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Modify State “Piracy” After *Allen*: Introducing Apology to the U.S. Copyright Regime

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Modify State “Piracy” After *Allen*: Introducing Apology to the U.S. Copyright Regime

RUNHUA WANG[†]

ABSTRACT

Copyright protection from state offenders is onerous because of the imbalanced bargaining power between states and authors, which is increased by the U.S. Supreme Court decision in *Allen v. Cooper*. This decision clarifies that state sovereign immunity is not abrogated by the Copyright Remedy Clarification Act of 1990 (“CRCA”). It secures states’ constitutional rights, the public interest, and the efficiency of copyright infringement litigations against states. However, a paradox of this decision is that it may harm innovation incentives or spirits of creativity due to the increased imbalanced bargaining power to prevent authors from being repaired for their economic or non-economic losses. This Article reviews the law and psychology literature and proposes to adopt compelled and voluntary state

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apologies in the copyright regime. It suggests that the apologies do not conflict with *Allen's* benefits but can rebuild the reputation of authors and repair relationships between the authority and authors to promote or sustain their innovation incentives.

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INTRODUCTION

It is the moment for the United States (“U.S.”) Congress to pass new laws protecting copyrights from copyright infringement by states.¹ In a recent case, *Allen v. Cooper*, the Supreme Court of the United States clearly decided that the Copyright Remedy Clarification Act of 1990 (“CRCA”), federal statutes regulating copyright protection against states, is unconstitutional.² Briefly, the reason is that neither Congress’s power nor Article I, Section 8 of the U.S. Constitution, promoting innovation, abrogates state sovereign immunity granted by the Eleventh Amendment.³ This reason has been applied as constitutionally correct by the lower courts⁴ and there have been constitutional law professors planning to add it in casebooks for teaching.⁵ However, to copyright owners, the consequence of this case

1. Meaghan H. Kent & Katherine C. Dearing, *Surrendering to Stare Decisis: Supreme Court Holds States Can Invoke Sovereign Immunity Against Claims of Copyright Infringement*, VENABLE LLP (Mar. 30, 2020), <https://www.venable.com/insights/publications/2020/03/surrendering-to-stare-decisis-supreme-court-holds>.

2. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

3. *Id.*

4. See, e.g., *eScholar LLC v. Neb. Dep’t of Educ.*, No. 8:20-CV-135, 2020 WL 6305453 (D. Neb. Oct. 28, 2020); *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep’t*, No. 4:17-CV-181 (S.D. Tex. Sept. 4, 2020); *In re Jones*, 618 B.R. 757, 769 (Bankr. D.S.C. 2020); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020); *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020).

5. See Josh Blackman, *Allen v. Cooper Is an Excellent Opinion for Teaching Sovereign Immunity*, REASON (Mar. 23, 2020 2:02 PM), <https://reason.com/2020/03/23/allen-v-cooper-is-an-excellent-opinion-for-teaching-sovereign-immunity>.

is that they cannot sue a state in a federal court for using their copyrighted works without a waiver of sovereign immunity from the state or lack of due process.⁶ Therefore, it turns back to Congress to fix the problem in the CRCA and instruct copyright owners to effectively prevent copyright infringement by states. Senators Thom Tillis and Patrick Leahy have taken action by consulting the U.S. Copyright Office to study the need and basis for abrogating state immunity against state infringement.⁷ Otherwise, it may only be in memory that copyright owners can sue a state for remedies, especially monetary damages, in a federal court.⁸

Copyright owners, however, are perhaps hopeless for changes in the near future. Congress has remained silent for decades after *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, where the U.S. Supreme Court decided that the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”),⁹ federal statutes regulating patent protection against states, was unconstitutional—applying similar reasoning as in *Allen*.¹⁰ *Florida Prepaid* sets clear barriers to patent infringement litigations against states and, since *Florida Prepaid*, lawyers and courts have interpreted this case broadly to be applied to copyright and trademark claims in addition to patent claims.¹¹ The U.S. Supreme Court recently affirmed this

6. *Allen*, 140 S. Ct. at 1007.

7. See Kevin Madigan, *Allen v Cooper: The Epilogue: The Copyright Office Embarks on a Journey to Determining Just How Bad the State Copyright Infringement Problem Is*, COPYRIGHT ALLIANCE (July 23, 2020), https://copyrightalliance.org/ca_post/allen-v-cooper-the-epilogue.

8. See, e.g., *Mills Music, Inc. v. Ariz.*, 591 F.2d 1278, 1287 (9th Cir. 1979). The court rewarded the copyright owner monetary damages and attorney fees against the State of Arizona for copyright infringement.

9. Patent and Plant Variety Protection Remedy Clarification Act of 1992, Pub. L. 102-560, 106 Stat. 4230 (1992).

10. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Mills Music, Inc. v. Arizona*, 591 F.2d. 1278 (9th Cir. 1979).

11. See, e.g., Mitchell Feller, *IP and Sovereign Immunity: Why You Can't Always Sue for IP Infringement*, IPWATCHDOG (Feb. 21, 2018),

broad interpretation in *Allen*.¹² Therefore, it would not be surprising if Congress fails to pass any new laws addressing copyright protection from copyright infringement by states for another decade (or longer).

Should a copyright owner give up suits or disputes over copyright concerns against a state offender after *Allen*?¹³ For litigation efficiency, they should unless they have strong interests that may be repaired without much monetary damages. Bargaining power has always been imbalanced between states and copyright owners.¹⁴ Due to this imbalanced bargaining power, it is not surprising that there have been few litigations or disputes against states for copyright issues, either before or after *Allen*.¹⁵ States, state governments, or state entities in this Article are a broad definition for public entities that enjoy sovereign immunity under the Eleventh Amendment, including but not limited to state government agencies, public libraries, and public universities.¹⁶ Before *Allen*, regardless of the barriers of sovereign immunity, a state could successfully defend itself under the fair-use doctrine and be held not liable to a copyright owner. *Allen*, therefore, firmly adds more weight to

<https://www.ipwatchdog.com/2018/02/01/ip-infringement-sovereign-immunity/id=93050>.

12. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

13. Copyrights are limited enforceable for specific expressions against some offenders for their infringing acts. 17 U.S.C. §§ 102, 106. Some offenders are innocent rather than infringers because their use of the copyrighted works is excluded from copyright protection. 17 U.S.C. § 107.

14. Cf. Nicholas Dernik, *State Sovereign Immunity: States Use the Federal Patent Law System as Both a Shield and a Sword*, 8 J. MARSHALL REV. INTELL. PROP. L. 134 (2008) (criticizing that states have an unfair advantage against patentees due to state sovereign immunity in the Eleventh Amendment).

15. See U.S. GEN. ACCT. OFF., GAO-01-811, *INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS* (2001).

16. See *State Sovereign Immunity*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/constitution-conan/amendment-11/state-sovereign-immunity> (last visited July 19, 2020) (“In evaluating such a claim, the Court will examine state law to determine the nature of the entity, and whether to treat it as an arm of the state.”); see, e.g., *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (finding that local school districts are not an arm of a state).

the already imbalanced bargaining power held by states. In other words, *Allen* provides dual contributions: it serves as an example for state sovereign immunity in law teaching and promotes litigation efficiency by avoiding unnecessary copyright litigation against a state.

The decision in *Allen*, nevertheless, may conflict with the ultimate goal of the copyright (or even the whole intellectual property (“IP”)) regime—promoting innovation and creative expressions.¹⁷ Neither the U.S. Supreme Court nor states believe that a state will not scruple to infringe copyrights after *Allen*, which give authors overwhelming anxiety about future copyright infringement by states.¹⁸ Lacking a robust standing to sue, state copyright infringement may result in irreparable economic and non-economic losses to authors, which may harm innovation incentives.¹⁹ On the one hand, according to *Ex Parte Young*,²⁰ it is legally plausible for a copyright owner to cure his or her irreparable economic interests by suing for copyright infringement against a state official for injunctive relief after *Allen*.²¹ However, it may not be practical for most authors for efficiency reasons (*i.e.*, high litigation costs and litigation uncertainties).²² On the other

17. See, e.g., Bradford L. Smith & Susan O. Mann, *Innovation and Intellectual Property Protection in the Software Industry: An Emerging Role for Patents?*, 71 U. CHI. L. REV. 241, 263 (2004) (discussing that the patent regime exchanges limited monopoly rights for disclosure of innovation).

18. *Id.* at 242.

19. See Keith E. Maskus, *Intellectual Property Rights and Economic Growth*, 32 CASE W. RES. J. INT’L L. 471, 474 (2000). But see Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (criticizing the reward theory of copyrights and the effects of monopoly on innovation incentives).

20. *Ex parte Young*, 209 U.S. 123 (1908).

21. See Devin M. Jacobs & Gregory J. Krabacher, *Copyrights and State Sovereignty: U.S. Supreme Court Removes Monetary Damages for State Actor Infringement*, BRICKER (May 28, 2020), <https://www.bricker.com/insights-resources/publications/copyrights-and-state-sovereignty-us-supreme-court-removes-monetary-damages-for-state-actor-infringement>.

22. See Jasper L. Tran & Cameron Baker, *Allen v. Cooper: States Stay Copyright Pirates*, 89 GEO. WASH. L. REV. ON THE DOCKET, 6 (forthcoming 2020).

hand, courts rarely compensate for non-economic interests of authors,²³ reasoning that the nature of a utilitarian copyright regime only repairs economic interests.²⁴ However, non-economic interests do matter to authors and motivate them to sue under copyright law.²⁵ For example, even though the U.S. copyright regime does not broadly recognize the moral rights of authors, there are some protections granting narrow moral rights to authors, addressing a specific set of non-economic interests.²⁶ Even so, a problem arises when the copyright offender is a state; the decision in *Allen* firmly puts authors on the passive and defensive in negotiations with a state offender.

Therefore, authors may have to compromise for practical reasons. Worse than a compromise, they may merely give up both asserting their copyrights and continuing producing creative expressions.²⁷ In responding to a study demanded by the Copyright Office, the Copyright Alliance surveyed and interviewed authors, or other copyright owners, who all expressed discouragement of creating due to various unpleasant experiences with government users of their copyrighted works, including a direct excuse of state sovereign immunity received from a state entity.²⁸

By recognizing the hardships of authors to protect their copyrights against a state and the potential negative

23. "Authors" in this Article refers to copyright owners. 17 U.S.C. § 201.

24. *See, e.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 744–45 (9th Cir. 2015).

25. *See generally* Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019 (2019).

26. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

27. *See, e.g.*, Copyright Alliance, *Sovereign Immunity Study: Comments of the Copyright Alliance*, COPYRIGHT ALLIANCE 19, <https://copyrightalliance.org/wp-content/uploads/2020/11/Copyright-Alliance-Comments-Sovereign-Immunity-Study-No.-2020-9.pdf> (last visited Jan 13, 2021) (telling a story that a famous author, Dr. Keith Bell, decided to stop writing after his unpleasant experience of copyright enforcement with states).

