) direct copyright infringement; and (2) contributory copyright infringement. (*Compare* Doc. No. 15 at 24–27, *with* Doc. No. 131, Ex. 1 at 31–36). The proposed second amended complaint also asserts DMCA claims against the two individuals. (Doc. No. 131, Ex. 1 at 36–38).

The Court dismissed the amended complaint against both Cannon and Stephenson due to qualified immunity. (Doc. No. 96 at 27–31). Specifically, the Court found that it was not objectively unreasonable for those individuals to approve the distribution and



display of allegedly infringing work, or circulate a hyperlink to an allegedly infringing article, when neither individual had any knowledge that the work violated any law or copyright. (*Id.* at 27–30). Alternatively, assuming *arguendo* that qualified immunity did not apply, the Court held that Plaintiffs did not plausibly plead direct copyright infringement or contributory copyright infringement claims because there were no allegations the Cannon or Stephenson knew or should have known about the infringing activity. (*Id.* at 27–28, 29–31).

As quoted above, the Plaintiffs attempt to cure their pleading defects by adding allegations that the allegedly infringing work contained the altered byline “by Whit Canning, special to Texas A&M Athletics.” (Doc. No. 131, Ex. 1 at 23, ¶¶ 53–54). Additionally, according to the proposed second amended complaint, the A&M employee policy mandated that the byline triggered Cannon’s and Stephenson’s duty to “inquire as to whether [A&M] had written permission, or approval by the copyright owner, to publish the content.” (*Id.*). Based on these allegations, Plaintiffs conclude that Stephenson and Cannon: (1) had actual knowledge or constructive knowledge that the allegedly infringing work was plagiarized; and (2) acted objectively unreasonable because a reasonable person in their position would know that “use of the plagiarized copy of the Gill Biography was unlawful.” (*Id.*).

The Court finds that the proposed second amended complaint does not cure the defects the Court

identified in the amended complaint.<sup>19</sup> (Doc. No. 96 at 27–31). First, both individuals are still entitled to qualified immunity. Plaintiffs attempt to plead that Cannon and Stephenson acted objectively unreasonable by adding a sentence in the proposed second amended complaint that a reasonable person in their position knew or should have known that use of plagiarized work was unlawful fails for several reasons. That sentence is a legal conclusion, rather than allegations of actual facts. Moreover, Plaintiffs misapply the reasonableness inquiry; it must first be asked if it was objectively unreasonable for someone in Cannon’s and/or Stephenson’s position to not “inquire[] as to whether [A&M] had written permission” to display an article that was flagged for distribution by a coworker simply because the article said “by Whit Canning, special to Texas A&M Athletics.” (See Doc. No. 131, Ex. 1 at 22–24). See also *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333,

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<sup>19</sup> The Court notes that the allegations that the article included the “by Whit Canning” language and that Cannon and Stephenson were required by A&M policy to not plagiarize work are not new. (Doc. No. 15 at 17 ¶ 45, 19 ¶ 51). Indeed, Plaintiffs argued these exact points in opposing the earlier motion to dismiss. (See, e.g., Doc. No. 62 at 66 (“Any competent University media relations officer (such as Marquardt and Cannon) or news information director (such as Stephenson), when viewing Plaintiffs’ copyrighted 12th Man story and noticing a byline of ‘by Whit [Canning],’ would have asked: ‘do we have permission from the author or the copyright owner of the 12th Man work to reprint this story?’”). Accordingly, the only truly new additions in the proposed amended complaint are Plaintiffs’ conclusions that Cannon and Stephenson: (1) had actual knowledge or constructive knowledge that the article was plagiarized; and (2) acted objectively unreasonable. (See Doc. No. 131, Ex. 1 at 22–24).

337 (5th Cir. 2003). The Court does not find that the inclusion of the by-line “by Whit Canning, special to Texas A&M Athletics” made it objectively unreasonable for Cannon and Stephenson to decide to publish and circulate an article that was given to them by a coworker (and another individual required to follow the University’s online and social media policy).

The Court therefore finds that Cannon and Stephenson are entitled to qualified immunity as to Plaintiffs’ claims for direct infringement and contributory infringement. Because the same allegations and conclusions apply to whether Plaintiffs stated a claim under those causes of action and whether Plaintiffs stated a DMCA cause of action, the Court also finds that Cannon and Stephenson are entitled to qualified immunity as to the latter claim. Therefore, Plaintiffs’ proposed second amended complaint is futile as to Cannon and Stephenson because all the claims pleaded against those individuals would be dismissed under qualified immunity.<sup>20</sup>

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<sup>20</sup> As explained in footnote 19, the allegation that the “by Whit Canning” by-line in the article and A&M’s employee policy is enough to infer actual or constructive knowledge onto Cannon and Stephenson was included in the amended complaint. Accordingly, the Court’s conclusion that the amended complaint failed to plausibly plead the requisite knowledge element applies with equal force as to the proposed second amended complaint. In other words, even if qualified immunity did not apply, the Court would still hold that Plaintiffs’ failed to plausibly plead Cannon’s and Stephenson’s liability under direct copyright infringement, contributory copyright infringement, and the DMCA.

In sum, the Court finds that Plaintiffs' proposed second amended complaint would be dismissed under Rule 12(b)(6) to the same extent that the Court dismissed the amended complaint (i.e., only the claims against Marquardt would survive). For that reason, the proposed second amended complaint is futile. Accordingly, the Motion for Leave to Amend (Doc. No. 131) was filed with undue delay, prejudices at least one of the Defendants (Marquardt), and is futile. That motion is therefore denied.

#### **V. The Foundation's Cross Motion (Doc. No. 141)**

When the Foundation filed its response in opposition to Plaintiffs' motion for leave to amend, it also filed the Cross Motion, which asks the Court to enter a final judgment on all of Plaintiffs' claims against the Foundation. (Doc. No. 141 at 7–8). For the following reasons, the Court grants the motion.

In this case, Plaintiffs alleged that the State of Texas—through A&M's Athletic Department—copied their property (a copyright interest in the Gill Biography) without permission and without paying them any compensation, essentially depriving them of its value. The Court is of the opinion that those allegations plausibly state a claim for damages under the Takings Clause of the Fifth Amendment through the Fourteenth Amendment.<sup>21</sup> By virtue of the Eleventh

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<sup>21</sup> “The Takings Clause of the Fifth Amendment states that ‘private property [shall not] be taken for public use, without just compensation.’” *Knick*, 139 S. Ct. at 2167 (quoting U.S. CONST.

Amendment, however, this Court lacks jurisdiction to hear such a case.<sup>22</sup> See *Bay Point Props.*, 937 F.3d at 456–57. There is no sovereign immunity bar to this case being adjudicated in Texas state court, but if the rule in *Jim Olive* is applied as to all copyright infringements by government actors, these Plaintiffs (as well

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amend. V). That Clause is applicable to the States through the Fourteenth Amendment. *Chi., B.& Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). “Copyrights are a form of property.” *Allen*, 140 S. Ct. at 1004 (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932)). Additionally, the Supreme Court has stated that “property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from independent sources. . . .” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal citations and quotations omitted). The fact that something is personal property (as opposed to real property) is immaterial for purposes of the Fifth Amendment. See *Horne v. Dep’t of Agric.*, 576 U.S. 350, 358 (2015). Additionally, the Takings Clause does not discriminate between tangible and intangible property. See, e.g., *Ruckelshaus*, 467 U.S. at 1003 (property interest in a trade secret); *Armstrong v. United States*, 364 U.S. 40, 46 (1960) (property interest in a materialman’s lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 579 (1934) (property interests in contracts). Moreover, in *Ruckelshaus*, the Supreme Court made clear that if something is “property” under the law, then it is “property” under the Takings Clause. See, 467 U.S. at 1003–04.

<sup>22</sup> This Court’s lack of subject matter jurisdiction to hear Plaintiffs’ federal takings claim is not because copyrights are not “property” under the Takings Clause or because an infringement can never be a “taking.” Cf. *Zoltek v. United States*, 442 F.3d 1345, 1350–51 (Fed. Cir. 2006) (holding that the plaintiff could not proceed under the Tucker Act by alleging that patent infringement was a taking because 28 U.S.C. § 1498 provides the only avenue for a patent owner to bring an action against the government for patent infringement, not because a patent is not covered by the Takings Clause).

as other copyright holders) may not have the ability to bring their federal takings claims anywhere.<sup>23</sup> *See*, 580 S.W.3d at 377.

As Plaintiffs note in their supplemental brief, several circuit courts have implied (in dicta) that sovereign immunity is inapplicable when the state courts do not provide litigants an available forum. (*See* Doc. No. 126 at 3 & n.1). *See also, e.g., Hutto*, 773 F.3d at 552 (“[T]he Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State’s courts* remain open to adjudicate such claims.”) (emphasis in original); *Williams*, 928 F.3d at 1213 (“Some of the circuits that have considered whether a claim under the Fifth Amendment Takings Clause is barred by Eleventh Amendment immunity have held that it is barred, *as long as a remedy is available in state court.*”) (emphasis added) (collecting cases).

