



## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

**[Docket No. 2020-9]**

### **Sovereign Immunity Study: Notice and Request for Public Comment**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of Inquiry.

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**SUMMARY:** The U.S. Copyright Office is initiating a study to evaluate the degree to which copyright owners are experiencing infringement by state entities without adequate remedies under state law, as well as the extent to which such infringements appear to be based on intentional or reckless conduct. The Office seeks public input on this topic to assist it in preparing a report to Congress.

**DATES:** Written comments are due on or before [INSERT 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <http://www.copyright.gov/docs/sovereignimmunitystudy>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, [regans@copyright.gov](mailto:regans@copyright.gov); Kevin R. Amer, Deputy

General Counsel, kamer@loc.gov; or Mark T. Gray, Attorney-Advisor, mgray@loc.gov. They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** On March 23, 2020, the Supreme Court issued its decision in *Allen v. Cooper*,<sup>1</sup> holding that the Copyright Remedy Clarification Act of 1990 (“CRCA”), which attempted to make states subject to liability for copyright infringement to the same extent as other parties, did not validly abrogate states’ sovereign immunity against suit. Following the decision, Senators Thom Tillis and Patrick Leahy sent a letter to the Copyright Office requesting that the Office “research this issue to determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”<sup>2</sup>

## **I. Background**

### *a. The Copyright Remedy Clarification Act*

Under the doctrine of sovereign immunity, “a federal court generally may not hear a suit brought by any person against a nonconsenting State.”<sup>3</sup> The Fourteenth Amendment to the Constitution, however, “can authorize Congress to strip the States of immunity.”<sup>4</sup> Section 1 of that Amendment provides that states may not “deprive any person of life, liberty, or property, without due process of law,”<sup>5</sup> and section 5 gives Congress the “power to enforce, by appropriate legislation,” those prohibitions,<sup>6</sup> including by subjecting states to suit in federal court.<sup>7</sup>

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<sup>1</sup> 140 S. Ct. 994 (2020).

<sup>2</sup> Letter from Sens. Thom Tillis & Patrick Leahy to Maria Strong, Acting Register of Copyrights, U.S. Copyright Office at 1 (Apr. 28, 2020), available at <https://www.copyright.gov/rulemaking/state-sovereign-immunity/letter.pdf> (“Request Letter”).

<sup>3</sup> *Allen*, 140 S. Ct. at 1000.

<sup>4</sup> *Id.* at 1003.

<sup>5</sup> U.S. Const. amend. XIV, sec. 1.

<sup>6</sup> U.S. Const. amend. XIV, sec. 5.

<sup>7</sup> *Allen*, 140 S. Ct. at 1003.

Enacted on November 15, 1990, the CRCA amended the Copyright Act to expressly provide that states are not immune from suit for copyright infringement.<sup>8</sup> Congress adopted the legislation in response to a 1985 Supreme Court decision, *Atascadero State Hospital v. Scanlon*, in which the Court held that to abrogate state sovereign immunity under the Fourteenth Amendment, Congress must use “unequivocal” language making its intention explicit.<sup>9</sup> At the time, the Copyright Act was silent on whether states were subject to liability,<sup>10</sup> although some pre-*Atascadero* courts had held that Congress intended states to be subject to infringement claims.<sup>11</sup> Shortly after the *Atascadero* decision, Congress asked then-Register of Copyrights Ralph Oman to study what “practical problems” copyright owners faced in enforcing their rights against state governments.<sup>12</sup> The Office subsequently issued a request for public comment<sup>13</sup> and received approximately forty responses.<sup>14</sup> Most comments were submitted by copyright owners, some of whom expressed concern about the risk of future infringement by state

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<sup>8</sup> Public Law 101-553, sec. 2(a)(2), 101 Stat. 2749 (1990), *codified at* 17 U.S.C. 511.

<sup>9</sup> 473 U.S. 234, 247 (1985).

<sup>10</sup> See 17 U.S.C. 501(a) (1977) (“Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.”).