28. *See* Madigan, *supra* note 8.

consequences on innovation and creative expressions, this Article proposes to adopt state apologies to cure copyright owners hardships. State “apologies” in this proposal do not mean express regrets but function to restore the reputation of authors and their emotional distress. Congress and state legislators can consider adding compelled state apologies in statutes, repairing reputational or emotional harms to copyright owners. State entities should also consider using voluntary apologies to communicate with authors, heal their emotional distress, and achieve a settlement, in which both the public and authors are better off. Apologies consist of, at least, dialogues established between the state entity and copyright owners, and involve an explanation and a public acknowledgment. Adding either compelled apologies through legislation or offering voluntary apologies does not result in more copyright litigations against state governments. These two approaches are utilitarian,²⁹ repairing or rebuilding the relationships between the authority and authors to promote settlement and innovation.

Part I of this Article discusses the hardships of private parties in protecting their copyrights against a state before and after *Allen*. Part II discusses how state actions under sovereign immunity influence innovation. Part III raises the proposal of adopting state apology for copyright infringement by states and explains the proposal’s justification. Part IV discusses the implications of this proposal. Finally, Part V defends the proposal against probable obstacles.

29. See, e.g., Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Jessica D. Litman, *Copyright Legislation and Technical Change*, 68 OR. L. REV. 275 (1989).

I. HARDSHIPS IN PROTECTING COPYRIGHTS AGAINST
STATE OFFENDERS

Copyright owners face legal and practical hardships in protecting their copyrights against a state. *Allen*³⁰ does not create new difficulties but only exposes an existing hardship—state sovereign immunity. After *Allen*, it is uncontroversial that this hardship is unable to be overcome unless a state deprives copyright rights without due process. This Part uses *Allen* as a benchmark and discusses the economic and legal hardships for copyright owners in protecting their copyrights against a state before and after *Allen*.

A. *Before Allen: Imbalanced Bargaining Power Between Authors and States*

Before the U.S. Supreme Court specifically addressed state sovereign immunity in *Allen*,³¹ copyright owners had many barriers to successfully suing a state for copyright infringement and for corresponding adequate remedies. Congress, and the CRCA, made filing lawsuits of copyright infringement against a state and asking for remedies from the state possible.³² However, the federal system’s legal barriers—the fair-use doctrine and sovereign immunity—prohibit copyright owners from suing and winning in federal courts.³³ Filing legal claims in state courts also cannot be effective in protecting copyrights due to sovereign immunity.³⁴ In addition to the legal barriers, copyright owners are also affected by economic reasons—high litigation costs.³⁵ The legal uncertainties caused by sovereign

30. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

31. *Id.*

32. 17 U.S.C. § 511.

33. *See infra* Part I.A.1.

34. *See infra* Part I.A.2.

35. *See infra* Part I.A.3.

immunity and financial constraints on copyright owners put states in a better bargaining position than copyright owners in copyright infringement or licensing disputes.³⁶ The imbalanced bargaining power prevents authors or other copyright owners from filing lawsuits against a state in any court or insisting on litigation.

1. Legal Uncertainties Under the CRCA

The CRCA allows a private party to enforce copyrights in federal courts against a state offender.³⁷ However, before the U.S. Supreme Court formally ruled it unconstitutional in *Allen*,³⁸ there had been legal uncertainties preventing a private party from filing suits against a state for copyright infringement. Two primary legal principles creating uncertainties are the fair-use doctrine in copyright law³⁹ and state sovereign immunity under the Eleventh Amendment.⁴⁰

a. The Fair-Use Doctrine

The ultimate goal in protecting copyrights is to promote the public good through promoting innovation and creative expressions.⁴¹ The knowledge in an original creative work can be used for education or by other creators in further

36. See Runhua Wang, *New Private Law? Intellectual Property “Common-Law Precedents” in China*, 89 UMKC L. REV. 109, 153 (2021) (arguing that intellectual property owners need robust property rights to obtain bargaining power against infringers); see generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (providing the theoretical foundation for understanding the effects of a court’s application of property and liability rules).

37. 17 U.S.C. § 511.

38. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

39. 17 U.S.C. § 107.

40. U.S. CONST. amend. XI.

41. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

innovation or creative expressions for free.⁴² The copyright regime rewards artists or authors by giving them monopoly rights for incentivizing innovation.⁴³ However, the strength and the scope of copyright protection is limited by the fair-use doctrine.⁴⁴

The fair-use doctrine is a defense against a copyright infringement claim.⁴⁵ It narrows the scope of copyright protection, excluding a non-commercial⁴⁶ or transformative use⁴⁷ and “criticism, comment, news reporting, teaching, . . . , scholarship, or research” from copyright infringement.⁴⁸ Besides those excluded purposes, when making judgments, courts should also consider the “nature of the copyrighted work,”⁴⁹ the amount of the copyrighted work contained in the infringing use,⁵⁰ and the infringing use’s effect on the value of the copyrighted work (*e.g.*, shrunk market size).⁵¹

42. Copyrights do not protect ideas but only protect original expressions of ideas.

43. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (“The purpose of copyright is to create incentives for creative effort.”).

44. *See id.* at 450–51 (“[A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to innovate and creatively express. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.”).

45. 17 U.S.C. § 107.

46. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001) (evaluating commercial nature under Section 107).

47. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–81 (1994) (ruling that a commercial parody may constitute a transformative use and, therefore, a fair use).

48. 17 U.S.C. § 107.

49. *Id.*

50. If the allegedly infringing work does not include a significant portion of the copyrighted work, the use in the allegedly infringing work is permissible under the *de minimis* use doctrine. *See, e.g., Gordon v. Nextel Commc’ns*, 345 F.3d 922, 924 (6th Cir. 2003); *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004) (suggesting that courts can measure the use under a quantitative or a qualitative standard).

51. 17 U.S.C. § 107.

While the fair-use doctrine is not frequently raised by defendants in practice⁵² and has uncertainties when applied in court,⁵³ industries that benefit from copyrights worry about it seriously when a defendant, or potential defendant, is a state.⁵⁴ This concern is not groundless. In an *amicus curiae* brief submitted by legal scholars in support of the state in *Allen*, they believe that North Carolina's use is trivial⁵⁵ and does not harm, but benefits, Mr. Allen's economic interests.⁵⁶ They argue the state's use constitutes "instant credibility for a private filmmaker," adding value to Mr. Allen and his works.⁵⁷ Moreover, these scholars suggest that North Carolina's use educates the public about history.⁵⁸ Accordingly, they conclude that such use constitutes a fair use and should be exempt from copyright infringement or any liability.⁵⁹

In practice, the fair-use defense is relatively robust when

52. See, e.g., Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C.L. REV. 1873, 1900–01 (2018) (showing empirical evidence that there were rarely music copyright cases including a fair-use defense or applying a fair-use defense successfully).

53. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact.").

54. Among the twenty-one *amicus curiae* briefs submitted to courts for *Allen*, five supporting Mr. Allen expressed a concern about a relaxed application of the fair-use doctrine when it is raised by the government. Brief of the Intellectual Property Law Association of Chicago as Amicus Curiae in Support of Petitioners, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877); Brief of the Copyright Alliance and the Chamber of Commerce of the United States as Amici Curiae in Support of Petitioner, *Allen*, 140 S. Ct. 994 (No. 18-877); Brief of Amicus Curiae the Software & Information Industry Association in Support of Petitioners, *Allen*, 140 S. Ct. 994 (no. 18-877); Brief of Ralph Oman as Amicus Curiae Supporting Petitioners, *Allen*, 140 S. Ct. 994 (no. 18-877).

55. Brief of Professor Simone Rose as Amicus Curiae in Support of Respondents at 5-14, *Allen*, 140 S. Ct. 994 (no. 18-877).

56. *Id.* at 18–20.

57. *Id.* at 19.

58. *Id.* at 20–23.

59. *Id.* at 18–23.

a case involves a state defendant.⁶⁰ For example, in *Jartech, Inc. v. Clancy*, both the jury and the appellate court found that making abbreviated copies of obscene films by the local City Council for use in nuisance abatement proceedings was a fair use.⁶¹ In *Association of American Medical Colleges v. Cuomo*, the court decided the State of New York's request and use of copyrighted exam materials for public records was non-commercial and non-competing, but for education and public interests, which should be a fair use.⁶² Nevertheless, Judge Mahoney dissented that this decision waived the State's liabilities so broadly as to devastate the other protectable parts of copyrights owned by private entities.⁶³ In other words, when courts use the fair-use doctrine to support state and public interests, the copyright protection can be weakened excessively due to an overbroad scope.

b. Sovereign Immunity

Another issue that prevents private parties from enforcing copyright interests against states in court is sovereign immunity.⁶⁴ State sovereign immunity is a constitutional right of states under the Eleventh Amendment, exempting them from being sued by private parties in federal courts without their consent.⁶⁵ Even though the U.S. Supreme Court had not expressed its attitude towards the Eleventh Amendment and whether

60. Brief of the Copyright Alliance and the Chamber of Commerce of the United States as Amici Curiae in Support of Petitioner, *supra* note 54, at 20.

61. *See Jartech, Inc. v. Clancy*, 666 F.2d 403, 406–08 (1982).

62. *See Ass'n of Am. Med. Colleges v. Cuomo*, 928 F.2d 519, 524–26 (1991).

63. *See id.* at 527.

64. U.S. CONST. amend. XI.

65. *See* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, U. PENN. L. REV. 5 (forthcoming 2020) (interpreting the Eleventh Amendment); *see also* OMAN, COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT xi (1988) (“The CRS study reveals that none of the fifty states in their state constitution, state laws, or state court decisions, expressly waives Eleventh Amendment immunity from suit for damages in federal court in copyright infringement cases.”).

Congress validly abrogated state sovereign immunity under the CRCA until *Allen*,⁶⁶ private parties were unnerved in enforcing copyrights against states by a presumption of state sovereign immunity.⁶⁷

Indeed, before *Allen*, it was questionable whether Congress abrogated state sovereign immunity by the CRCA.⁶⁸ On the one hand, some scholars believe that the answer is positive, so private parties can sue states in federal courts for the federal question—copyright infringement.⁶⁹ On the other hand, William Baude and Stephen Sachs interpret the Eleventh Amendment as its plain meaning:

It strips the federal government of judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs. It denies subject-matter jurisdiction in *all* such cases, regardless of why and how the plaintiffs are in federal court, and it does so in *only* such cases.⁷⁰ In other words, state sovereign immunity cannot be abrogated by Congress and its legislation, such as the CRCA.⁷¹

Moreover, since *Florida Prepaid*,⁷² it has been tacit that

66. See Baude & Sachs, *supra* note 65, at 4 (criticizing that state courts are waiting for the Supreme Court to interpret the scope of state sovereign immunity).

67. See Letter from the Hon. Robert W. Kastenmeier & Hon. Carlos Moorhead, Subcommittee on Courts, Civil Liberties and the Administration of Justice, to Ralph Oman, Register of Copyrights (Aug. 3, 1987); see also Brief of the American Society of Media Photographers, Inc., and the National Press Photographers Association as Amici Curiae in Support of Petitioners, Joined by The North American Nature Photography Association et al. at 13–14, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877) (arguing that the government defendant may assert State sovereign immunity or lawyers may decline to litigate for State sovereign immunity).

68. See generally KIRK D. NEMER, CONG. RESEARCH SERV., WAIVER OF ELEVENTH AMENDMENT IMMUNITY FROM SUIT: STATE SURVEY RELATING TO COPYRIGHT INFRINGEMENT CLAIMS (1988) (showing the diverse attitudes of States to waiving their sovereign immunity).

69. See, e.g., *Mills Music, Inc. v. Ariz.*, 591 F.2d 1278, 1284 (9th Cir. 1979).

70. Baude & Sachs, *supra* note 65, at 4 (“The Eleventh Amendment means what it says.”).

71. *Id.* at 12.