As explained above, the Court disagrees with Plaintiffs that sovereign immunity is automatically abrogated for federal takings claims if the state courts are “closed.” *See, supra* note 11. Instead, the Court agrees with the Sixth Circuit that the remedy for not having an adequate forum to litigate constitutional claims is to require the state to “open” its courts or to seek a legislative solution. *See DLX*, 381 F.3d at 528. Moreover, a federal district court is unable to create its own subject matter jurisdiction or control the subject

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<sup>23</sup> Additionally, the holding of *Jim Olive* is such that there is no taking under Texas law, either. *See*, 580 S.W.3d at 363–64, 377.

matter jurisdiction of state courts; that authority lies with the legislative bodies and the Supreme Courts of the respective jurisdictions. It seems contrary to centuries of jurisdictional rulings to suggest that, while a federal court's jurisdiction is fixed and cannot be expanded by the parties or by itself, *see Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377 (1994), *Turner v. Bank of North America*, 4 U.S. 8, 10 (1799), it can be expanded by the actions of a state intermediate appellate court.

The Court therefore holds that it lacks jurisdiction to hear Plaintiffs' federal takings claims, even if *Jim Olive* precludes them from pursuing those claims in Texas state court. If this Court's interpretation of the Eleventh Amendment is incorrect, however, then it believes that the exception to sovereign immunity implied by the circuit courts cited above, if it truly exists, applies in this case. Specifically, Plaintiffs have a plausible claim under the Takings Clause of the Fifth Amendment, but, under the *Jim Olive* rule currently in place, Texas state courts have deprived them of the ability to pursue that claim.

The Court acknowledges that the sovereign immunity issue is dispositive of Plaintiffs' takings claims against the Athletic Department (and by inference a claim against A&M—the would-be proper party). Moreover, it is not aware of the Fifth Circuit expressly addressing this topic. Further, Plaintiffs currently may not have an adequate forum to litigate their federal takings claims. For these reasons, the Court believes that an immediate appeal would alleviate the risk of

injustice or undue hardship to Plaintiffs. Accordingly, the Court severs the Athletic Department from this case and enters final judgment under Rule 54(b) as to all of Plaintiffs' claims against it. *See PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996) ("A district court should grant [Rule 54(b)] certification only when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal. . . .") (citation omitted).

Having determined that final judgment shall be entered against the Athletic Department, the Court now turns to the Foundation's Cross Motion. The Foundation argues that "[w]ithout a final judgment, [it]—a dismissed party—will continue to incur unnecessary expenses and disruptions defending itself from Plaintiffs' persistent attempts to revive their invalid claims." (Doc. No. 141 at 8). The Court is sympathetic to the Foundation's frustration in having to incur expenses and defend its reinstatement in a case that it was dismissed from well over a year ago.

Additionally, the claims against the Foundation are closely intertwined with the claims against the Athletic Department. Therefore, allowing Plaintiffs to appeal the Court's dismissal of the Foundation while they appeal the Court's ruling as to the Athletic Department would avoid extra expenses for the parties and work for the Fifth Circuit. *See PYCA Indus.*, 81 F.3d at 1421 ("One of the primary policies behind requiring a justification for Rule 54(b) certification is to avoid piecemeal appeals.") (citation omitted).



Accordingly, the Court grants the Foundation's Cross Motion (Doc. No. 131), severs it from this case, and enters a final judgment under Rule 54(b) as to all of Plaintiffs' claims against it.

Finally, the Court severs Cannon and Stephenson and enters a final judgment against Plaintiffs' claims against them as well. The Court has now twice held that these two individuals are entitled to qualified immunity against Plaintiffs' claims. "Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985)). Thus, Cannon and Stephenson are entitled to judgment on the claims brought against them by Plaintiffs. Moreover, it would cause piecemeal appeals and unnecessary expenses for Plaintiffs to appeal the Court's rulings concerning some of the dismissed defendants now but wait to appeal those substantially similar rulings concerning Cannon and Stephenson. Lastly, it would be more efficient and equitable for the Fifth Circuit to consider all of the dismissed defendants together.

Accordingly, the Court grants the Foundation's Cross Motion (Doc. No. 141), severs the Athletic Department, the Foundation, Cannon, and Stephenson from this case, and enters a final judgment in their favor on Plaintiffs' claims against them under Rule 54(b). The Court believes that this approach allows Plaintiffs to seek a more immediate resolution to their concerns that they have no forum to recover from an alleged unconstitutional taking and also allows the

dismissed defendants to avoid unnecessary expenses and delays in waiting from the adjudication of Plaintiffs' claims against Marquardt.

## VI. Conclusion

This Court dismissed Plaintiffs Michael J. Bynum's and Canada Hockey LLC's amended complaint as to all claims against Texas A&M University (as the proposed substitute party for Defendant the Texas A&M University Athletic Department), Defendant the Texas A&M University 12th Man Foundation, Defendant Alan Cannon, and Defendant Lane Stephenson. (Doc. No. 96). The only remaining claims are those asserted against Defendant Brad Marquardt. (*Id.*). The Court now reaffirms that dismissal order. The claims against the Athletic Department (and therefore A&M) remain dismissed without prejudice because the Eleventh Amendment deprives the Court from jurisdiction to hear such claims. *See Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996). Accordingly, Plaintiffs' motions to reconsider (Doc. Nos. 102, 128, and 129) are hereby denied.

The Court further denies Plaintiffs' motion for leave to file a second amended complaint (Doc. No. 131) because Plaintiffs unduly delayed in filing the motion, the proposed second amended complaint would cause undue prejudice to Marquardt, and the proposed second amended complaint is futile. Lastly, the Court grants the Foundation's cross motion for entry of final judgment (Doc. No. 141), severs from this case the

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Athletic Department (and consequently A&M), the Foundation, Cannon, and Stephenson, and enters final judgment under Rule 54(b) against Plaintiffs' claims against these defendants. The effect of this order is that the only remaining defendant in this case is Marquardt; and the only active claims against him are Plaintiffs' direct copyright infringement, contributory copyright infringement, and vicarious copyright infringement claims.

SIGNED at Houston, Texas this 4th day of September, 2020.

/s/ Andrew S. Hanen  
Andrew S. Hanen  
United States District Judge

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CANADA HOCKEY LLC;	§	
dba EPIC SPORTS, <i>et al</i> ,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION
TEXAS A&M UNIVERSITY	§	NO. 4:17-CV-181
ATHLETIC DEPARTMENT,	§	
<i>et al</i> ,	§	
Defendants.	§	

**ORDER**

(Filed Mar. 29, 2019)

Before the Court are Defendant Texas A&M 12th Man Foundation's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. No. 33) and Defendants Texas A&M University Athletic Department, Brad Marquardt, Alan Cannon, and Lane Stephenson's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (Doc. No. 34). Plaintiffs have filed Responses in Opposition (Doc. Nos. 40, 54, and 62). Defendants have filed Replies in Support (Doc. Nos. 43 & 77). Plaintiffs have filed a Sur-Reply (Doc. No. 89) and all parties have filed Supplemental Briefs (Doc. No. 93 & 94).

Upon careful consideration of the parties' arguments and applicable law, the Court hereby **GRANTS** Defendant Texas A&M 12th Man Foundation's Motion

to Dismiss (Doc. No. 33) and **GRANTS in part** and **DENIES in part** the other Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (Doc. No. 34).

### **I. Background**

This lawsuit arises out of the publication of an article on the University athletic website in January of 2014. The Defendants in this case include Texas A&M Athletic Department (“A&M Athletic Department”),<sup>1</sup> Texas A&M University 12th Man Foundation (“Foundation”), Brad Marquardt, Alan Cannon, and Lane Stephenson.<sup>2</sup> Plaintiffs allege (and Defendants do not dispute) that some of the Defendants published an article about the “12th Man” on the “official website for news about Aggie athletics.” (Doc. No. 15 at 2). Plaintiffs contend that other Defendants either benefited from or encouraged this article’s publication. Plaintiff, Michael Bynum (“Bynum”) claims to own the copyright in the work that this article allegedly infringes, and alleges that he did not license or otherwise give permission for Defendants to use the material on its website. Defendants do not dispute these claims.

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<sup>1</sup> The Court will refer to the Texas A&M Athletic Department as “A&M Athletic Department” or “Athletic Department,” and will refer to Texas A&M University—who is not a named Defendant in this suit—as the “University.”

<sup>2</sup> The latter three Defendants have been sued in their individual capacities.

Bynum is an author and editor of sports history and memorabilia “coffee-table” books (Doc. No. 15 at 6). He acts as the primary researcher and editor for these books by collecting and reviewing primary documents and conducting interviews. (*Id.*). As a part of his editorial duties, Bynum often employs writers on a work-for-hire basis, providing the writers with his research and having them create pieces for inclusion in the book. (*Id.* at 7). Plaintiffs contend that Bynum occasionally purchases the right to reprint previously published content from these work-for-hire writers. (*Id.*). While Bynum has worked with other publishers in the past, Canada Hockey LLC (doing business as Epic Sports) is Bynum’s own publishing company (and his co-plaintiff in this case). (*Id.*).

Bynum has previously published books about A&M football. (*Id.*). Bynum alleges that he first became intrigued by the 12th Man lore in 1980 while working on his first book with A&M, *Aggie Pride*. (*Id.* at 8). Bynum was so intrigued that in the 1990s he selected the 12th Man story as a topic for a forthcoming book. (*Id.* at 9). Plaintiffs describe the 12th Man story as follows:

The University’s now famous 12th Man tradition was inspired by the actions of E. King Gill at the 1922 football game known as the “Dixie Classic.” Gill, a squad player for A&M’s football team, who was already training with the university’s basketball team, was up in the press box watching his team face the then top-ranked Prayin’ Colonels of Centre College,

when he was waved down to the sideline before halftime to suit up in case his injured team ran out of reserve players. Gill stood on the sideline, ready to play, for the remainder of the game.