<sup>11</sup> See *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979) (affirming copyright damages and attorneys’ fees award under 1909 Act because language providing for damages against infringers was “sweeping and without apparent limitation, suggesting that Congress intended to include states within the class of defendants”); *Johnson v. Univ. of Va.*, 606 F. Supp. 321, 324 (W.D. Va. 1985) (“[B]ased on the *Mills Music* analysis of the 1909 Act, and this court’s examination of the operative language of the 1976 Act, the court determines that the 1976 Act waived the states’ Eleventh Amendment immunity from liability for damages and equitable relief for copyright infringements.”). *But see Wihtol v. Crow*, 309 F.2d 777, 782 (8th Cir. 1962) (dismissing copyright claim against school district on Eleventh Amendment grounds because the district was “an instrumentality of the State of Iowa, constituting a part of its educational system and engaged in performing a state governmental function under state law and at state expense”).

<sup>12</sup> Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, to Ralph Oman, Register of Copyrights, U.S. Copyright Office at 1 (Aug. 3, 1987), reproduced in U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment, A Report of the Register of Copyrights* (June 1988), <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>.

<sup>13</sup> *Request for Information: Eleventh Amendment*, 52 FR 42045 (Nov. 2, 1987).

<sup>14</sup> The public comments can be viewed at <https://archive.org/details/Copyright11thAmendmentStudyComments>.

entities, while others discussed past acts of infringement committed by states.<sup>15</sup> The Office summarized these comments in a public report (the “Oman Report”), which ultimately recommended that Congress “amend the Copyright Act . . . to ensure that copyright owners have an effective remedy against infringing states.”<sup>16</sup>

After the Office issued its report, the CRCA was introduced in Congress, and Congress held hearings on the issue of state infringement. The final legislation amended the Copyright Act to provide that “[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment . . . or under any other doctrine of sovereign immunity, from suit in Federal court by any person” for copyright

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<sup>15</sup> U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* 6 (June 1988) (“Oman Report”) (“The major concern of copyright owners appears to be widespread, uncontrollable copying of their works without remuneration”), available at <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf>. The CRCA’s legislative history reveals similar concerns about prospective infringement. See *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States*, Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary, 101st Cong. 102 (1989) (testimony of Barbara Ringer, former Register of Copyrights) (until *Atascadero*, states believed “you have got to pay,” but now “their lawyers are going to tell them you don’t have to pay,” and “gradually, and maybe not so gradually, this free ride will become quite the rule rather than the exception unless you do something”); *Copyright Remedy Clarification Act*, Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 101st Cong. 69 (1989) (prepared statement of Copyright Remedies Coalition) (expressing concern that “states may well confuse insulation from damages with full immunity from any copyright liability, causing them to believe that their activities are beyond the reach of the Copyright Act”).

<sup>16</sup> Oman Report at 104. The Office’s specific legislative recommendations turned on whether Congress could abrogate state immunity under Article I, section 8, clause 8 of the Constitution (the “Intellectual Property Clause”). The Supreme Court had not yet addressed that question. Shortly before the report was completed, however, the Court granted certiorari in *United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987), certiorari granted sub nom. *Pennsylvania v. Union Gas Co.*, 485 U.S. 958 (1988), in which the Third Circuit had held that Article I could be a basis for abrogation. The Oman Report recommended that if the Supreme Court affirmed that decision, Congress should revise section 501 of the Copyright Act to “clarify its intent to abrogate states’ Eleventh Amendment Immunity pursuant to its [Intellectual Property Clause] power.” Oman Report at 104. Otherwise, the Report recommended that Congress “amend the jurisdictional provision in 28 U.S.C. § 1338(a), to provide that where states are defendants, private individuals may sue them in state court for copyright damages.” *Id.* at 104-05.

infringement.<sup>17</sup> It further provided that “[a]ny State . . . shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.”<sup>18</sup>

*b. Florida Prepaid v. College Savings Bank*

Nine years after enactment of the CRCA, the Supreme Court issued an opinion in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>19</sup> which addressed whether Congress had validly abrogated states’ immunity from patent infringement suits when it adopted the Patent Remedy Act. In *Florida Prepaid*, the Court set out a number of requirements that Congress needed to meet for such abrogation to constitute a valid exercise of Congress’s authority under section 5 of the Fourteenth Amendment. First, Congress was required to identify a “pattern of patent infringement” by state governments.<sup>20</sup> Second, the infringement must constitute a violation of the Fourteenth Amendment such that patent owners were being deprived of property “without due process of law.”<sup>21</sup> The Court explained that such a deprivation occurs “only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent.”<sup>22</sup> The Court cautioned that, because states do not violate due process when they commit a “negligent act that causes unintended injury to a person’s property,” patent infringement that was merely negligent rather than intentional or reckless did not violate the Fourteenth Amendment.<sup>23</sup> Third, there must be

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<sup>17</sup> 17 U.S.C. 511(a); *see also id.* at 511(b) (“In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity.”).