72. 527 U.S. 627 (1999).

the CRCA regarding copyright protection is very likely unconstitutional and fails in abrogating state sovereign immunity.⁷³ In *Florida Prepaid*, the U.S. Supreme Court ruled that the Patent Remedy Act⁷⁴ was unconstitutional for allowing private parties to sue a state for patent infringement if due process was satisfied.⁷⁵ A private party generally cannot sue a state for monetary damages in federal courts,⁷⁶ especially after *Florida Prepaid*.⁷⁷

Companies complain that states use the uncertainties of state sovereign immunity to threaten companies to compromise for an unfair settlement. For example, Dow Jones defines itself as a “victim” of an abuse of sovereign immunity after copyright infringement.⁷⁸ The California Public Employees’ Retirement System (“CalPERS”), a California state agency, published over 10,000 copyrighted materials from Dow Jones’ publications, such as the Wall Street Journal.⁷⁹ These publications require an enormous cost spent by Dow Jones in collecting material to originate them,⁸⁰ so they are reluctant to license the copyrighted publications without fair license fees to offset that cost.⁸¹

73. See Feller, *supra* note 11.

74. Patent and Plant Variety Protection Remedy Clarification Act of 1992, Pub. L. No. 102-560, 106 Stat. 4230 (1992).

75. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 648 (1999) (concluding that Article I, § 8 of the U.S. Constitution does not give Congress the power to abrogate State sovereign immunity).

76. See *Ex parte* Young, 209 U.S. 123, 204 (1908) (Harlan, J., dissenting).

77. *Fla. Prepaid*, 527 U.S. at 633.

78. Brief for Amicus Curiae Dow Jones & Company, Inc. in Support of Petitioners at 4, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877).

79. See *id.*; see also Yves Smith, *CalPERS Internal News Site Ignores Unfavorable Stories, Steals Copyrighted Material*, NAKED CAPITALISM (June 9, 2017), <https://www.nakedcapitalism.com/2017/06/calpers-internal-news-site-ignores-unfavorable-stories-steals-copyrighted-material.html>.

80. Brief for Amicus Curiae Dow Jones & Company, Inc. in Support of Petitioners, *supra* note 78, at 5.

81. *Id.* at 6 (“At the time Dow Jones learned of the ongoing CalPERS infringements, the Dow Jones reprint price schedule stipulated a fee of \$360 for

However, when Dow Jones tried to enforce copyrights against CalPERS, CalPERS asserted no liability for its use and publication because of the exemption under sovereign immunity.⁸² In another similar copyright infringement case, where CalPERS successfully asserted sovereign immunity in a federal district court,⁸³ Dow Jones ultimately accepted a “low-seven-figure settlement” in its copyright enforcement action against CalPERS.⁸⁴

2. Ineffective State Law

A copyright owner may sue a state in a state court.⁸⁵ Some legal professionals suggest that copyright owners file lawsuits against state offenders in state courts under state copyright law.⁸⁶ However, such a suggestion cannot be an effective solution for most copyright owners, who are

the right to reproduce a single full-text [The Wall Street Journal] Article in a one-time email to 200 recipients, and a fee of \$1,900 to display a single full-text Journal article on a publicly accessible website for one year.”); *see also* Smith, *supra* note 79 (“[The price of a site license] would be over \$100,000.”).

82. Brief for Amicus Curiae Dow Jones & Company, Inc. in Support of Petitioners, *supra* note 78, at 8.

83. *See id.*; *Arya v. CalPERS*, 943 F. Supp. 2d 1062, 1072 (E.D. Cal. 2013).

84. Brief for Amicus Curiae Dow Jones & Company, Inc. in Support of Petitioners, *supra* note 78, at 8.

85. *See Curran v. Ark.*, 56 U.S. 304, 309 (1853) (believing that the 11th Amendment consents individuals to sue the government in state courts). *But see NEMER*, *supra* note 68, at CRS-21 (“The Attorney General [of Texas] concluded that the Eleventh Amendment would bar any damage action in federal court against the State, and to sue the State of Texas in state court would require permission to sue to be granted by the legislature.”).

86. *See, e.g., Intellectual Property Law Briefing: Florida Prepaid and Infringement by State Actors*, FINDLAW (Mar. 26, 2008), <https://corporate.findlaw.com/law-library/intellectual-property-law-briefing-florida-prepaid-and.html> (suggesting patentees to sue states under state-law cause of actions after *Fla Prepaid*); Eric Goldman, *U.S. Supreme Court Confirms that States Have Sovereign Immunity from Copyright Infringement Suits—Allen v. Cooper*, TECH. & MKTG. L. BLOG (Apr. 13, 2020), <https://blog.ericgoldman.org/archives/2020/04/u-s-supreme-court-confirms-that-states-have-sovereign-immunity-from-copyright-infringement-suits-allen-v-cooper.htm> (suggesting copyright owners can learn from patentees to use the state-law regime).

reluctant to sue under this approach.⁸⁷

First, copyright owners worry that they may not sue a state successfully in a state court, even though worries about partiality against private parties by state courts in copyright infringement cases have not been observed in practice.⁸⁸ The primary barrier for copyright owners is less “judicial activism,”⁸⁹ but more state sovereign immunity. For example, in Texas, private parties still need permission from the state legislature to sue the state for copyright infringement in a state court.⁹⁰ Moreover, state courts have also frequently rejected the enforcement of copyrights against a state based on sovereign immunity.⁹¹

Second, it is systematically ineffective for copyright owners to use or rely on state legal systems for copyright protection.⁹² In state courts, copyright owners can sue state entities under common law doctrines, such as takings⁹³ and

87. See U.S. GEN. ACCT. OFF., *supra* note 15, at 2 (“Through an analysis of the published case law and a survey of the states, we identified 58 lawsuits that had been active since January 1985 in either a state or federal court in which a state was a defendant in an action involving the unauthorized use of intellectual property. The federal courts—which have exclusive jurisdiction over patent and copyright infringement cases—heard 47 of these cases in which the state was a defendant . . .”).

88. See Brief of the Recording Industry Association of America et al. as Amici Curiae in Support of Petitioners at 3, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877).

89. “Judicial activism” suggests that a court “applies law departing from the text of the law for political or policy reasons.” Runhua Wang, *Decoding Judicial Reasoning in China: A Comparative Empirical Analysis of Guiding Cases*, 68 CLEV. STATE L. REV. 521, 574 n.287 (2020).

90. NEMER, *supra* note 68, at CRS-21.

91. Brief of the American Society of Media Photographers, Inc., and the National Press Photographers Association as Amici Curiae in Support of Petitioners, Joined by The North American Nature Photography Association et al., *supra* note 67, at 14 (“Countless cases have been summarily dismissed in both federal and state courts due to an incorrect interpretation of the CRCA and exercise of sovereign immunity.”).

92. See, e.g., Brief for the Recording Industry Association of America et al. as Amici Curiae in Support of Petitioners, *supra* note 88, at 3.

93. See Brief of the American Society of Media Photographers, Inc., and the

breach of contract,⁹⁴ or state copyright law.⁹⁵ However, there are material difficulties for copyright owners to rely on these approaches. One critical reason is that the law is inconsistent between states. For example, with respect to state copyright law, while many international treaties put efforts on copyright law harmonization and are joined by the United States,⁹⁶ Tim Wu believes no efforts have been made by the U.S. Supreme Court in harmonizing state copyright laws under those international treaties.⁹⁷ Marketa Trimble also argues that “State IP statutes typically neither mention nor refer to international treaties on IP.”⁹⁸ She blames the failure of the rise of state copyright law on the Supremacy Clause⁹⁹ and the dormant Commerce Clause,¹⁰⁰ which limit state legislation on copyright issues.¹⁰¹ In practice, copyright owners rarely file state law claims in courts, as shown in Christopher Cotropia and James Gibson’s empirical evidence.¹⁰²

National Press Photographers Association as Amici Curiae in Support of Petitioners, Joined by The North American Nature Photography Association et al., *supra* note 67, at 12 (citing *Romero v. California Dep’t of Transp.*, No. CV 08-8047, 2009 WL 650629 at *4 (C.D. Cal. Mar. 12, 2009) (parallelly listing takings of copyrights and remedies of copyright infringement)).

94. See Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners at 12–17, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877) (complaining that Oregon escaped its contract liabilities to Oracle in copyright licenses); see also U.S. GEN. ACCT. OFF., *supra* note 15, at 22 tbl. 2.

95. See Marketa Trimble, *US State Copyright Laws: Challenge and Potential*, 20 STAN. TECH. L. REV. 66, 67 (2017) (“Copyright law in the United States falls primarily in the domain of federal law; however, individual U.S. states . . . do have state laws that concern copyright.”).

96. *E.g.*, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

97. Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 585 (2007) (“[The Supreme Court] makes no effort to reconcile inconsistent State law and pays no special attention to State interpretation of a treaty.”).

98. Trimble, *supra* note 95, at 81.

99. U.S. CONST. art. VI, cl. 2.

100. U.S. CONST. art. I, § 8, cl. 3.

101. See Trimble, *supra* note 95, at 73–79.

102. See Christopher A. Cotropia & James Gibson, *Copyright’s Topography: An*

Besides the ineffectiveness of state copyright regimes in copyright protection for these problems, when the offender is a state entity, sovereign immunity further aggravates the uncertainty and inconsistency. State entities or legislatures can waive sovereign immunity and then sit in court as a defendant.¹⁰³ However, states are not consistent with the determination of a valid waiver, which is made under state law.¹⁰⁴ In Kirk Nemer's survey report, some state constitutions entirely restrict state entities to be sued in state courts.¹⁰⁵ There are also states where waivers are unconstitutional,¹⁰⁶ such as Alabama¹⁰⁷ and West Virginia.¹⁰⁸ In these states, private parties cannot sue the states for copyright infringement regardless of their state copyright laws.

3. Litigation Cost

Plaintiffs are cost-sensitive.¹⁰⁹ Copyright owners seek statutory damages to cover their losses in copyright infringement and litigation.¹¹⁰ Furthermore, by observing copyright lawsuits and the damages awarded by juries, Samuelson and Wheatland argue that copyright owners seek

Empirical Study of Copyright Litigation, 92 TEX. L. REV. 1981, 1997 (2014) ("State infringement claims accompanied federal claims in less than 2% of cases, and state infringement claims stood on their own even more rarely—roughly 1 in every 400 cases.").

103. NEMER, *supra* note 68, at abstract.

104. *Id.* at CRS-1, CRS-2.

105. *Id.* at CRS-2; *see also, e.g.*, ARK. CONST. art. 5, § 20 ("The State of Arkansas shall never be made defendant in any of her courts.").

106. *See* NEMER, *supra* note 68, at CRS-2.

107. *See Aland v. Graham*, 250 So. 2d 677, 681 (Ala. 1987) ("[N]o individual has authority to waive this immunity.").

108. *See Mellon-Stuart Co. v. Hall*, 359 S.E.2d 124, 129 (W. Va. 1987) ("This constitutional grant of immunity is absolute and, as we have consistently held, cannot be waived by the legislature or any other instrumentality of the State.").