Today, the 12th Man tradition is a symbol of the Aggies' unity, loyalty, and willingness to serve when called upon to do so, and is woven into many aspects of life at A&M.

(*Id.* at 8). Plaintiffs allege that Bynum spent the next decade researching Gill and the 12th Man story. (*Id.* at 9). As a part of this research, Bynum sifted through primary documents, visited locations that he felt were significant to Gill's life, and conducted interviews with A&M Athletic Department personnel. (*Id.* at 7, 9). Some of these interviewees included Brad Marquardt ("Marquardt"), an Associate Director of Media Relations, and Alan Cannon ("Cannon"), then, an Assistant Athletic Director for Media Relations. Both are Defendants in the present suit. (*Id.* at 9). Eventually, Bynum hired Whit Canning to produce a biography about Gill ("Gill Biography" or the "work") that Bynum planned to use as the opening chapter to the forthcoming 12th Man book. (*Id.*). The parties do not dispute that Bynum owns the copyright in the Gill Biography,<sup>3</sup> or that Canning is the original author of the work.

Plaintiffs allege that Bynum asked at least two A&M Athletic Department personnel—the former

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<sup>3</sup> "Bynum is the copyright owner of U.S. Copyright Registration No. TXu002020474 for the 2010 draft of the *12th Man* book containing the Gill biography at issue." (Doc. No. 15 at 25).

head of the Foundation and the 2006 editor of the Foundation’s magazine—to proofread drafts of the Gill Biography sometime in 2006. That same year, Bynum discussed a potential purchase agreement for the book with Jerry Cooper, a friend and former editor of the Foundation’s magazine. (*Id.* at 10). Through Cooper, Bynum worked on solidifying a deal with the Association of Former Students of Texas A&M (“Association”) and/or the 12th Man Foundation. Both the Association and the Foundation received these early drafts of Bynum’s work, but ultimately, neither opted to sign a purchase agreement. (*Id.* at 10).

In mid-2010, Bynum emailed Marquardt asking for assistance locating additional photographs to include in the 12th Man book. (*Id.*). Bynum included a PDF draft of the book as an attachment to this email. (*Id.* at 10–11). Plaintiffs contend that this draft of the forthcoming book included the Gill Biography plus pictures and captions. (*Id.*). This PDF draft also contained copyright management information including Bynum’s name, the copyright date, an indication that the copyright was owned by Epic Sports, and a statement that “[n]o part of this work covered by this copyright hereon may be reproduced or used in any form or by any means.” (*Id.* at 12). Plaintiffs allege that Bynum continued to email Marquardt “as late as December 28, 2013,” asking questions related to the book. (*Id.* at 14).

Bynum delayed publication of the book, planning to release it on the 75th anniversary of the 1939 championship season in the fall of 2014. (*Id.* at 13). Bynum and his publishing company executed a publishing



agreement to this effect in November of 2013. (*Id.* at 13–14).

Plaintiffs allege that shortly thereafter, in January of 2014, “during the NFL playoffs, Texas A&M University, primarily through the A&M Athletic Department, launched a campaign to promote its ongoing claim that it is the true owner of the ‘12th Man,’ not the Seattle Seahawks, who had qualified for the 2014 NFL playoffs and whose fan base calls itself the ‘12th Man.’” (*Id.* at 14).

Plaintiffs allege that as a result of this campaign the “A&M Athletic Department and the Foundation directed staff at the A&M Athletic Department, including at least Marquardt and Cannon, to find background information on Gill that could be used to promote the 12th Man story and solicit more donations.” (*Id.* at 15). Then on January 22, 2014, Jerry Cooper emailed Bynum informing him that a “near verbatim copy” of the Gill Biography appeared as the feature story of the University’s e-Newsletter, “which included a hyperlink to a page on the A&M Athletic Department Website displaying the infringing copy of Bynum’s Gill Biography” (hereinafter, the “allegedly infringing work”). (*Id.* at 16).

Later that day, Bynum sent an email to Cannon and Marquardt informing them that they had published and distributed this “near verbatim copy” without his permission and demanding that the work be removed from the A&M Athletic Department Website.

(*Id.* at 22). Marquardt responded, apologetically, stating:

It was an incredibly coincidental mix-up on my part. I was cleaning my office, which you may recall is generally a cluttered mess. While going through files, I found a story of the 12th Man on some slightly yellowed 8.5x11 paper. I had no recollection of it [*sic*] origin. But I'm always seeking background info on the 12th Man especially since we joined the SEC and reporters aren't as familiar with the history of the 12th Man. I asked my secretary to key it in for me which she did. A few days after that, my co-worker asked if I had anything on the 12th Man. Coincidentally, I did and that's how a 16-year old story found its way on the internet.

(Doc. No. 15, Ex. N). In the email, Marquardt went on to ask whether Bynum would be willing to allow the Athletic Department to leave the allegedly infringing work on the website with attribution to Bynum and an explanation that it was an excerpt from Bynum's forthcoming book. (Doc. No. 15 at 22). Bynum refused. (*Id.*). The A&M Athletic Department removed the work from its website, but Plaintiffs contend that this takedown did not remedy the electronic distribution of the allegedly infringing work. (*Id.*). Plaintiffs allege that recipients of the University's e-Newsletter (that hyperlinked to the allegedly infringing work) proceeded to re-share the link or re-distribute electronic copies of the work via email and various social media platforms. (*Id.* at 24).

Plaintiffs claim that Lane Stephenson (“Stephenson”), is the former Director of News and Information Services at the University. Plaintiffs allege that during the relevant time period, Stephenson was in charge of the University website and was responsible for the content in the e-Newsletter and the University’s official Twitter account “@TAMU.” (*Id.* at 5). Plaintiffs allege that Stephenson assisted Marquardt in distributing the allegedly infringing work by publishing the allegedly infringing work online and dispersing the hyperlink via email and Twitter.

Based on these actions, Plaintiffs accuse Defendants of direct and indirect copyright infringement, violations of the Digital Millennium Copyright Act, and unconstitutional taking of property without just compensation (in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and under the Texas Constitution). The Athletic Department moves to dismiss these claims, asserting that Plaintiffs failed to state a claim. (Doc. No. 33). The remaining Defendants have also moved to dismiss on these grounds, and have also invoked sovereign and qualified immunity defenses. (Doc. No. 34). The Court will address each of these arguments in turn.

## **II. Legal Standards**

### *a. Motion to Dismiss Standards*

A defendant may file a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for “failure to state a claim upon which relief may be

granted.” FED. R. CIV. P. 12(b)(6). To defeat a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The court is not bound to accept factual assumptions or legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678–79. When there are well-pleaded factual allegations, the court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.* The court may also consider documents that a defendant attaches to a motion to dismiss, if the documents are “referred to in the

plaintiff's complaint and are central to [the] claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 500 (5th Cir. 2000); see also *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp. 2d 919, 926 (N.D. Tex. 2014).

A court must dismiss a suit for lack of subject matter jurisdiction under Rule 12(b)(1) where it lacks the statutory or constitutional power to adjudicate the case. FED. R. CIV. P. 12(b)(1); see also *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Where "a defendant makes a 'factual attack' upon the court's subject matter jurisdiction over the lawsuit [and] the defendant submits affidavits, testimony, or other evidentiary materials," the plaintiff is also "required to submit facts through some evidentiary method." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981) (delineating the difference between a "facial attack" and a "factual attack" to subject matter jurisdiction in a motion to dismiss). In a "factual attack," the plaintiff also has the burden of proving by a preponderance of the evidence that the court has subject matter jurisdiction. *Id.* The party asserting jurisdiction bears the burden of overcoming the presumption that the cause falls outside the court's limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

*b. Direct Infringement Standard*

Copyright infringement is prohibited by 17 U.S.C. § 501. Section 501 provides that the registered owner of any of the exclusive rights conferred under the

Copyright Act (under 17 U.S.C. §§ 106–118) has a cause of action against any infringer of any of those rights. *See Richard Anderson Photography v. Brown*, 852 F.2d 114, 118 (4th Cir. 1988). In determining whether a defendant has violated § 501, courts follow a two-step direct infringement analysis. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d. Cir. 1946); *Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 722, 790 (5th Cir. 1999). To survive a Motion to Dismiss on a direct infringement claim, a plaintiff must plead facts indicating that a defendant copied its copyrighted work, and that the plaintiff in fact owns the copyright. Where the plaintiff lacks evidence of actual copying, courts allow circumstantial proof, that is, a showing of defendant’s access to the copyrighted work plus probative similarity between the copyrighted work and the alleged infringing material. *See Alcatel*, 166 F.3d at 790. Second, a plaintiff must also plead that the copyrighted work was improperly appropriated, in other words, the defendant took enough of the protectible components of the work to constitute appropriation. *Id.*

*c. Contributory Infringement Standard*

“One infringes contributorily by intentionally inducing or encouraging direct infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). For a contributory infringement claim to survive a Motion to Dismiss, a plaintiff must plead facts that show that the defendant, with knowledge of the infringing activity, induced, caused, or materially contributed to the infringing conduct of another.

*DynaStudy, Inc. v. Houston Ind. Sch. Dist.*, 325 F. Supp. 3d 767, 775 (S.D. Tex. 2017) (citing *Alcatel*, 166 F.3d at 790).