<sup>18</sup> *Id.* at 501(a).

<sup>19</sup> 527 U.S. 627 (1999).

<sup>20</sup> *Id.* at 640.

<sup>21</sup> *Id.* at 642.

<sup>22</sup> *Id.* at 643.

<sup>23</sup> *Id.* at 645.

“congruence and proportionality” between the constitutional violations Congress seeks to remedy and the means adopted for that purpose.<sup>24</sup>

The Court in *Florida Prepaid* struck down the Patent Remedy Act for failure to meet these requirements. It concluded that Congress had not identified a pattern of infringement because (1) Congress had “little evidence of infringing conduct” by state actors;<sup>25</sup> (2) Congress “barely considered” the adequacy of state-law remedies for patent infringement by the state;<sup>26</sup> (3) the legislative record did not reflect a pattern of intentional or reckless infringements, but instead consisted only of “a handful of instances of state patent infringement that do not necessarily violate the Constitution”;<sup>27</sup> and (4) the legislation was not limited to “cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy,” or cases where the infringement was not negligent or committed pursuant to state policy.<sup>28</sup> After the Court’s decision, Congress considered, but did not pass, legislation that would have conditioned states’ ability to recover damages for infringement of their own intellectual property on their waiver of immunity to infringement damages.<sup>29</sup>

*c. Allen v. Cooper*

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<sup>24</sup> *Id.* at 639 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

<sup>25</sup> *Id.* at 640–41.

<sup>26</sup> *Id.* at 643–44.

<sup>27</sup> *Id.* at 645–66.

<sup>28</sup> *Id.* at 646–47.

<sup>29</sup> See *Sovereign Immunity and Protection of Intellectual Property*, Hearing Before Senate Comm. on the Judiciary, 107th Cong. 3–4 (Feb. 27, 2000) (prepared statement of Sen. Patrick Leahy), <https://www.govinfo.gov/content/pkg/CHRG-107shrg85184/pdf/CHRG-107shrg85184.pdf> (discussing Intellectual Property Protection Restoration Act of 2001 and stating that “no condition could be more reasonable or proportionate than the condition that in order to obtain full protection for your federal intellectual property rights, you must respect those of others”); *Intellectual Property Restoration Act of 2003*, Hearing Before House Subcomm. on Courts, the Internet, and Intellectual Property, 108th Cong. (June 17, 2003) (prepared statement of Marybeth Peters, Register of Copyrights), available at <https://www.copyright.gov/docs/regstat061703.html> (stating that proposed legislation “provides significant incentives for a State to waive its immunity, but does so in a way that is inherently proportional and fair to the States and copyright owners”).

This year, the Supreme Court decided *Allen v. Cooper*, a case considering the validity of the CRCA’s abrogation of state immunity. In *Allen*, a videographer brought an infringement action against North Carolina after the state published his videos and photographs of a sunken pirate ship online without authorization. North Carolina contended that it was immune to suit and that the CRCA failed to properly abrogate its immunity. Applying the analysis from *Florida Prepaid*, the Court held that the CRCA failed the congruence and proportionality test for substantially the same reasons that applied to the Patent Remedy Act.<sup>30</sup> With respect to the legislative record, the Court found the evidence of copyright infringement supporting the CRCA to be “scarcely more impressive than what the *Florida Prepaid* Court saw,” amounting to “only a dozen possible examples of state infringement.”<sup>31</sup> The Court also pointed to congressional testimony and statements by Members of Congress suggesting that copyright infringement by states currently was not a widespread problem.<sup>32</sup>

The Court further held that Congress had failed to make a sufficient showing of *unconstitutional* infringement by states. Under its precedent, the Court noted, “a merely negligent act does not ‘deprive’ a person of property,” and therefore “an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause.”<sup>33</sup> In the case of the CRCA, only two of the infringements cited in the legislative record appeared to be intentional.<sup>34</sup> Moreover, the record contained “no information about the availability of state-law remedies for copyright infringement (such as contract

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<sup>30</sup> *Allen*, 140 S. Ct. at 999.