109. This is a premise of rational people.

110. *See Cotropia & Gibson*, *supra* note 102, at 1999 (showing empirical evidence that most copyright-related cases seek statutory damages including actual damages and enhanced statutory damages).

grossly excessive damages.¹¹¹ By contrast, most copyright litigations have been settled before trial or judgment.¹¹²

Before filing a lawsuit regarding copyright infringement against a state, however, many copyright owners have been scared away by the prospect of high litigation costs without adequate, or even any, recovery.¹¹³ They also bear risks to repay the state defendants' litigation costs if they lose.¹¹⁴ Even large companies may settle with a state because of high litigation costs. For example, Oracle was forced to settle its copyright disputes against the State of Oregon because of litigation cost concerns.¹¹⁵ In addition, Dow Jones was forced to settle with CalPERS after balancing the probability of receiving full recovery and the high litigation cost.¹¹⁶ However, such settlement agreements may not effectively compensate copyright owners because their copyrights may

111. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009).

112. See Cotropia & Gibson, *supra* note 102, at 1999 (showing a voluntary termination rate of 80.16%); see also Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1954–55 (2009) (showing a settlement rate of approximately 67.7%).

113. See, e.g., Brief for the Recording Industry Association of America et al. as Amici Curiae in Support of Petitioners, *supra* note 88, at 9 (“[T]he copyright owner decided not to file suit upon learning that state sovereign immunity barred any monetary recovery (including costs or attorneys’ fees) from the infringer.”); see also Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (and How Not to)*, 79 TEX. L. REV. 1037, 1094 (2001) (explaining that lost profits, attorney’s fees, and punitive damages are not available in takings claims against states).

114. See Brief of Amicus Curiae the Software & Information Industry Association in Support of Petitioners, *supra* note 54, at 22 (“[I]f a copyright owner files a baseless suit, and loses, a state may seek its attorneys’ fees and costs when it prevails.”); see also 17 U.S.C. § 505 (1976).

115. See Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 94, at 17 (“The state and federal cases ultimately settled while pending on appeal. But they forced Oracle to devote years and substantial resources to the lawsuit, far more time than should have been necessary for this straightforward case.”).

116. *Id.* at 8.

be “void and unenforceable” under state legislations.¹¹⁷ These companies (e.g., Oracle and Dow Jones) are left bitter after their settlements.¹¹⁸ Small companies are left in an even worse condition than large companies, as they may not even have a chance to negotiate with a state offender due to financial constraints.¹¹⁹

B. *The Unconstitutional CRCA Under Allen*

In March 2020, the U.S. Supreme Court delivered its decision in *Allen*, clearly ruling that the CRCA is unconstitutional and invalid.¹²⁰ Frederick Allen owns the copyrights on some videos and photos of the shipwreck of the Queen Anne’s Revenge and its recovery.¹²¹ The State of North Carolina, which owns the shipwreck and paid for the recovery, impermissibly posted some of Mr. Allen’s copyrighted videos and photos online, promoting tourism.¹²² Mr. Allen sued the State for copyright infringement under the CRCA and claimed that the CRCA abrogated the State’s sovereign immunity. In this case, the U.S. Supreme Court

117. *See id.* at 26 (“[North Carolina] state legislation even expressly stated that the prior settlement agreement was supposedly ‘void and unenforceable.’”).

118. *See generally id.*; Brief for Dow Jones & Company, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 78.

119. Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 94, at 3 (“For many small software companies such as start-ups and solo-practicing developers, it is impossible to negotiate waivers because they lack sufficient leverage to pressure a state to agree.”). After receiving concerns regarding copyright infringement, state entities usually do not respond to the concerns at all or properly, as the California survey shows. Comments of Copyright Alliance, *supra* note 27, at 12 (finding that most copyright owners complain government entities ignored their concerns about copyright infringement, refused to recognize their copyrights, or invoked state sovereign immunity under the Eleventh Amendment).

120. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) (“[The CARC] is invalid under [Section Five of the Eleventh Amendment to the U.S. Constitution].”).

121. *Id.* at 999.

122. Richard Wolf, *Ahoy! Supreme Court Protects States from Copyright Lawsuits in Blackbeard Pirate Ship Case*, USA TODAY (Mar. 23, 2020, 2:23 PM), <https://www.usatoday.com/story/news/politics/2020/03/23/supreme-court-pirated-video-photos-blackbeard-pirate-ship/4862817002>.

directly addressed the concerns and uncertainties surrounding state sovereign immunity in copyright infringement cases.

First, under *Allen*, Article I, Section 8 of the U.S. Constitution—or, rather, Congress using its power authorized by Article I, Section 8—cannot abrogate state sovereign immunity under the Eleventh Amendment.¹²³ Article I, Section 8 of the U.S. Constitution contains the IP Clause, which grants Congress the enumerated 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.”¹²⁴ This IP Clause gives Congress legislative power to promulgate IP statutes for promoting innovation.¹²⁵ However, when a copyright offender is a state entity, the scope of enforcing power under federal statute against the state entity is constrained by the Eleventh Amendment.¹²⁶ The CRCA, which was promulgated by Congress under the authorization of Article I, Section 8 of the U.S. Constitution, broadly abolishes state sovereign immunity from copyright lawsuits, and thus conflicts with the Eleventh Amendment.¹²⁷ Therefore, it is invalid and unconstitutional.¹²⁸

Second, copyright owners can seek protection against a state if the state unconstitutionally infringes their copyrights, as explained in *Allen*.¹²⁹ Unconstitutional copyright infringement refers to intentional infringement without due process under the Fourteenth Amendment.¹³⁰

123. *Allen*, 140 S. Ct. at 1001.

124. U.S. CONST. art. 1, § 8, cl. 8.

125. *See Allen*, 140 S. Ct. at 1001.

126. *See id.* at 999, 1003.

127. *See id.* at 999.

128. *See id.*

129. *See id.* at 1006.

130. *See id.* at 1005 (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642–43 (1999)).

According to the Eleventh Amendment, Congress or federal power can strip state sovereign immunity only if the Fourteenth Amendment is violated.¹³¹ Section 1 of the Fourteenth Amendment prohibits a state from taking private property without due process.¹³² The U.S. Supreme Court recognizes that IP rights are property rights, in this context.¹³³ Therefore, copyright owners can only seek remedies for copyright infringement by states, when the state's infringement was made without due process.¹³⁴ This scope is narrower than the text contained in the CRCA.¹³⁵

Third, the U.S. Supreme Court believes that its holding in *Allen* is consistent with *Florida Prepaid*.¹³⁶ *Florida Prepaid* deals with the issue of patent infringement by states¹³⁷ and should not be overruled.¹³⁸ It rules that the Patent Remedy Act is unconstitutional because it governs both intentional and state patent infringements where no violation of due process has occurred, and also indiscriminately abolishes state sovereign immunity in such cases.¹³⁹ The constitutional foundation for both the Patent Remedy Act and the CRCA is the IP Clause.¹⁴⁰ The CRCA and Patent Remedy Act share an identical "indiscriminate

131. *See id.* at 1003.

132. *See id.*

133. *See id.* at 1004 (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932)) ("Copyrights are a form of property.").

134. *See id.*

135. *See id.* ("For an abrogation statute to be 'appropriate' under Section 5, it must be tailored to 'remedy or prevent' conduct infringing the Fourteenth Amendment's substantive prohibitions." (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997))).

136. *Id.* at 999; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

137. *See generally Fla. Prepaid*, 527 U.S. 627.

138. *See Allen*, 140 S. Ct. at 1003.

139. *See Fla. Prepaid*, 527 U.S. at 647.

140. *See id.* at 646 ("[T]he provisions of the Patent Remedy Act are 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'").

scope,” “too ‘out of proportion’ to any due process problem” to defeat sovereign immunity concerns.¹⁴¹ Accordingly, the U.S. Supreme Court did not distinguish between patents and copyrights. It ruled consistently in holding that the CRCA was invalid and unconstitutional, utilizing the same reasoning that was used in *Florida Prepaid* addressing the Patent Remedy Act.¹⁴²

C. Copyright Protection After *Allen*

Copyright protection from state infringement after *Allen* is clear on two points, but the two are both ineffective in practice. First, it is agreed that private parties can rely on the federal system for filing claims of copyright infringement against states with states’ express consent to sit in a federal court or waiver of sovereign immunity.¹⁴³ However, recalling the industry’s complaints,¹⁴⁴ Nemer’s fifty-state survey,¹⁴⁵ and the CA’s 2020 survey,¹⁴⁶ it is always difficult for private parties to acquire such an express consent or a waiver from states. Beyond acquiring an express consent or a waiver, there is still the potential that the state entity refuses to enforce the waiver,¹⁴⁷ or the state legislature prohibits the enforcement.¹⁴⁸ Second, *Allen* does not prevent private

141. See *Allen*, 140 S. Ct. at 1005–06.

142. See *id.* at 1001–02.

143. See, e.g., Tom Kulik, *States’ Rights Revenge? 3 Key Takeaways from SCOTUS Ruling in Allen v. Cooper*, ABOVE THE LAW (Mar. 30, 2020, 5:01 PM), <https://abovethelaw.com/2020/03/states-rights-revenge-3-key-takeaways-from-scotus-ruling-in-allen-v-cooper>.

144. See Brief for Oracle America, Inc., as Amicus Curiae in Support of Petitioners, *supra* note 94, at 3 (complaining that a waiver in licensing agreements is illusory in practice).

145. See NEMER, *supra* note 68, at CRS-2.

146. Copyright Alliance, *supra* note 27, at 12 (complaining that government entities hardly respond seriously to the concerns raised by copyright owners).

147. See Brief for Oracle America, Inc., as Amicus Curiae in Support of Petitioners, *supra* note 94, at 3.

148. NEMER, *supra* note 68, at CRS-21. The State of Alabama is not authorized to waive the immunity without consent from the legislature. *Aland v. Graham*,

parties from filing copyright infringement lawsuits in state courts.¹⁴⁹ However, the state legislature may completely prohibit litigations against the state,¹⁵⁰ and the state copyright protection can be ineffective.¹⁵¹

Whether private parties can sue a state for copyright infringement in federal courts without the state's express consent after *Allen* is controversial among legal professionals. Some legal practitioners superficially explain the case as that states cannot be sued without their consent.¹⁵² Alternatively, some legal practitioners did not distinguish between monetary damages and other types of remedies, such as injunctive relief.¹⁵³ Instead, they superficially suggest that private parties cannot seek monetary damages from states for copyright infringement in federal courts.¹⁵⁴ Private parties can still sue state offenders for a declaratory judgment, an injunction, or other remedies.¹⁵⁵

250 So. 2d 677, 681 (Ala. 1971).

149. Justin A. MacLean & Michael R. Friedman, *Allen v. Cooper and Georgia v. Public.Resource.org: The Supreme Court Navigates the Relationship Between State Government and Federal Copyright Law*, GREEBERG TRAUER (May 05, 2020), <https://www.gtlaw.com/en/insights/2020/5/allen-v-cooper-and-georgia-v-public-resource-org-supreme-court-state-federal-copyright-law>.

150. See, e.g., NEMER, *supra* note 68, at CRS-5. (listing the State of Arkansas's constitution that prohibits suits against the state both in state courts and federal courts). ARK. CONST. art. 5, § 20.

151. *Supra* Part I.A.2.

152. Kevin Milewski, *Supreme Court Rules That States Cannot be Sued for Copyright Infringement, For Now...*, PROSKAUER (Mar. 24, 2020), <https://newmedialaw.proskauer.com/2020/03/24/supreme-court-rules-that-states-cannot-be-sued-for-copyright-infringement-for-now/#page=1>.