*d. Vicarious Infringement Standard*

One infringes vicariously by “profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930. Thus, vicarious liability requires some degree of supervisory authority over the direct infringer, as well as a direct financial interest in the infringing activity. *DynaStudy*, 325 F. Supp. 3d at 777.

*e. Digital Millennium Copyright Act Violations*

Finally, Plaintiffs allege that Defendants Marquardt and the A&M Athletic Department violated one of the provisions of the Digital Millennium Copyright Act (“DMCA”). 17 U.S.C. § 1202. The DMCA prohibits falsifying, removing, or altering “copyright management information.” 17 U.S.C. § 1202 (a)–(b). As it relates to Plaintiffs’ allegations in the present case, “copyright management information” includes:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the

work, including the information set forth in a notice of copyright.

17 U.S.C. § 1202 (c)(1)–(3).

The Court will now turn to Plaintiffs' claims against each named Defendant.

### **III. Analysis**

#### **a. Claims Against the A&M Athletic Department**

##### *1. Copyright and DMCA Violations*

Plaintiffs allege that the A&M Athletic Department is liable for direct copyright infringement and violations of the DMCA for its intentional infringement of the Gill Biography and for its removal and omission of copyright management information from the allegedly infringing work. (Doc. No. 15 at 24). Defendants respond arguing that the Athletic Department is not an entity that is capable of being sued; rather, it is a department within Texas A&M University. (Doc. No. 34 at 3). Accordingly, the University moves to dismiss under 12(b)(1). Defendants also contend that the University is immune from suit under the Eleventh Amendment and consequently, should not be substituted in lieu of the A&M Athletic Department. (*Id.* at 6). In response, Plaintiffs essentially ask this Court to find that the Athletic Department has the capacity to be sued, or else rewrite the law in a different way by finding that Congress abrogated the states' sovereign immunity for copyright claims.



Plaintiffs make an intriguing—although ultimately unavailing—argument for why the A&M Athletic Department is its own “independent commercial enterprise.” (Doc. No. 62 at 6). Plaintiffs argue two main reasons why the Athletic Department should be treated as a commercial enterprise, separate from the University: (1) the Athletic Department’s structure, finances, and business operations are distinct from the University’s (this point is divided into three subpoints below) and (2) the Athletic Department cannot be viewed as an arm of the State.

First, Plaintiffs contend that the Athletic Department is structured like a business. (Doc. No. 62 at 6). Plaintiffs admit that the Athletic Department has not taken the “formal steps of incorporating,” but argues that nonetheless, it has operational and financial independence from the University. (*Id.*). In support, Plaintiffs allege that the Athletic Department, unlike any other department within the University, has its own business office and its own human resources, marketing, information technology, and compliance departments. (*Id.* at 7). The A&M Athletic Department even has its own Chief Financial Officer. (*Id.*). Plaintiffs also point out that the Athletic Department website is “littered with advertisements” from various big-name sponsors. (*Id.*).

Next, Plaintiffs argue that in addition to being structured like an independent business, the Athletic Department keeps its finances separate from the rest of the University. (*Id.* at 8). Plaintiffs characterize A&M Athletics as a “highly profitable business.” (*Id.* at

6). “The Athletic Department operates on annual revenues of nearly \$200 million dollars, none of which comes from the State or other public dollars.” (*Id.* at 8). Indeed, section 18(d) of Article 7 of the Constitution of the State of Texas prevents “educational and general funds” from being appropriated to intercollegiate athletics. Rather than fund the athletics program with public dollars, Plaintiffs contend that the Athletic Department relies on its annual revenue from ticket sales, media rights, Southeastern Conference revenue sharing, licensing agreements, and private donations through the 12th Man Foundation. (*Id.* at 9). As such, Plaintiffs argue that the A&M Athletic Department is “a separate profit-making subsidiary (created by the University) that operates independently from the University.” (*Id.* at 10).

Last, Plaintiffs also contend that the Athletic Department is “at least in part, comprised of an actual private, non-governmental entity: Texas A&M Ventures, LLC.”<sup>4</sup> (Doc. No. 62 at 10). According to Plaintiffs, Texas A&M Ventures is a “Missouri limited liability corporation affiliated with Learfield Communications, LLC.” (*Id.*). Plaintiffs relate Texas A&M Ventures to the Athletic Department based on the overlap of eight “staff persons.” (*Id.* at 11).

As a result of these “independent operations,” Plaintiffs argue that the Athletic Department cannot

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<sup>4</sup> The Court notes that Texas A&M Ventures, LLC is not a party to this suit and has not been accused of any wrongdoing in this case.

be treated as an arm of the State under the “function by function” analysis set out in *Clark v. Tarrant Cty.*, 798 F.2d 736, 744–45 (5th Cir. 1986) and its progeny (Doc. No. 62 at 14). These factors include “ (1) whether the state statutes and case law view the entity as an arm of the state; (2) the entity’s degree of local autonomy; (3) whether the entity is concerned primarily with local, as opposed to statewide, problems; (4) whether the entity has the authority to sue and be sued in its own name; and (5) whether it has the right to hold and use property.” (*Id.*) (citing *Clark*, 798 F.2d at 744–45). Plaintiffs analyze the “business-like” functions of the Athletic Department, listed above, using the lens provided by *Clark* and its progeny and conclude that the Athletic Department does not “stand in the shoes of the state itself.” (*Id.* at 12–13) (citing *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1036 (5th Cir. 1998)). Notably, Plaintiffs point out that while the “vulnerability of the State’s purse [is] the most salient factor” in this analysis because of the unique financial independence enjoyed by the Athletic Department, the “State’s purse” is likely not at issue. (*Id.* at 13) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)).

Nevertheless, the law compels a holding for Defendants; the A&M Athletic Department has no capacity to be sued. See FED. R. CIV. P. 17(b) (stating that a party’s capacity to sue or be sued in federal court is determined by state law). In discussing jural authority, most courts contemplate whether a department of a city or county has been explicitly granted a “separate

legal existence.” See, e.g., *Hartfield v. Houston Police Dep’t*, No. 1-1-11-4288, 2011 WL 6718795, at \*2 (Dec. 21, 2011); *Johnson v. Miles*, No. 1:07cv507, 2008 WL 4524823, at \*2 (E.D. Tex. Sept. 29, 2008) (quoting *Darby v. Pasadena Police Dep’t*, 939 F.2d 311, 313 (5th Cir. 1991)).<sup>5</sup> Here, although the analysis turns on whether a department within a state entity has a “separate legal existence,” under FED. R. CIV. P. 17(b), a similar analysis applies. There is no indication that the State of Texas has granted the A&M Athletic Department a “separate legal existence.”

Defendants, in support of their argument that the Athletic Department is a part of the University and not its own separate entity, provide the Court with the University’s organizational chart, which they argue “clearly delineates that the Director of Athletics reports to the President of the University, and does not lie outside the governing structure of the University as a whole.” (Doc. No. 34 at 3; Ex. A). Defendants also provide policy statements from the A&M Board of Regents that specifically discuss the Board’s expectation that the University “exercise meaningful oversight of the activities of its athletic department.” (*Id.* at 4). Finally, Defendants provide an affidavit from Scott Woodward,

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<sup>5</sup> “In order for a plaintiff to sue a department of a city or county, that department must enjoy a separate legal existence . . . Unless the political entity that created the department has taken “explicit steps to grant the servient agency with jural authority,” the department lacks the capacity to sue or to be sued.” *Johnson*, 2008 WL 4524823, at \*2 (quoting *Darby*, 939 F.2d at 313).

the current Director of Athletics at the University, in which Woodward declares:

The Athletic Department of Texas A&M University has no separate corporate existence, apart from its role as a department of Texas A&M University. The Athletic Department has no articles of incorporation, no corporate charter, and was not created by an act of the Texas Legislature, or by resolution of the . . . Board of Regents.

(Doc. No. 94, Ex. 3 ¶ 3). Defendants conclude that this evidence demonstrates that the Athletic Department is a part of the University and consequently lacks capacity to be sued as a separate entity. (*See id.*).

Although Plaintiffs list a number of reasons why the Athletic Department could be deemed independent (some appealing, some less so), the fact is that the Athletic Department is not separate. It is a part of the University, not a separate entity. As such, the A&M Athletic Department simply lacks capacity to be sued, and Plaintiffs have failed to meet their burden to prove jurisdiction. *See Kokkonen*, 511 U.S. at 377.