<sup>31</sup> *Id.* at 1006.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1004. The Court had previously reserved, but not decided, the question “whether reckless conduct suffices” to violate due process. *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986)).

<sup>34</sup> *Id.* at 1006.

or unjust enrichment suits)—even though they might themselves satisfy due process.”<sup>35</sup> The Court thus concluded that the balance struck by the CRCA “between constitutional wrong and statutory remedy” was “askew.”<sup>36</sup> The “exceedingly slight” evidence of Fourteenth Amendment injury, combined with the fact that the statute extended to “every infringement case against a State,” meant that “the law’s ‘indiscriminate scope’ [was] ‘out of proportion’ to any due process problem.”<sup>37</sup>

At the conclusion of the opinion, the Court observed that its decision “need not prevent Congress from passing a valid copyright abrogation law in the future.”<sup>38</sup> It noted that in adopting the CRCA, “Congress acted before this Court created the ‘congruence and proportionality’ test,” and therefore it “likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection.”<sup>39</sup> Under that standard, “if [Congress] detects violations of due process, then it may enact a proportionate response,” and [t]hat kind of tailored statute can effectively stop States from behaving as copyright pirates.”<sup>40</sup>

#### *d. Current Study*

On April 28, 2020, Senators Thom Tillis and Patrick Leahy sent a letter to the Copyright Office noting that the *Allen* decision has “created a situation in which copyright owners are without remedy if a State infringes their copyright and claims State

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<sup>35</sup> *Id.* at 1006-07.

<sup>36</sup> *Id.* at 1007

<sup>37</sup> *Id.* (quoting *Florida Prepaid*, 527 U.S. at 646-47).

<sup>38</sup> *Id.*; see also *id.* at 1009 (Breyer, J., concurring) (“One might . . . expect that someone injured by a State’s violation of [its] duty [not to infringe copyright] could ‘resort to the laws of his country for a remedy,’ . . . . Or more concretely, one might think that Walt Disney Pictures could sue a State (or anyone else) for hosting an unlicensed screening of the studio’s 2003 blockbuster film, *Pirates of the Caribbean* (or any one of its many sequels).” (citation omitted)).

<sup>39</sup> *Id.* at 1007.

<sup>40</sup> *Id.*



sovereign immunity,” and expressing concern “about the impact this may have on American creators and innovators.”<sup>41</sup> The letter states that the Senators “have heard from affected copyright owners that in recent years State infringements of copyright have become much more common.”<sup>42</sup> To determine whether there is a sufficient basis for federal legislation, the letter asks that the Office “study the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law. As part of this analysis, the Office should consider the extent to which such infringements appear to be based on intentional or reckless conduct.”<sup>43</sup> The letter requests that the Office provide a public report summarizing the findings of this study, as well as the facts and analyses upon which those findings are based, by April 30, 2021.<sup>44</sup>

Pursuant to this request, the Office is seeking public input in multiple phases. The Office is providing 60 days for written comments from interested parties on the topics outlined below. To fulfill the request from Congress and the requirements of the Court, the Office seeks factual evidence and other verifiable information to support this inquiry. For each question, to the extent available, please include empirical data or other quantitative analysis in your response. If describing a litigation matter, please include information sufficient for the Office to identify such matter, such as the relevant court, docket number, asserted claims, and dates. As applicable, the Office encourages commenters to append relevant materials, such as pleadings, opinions, or other documentary evidence, in support of their comments. If participants currently gathering

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<sup>41</sup> Request Letter at 1.

<sup>42</sup> *Id.* at 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Senators Tillis and Leahy also sent a letter to the Patent and Trademark Office requesting a study of patent and trademark infringement by state entities. *See* Letter from Sens. Thom Tillis & Patrick Leahy to Andrei Iancu, Director, U.S. Patent and Trademark Office (Apr. 28, 2020).

empirical research and analyses find themselves unable to complete them within the 60-day period for submissions, they are encouraged to contact the Office promptly, describing the nature of the research and indicating the time required for completion. To the extent possible, the Office will seek to accommodate such submissions by providing an additional comment period limited to the provision of empirical data at a later date, but encourages all commenters to meet the noticed deadline if possible, so that the Office may fully consider the submissions in light of the congressional deadline.