153. See Brian D. Wassom, *Supreme Court Gives a Pass to State-Sanctioned Piracy of Media Copyrights*, AMERICAN BAR ASSOCIATION (Apr. 9, 2020), https://www.americanbar.org/groups/communications_law/mediabar/piracy.

154. *Id.*

155. E.g., Leon Bass & Kristin Hardy, *Did the Supreme Court Just Give States License to Pirate Copyrights? Protecting Copyrights Post Allen*, TAFT (Apr. 13, 2020), <https://www.taftlaw.com/news-events/law-bulletins/did-the-supreme-court-just-give-states-license-to-pirate-copyrights-protecting-copyrights-post-allen>; Kulik, *supra* note 143; Mark H. Wittow et al., *U.S. Supreme Court Holds*

Indeed, the invalidation of the CRCA by the U.S. Supreme Court does not suggest that the Court entirely prohibits remedies for copyright owners from a state.¹⁵⁶ *Allen* functions to instruct Congress to correct its unconstitutional text in the CRCA to be tailored to govern unconstitutional copyright infringements by a state.¹⁵⁷ The constitutional rights of states—sovereign immunity under the Eleventh Amendment—does not abolish people’s constitutional rights—due process and property rights in the Fourteenth Amendment.¹⁵⁸

Many public universities, public libraries, and scholars believe that the invalidation of the CRCA does not create shameless state copyright offenders.¹⁵⁹ Public libraries argue that they actively comply with copyright law and conduct copyright protection, even though their conduct is very likely

Copyright Remedy Classification Act of 1990 Does Not Abrogate State Sovereign Immunity for Copyright Infringement: Allen v. Cooper, THE NATIONAL L. REV. (March 25, 2020), <https://www.natlawreview.com/article/us-supreme-court-holds-copyright-remedy-classification-act-1990-does-not-abrogate>.

156. *Allen v. Cooper*, 140 S. Ct. 994, 1006 (2020) (“[This decision] need not prevent Congress from passing a valid copyright abrogation law in the future.”).

157. *Id.* at 1004 (“For an abrogation statute to be ‘appropriate’ under Section 5, it must be tailored to ‘remedy or prevent’ conduct infringing the Fourteenth Amendment’s substantive prohibitions.” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997))).

158. See *Ex Parte Young*, 209 U.S. 123, 181–82 (1908) (Harlan, J., dissenting); see also Jeffrey W. Childers, *State Sovereign Immunity and the Protection of Intellectual Property: Do Recent Congressional Attempts to Level the Playing Field Run Afoul of Current Eleventh Amendment Jurisprudence and Other Constitutional Doctrines*, 82 N.C. L. REV. 1067, 1102 (2004) (partially supporting the constitutional Intellectual Property Protection Restoration Act of 2003); Intellectual Property Protection Restoration Act of 2003, S. 1191, 108th Cong. § 5 (2003) (“Imposes liability on States for violations of the fifth or fourteenth amendment of the U.S. Constitution (takings or due process violations) involving intellectual property under such Federal laws.”).

159. Brief of Law Professors as Amici Curiae in Support of Respondents, at 18, *Allen v. Cooper*, 140 S. Ct. 994 (2020); see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645 (“[T]he evidence before Congress suggested that most state infringement was innocent or at worst negligent.”)

protected under the fair-use doctrine.¹⁶⁰ Public universities argue that they do not intentionally infringe copyrights because they are in the education industry valuing ethics and reputation, and their employees are also creators who value copyright ownership.¹⁶¹ Even the State of North Carolina tried to settle with Mr. Allen by paying him \$15,000 and laying out his respective rights to the copyrighted materials.¹⁶²

Due to the barriers of sovereign immunity, copyright owners may still seek remedies for copyright infringement by states in alternative approaches after *Allen*. First, they can seek injunctive relief against state officials.¹⁶³ An injunction can prevent government officials from continuing to impermissibly use their copyrighted work.¹⁶⁴ Second, *Allen* also does not prohibit them from seeking monetary damages from government officials who infringe copyrights.¹⁶⁵ Third, private parties have a constitutional right to bring due process or takings claims against states for copyright infringement. However, even though copyright owners can establish the existence of property by copyright, when raising a claim under the Takings Clause of the Fourteenth Amendment, the property owner must prove that the

160. Brief of Amici Curiae American Library Association et al. in Support of Respondents, at 7, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (“[L]ibraries at state colleges and universities play a central role in educating faculty and students concerning compliance with copyright law.”).

161. See Brief of Association of Public and Land-grant Universities and Association of American Universities as Amici Curiae in Support of Respondents at 9–10, *Allen v. Cooper*, 140 S. Ct. 994 (2020); see also Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and Scholarly Publishing*, 17 MICH. TELECOMM. & TECH. L. REV. 385–385, 409–10 (2011) (discussing faculty-creators care about ownership of copyrights).

162. *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

163. See *Ex parte Young*, 209 U.S. at 123.

164. Bass & Hardy, *supra* note 155.

165. See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 525 (2003) (suggesting people to sue federal government officials rather than the federal government for constitutional restrictions).

property's full value has been deprived by a state;¹⁶⁶ this is difficult to prove in copyright infringement.¹⁶⁷ Obviously, none of these approaches can properly compensate copyright owners.¹⁶⁸

With this framework in place, how can copyright owners effectively protect their copyrights against state copyright offenders, receive adequate compensation, and retain innovation incentives without a new, constitutional, CRCA?¹⁶⁹ Rational copyright owners may not sue due to high litigation expenses and a massive amount of time for merely an injunction, which cannot adequately redress their loss.¹⁷⁰ The result of *Allen* seems economically efficient; it decreases litigation numbers and encourages settlements because copyright owners have become more hesitant to sue a state

166. See Janice D. Paster, *Money Damages for Regulatory Takings*, 23 NAT. RES. J. 711, 715 (1983) ("The property owner could seek compensation when the taking was an absolute conversion, an infliction of permanent injury, or the destruction of value.").

167. See, e.g., *Univ. Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 375–77 (Tex. App. 2019) (ruling that an alleged copyright infringement by a state entity does not constitute a taking because the copyright owner does not lose the right to use or license his copyrighted work and the alleged infringement by the state entity only costs the copyright owner a licensing fee).

168. A declaratory judgment of a state's copyright infringement is meaningless to copyright owners who spend high costs to develop their works. See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020) (showing a that plaintiff seeks monetary damages); see also Brief for Dow Jones & Company, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 78, at 5 (complaining about the high costs to develop the copyrighted information); Copyright Alliance, *Sovereign Immunity Study Reply Comments*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/wp-content/uploads/2020/10/Copyright-Alliance-Reply-Comments-Sovereign-Immunity-Study-1.pdf> (last visited Jan. 14, 2021) (delivering complaints by copyright owners that injunctions "do nothing to compensate for the harm caused, and do little to deter against future infringement").

169. Without a valid new CRCA, copyright owners lack a direct legal base for suing states in federal courts for copyright infringement without consent from states. Congress has not cured the unconstitutional Patent Remedy Act since the Supreme Court's 1999 holding in *Florida Prepaid*. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (ruling the Patent Remedy Act unconstitutional under the Fourteenth Amendment).

170. See Wang, *supra* note 89, at 549 (defining that rational people attempt to maximize their wealth or money).

after *Allen*. This increased efficiency is caused by a decrease of copyright owners’ bargaining power in their settlement agreements with a state, against the expectations of the industry and authors.¹⁷¹ Forcing copyright owners to settle with a state, and receive low compensation in return for the state’s use, extends the scope of compulsory licenses,¹⁷² which may harm their innovation incentives.¹⁷³

II. *ALLEN’S* CONTROVERSIAL EFFECTS ON INNOVATION

People maintain a variety of human rights over copyrights and copyrighted works, depending on the groups in which they belong. Authors value the property and moral rights of copyrights. “Knowledge receivers” value the right to access knowledge in the copyrighted works and participate in arts or cultural activities. The copyright regime is left to balance between the interests of the two groups for education, knowledge spillover, and promoting innovation.¹⁷⁴ However, the copyright regime has not addressed many non-economic interests of authors.¹⁷⁵ *Allen* worsens the ignorance of those interests but secures litigation efficiency, despite that the decision in *Allen* explains a fundamental constitutional question.¹⁷⁶ This Part explains the economic and non-economic interests of the public and authors and pierces *Allen’s* paradox.

171. See, e.g., Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 94, at 3.

172. E.g., 17 U.S.C. § 115 (defining the scope of exclusive rights in nondramatic musical works).

173. Wang, *supra* note 36, at 148 (criticizing the premise of compulsory licenses which conflicts with the economic rationale of IP law to promote innovation).

174. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 609 (1962).

175. See generally Gilden, *supra* note 25, at 1020–21 (explaining rightsholders may be motivated by family privacy, sexual autonomy, reputation, or well-being).

176. See *Allen v. Cooper*, 140 S. Ct. 994 (2020).

A. *Public Knowledge and the Public's Access Right*

It is widely recognized that people have human rights to access knowledge and innovate.¹⁷⁷ The Universal Declaration of Human Rights (“UDHR”) defines two human rights that interact with copyrights—the rights of access and participation.¹⁷⁸ The human rights embedded in copyrights are indeed more developed in Europe than the U.S.¹⁷⁹ However, while the U.S. has not signed the UDHR, the utilitarian copyright law in the U.S. does not conflict with these two human rights defined in the UDHR. By contrast, those two human rights in the utilitarian copyright regime are reflected in its goal to support social development.¹⁸⁰

The ultimate goal of establishing the copyright regime in the U.S. is to make knowledge available to the public and promote innovation.¹⁸¹ Society demands knowledge, especially creative knowledge for development. Knowledge receivers can use publicly available knowledge in their creative expressions and become innovative-information providers to receive rewards from the legal regime and the

177. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 27(1) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

178. *Id.*

179. See, e.g., Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L. J. 549, 551–52 (2006) (comparing the protection of human rights of copyright authors in the U.S. and France).

180. See Peter Drahos, *Intellectual Property and Human Rights*, 3 INTEL. PROP. Q. 349, 358 (1999) (suggesting that the right to development is a human right and IP does not conflict with human rights if IP can promote development); see Henry E. Smith, *IP and the New Private Law*, 30 HARV. J. L. & TECH. 1, 6 (2017).

181. This the foundation of the discussions about building and optimizing IP regimes in the literature. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804, 832–39 (2008) (reviewing the literature on exploring a balance between public and private interest in the design of IP regimes).

market.¹⁸² However, it is also possible for people to merely receive knowledge or information and not contribute any new knowledge to society. These demands by knowledge receivers are suggestive of their right to access knowledge and participate in arts.