Typically, where the incorrect party was named in a suit, the correct party could be substituted under FED. R. CIV. P. 17. *See, e.g., Goldin v. Bartholow*, 166 F.3d 710, 721 (5th Cir. 1999) (“Under the Rules of Civil Procedure, a party is allowed, and strongly encouraged, to substitute the proper defendant when circumstances change so as to render the prior defendant not the real party in interest.”). Here, however, the “correct

party,” the University, is an arm of the state, and has invoked a sovereign immunity defense under the Eleventh Amendment.<sup>6</sup>

Plaintiffs argue that sovereign immunity does not defeat their claims. To this point, Plaintiffs make another intriguing policy argument as to why sovereign immunity should not bar copyright claims against a state. (Doc. No. 62 at 17). Plaintiffs’ argument is excerpted below:

First, the states simply do not have sovereign immunity in areas, such as bankruptcy, where they surrendered their immunity “in the plan of the Convention.” *Central Virginia Community College v. Katz*, 546 U.S. 356, 373 (2006). In these areas, no abrogation statute is necessary. As explained below, copyright claims are analogous to bankruptcy claims, and are therefore not subject to state sovereign immunity defenses. Second, Congress may abrogate the states’ immunity under Section Five of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Although the Fifth Circuit rejected Congress’s attempt to abrogate state immunities to copyright claims under the Due Process Clause, *see Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) and *Rodriguez v. Tex. Com’n on the Arts*, 199 F.3d 279, 280–81 (5th Cir. 2000), those precedents do not bar Plaintiffs’ claims here. Post-Chavez decisions by

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<sup>6</sup> Moreover, Plaintiffs have not asked (and, in fact, have steadfastly refused) to substitute the University.

the Supreme Court have made clear that abrogation is permissible where, as here, plaintiffs allege an actual constitutional violation. *United States v. Georgia*, 546 U.S. 151 (2006). Moreover, *Chavez* and *Rodriguez* relied heavily on a lack of evidence that states frequently violate copyrights. But, here, Plaintiffs can document more than one hundred fifty (150) lawsuits, either filed or brought to judgment, occurring after the Fifth Circuit's decisions in these two cases.

(Doc. No. 62 at 17).

In *Katz*, the case Plaintiffs use in support of this contention, the Supreme Court held that sovereign immunity did not bar an adversary proceedings brought by a Chapter 11 trustee to set aside alleged preferential transfers by a debtor to a state agency. 546 U.S. at 357. Plaintiffs specifically attempt to analogize the present case to *Katz* by stating that “there simply is no immunity in bankruptcy cases because Congress’s bankruptcy powers involve such a waiver . . . [t]he question in the present case is whether Plaintiffs’ copyright claims fall into a similar category,” where Article 1, section 8 clause 8 of the United States Constitution (which enumerates Congress’s power over intellectual property)<sup>7</sup> “is structurally similar to Congress’s power over bankruptcy.” (Doc. No. 62 at 19). This Court declines to paint with such a broad brush.

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<sup>7</sup> “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, 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.

Plaintiffs miss an important distinction between *Katz* and the case at hand; the Supreme Court was very careful to keep the holding narrow in *Katz*, repeatedly emphasizing the “*in rem*” nature of bankruptcy proceedings and the “*in rem*” jurisdiction of the bankruptcy courts. *Katz*, 546 U.S. at 378 (“In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”). Consequently, this Court declines to extend the holding of *Katz* to apply to copyright claims.

More importantly, the Fifth Circuit in *Chavez* answered this question concerning States’ immunity from copyright suits, and rejected the Plaintiffs’ position. *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000). The court held that abrogation of a State’s Eleventh Amendment sovereign immunity turns on an “express statement of intent” by Congress and a constitutionally valid exercise of power. *Id.* at 503 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996)). The court found that there had not been an express statement of intent or constitutionally valid exercise of power by Congress abrogating State sovereign immunity with regard to copyright actions. *Id.* at 607.<sup>8</sup> Plaintiffs ask this Court to disregard the Fifth

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<sup>8</sup> The *Chavez* case has a long, somewhat torturous history of vacated and remanded opinions stemming from Supreme Court opinions handed down while the suit was pending before the Fifth Circuit. See *Chavez v. Arte Publico Press*, 180 F.3d 674 (5th Cir. 1999) (per curiam) (“The court voted to hear this case en banc, thereby vacating the panel opinion. See *Chavez v. Arte Publico*



Circuit's holding, arguing that when *Chavez* was decided, states were not in the habit of engaging in commercial, intellectual property-based enterprises as they are today. (See Doc. No. 62 at 17). Plaintiffs cite one hundred and fifty-four cases that have been filed since *Chavez* was decided, all of which represent situations where a government entity either had or could have asserted immunity against alleged copyright violations. (*Id.*; Ex. E).<sup>9</sup> Plaintiffs point out how the number of copyright cases against state actors has “ballooned” from seven cases pre-*Chavez* to one hundred and fifty-four since the *Chavez* decision in 2000. (*Id.*). While this increase may be a barometer demonstrating an increase in commercial activity by the States or an increase in litigation (especially in areas concerning intellectual property), or both, the increase itself does not tell the entire story. A survey of these cases demonstrates that less than five percent of the courts involved were willing to allow cases to proceed against

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*Press*, 139 F.3d 504 (5th Cir.), revised and superseded by 157 F.3d 282 (5th Cir.), reh'g granted and opinion vacated, 178 F.3d 281 (5th Cir.1998). While the case was awaiting oral argument, the Supreme Court decided *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). We now REMAND this case to the panel for reconsideration in light of these decisions.”).

<sup>9</sup> Although Plaintiffs ask the Court to circumvent binding precedent, and this Court is of course bound by the Fifth Circuit precedent before it and ultimately declines to adopt their reasoning, the Court thought the Plaintiffs' arguments were worth noting.

state entities despite the Eleventh Amendment.<sup>10</sup> Despite these lopsided results, this Court is not unsympathetic to the reasoning behind the argument that once a State leaves the realm of performing traditional state functions<sup>11</sup> and enters the commercial marketplace, it should be treated just like any other commercial entity and that the failure to do so leads to results that are less than uniform. Additionally, the Court realizes that even within the smaller subset of colleges which may step into the commercial arena, this principle leads to disparate results as one public college (e.g., San Jose State) may be protected from having to defend an intellectual property lawsuit while another mere minutes away (e.g., Stanford) may be forced to participate in the same litigation for the very same activity.<sup>12</sup> The resolution of this disparity, however, is beyond the province of a district court which is not only

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<sup>10</sup> In fact, a survey of these cases indicates that only five courts have actually allowed a case to proceed against the state entity. None of these courts are in the Fifth Circuit, so none are bound by the dictates of *Chavez*. A more detailed analysis of these cases is found in the Appendix.

<sup>11</sup> This Court will not opine as to whether the establishment and maintenance of a strong football program falls under the umbrella of a traditional state function. Although the Court has an idea what the answer to that question would be in Texas, it suspects that a poll of all fifty states on that topic would also lead to a disparity of results.

<sup>12</sup> This incongruous result could occur in this community just as easily. While Texas Southern University and University of Houston might have Eleventh Amendment protection, Rice University, for the same activity, would not. The University of Texas Medical School would have immunity, while Baylor College of Medicine might not.

bound by the demands of the Constitution, but also by controlling Circuit precedent.

The Court holds that the State (and consequently, the University) retains its Eleventh Amendment sovereign immunity in copyright cases. The Eleventh Amendment confers waivable immunity upon sovereign entities. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). The purpose of the Eleventh Amendment is to prevent states from being “compelled to litigate” in suits it neither consented to nor initiated. *Id.* The University is an arm of the state. *Eustice v. Tex. A&M Univ.*, 4:15-cv-3180, 2016 WL 87104444, at \*3 (Sept. 30, 2016) (“As a state-funded state institution of higher education, TAMU is an arm of the state and, therefore, immune from suit.”); *see also* Tex. Educ. Code § 86.02. Plaintiffs do not contend that the State of Texas or the University waived immunity for copyright claims or consented to be sued in Federal court, and Congress has not abrogated the States’ immunity for this cause of action. *See Chavez*, 204 F.3d at 603; *Coll. Savings Bank v. Fl. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Fl. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999). Therefore, the Court finds that substitution of the University would be improper. Accordingly, Plaintiffs’ copyright claims against the A&M Athletic Department are dismissed.

2. *Takings Claim Under Constitution of the State of Texas*

In the alternative, Plaintiffs assert state and federal takings claims against the A&M Athletic Department. (Doc. No. 15 at 30–32). Plaintiffs argue that Defendant A&M Athletic Department took, damaged, or destroyed Plaintiffs’ property through its blatant and intentional infringement of Plaintiffs’ copyright, to the benefit of A&M Athletic Department, without adequate compensation. (*Id.* at 31). Plaintiffs claim that Bynum owns the exclusive copyrights to the 12th Man book and the Gill Biography, and that this is a property interest protected by section 17 of Article 1 of the Constitution of the State of Texas. (*Id.* at 3–31). They further contend that the Athletic Department’s actions constitute a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution. (*Id.* at 32).

As noted above, the A&M Athletic Department is not an entity with capacity to sue or be sued, and, therefore, the takings claims must be dismissed on that basis. Defendants contend further that the Court may not substitute the proper party in interest, the University, an arm of the State, as a party because it enjoys sovereign immunity.

Nevertheless, even if the Court were to substitute the University as the proper party, the state law claims under the Texas Constitution are barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) (holding that a

claim brought in federal court under state law against a State is barred by the Eleventh Amendment). Therefore, the state law takings claims must be dismissed without prejudice for lack of jurisdiction.