After this comment period has closed, the Office intends to host one or more public roundtables to seek additional input, potentially virtually. The Office may request further written comments on particular issues discussed in response to this notice and/or at the public roundtables.

## **II. Subjects of Inquiry**

The Copyright Office invites written comments on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted. The Office also requests that commenters explain their interest in the study and, with respect to each answer, the basis for their knowledge (*e.g.*, the commenter is a copyright owner, artist, academic, or state official).

1. Please provide information regarding specific instances of infringing conduct committed by a state government entity, officer, or employee, including, where relevant:

- a. The work(s) infringed;
- b. The act(s) of alleged infringement;

- c. When the infringement occurred;
  - d. The state actor(s) who committed the infringement;
  - e. Whether the infringement was intentional or reckless, and the basis for that conclusion;
  - f. Whether the infringement was committed pursuant to a state policy;
  - g. Whether the state was contacted by or on behalf of the copyright owner in response to the infringement, and if so, how the state responded;
  - h. Whether a lawsuit was filed as a result of the infringement, and if so, where the case was filed, what claim(s) were brought regarding the infringement, whether the case remains pending, and if not, how it was resolved; and
  - i. If a lawsuit was not filed, why the copyright owner chose not to do so, including whether it attempted to resolve the matter privately in lieu of litigation, and any relevant details with respect to those attempts.
2. To what extent does state sovereign immunity affect the licensing or sale of copies of copyrighted works to state entities? For example:
- a. Do copyright owners provide different payment or licensing terms in transactions with state entities than are provided in transactions with other parties?
  - b. Have copyright owners changed aspects of their sales or licensing practices as a result of state sovereign immunity?

- c. Do different states or state entities take different approaches to working with copyrighted material? Are there particular states that more frequently infringe?
  3. What remedies are available for copyright owners when states infringe their works?
    - a. To what extent did copyright owners file suits under the Copyright Act against state entities prior to the Supreme Court's decision in *Allen v. Cooper*?
    - b. In your opinion, does the availability of injunctive relief against state officials provide an adequate remedy to address the needs of copyright owners in response to instances of state copyright infringement?
    - c. To what extent are there state law causes of action that may provide a remedy for copyright infringements by state entities? Are there state court cases in which a copyright owner has been awarded a judgment on such a claim?
    - d. To the extent state law provides a cause of action relevant to copyright infringement, how do the elements of the cause of action and/or available remedies differ from those applicable to claims under the Copyright Act?
    - e. In your opinion, are those remedies adequate to address the needs of copyright owners in response to instances of state copyright infringement?
  4. How can Congress determine whether copyright infringement by a state is common or infrequent? What metrics should be used in making such a determination?
  5. Has the prevalence of infringement by states increased in recent years?

- a. What empirical evidence is available to determine whether and to what extent there has been a change over time?
  - b. To what extent, if any, have instances of actual or threatened infringement by states increased since the decision in *Allen*, or can they be expected to increase?
6. How do different states handle claims of infringement? Please discuss, as relevant:
- a. Whether any state agencies carry insurance policies that would cover infringement by a state employee, and if so, whether those insurance policies distinguish between infringement that is intentional, reckless, or negligent;
  - b. Any laws, regulations, or policies that state entities have adopted to minimize the likelihood of, or to provide a remedy for, copyright infringement by a state entity;
  - c. How frequently copyright owners claim a state actor has infringed their rights, either privately or in litigation;
  - d. How state entities typically respond to credible claims of copyright infringement, including any formal or informal policies providing for negotiations with or payment to the copyright owner, as well as whether the Attorney General's office is notified of such claims;
  - e. What state entities are eligible to assert sovereign immunity as a defense to copyright infringement claims;

- f. Whether state entities have the right to waive sovereign immunity as a defense to an infringement lawsuit in federal court, and what authority permits or prevents such waiver; and
  - g. Whether any states record and/or track copyright infringement claims received by state entities.
7. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

**Dated:** May 29, 2020

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**Regan A. Smith,**  
*General Counsel and*  
*Associate Register of Copyrights*

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