Compared to other types of IP rights (*i.e.*, patents, trademarks, trade secrets), copyrights and copyright protection concern the public interest the most. In the 18th and early 19th centuries, the U.S. enforced copyrights weakly and allowed the public to access knowledge for at a low price or even for free.¹⁸³ Even though private parties bargained for strong property interests in the legislation of the 1976 General Revision of Copyright Law,¹⁸⁴ the copyright regime maintains its purpose to “promote uncompensated positive externalities” for the public good.¹⁸⁵ For example, some use of copyrights for educational purposes constitutes public interests, supported by the copyright regime.¹⁸⁶ Similarly, 17 U.S.C. § 108 exempts some non-commercial activities by public libraries and archives for public interests to support research or public education.¹⁸⁷

Therefore, within a copyright regime in which free

182. See Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, in 2 *INNOVATION POLICY AND THE ECONOMY* 51, 62 (2002).

183. See LAWRENCE W. FRIEDMAN, *A HISTORY OF AMERICAN LAW 187–88* (3rd ed. 2005).

184. See generally Jessica Litman, *Copyright, Compromise and Legislative History*, 72 *CORNELL L. REV.* 857 (1987).

185. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031, 1052 (2004).

186. 17 U.S.C. § 107.

187. *Id.* § 108 (excluding some non-commercial use of arts by a library or archives from copyright infringement “if (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.”).

ridings can be leniently tolerated, it is not surprising that the public authorizes “pirates” for the public welfare.¹⁸⁸ By their “piracy,” public authorities bridge knowledge and the public at a low cost but high effectiveness and efficiency. Specifically, public universities need to sustain educational resources for teaching and research¹⁸⁹ because they bear heavy duties to educate students and the public¹⁹⁰ and also engage in innovation.¹⁹¹ Public libraries provide various databases to effectively and efficiently detect research sources or inspire readers to research new areas.¹⁹²

Moreover, sovereign immunity can shield state entities, especially public universities, from copyright litigation, when they serve the public good.¹⁹³ Before *Allen*,¹⁹⁴ Peter Menell suggested that an educational use of copyrights by a state should be immune from copyright infringement litigation.¹⁹⁵ For similar reasons, the Association of Public

188. Wang, *supra* note 36, at 119.

189. See Brief of Association of Public and Land-grant Universities and Association of American Universities as Amici Curiae in Support of Respondents, *supra* note 161, at 2 (expressing concerns that expensive copyright litigations divert scarce resources owned by universities that should be used in education and research).

190. THE AMERICAN ACADEMY OF ARTS & SCIENCES, PUBLIC RESEARCH UNIVERSITIES: SERVING THE PUBLIC GOOD 2 (2016) (“Public research universities educate about 20 percent of all students nationwide; among the nation’s research universities, they award 65 percent of all master’s degrees and 68 percent of all research doctorate degrees. They enroll 3.8 million students, including almost 900,000 graduate students, annually.”).

191. See Shubha Ghosh, *Are Universities Special?*, 49 AKRON L. REV. 671, 674 (2016).

192. Brief of Amici Curiae American Library Association et al. in Support of Respondents, *supra* note 160, at 23; see also Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYR. SOC’Y. USA 291, 350 (2019); Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. DAVIS L. REV. 893 (2019).

193. See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (ruling that state universities are immune from monetary damages according to the Eleventh Amendment).

194. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

195. Peter S. Menell, *Economic Implications of State Sovereign Immunity from*

and Land-grant Universities, a non-profit organization relating to research and education, submitted an *amicus curiae* brief to the U.S. Supreme Court showing its strong interests that sovereign immunity should be upheld for promoting research, innovation, and education in public universities.¹⁹⁶ However, both the public interest concerns benefiting the demand side of knowledge by the copyright regime and the Eleventh Amendment may harm the supply side of knowledge from artists and authors.

B. *Economic Incentives for Copyright Owners*

To explain how IP regimes promote innovation and creative expressions, the conventional reward theory¹⁹⁷ and the controversial prospect theory¹⁹⁸ apply to authors who are interested in protecting their innovative outcomes in the forms of patents or copyrights. Under the reward theory, when expressing and contributing creative information to the public, innovative-work providers are rewarded with limited exclusive rights and expect compensation from the market and society directly.¹⁹⁹ With these exclusive rights, they ask for enough compensation from the market for using or commercializing the original creative works, secured by patents or copyrights, to offset their investment in producing

Infringement of Federal Intellectual Property Rights, 33 LOY. L.A. L. REV. 1399, 1407–08 (2000).

196. See Brief of Association of Public and Land-grant Universities and Association of American Universities as Amici Curiae in Support of Respondents, *supra* note 161, at 1–2.

197. See Steven Shavell & Tanguy van Ypersele, *Rewards versus Intellectual Property Rights*, 44 J. L. & ECON. 525, 529–30 (2001) (retesting the robustness of the reward theory).

198. See generally Edmund W Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265 (1977) (raising out the prospect theory); cf. John F. Duffy, *Rethinking the Prospect Theory of Patents*, 13 U. CHI. L. REV. 439 (1996) (challenging the prospect theory).

199. See Zimmerman, *supra* note 19, at 31 (introducing classical rationale of copyrights to encourage creative works).

the works and continue to innovate.²⁰⁰ They also expect investors to be signaled by the IP rights and attracted to invest in their business.²⁰¹ Under the prospect theory suggested by Edmund Kitch, which supplements rather than conflicts with the reward theory, the rewards or compensation can be realized through follow-on authors, artists, or innovators because of the exclusive rights.²⁰²

With respect to the economic incentives demanded by authors and encouraged by the IP Clause,²⁰³ the copyright regime cannot supply enough incentive for innovation or creatively expression. First, commercializing copyrighted works or copyrights needs strong support from private law, securing transactions.²⁰⁴ However, property law and private property rights are opposite to the copyright regime's goal of promoting "uncompensated positive externalities."²⁰⁵ The economic rationale is that the social surplus exceeding rewards for authors decreases their incentives to innovate or creatively express.²⁰⁶ A weakness of relying on private law is that it does not embrace disputes against states.²⁰⁷ Moreover, states may not actually infringe but may pay to use copyrighted works under licenses negotiated under their stronger bargaining power. However, the payment may not

200. Menell, *supra* note 195, at 1416; *see also* Shavell & Ypersele, *supra* note 197, at 529.

201. The literature explains that IP rights have signal effects to attract investors showing the competitiveness and the potential of a company and also give them the confidence to be paid back with the intangible property rights if the business fails. *See* CAROLIN HÄUSSLER ET AL., TO BE FINANCED OR NOT... - THE ROLE OF PATENTS FOR VENTURE CAPITAL FINANCING (2009); Clarisa Long, *Patent Signals*, 2 U. CHI. L. REV. 625, 646 (2002).

202. *See* Kitch, *supra* note 198, at 275–80.

203. U.S. CONST. art. I, § 8.

204. *See* Smith, *supra* note 180, at 3.

205. *See* Lemley, *supra* note 185, at 1048 ("Tangible property law also implicitly rejects the idea that owners are entitled to capture all positive externalities.").

206. Shavell & Ypersele, *supra* note 197, at 530.

207. *See* Smith, *supra* note 180, at 3.

adequately compensate copyright owners and cannot incentivize them to innovate. Suzanne Scotchmer explains that companies hold superior information to the government so as to know the value of their works better than the government.²⁰⁸ Second, even though inventors or authors receive similar economic incentives from the IP regime, the IP regime unequally provides a narrower scope of protection for copyrights compared to patents. Mark Lemley distinguishes copyright protection from patent protection²⁰⁹: as the protection scope of copyrights only applies to the exact expression of copyright works, rather than ideas or functions embedded in the works.²¹⁰ However, with a narrower protection scope, authors may have a stronger desire other than economic compensation they receive from copyrights than inventors of patents.²¹¹

C. *Non-Economic Incentives for Copyright Owners*

Copyright owners have non-economic interests that drive them to innovate or litigate. Peter Yu contends that authors value copyrights beyond ordinary properties.²¹² Steve Calandrillo has thoroughly explained various non-economic incentives of authors to innovate.²¹³ He has summarized that authors have natural and moral rights over

208. See Suzanne Scotchmer, *On the Optimality of the Patent Renewal System*, 30 RAND J. ECON. 181, 181 (1999).

209. Mark A. Lemley, *Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013–14 (1996-1997).

210. See *id.*

211. See Gilden, *supra* note 25, at 1055 (arguing that copyrights are “trademark-like” and copyright infringements may create “market confusion”); see, e.g., *Salinger v. Colting*, 607 F.3d 68, 81 (2d. Cir. 2010).

212. See Peter Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37, 88 (2016).

213. See Steve P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301, 316–23 (1998).

copyrights.²¹⁴ These rights, with respect to copyrights, are categorized as human rights; this is reflected in some international laws,²¹⁵ such as Article 27 of the UDHR²¹⁶ and Article 15.1 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).²¹⁷

The legal terms of moral rights or human rights, however, do not match the non-economic incentives of authors recognized or supported by the U.S. copyright regime. First, the U.S. has not joined the ICESCR or signed the UDHR, which both provide a foundation of human rights for copyrights. Second, the legal term of moral rights stems from the French concept, *droit moral*, covering authors’ non-economic interests and embraced by French copyright law.²¹⁸ In French, *droit moral* translates to “rights of personality or individual civil rights.”²¹⁹ Without total transplantation of this concept from France to the U.S., some scholars conclude that fairness and morality with respect to moral rights are better protected in France than the U.S.²²⁰ Nevertheless, Jean-Luc Piotraut argues that fairness and morality are not

214. See *id.* at 312–15. Even though his arguments are made for both patents and copyrights, the evidence and the literature used are from the area of copyrights. See *id.*

215. See Paul L. C. Torremans, *Is Copyright a Human Right?*, 2007 MICH. ST. L. REV. 271, 275–79 (2007).

216. UDHR, *supra* note 177 (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

217. G.A. Res. 2200 (XXI) A, annex, International Covenant on Economic, Social and Cultural Rights, 21 U.N. GAOR Supp. No. 16, at 15 (Dec. 16, 1966) (“The States Parties to the present Covenant recognize the right of everyone: . . . To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

218. Piotraut, *supra* note 179, at 595; see Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 818 (2001) (explaining that the English term “moral rights” is merely the literal translation of *droit moral* from French).

219. Piotraut, *supra* note 179, at 595.

220. See *id.* (criticizing that “moral rights” is lacking a clear definition in English, compared to its clear definition in French).

boundlessly enforced in the French copyright regime, which is overall coherent with the U.S.²²¹ Therefore, either a broad term of non-economic rights or specifically named non-economic rights are less controversial than moral rights in the setting of U.S. copyright law.²²²

It is conventional that the utilitarian U.S. copyright law prefers economic rights to non-economic rights.²²³ Some scholars believe that the U.S. copyright regime is built on pecuniary or property rights, which do not address many non-economic concerns.²²⁴ Such a narrow understanding of the utilitarian copyright regime in the U.S. also suggests why French scholars often criticize the U.S. copyright law.²²⁵

Modern scholars, however, agree that non-economic rights over copyrights (*e.g.*, moral rights) do not necessarily conflict with managing copyrights as property rights.²²⁶ Based on Locke's labor theory, Orit Afori explains that property rights recognize the natural right that copyrights are the fruits of authors' labor.²²⁷ However, based on Hegel's

221. *See id.* at 566.

222. *See* Lloyd Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1211 (1998) (suggesting that it has become gradually less controversial that the U.S., at some level, has embraced natural and moral rights—particularly the specific rights from moral rights—over copyrights).

223. *See* Piotraut, *supra* note 179, at 552.

224. *See* Rudolf Monta, *The Concept of "Copyright" Versus the "Droit d'Auteur,"* 32 S. CAL. L. REV. 177, 177 (1959); *see also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985).

225. *See* Piotraut, *supra* note 179, at 555.