3. *Takings Claims Under the Constitution of the United States*

The Fifth Circuit has held that takings claims against a state for monetary damages under the Fifth Amendment to the United States Constitution are barred by the Eleventh Amendment. See *John G. and Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994) (“[A] Fifth Amendment inverse condemnation claim brought directly against the State . . . is . . . barred by the Eleventh Amendment”); *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993) (“Even if the Act amounted to a ‘taking’ under the Fifth Amendment . . . the [ ] claim would be barred because under the Eleventh Amendment, a citizen may not sue his own state in federal court.”).<sup>13</sup>

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<sup>13</sup> In the context of prospective injunctive relief, however, the Fifth Circuit has held that the Eleventh Amendment did not bar a landowner’s federal takings claim. See *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009) (holding that the *Ex Parte Young* exception to Eleventh Amendment immunity applies in the context of a Fifth Amendment takings claim seeking prospective injunctive relief against a state). Plaintiffs seek solely monetary damages, not prospective injunctive relief, for their federal takings claims. (Doc. Nos. 15 at 32-33). Therefore, substituting the University, a party with capacity to be sued, would be futile because the monetary claims against it, as an arm of the State of Texas, are barred by the Eleventh Amendment. In addition, even

The Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V. The “Just Compensation Clause” applies to the States through the Fourteenth Amendment. *See Williamson Cry. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 176 & n.1 (1985) (citing cases). Contrary to Plaintiffs’ contentions, the United States Supreme Court and the Court of Appeals for the Fifth Circuit have repeatedly held that a takings claim under the Just Compensation Clause is not ripe until a plaintiff seeks compensation through the procedures the state has provided. *See id.* at 194 (noting that “Wile Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property *without just compensation*”) (emphasis added) (citation omitted); *Rolf v. City of San Antonio*, 77 F.3d 823, 826–27 (5th Cir. 1996) (“A just compensation claim is not ripe, that is, there is no justiciable case or controversy, until the claimant unsuccessfully has sought compensation from the state, unless that state’s procedures are inadequate.”); *Waltman v. Payne*, 535 F.3d 342, 348 (5th Cir. 2008) (holding that a takings claim is not ripe until (1) the relevant governmental unit has reached a final decision as to what will be done with the property and (2) the plaintiff has sought compensation through whatever adequate procedures the state provides); *Sandy Creek Investors, Ltd. v. City of Jonestown, Tex.*, 325 F.3d 623, 626 (5th Cir. 2003)

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if Plaintiffs had sought solely prospective injunctive relief against the proper party in interest, their federal takings claim is not ripe.

(same) (citing cases). In order to show that state procedures are not adequate, a plaintiff must show that they “almost certainly” would not be compensated under Texas law. *See John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000). “[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Williamson*, 473 U.S. at 195.

“Texas provides an inverse condemnation action for violation of article I, section 17 of the Texas Constitution.” *Town of Flower Mound v. Stafford Estates Ltd. P ‘ship*, 135 S.W.3d 620, 646 (Tex. 2004). Inverse condemnation occurs when a property owner seeks compensation for property taken for public use without process or a proper condemnation proceeding. *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971). As Defendants point out, “sovereign immunity does not shield the State of Texas from a claim based on a taking under Article I, section 17 of the Texas Constitution, known as the ‘takings clause,’” in state court. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2009). A claimant seeking damages in Texas state court for a taking under Article I, Section 17 must show that a governmental actor acted intentionally to take or damage property for a public use. *Id.*

Although Plaintiffs assert that state procedures are inadequate, they fail to plead facts to show that they “almost certainly” would not be compensated under Texas’s inverse condemnation procedure, nor have

they alleged that they have utilized the state procedures and have been refused just compensation. Instead, they contend that *Williamson* does not apply because the property taking in this case is “complete” in the sense that the alleged infringement has already occurred. (Doc. No. 93 at 8–9). This contention ignores clear Supreme Court and Fifth Circuit precedent, which requires not only that the taking be complete in the sense that the relevant governmental unit has come to a final decision as to what will be done with the property (the first prong of the ripeness requirement), but also that the plaintiff has pursued his claim in state court (the second prong of the ripeness requirement). *See Williamson*, 473 U.S. at 194–95 (explaining the second prong); *Waltman*, 535 F.3d at 348 (setting forth the two prongs of the ripeness analysis); *Sandy Creek Investors, Ltd.*, 325 F.3d at 626 (same). Since they have not alleged facts to indicate that they have adjudicated their state law takings claims in state court, Plaintiffs’ federal takings claims are not ripe for adjudication. Accordingly, even if they had named the proper party in interest, Plaintiffs’ federal taking claim is premature and must be dismissed as not being ripe.

**b. Claims against the 12th Man Foundation**

Plaintiffs allege that the Foundation is liable for contributory and vicarious copyright infringement for their purported role in the distribution of the allegedly infringing work. (Doc. No 15 at 26–27). As previously



mentioned, for a claim for contributory infringement to survive a Motion to Dismiss, Plaintiffs must plead facts indicating that Defendants (1) had knowledge of the infringing activity and (2) induced, caused, or materially contributed to the infringing activity. *Dyna-Study*, 325 F. Supp. 3d at 775. For Plaintiffs' claim for vicarious infringement to survive, Plaintiffs must allege facts demonstrating that Defendants (1) had the right and ability to supervise the alleged infringer and (2) had a financial interest in or benefitted financially from the infringement while making no attempt to derail the infringement. *Grokster*, 545 U.S. at 930.

A contributory infringer must have "knowledge of the infringing activity"; in the present case, Plaintiffs failed to plead facts indicating that the Foundation or any employee thereof had knowledge of the infringement. *Alcatel*, 166 F.3d at 790. Moreover, Plaintiffs' allegations to this effect are conclusory: "Defendants at all times had knowledge of these acts and the infringement of the Gill Biography." (Doc. No. 15 at 27). Plaintiffs do no more than "lump" the Foundation together with other Defendants, failing to allege facts about what, specifically, the Foundation did to contributorily infringe. See *Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) ("When the plaintiffs complaint uses blanket terms covering all the defendants, by lumping them together or calling them collectively [defendants], these allegations are properly disregarded."). Plaintiffs do not allege plausible facts indicating that the Foundation had any knowledge that Marquardt had his secretary "key in" the Gill Biography and

remove the copyright management information, or that he offered the allegedly infringing work for publication on the University's website. *See DynaStudy*, 325 F. Supp. 3d at 777 (dismissing the plaintiffs contributory infringement claim, finding that its mere allegation that defendant "had 'reasonable grounds to believe' that his actions would induce infringement" was insufficient to survive a motion to dismiss). Plaintiffs allege that in 2006, Bynum emailed an early draft of the work to Foundation personnel, but do not allege that this had any implication on the eventual infringing activity, which occurred years later. (Doc. No. 15 at 10). Accordingly, Plaintiffs' claim against the Foundation for contributory infringement is dismissed.

Plaintiffs' claim of vicarious infringement is also dismissed. Plaintiffs have pleaded facts satisfying the second element of vicarious infringement (that being the possibility of a financial reward), but not the first element. Plaintiffs allege that the Foundation had a financial interest in using the Gill Biography to protect the 12th Man brand because it relies on the tradition to generate donations, its primary source of funding. (Doc. No. 15 at 27). Regardless, Plaintiffs have not pleaded facts indicating that the Foundation had supervisory authority over Marquardt (or any of the other allegedly direct infringers).<sup>14</sup> Thus, Plaintiffs

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<sup>14</sup> Plaintiffs have not alleged that any of the individually named defendants are employed by the 12th Man Foundation. (Doc. No. 15 at 4–5).

claim for vicarious infringement against the Foundation is dismissed.

### **c. Claims against Marquardt**

Plaintiffs allege that Marquardt (in his individual capacity) is liable for direct and contributory infringement as well as violations of the DMCA. As stated above, Marquardt is the Associate Director of Media Relations for the A&M Athletic Department, and is responsible for the “@AggieFootball” Twitter account. Defendants respond that, as an employee of the state, Marquardt is entitled to qualified immunity.<sup>15</sup>

#### *1. Qualified Immunity*

Claims against a public official in his or her individual capacity are subject to the defense of qualified immunity. *See, e.g., Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 338 (5th Cir. 2003). In addressing a public official’s claim to qualified immunity, courts apply the following test. First, the court must determine whether the plaintiff has made a sufficient showing that the official violated a clearly established constitutional or

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<sup>15</sup> Plaintiffs disagree that the individually named Defendants are qualifiedly immune because, according to Plaintiffs, “the Athletic Department [which employs these Defendants] is neither the State nor an arm-of-the State.” (Doc. No. 62 at 39). As such, Plaintiffs conclude that these Defendants are “not State employees.” (*Id.*). The Court has overruled Plaintiffs’ underlying argument that the Athletic Department has a separate legal existence. On those same grounds, the Court overrules Plaintiffs’ argument on this point.

statutory right. *Id.* at 337. Next, if the answer to this question is in the affirmative, courts ask whether the official's actions were objectively reasonable in light of the clearly established right. *Id.* Thus, "[t]he second prong of this task actually subdivides into two inquiries: (a) whether the allegedly violated rights were clearly established at the time of the incident and (b) whether the violators' conduct was objectively unreasonable in light of those rights." *Khan v. S. Univ. & Agric. & Mech. Coll. Bd. of Supervisors*, No. 03-30169, 2005 WL 1994301, at \*3 (5th Cir. Aug. 19, 2005). At the motion to dismiss stage, "it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness.'" *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002).

First, Plaintiffs have pleaded facts demonstrating that Marquardt violated a clearly established right. Courts have found that "copyright protection is [a] clearly established" right. *Campinha-Bacote v. Bleidt*, No. H-10-3481, 2011 WL 4625394, at \*3 (S.D. Tex. Oct. 3, 2011). Relatedly, the prohibition against altering copyright management information also protects a "clearly established right" (and a well-known practice in academia). *See* 17 U.S.C. § 1202.

Next, Plaintiffs have pleaded facts which meet the second prong of the qualified immunity analysis. Plaintiffs allege that Marquardt violated Bynum's exclusive rights in his work when Marquardt asked his secretary to "key in" the Gill Biography, removed the copyright management information, and offered the work for distribution via the University's e-Newsletter. Drawing

every inference in the light most favorable to Plaintiffs, as the Court must do at this stage, the Court finds that an objectively reasonable individual would have known (or had reason to know) that taking a work authored by another, having one's secretary type it up omitting all indication of who owned or had edited the work—and distributing the work via an e-Newsletter, was bound to violate U.S. copyright laws. Marquardt allegedly included Whit Canning's name on the infringing work; however, this alone does not tip the scale in his favor at this stage. (Doc. No. 34 at 22). Accordingly, the Court denies Marquardt qualified immunity based on the allegations of infringement and the DMCA violations asserted in Plaintiffs' well-pleaded complaint.

## *2. Direct Infringement*

The facts described above that prompted the Court to deny Marquardt's qualified immunity defense also establish a prima facie case of direct copyright infringement. Specifically, Plaintiffs have alleged that Marquardt had access to Bynum's work and that the allegedly infringing work bears probative similarity to the copyrighted work. First, Bynum contends that in June of 2010, he emailed a draft copy to Marquardt and Glen Johnson, a photographer with the Athletic Department. Next, Plaintiffs claim that the Gill Biography that was distributed via the e-Newsletter was a "near verbatim copy" of the draft Bynum had previously sent to Marquardt and Johnson. It is reasonable to infer that this "near verbatim" reproduction

encompassed enough of the protectible aspects of Bynum's copyrighted work to constitute appropriation of the same. For purposes of the Motion to Dismiss analysis, Plaintiffs have pleaded facts indicating that Marquardt infringed Bynum's exclusive rights to his work.

### 3. *Contributory Infringement*

Plaintiffs have also alleged that Marquardt contributorily infringed Bynum's work when he tweeted from the "@AggieFootball Twitter account hyperlinking to the page on the A&M Athletic Department website displaying the infringing article." (Doc. No. 15 at 27). Indeed, this act, as alleged, meets both prongs of the contributory infringement test. Marquardt (1) had knowledge of the infringing activity (Plaintiffs allege that he created the allegedly infringing work in the first place), and (2) materially contributed to the infringing activity (e.g., distribution) by posting a link to the allegedly infringing work on the department's Twitter page, resulting in wider distribution. Accordingly, Plaintiffs have pleaded facts indicating that Marquardt contributorily infringed Bynum's work.

It should be noted that "it is not plausible to hold [an actor] liable secondarily" for the infringement that the actor committed directly. *DynaStudy*, 325 F. Supp. 3d at 776. Nevertheless, since Plaintiffs may plead their claims in the alternative, their direct and indirect infringement claims may survive against Marquardt

at this stage (regardless that, as a matter of law, he cannot ultimately be held liable for both).

#### 4. *DMCA Violations*

Plaintiffs also allege that Marquardt violated one of the provisions of the DMCA. 17 U.S.C. §1202. The DMCA prohibits falsifying, removing, or altering “copyright management information.” *Id.* at (a)–(b). Plaintiffs have pleaded sufficient facts indicating that Marquardt knew or should have known who the “yellowed” page “story of the 12th Man” belonged to based on the copyright management information that Plaintiffs allege was included in the PDF draft Bynum sent Marquardt in 2010. (Doc. No. 15 at 22). Plaintiffs also emphasize that Bynum was emailing with Marquardt about the 12th Man book in the months leading up to the distribution of the allegedly infringing work. (*Id.* at 14). Plaintiffs claim that this fact makes it more improbable that Marquardt simply forgot who provided him with the Gill Biography; Plaintiffs allege that he should have at least “remembered” that it did not belong to him. Plaintiffs also claim that in the “near verbatim” copy that appeared online, Marquardt removed and omitted all indication of who owned or had edited the work. Drawing all inferences in the light most favorable to the Plaintiffs, as the Court must do at this stage, the Court finds that Plaintiffs have sufficiently pleaded their claim against Marquardt for DMCA violations.

**d. Claims Against Cannon**

Plaintiffs allege that Cannon (in his individual capacity) is liable for direct and contributory infringement. Cannon is the Associate Athletic Director of Media Relations for the A&M Athletic Department. Plaintiffs allege that Cannon is responsible for handling media relations for A&M's sports programs and that he is responsible for the content of the website. (Doc. No. 15 at 5). Defendants respond that Cannon, like Marquardt, is entitled to qualified immunity. The Court will apply the qualified immunity analysis to each claim before determining whether Plaintiffs have pleaded sufficient facts to overcome Defendants' Motion to Dismiss on that point.

*1. Direct Infringement*

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Cannon has a qualified immunity defense to Plaintiffs' infringement claims. As mentioned above, Plaintiffs have met the first prong of the qualified immunity analysis because copyright protection is a clearly established right. Regardless, Plaintiffs have failed to plead facts indicating that Cannon's conduct was "objectively unreasonable" under the second prong of the qualified immunity analysis. It was not objectively unreasonable for Cannon to have "approved the distribution and display" of the allegedly infringing work where Plaintiffs have failed to plead facts indicating that Cannon had



any knowledge that the work he was approving violated any law or copyright. (Doc. No. 15 at 25); *see Malley*, 475 U.S. 341; *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (finding that an officer is entitled to qualified immunity if a reasonable officer could have believed his or her actions were lawful in light of information he or she possessed at the time).

Moreover, even if Cannon’s qualified immunity defense failed, in order to survive the Motion to Dismiss on this point, Plaintiffs’ pleaded facts would still fall short as to the first element of a direct infringement claim (actual or constructive copying).<sup>16</sup> Plaintiffs have not alleged that Cannon “actually copied” the Gill Biography. Plaintiffs have also failed to allege that Cannon had access to the copyrighted work. Plaintiffs contend that “Bynum informed . . . Cannon of his research and work to develop the 12th Man book in order to confirm certain facts about Gill’s athletic tenure at Texas A&M.” (Doc. No. 62 at 44–45). Nevertheless, Cannon’s alleged awareness of Bynum’s research does not equate to his access to Bynum’s copyrighted work. As described above, without access to the original work, constructive copying—that is, probative similarity between the original and the copy—cannot be established. Accordingly, Plaintiffs’ claim for direct infringement against Cannon fails.

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<sup>16</sup> “A copy is legally actionable if (1) the alleged infringer actually used the copyrighted material to create his own work, and (2) substantial similarity exists between the two works.” *Alcatel*, 166 F.3d at 790.

2. *Contributory Infringement*

Based on this record, Cannon is also entitled to the protection of qualified immunity for this alleged indirect infringement. The second-prong of the qualified immunity analysis requires the Court to determine whether the defendant acted as a “reasonable official” would under the circumstances. In cases, as here, where the defendant is the secondary actor in the infringement (e.g., is accused of indirect infringement) and has asserted a qualified immunity defense, a plaintiff must demonstrate that the defendant had actual or constructive knowledge of the underlying direct infringement. *See Alcatel*, 166 F.3d at 790.

While copyright protection constitutes a clearly established right, the dispositive question here is “whether an objectively reasonable official would understand that the alleged improper actions were unlawful.” *Campinha-Bacote*, 2011 WL 4625394, at \*3. Without actual or constructive knowledge of the alleged copying, a reasonable official would not be able to discern whether the act was unlawful. *See Anderson*, 483 U.S. at 641. Here, Plaintiffs have not alleged facts indicating that Cannon knew (or had reason to know) about the underlying infringement. Thus, it cannot be said that a reasonable official would have known that publishing the allegedly infringing work online was improper or unlawful in itself. As such, Plaintiffs’ claims against Cannon are dismissed.

**e. Claims Against Stephenson**

Finally, Plaintiffs allege that Stephenson (in his individual capacity) is liable for direct and contributory copyright infringement. As stated above, Stephenson is the former Director of News and Information Services at the University. Plaintiffs allege that in 2014, when the events at issue occurred, Stephenson was responsible for the content of the University’s e-Newsletter, website, and Twitter account, “@TAMU.” (Doc. No. 15 at 5). Once again, Defendants assert qualified immunity. As above, the Court will begin with the qualified immunity analysis for each claim.

*1. Direct Infringement*

Stephenson has a qualified immunity defense to Plaintiffs’ infringement claims. To overcome the qualified immunity defense, Plaintiffs must allege facts showing that a clearly established right was violated, and that Stephenson’s actions were “objectively unreasonable” in light of this right. *See Khan*, 2005 WL 1994301, at \*3. First, as described above, copyright protection is a clearly established right. Regardless, Plaintiffs have failed to allege facts showing that Stephenson’s conduct was “objectively unreasonable” under the second prong of the analysis. A claim of direct infringement requires a showing that the alleged infringer actually or constructively copied the copyrighted work.<sup>17</sup> Thus, acting unreasonably under these

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<sup>17</sup> As described above, “constructive copying” may be based on circumstantial proof of access to the work plus probative

circumstances would mean that Stephenson had actually or constructively copied the Gill Biography. Plaintiffs have failed to plead facts indicating that that Stephenson was even aware that the Gill Biography existed, much less that he actually copied or had access to the original work. The Court finds that Plaintiffs have failed to plead sufficient facts to overcome Stephenson's qualified immunity defense.