226. *See* Lee, *supra* note 218, at 798 (disagreeing with Kwall's complaint that the U.S. copyright regime is based on "pecuniary or property rights" and ignores moral rights of authors); *see also* Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 267 (2006). *Contra* Kwall, *supra* note 224.

227. Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 504 (2004) (arguing that this also corresponds with Locke's labor theory for explaining natural law); *see generally* JOHN LOCKE, TWO

personality theory, Piotraut argues that non-economic rights held by copyright owners are personal rights, which do not conflict with but rather support their property rights.²²⁸ In legislation, Paul Torremans shows that some European countries (*e.g.*, Germany) adopt property clauses in their constitutions to protect copyrights as well as cover property rights and personal rights as the human rights of copyright owners.²²⁹ In other words, copyrights are a nexus of property rights and non-economic rights. Therefore, even though Calandrillo has reminded that the IP Clause does not directly support non-economic rights over copyrights (*i.e.*, natural and moral rights),²³⁰ U.S. law is not hostile to non-economic rights over copyrights.²³¹

In fact, non-economic rights are increasingly realized by authors and courts in the U.S. Justice Holmes first identified that personality rights of authors are bound with their works.²³² Then, in the late 19th century, Samuel Warren and Louis Brandeis found that privacy rights can be realized through common-law property rights and U.S. copyright law doctrines.²³³ Moreover, in psychological theories, copyright owners have non-economic interests in their works plus potential monetary damages caused by copyright infringement.²³⁴ Recently, after *Garcia v. Google, Inc.*,²³⁵ where the Ninth Circuit refused to enforce copyrights for the plaintiff's non-economic rights, many scholars expressed their attitudes on the scope of copyright law addressing non-

TREATISES ON CIVIL GOVERNMENT (George Routledge & Sons, 2nd ed. 1887).

228. See Piotraut, *supra* note 179, at 565.

229. Torremans, *supra* note 215, at 288–89.

230. See Calandrillo, *supra* note 213, at 312–13.

231. See generally Piotraut, *supra* note 179.

232. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

233. See Warren & Brandeis, *supra* note 26, at 198. *But see* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

234. See Wang, *supra* note 89, at 549 (noting that people have plural utility).

235. *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015).

economic rights (e.g., privacy, public rights, emotional distress).²³⁶ Even though there are scholars, like Jeannie Fromer,²³⁷ Eric Goldman and Jessica Silbey,²³⁸ and Alfred Yen,²³⁹ who support the Ninth Circuit's opinion in *Garcia* and opposing concerns about non-economic interests in copyright claims, there are also scholars, like Edward Lee, who extend opinions that copyright law "legitimately protects . . . reputation or [in some cases the] privacy interests" of authors.²⁴⁰

By surveying recent copyright cases in the U.S. and the motivations of copyright owners who sued in those cases, Andrew Gilden has demonstrated how the Copyright Act is an effective legal tool for people to pursue their personal rights or other non-economic rights in courts.²⁴¹ In detail, he categorized four main non-economic interests—"family privacy, sexual autonomy, reputation, or physical and psychological well-being"—motivating copyright owners to sue under the Copyright Act.²⁴² Even though these non-economic rights could be sought under tort law, contract law, or criminal law, he has indicated that copyright law covers these rights better than other laws.²⁴³ Gilden shows that courts are likely to give injunctive relief or monetary damages for people's non-economic losses under the

236. See Gilden, *supra* note 25, at 1027–28.

237. See Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 587 (2015).

238. See Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. Rev. 929, 996 (2019).

239. See Alfred Yen, *The Challenge of Following Good Advice About Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 412 (2016).

240. Edward Lee, *Suspect Assertions of Copyright*, 15 CHI.-KENT J. INTELL. PROP. 379, 381–82 (2016).

241. See generally Gilden, *supra* note 25 (suggesting that courts should brave, rather than ignore, the demands of non-economic interests of copyright owners in copyrighted works).

242. *Id.* at 1021, 1025–58.

243. *Id.* at 1021, 1072.

Copyright Act, regardless of whether there is an imminent economic loss.²⁴⁴ Even though courts nominally reject the enforcement of non-economic interests under the Copyright Act, plaintiffs' losses can be interpreted and labeled as a form of economic loss.²⁴⁵ The courts' effective application of the Copyright Act to repair non-economic interests in the name of economic loss²⁴⁶ has been recognized by plaintiffs and motivates them to sue under copyright doctrines.²⁴⁷ Nevertheless, the copyright regime still has the problem that courts have not directly approved, and even reject, non-economic interests in litigation regarding copyright infringement.²⁴⁸

After surveying and interviewing creators, the Copyright Act raised a First Amendment interest for copyright owners where state entities use their copyrighted work without permission.²⁴⁹ Because the original expression in the copyrighted work suggests free speech, states using the expression without permission constitutes compelled government speech, which intrudes on authors or other copyright owners' right of free speech.²⁵⁰ However, this could be a much tougher claim to achieve than a claim of copyright infringement in practice.²⁵¹

244. *See id.* at 1056–58.

245. *See, e.g.,* Smith v. NBC Universal, 524 F. Supp. 2d 315 (S.D.N.Y. 2007).

246. *See generally* Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 73 (2018).

247. *E.g.,* Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015); *see also* Gilden, *supra* note 25, at 1027.

248. *See, e.g.,* Garcia, 786 F.3d at 745; Bollea v. Gawker Media, L.L.C., 913 F. Supp. 2d 1325, 1330 (M.D. Fla. 2012).

249. Copyright Alliance, *supra* note 168, at 8–9.

250. *Id.*; *see also* Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 203 (Annabelle Lever ed., 2012).

251. The First Amendment and the Copyright Act function differently in protecting expression.

D. Liability Rule and Non-Economic Interests of Copyright Owners

Without concerns over non-economic interests held by copyright owners, *Allen* should be an efficient rule to justify copyright disputes between copyright owners and states. *Allen*'s outcome can be viewed as an application of the liability-rule principle raised by Guido Calabresi and Douglas Melamed.²⁵² In the copyright scenario, under the liability rule, courts reject injunctive relief and allow infringers to use copyrighted works by paying monetary damages. This liability rule is efficiently applied when transaction costs are high between copyright licensees and copyright holders for promoting access to knowledge. Transaction costs are high in two circumstances: first, a party needs to negotiate with multiple copyright holders to be licensed; and second, a copyright holder does not license the party to use the copyright at a reasonable price and extorts the party.²⁵³ Therefore, beyond being a constitutional right efficient at the macro level, sovereign immunity, like "a royalty-free compulsory license,"²⁵⁴ is efficient at the micro level for public libraries, state universities, and other state institutes, which intensively use copyrighted work to serve the public interest. Knowing the strong enforcement of sovereign immunity, plaintiffs will not sue state offenders or pursue damages without due process concerns, which reduces litigation numbers and suggests high efficiency.²⁵⁵ Such an application of the liability rule avoids unjust enrichment for copyright holders and extortion against states.²⁵⁶

252. See generally Calabresi & Melamed, *supra* note 36.

253. See James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L. Rev. 440, 460 (1995).

254. Copyright Alliance, *supra* note 168, at 7.

255. See Wang, *supra* note 36, at 389 (explaining that utilitarian courts can minimize the cost and number of litigations by setting efficient rules).

256. Krier & Schwab, *supra* note 253, at 466.

The adoption of the liability rule for efficiency, however, is not always reasonable. James Krier and Stewart Schwab criticized the liability rule for over extorting rights from copyright holders.²⁵⁷ When a state is the offender in a copyright infringement claim, compensation given by the state to the copyright owner under due process may not fully cover the copyright owner's economic losses. More importantly, the copyright owner's non-economic interests may be totally disregarded, which may harm his innovation incentives.

Under the U.S. Supreme Court's instruction, courts prefer the liability rule to the property rule in patent- or copyright-infringement litigations for decreasing the transaction costs of disseminating knowledge.²⁵⁸ The U.S. Supreme Court only expressively admitted economic interests owned by copyright holders,²⁵⁹ even though the economic interests can be broad enough to include some privacy concerns of authors, such as the right to first publication.²⁶⁰ The problem is that, regardless of the non-economic interests that could be compensated for equitably, plaintiffs can only sue for economic interests and are more likely to receive damages than a proper equitable remedy, such as an injunction, for their non-economic losses.²⁶¹ Even though a copyright holder who seeks recovery for non-economic interests may leave with some nominal monetary damages approved by courts, when the defendant is a state entity, the copyright holder may not receive even the

257. *See id.* at 467.

258. *See generally* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (reaffirming a high standard for receiving a permanent injunction, which requires a plaintiff to have suffered an irreparable injury that damages fail to adequately compensate for).

259. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

260. *See* Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 554 (1985); *see also* Gilden, *supra* note 25, at 1025–26, 1073.

261. *See, e.g.*, Garcia v. Google, Inc., 786 F.3d 733, 745–47 (9th Cir. 2015) (refusing to grant an injunction to recover harmed non-economic interests).

nominal damages. The state entity undervalues some copyrights when it provides the copyright owner with insufficient economic interests and zero non-economic interests, which impairs his innovation incentives.²⁶²

Allen is not a proper example to clearly demonstrate this problem because Mr. Allen's purpose was to pursue higher rewards for his copyrights through litigation.²⁶³ However, the problem remains after *Allen*: when the U.S. Supreme Court decided the case, it did not recognize non-economic rights owned by copyright holders implicitly when the copyright infringer is a state, who usually does not pay appropriate licensing fees to copyright owners because of their overwhelming bargaining power.²⁶⁴

III. PROPOSING APOLOGY TO CURE AND PREVENT STATE "PIRACY"

Several concerns of copyright owners remained during and after *Allen*.²⁶⁵ Can the copyright regime maintain its litigation efficiency and not impair innovation incentives for authors or their spirit of creativity? When states are immune from copyright infringement litigation, can the copyright

262. Psychologists suggest that people are discouraged from some behaviors by punishment and encouraged to conduct particular behaviors by being rewarded. See SUSAN CLAYTON & GENE MYERS, CONSERVATION PSYCHOLOGY: UNDERSTANDING AND PROMOTING HUMAN CARE FOR NATURE 148 (2009).

263. See *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020). North Carolina expressed an intent to settle for \$15,000 and attribution of respective rights to the parties, which was refused by Allen.

264. The Supreme Court does not distinguish copyrights from patents when interpreting the Eleventh Amendment and adjudicating upon the validity of the CRCA. In *Florida Prepaid*, the Supreme Court held that patents are a form of property. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 642–43 (1999). This rationale was reconfirmed in *Allen*; however, non-economic interests are more frequently a concern of copyright owners than patent owners. *Allen*, 140 S. Ct., at 1004. Therefore, there are scholars, like Gilden, who explore copyright cases and the non-economic concerns behind copyright infringement cases. Gilden, *supra* note 25.

265. See generally *Allen*, 140 S. Ct. 994.

regime avoid abuse of the immunity?²⁶⁶ Because copyright owners may only receive limited compensation from a state, is it possible for the state to address their non-economic injuries in an approach other than overpaying them monetary damages?