Even if Stephenson's qualified immunity defense had been overruled, Plaintiffs' direct infringement claim against him would still fail. Plaintiffs' only allegations against Stephenson on this point state that Stephenson "featured" the hyperlink to the allegedly infringing work in the e-Newsletter and promoted the allegedly infringing work from the "@TAMU" Twitter account. (Doc. No. 15 at 5, 25). Neither of these allegations satisfy the elements of a direct infringement claim which, of course, are (1) actual or constructive copying and (2) improper appropriation. Although Plaintiffs have alleged that the infringing work is a "near verbatim copy" of the original, there are no allegations that Stephenson was responsible for creating this copy (or that he even had access to the original work). It cannot be said that Stephenson's actions, as alleged, meet the elements of a direct infringement claim. The direct infringement claims against Stephenson are dismissed.

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similarity between the original and infringing works. *See Alcatel*, 166 F.3d at 790.

## 2. *Contributory Infringement*

Under this same reasoning, it similarly cannot be said that Stephenson acted unreasonably under Plaintiffs' contributory infringement theory. A reasonable individual would not have known that merely circulating a hyperlink to an article, which a coworker flagged for distribution, was improper or unlawful.<sup>18</sup> Accordingly, Stephenson is qualifiedly immune from suit for this claim as well.

Assuming *arguendo* that Stephenson was not entitled to qualified immunity, Plaintiffs' claim would still fail. Plaintiffs allege that Stephenson contributorily infringed Bynum's copyrighted work because Stephenson was responsible for a promotional tweet from the "@TAMU" Twitter account. This tweet, similar to that from the "@AggieFootball" account, hyperlinked to the allegedly infringing work. Plaintiffs also contend that Stephenson created the e-Newsletter that featured the link to the allegedly infringing work. Nevertheless, Plaintiffs' claim against Stephenson for contributory infringement fails—Plaintiffs have not alleged any facts indicating that Stephenson knew or should have known about the infringing activity. While a finding of contributory infringement does not require actual knowledge of particular *instances* of infringement, the plaintiff must still plead facts indicating that the defendant knew or should have known about the alleged direct infringement of another prior

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<sup>18</sup> See the Court's analysis for Cannon's qualified immunity defense to contributory infringement, *supra*.

to the filing of the suit. *DynaStudy*, 325 F. Supp. 3d at 777 (citing *Alcatel*, 166 F.3d at 790). As alleged, Stephenson perhaps contributed to the infringement by compiling the e-Newsletter that ultimately distributed a link to the allegedly infringing work; however, absent particularized facts as to Stephenson's actual or constructive knowledge of the alleged direct infringement, Stephenson cannot be held liable due to qualified immunity. The contributory infringement claims against Stephenson are dismissed.

#### **IV. Conclusion**

For the foregoing reasons, the Court hereby **GRANTS** Defendant Texas A&M 12th Man Foundation's Motion to Dismiss (Doc. No. 33) and **GRANTS in part** and **DENIES in part** the other Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (Doc. No. 34). Consequently, Plaintiffs' copyright related claims against the A&M Athletic Department, 12th Man Foundation, Cannon, and Stephenson are **DISMISSED**. Additionally, Plaintiffs' takings claims based on federal law are **DISMISSED**. Plaintiffs' takings claims based on state law are **DISMISSED without prejudice**. Finally, Defendants' Motion to dismiss is **DENIED** as to Defendant Marquardt.

Signed this 29th day of March, 2019.

/s/ Andrew S. Hanen  
Andrew S. Hanen  
United States District Judge

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**APPENDIX**

This Court's review found only five cases that arguably support the Plaintiffs' position here:

In *Berry v. Alabama*, Civ. A. No. 99-C-1053-NE (N.D. Ala. May 25, 1999), there is no discussion as to why the University's motion was denied, nor is there any access to the pleadings to aid in the understanding of the nature of the case and the relief sought. The motion to dismiss was denied on May 25, 1999, just one month before the United States Supreme Court decided *Florida Prepaid* and a year before the Fifth Circuit decided *Chavez*. Although the complete absence of available analysis leaves this Court little on which to base a conclusion. It is possible that the district court in Alabama interpreted the Copyright Remedies Clarification Act ("CRCA") as validly abrogating the States' Eleventh Amendment immunity, which is not the law in the Fifth Circuit since *Florida Prepaid* and *Chavez*. Since this opinion, the Eleventh Circuit has issued an opinion overruling this (potential) holding in favor of valid abrogation. *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. of Georgia*, 633, F.3d 1297, 1313–1317 (2011) (finding "Congress may not abrogate the State's sovereign immunity pursuant to the Copyright and Patent Clause," and overruling the appellant's alternative argument that "§ 5 of the Fourteenth Amendment supports Congress' abrogation of the State's sovereign immunity under the CRCA.>").

In *Cambridge Press et al. v. Becker et al.*, Civ. A. No. 1:08-cv-1425-ODE (N.D. Ga. Sept. 30, 2010), the

district court found that the *Ex Parte Young* exception applied to claims for contributory copyright infringement where the plaintiffs sought solely prospective injunctive relief. After granting summary judgment on all of the claims except the contributory infringement claim, the court cautioned plaintiffs:

“Under *Ex parte Young*, 209 U.S. 123 (1908), suit against Defendants is allowed to the extent that it seeks “prospective equitable relief to end *continuing* violations of federal law.” *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). Plaintiffs must therefore satisfy the “ongoing and continuous” requirement from *Ex Parte Young* in order to receive prospective relief. *Id.* at 1338.”

*Cambridge Press*, Civ. A. No. 1:08-cv-1425-ODE, Doc. No. 235 at 30 n. 8. Notably, Plaintiffs here do not seek “prospective” injunctive relief for an “ongoing and continuous” violation of federal law. This is a key distinction and renders this case inapplicable to Plaintiffs’ claims for monetary damages against an arm of the State of Texas.

*Keeton v. Board of Education*, Civ. A. No. 1:15-cv-1036-LPS-CJB (D. Del. Oct. 12, 2016), is a First Amendment case against officials and a county school board; it has nothing to do with a State’s invocation of Eleventh Amendment immunity. It does not mention the Eleventh Amendment, perhaps because the Defendant is an arm of a municipality rather than a State. This case is inapposite and does not address a



state's Eleventh Amendment immunity or lack thereof for copyright infringement.

In *Oracle v. The Oregon Health Insurance Exchange Corp.*, Civ. A. No. 3:14-cv-1279-BR (D. Or. Nov. 18, 2015), the court found that Oregon waived its immunity in a forum selection clause in a contract with Plaintiff. Here, there is no contract, no forum selection clause, nor any other contractual device that could arguably waive the State of Texas' sovereign immunity for this lawsuit.

In *Allen et al. v. Cooper*, Civ. A. No. 5:15-cv-00627-BO (E.D.N.C. Mar. 23, 2017), plaintiffs, who were in the business of taking photographs and video of shipwrecked vessels and publishing them, sued defendant Governor of the State of North Carolina and other state officials for copyright infringement for publishing some of their works on the internet. Defendants settled with Plaintiffs for \$15,000 and signed a settlement agreement. After settling the copyright dispute, North Carolina passed a statute declaring all photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck in the custody of any agency of the State were public record and prohibiting any limitations on the use of those photographs or videos.

Plaintiffs sued the State, asserting a copyright infringement and a takings claim. Defendants moved to dismiss on the basis of Eleventh Amendment immunity. Reasoning that neither the United States Supreme Court nor the Fourth Circuit had directly ruled on the

issue, the court found that, contrary to Fifth Circuit law in *Chavez*, Congress had validly abrogated states' sovereign immunity based on section 5 of the Fourteenth Amendment. [Doc. No. 69 at 9]. The district court further challenged Supreme Court precedent in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny, calling the general doctrine of state sovereign immunity "flawed and contrary to the fundamental nature and meaning of the Constitution." [Doc. No. 69 at 10]. The court notes several learned scholars who question the long-standing doctrine of sovereign immunity. [See *id.* at 11 n.5]. The court concluded that the Eleventh Amendment means that a state may not be sued by a citizen of another state in federal court where the basis of jurisdiction lies solely on diversity. [*Id.* at 12]. It then questioned stare decisis and the moorings of the Eleventh Amendment, but later relented, stating that it is "constrained, under the absolute hierarchical system of courts in the federal judiciary, to hold that the defense of sovereign immunity is available to the states in federal court in a case arising under this Court's federal question jurisdiction." [*Id.* at 17]. The court went on to hold, nonetheless, that Congress validly abrogated sovereign immunity and that "such an abrogation was congruent and proportional to a clear pattern of abuse by the states." [*Id.*] The court found that the state law claims were barred by sovereign immunity, however. [*Id.* at 18].

The Fourth Circuit rejected the district court's conclusion that Congress had validly abrogated sovereign immunity and reversed "each of the district

court's rulings on immunity and remand with instructions that the district court dismiss without prejudice Allen and Nautilus's claims against North Carolina, the Department, and the public officials acting in their official capacities and to dismiss with prejudice the remaining claims against the officials in their individual capacities." *Allen v. Cooper*, 895 F.3d 337, 358 (4th Cir. 2018). Plaintiffs have filed a petition for a writ of certiorari in the United States Supreme Court.

In sum, each of these cases is distinguishable from the present case or wholly inapplicable. The closest analog is the *Allen* case. At the time the decision was rendered, the Fourth Circuit had not directly addressed whether Congress had validly abrogated sovereign immunity when it enacted the CRCA. The Fourth Circuit has now decidedly rejected the district court's conclusion and reversed. Consequently, even the most favorable cases Plaintiffs refer to, do not really help them.

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