Some scholars have introduced apology as a new form of civil remedy in the U.S. for people who have experienced “emotional or symbolic injuries.”²⁶⁷ Liesbeth Hulst and Arno Akkermans argue that money cannot substitute proper compensation for non-economic losses, even though they agree that money has symbolic value providing recognition and satisfaction.²⁶⁸ Robyn Carroll suggests apology should complement monetary damages in compensating for mental distress.²⁶⁹ Brent White indicates that compelled apologies have been broadly used in criminal law to deter crime, heal psychological injuries, and reinforce social norms.²⁷⁰ There is also a demonstrated demand for apologies by plaintiffs in certain civil disputes (*e.g.*, medical malpractice²⁷¹). White also highlights the particular value of apology when expressed by the government: people seek apology from the government as a means to acquire respect and value

266. See Brief of Oracle America, Inc. as Amicus Curiae in Support of Petitioners, *supra* note 94, at 10.

267. See Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006).

268. Liesbeth Hulst & Arno J. Akkermans, *Can Money Symbolize Acknowledgment? How Victims' Relatives Perceive Monetary Awards for Their Emotional Harm*, 4 PSYCHOL. INJ. & L. 245, 256–57 (2011).

269. See Robyn Carroll, *Beyond Compensation: Apology as a Private Law Remedy*, in THE LAW OF REMEDIES: NEW DIRECTION IN THE COMMON LAW, 323, 324–26 (Jeff Berryman & Rick Bigwood eds., 2010).

270. White, *supra* note 267, at 1270.

271. *Id.* at 1269, 1271; see also Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565 (1996); Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003).

recognized by the government.²⁷²

Consistent with the above literature, this Article suggests the copyright regime adopts state apologies for alleviating the non-economic harms to copyright owners. State infringers should be compelled to or voluntarily apologize to compensate copyright holders. One approach is that legislation, especially congressional legislation, should evolve to include compelled state apologies for copyright infringements. Therefore, courts can order a compelled apology for copyright owners if an infringer is a state. Alternatively, states should consider voluntarily comforting emotional or mental distress of copyright owners by identifying the sources of copyrighted works and offering commendation for copyright owners. This Part first explains why state apologies are needed for copyright infringement by states and defines state apologies under the proposal. Then, it explains why and how it can be justified in the U.S. copyright regime with evidence showing how apologies are reasonably adopted in other jurisdictions.

A. *Need for State Apology*

A state apology in a copyright context is not necessarily an "I am sorry." An apology can be expressed in various forms, "including expressions of regret, admission of responsibility or fault or damage, request for forgiveness, a promise of forbearance or some offer of reparation, restitution or compensation, and/or a promise that the offense will not be repeated."²⁷³ Not all of these forms of

272. See White, *supra* note 267, at 1281.

273. Sophie M. Beesley, Effect of Apology Focus on Perceptions of Sincerity, Apology Acceptance and Forgiveness, 7 (2010) (B.A. thesis, Edith Cowan University) (on file with Edith Cowan University); see also Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 744 (1982); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219 (1989); Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. SOC. PSYCHOL. 465 (2004).

apologies are proper or effective for alleviating concerns about copyright infringement by states or contributing to innovation incentives. A state can provide particular forms of apologies to copyright owners depending on various purposes. Meanwhile, a state apology in this proposal can be defined by states with explanations about their policy goals and the economic and psychological rationale.

The ultimate purpose for a state to provide compelled or voluntary apologies to a harmed author is to reconstruct the relationship between an alleged state infringer and the author for encouraging his continuous innovation.²⁷⁴ This goal motivates legislators to add compelled apologies as remedies in copyright statutes, plaintiffs to claim for apologies, courts to apply such statutes, and states to offer apologies to authors voluntarily. It is also the foundation for achieving the policy goals of strengthening copyright protection, promoting litigation efficiency, and encouraging innovation.

First, the use of apology should be able to promote settlement, which is a commonly agreed upon notion.²⁷⁵ How effective apologies are to moderate aggression depends on facts and specific apologies.²⁷⁶ In the copyright infringement context, an ideal apology from a state offender establishes dialogues with a copyright owner and offers nominal economic compensation. In the dialogues, the copyright owner has a chance to express his non-economic concerns, including his emotional distress. The alleged state infringer can explain its negligence and the public interest underlying

274. See Beesley, *supra* note 273, at 7; see also E. Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, 18 *PSYCHIATRY: J. STUD. INTERPERSONAL PROCESSES* 213 (1955) (suggesting the importance of reputation to apology recipients in any further cooperation); White, *supra* note 267, at 1267.

275. See generally Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 *CLEV. ST. L. REV.* 545 (2000) (suggesting the use of apology in mediation).

276. See Jennifer K. Robbennolt, *Apologies and Settlement*, 45 *CT. REV.* 90, 91 (2008).

the use of the copyrighted work to the author. Such dialogues can reduce aggression and heal the author's emotional distress. Moreover, the state can comfort him with acknowledgment, recognition, and some economic compensation to reduce aggression further.²⁷⁷ The whole process makes the copyright owner perceive that the state's payment compromises public interests and the copyright owner's interests.²⁷⁸ Even though an author insists on strong economic interests, empirical evidence implies that he may be more likely to reduce his expectations of monetary compensation and improve expectations of the relationship with the state infringer after receiving an apology from the state.²⁷⁹ Although an apology is still insufficient for some copyright owners, they are prevented from suing for more economic damages after the apology. The process of delivering that apology can satisfy the due process requirement so as to avoid unconstitutional copyright infringement.²⁸⁰

Second, apologies should be able to rebuild the reputation of harmed copyright owners, which is critical to their innovation incentives, regardless of economic or non-

277. See Prue E. Vines, *Apologies and Civil Liability in England, Wales and Scotland: The View from Elsewhere*, 12 EDINBURGH L. REV. 200, 206 (2008).

278. See Robbennolt, *supra* note 276, at 93 (suggesting that a victim is more likely to accept an apology if he feels that the solution is a reciprocal concession).

279. See generally Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOTIATION L. REV. 349 (2008).

280. See *Daniels v. Williams*, 474 U.S. 327, 328 (1985) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."). In civil proceedings, an evaluation test is applied for balancing a copyright owner's interest and the public interest represented by the government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

economic interests sought.²⁸¹ If a copyright owner seeks compensation for economic interests, regardless of the economic compensation amount, a state offender can offer apologies to assist in building the reputation or goodwill of the copyright owner, which will help to generate economic interests from the market in the long term. For example, a state can award a prize to copyright owners for their contributions to the public interest, for which individual owners can apply. Here, the prize functions as an apology. Alternatively, a state can seek authorization from the copyright owner to advertise its use of the copyrighted work, suggesting a beneficial social influence of the work. States should publicly acknowledge the contributors of copyrighted works, avoiding follow-on infringement.

If a copyright owner seeks non-economic interests, state entities or courts should identify which interests or private rights constitute the main concern or discouragement of innovation. Apologies can heal emotional distress of authors or other authorship rights to preserve their innovation incentives and enthusiasm. Here, apologies can be a public acknowledgment of the authorship of copyright owners,²⁸² repairing their personal reputation or healing their emotional distress. Alternatively, apologies can be dialogues, providing authors a factual explanation of negligent behaviors without admission of the offense,²⁸³ a policy explanation with respect to public interests, or an opportunity to express their emotional distress to the state offender. Other incentives promoted by non-economic theory scholars, such as whether to repair “family privacy [and]

281. See, e.g., Zimmerman, *supra* note 19, at 42-48 (explaining the intrinsic interests incentivizing innovation, including reputation).

282. See Brent T. White, *Saving Face: The Benefits of Not Saying I'm Sorry*, 72 L. & CONTEMP. PROBS. 261, 264 (2009) (criticizing the effectiveness of apology and forgiveness but upholding acknowledgement and cooperation).

283. See, e.g., Vines, *supra* note 277, at 7; see also Kathryn Anderson et al., *A 30-Month Study of Patient Complaints at a Major Australian Hospital*, 21 J. QUALITY CLINICAL PRAC. 109, 111 (2001) (showing that most victims of healthcare disputes are effectively comforted by an explanation).

sexual autonomy"²⁸⁴ by apologies, are a separate issue, inapplicable in a utilitarian copyright regime.

B. *Compelled State Apologies*

In future federal and state copyright law reforms, copyright statutes should list apologies as a form of equitable relief supplementing injunctive relief against state copyright infringers in cases where states waive their sovereign immunity or cannot claim sovereign immunity because of unconstitutional actions (*i.e.*, copyright infringement without due process). It is not necessary to define the apology's specific form—private or public, formal or informal—or expression in the copyright compensation legislation, but can be ordered based on the claims raised by plaintiffs and the discretion of judges or state offenders.²⁸⁵

People can seek public apology as a legal remedy in many jurisdictions outside of the U.S. (*e.g.*, many Asian countries, a few European countries, Canada, and Australia).²⁸⁶

284. Gilden, *supra* note 25, at 1021.

285. White suggests that judges should have discretion when ordering apologies because they are fact-related. White, *supra* note 267, 1308–09. The form of apologies is complex, so the legislative language in most jurisdictions adopting an apology as a remedy does not define it. For example, in China, the China's Civil Code only lists apologies as a form of apology without any details. [Civil Code of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 179.11. In Queensland Australia, the Anti-Discrimination Act lists a private apology and a public apology as a legislative remedy. *Anti-Discrimination Act 1991* (Qld) s 209 (Austl.) (“[A]n order requiring the respondent to make a private apology or retraction; . . . an order requiring the respondent to make a public apology or retraction by publishing the apology or retraction in the way, and in the form, stated in the order.”).

286. These countries include but are not limited to Japan, China, Indonesia, South Korea, Vietnam, England and Wales, Canada, Ukraine, Slovakia, Russia, Turkey, and Poland. See Andrea Zwart-Hink et al., *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 U. W. AUSTL. L. REV. 100, 100 n.3 (2014); Nicola Brutti, *Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology*, 24 EUR. BUS. L. REV., 127, 131–33 (2013); White, *supra* note 267, at 1262 n.2; Robyn Carroll et al., *Apology Legislation and Its Implications for International Dispute Resolution*, 9 DISP. RESOL. INT'L, no. 2, Oct. 2015, at 115, 116–17.

Apologies, especially public apologies, are broadly applied as remedies in civil disputes in Japan and China. In Japan, apologies are effective compensation, as crucial as monetary damages, for individuals and entities.²⁸⁷ In China, court-ordered apologies are provided for in China's Civil Code,²⁸⁸ parallel to other legislative remedies, and lavishly granted by courts in IP disputes to fix the losses beyond what can be quantitatively estimated, such as a company's goodwill.²⁸⁹ In Australia, public or private apologies are applied to repair injuries on civil rights, such as discrimination,²⁹⁰ and have been effectively applied broadly in both civil and criminal disputes.²⁹¹ In the Netherlands, the Dutch Civil Code allows apologies as remedies for defamation,²⁹² and there are scholars who believe that Dutch law can embrace public apologies more broadly as in Australia.²⁹³

The U.S. movement towards apology is partially motivated Australia, Canada, and the U.K.²⁹⁴ These jurisdictions adopt apologies as a form of civil remedies in legislation.²⁹⁵ Even though the U.S. has not adopted apology as a form of civil remedies by statute, White argues that the seed has been planted.²⁹⁶ He believes that equitable relief allowed by the Civil Right Act of 1871 should include apology.²⁹⁷ There is a possibility this seed develops in the

287. Bolstad, *supra* note 275, at 558.

288. Civil Code of the People's Republic of China, art. 179.11.

289. See Wang, *supra* note 36, at 353 (showing that Chinese courts are commonly guided to order public apologies for healing victims in trademark infringement cases and unfair competition cases).

290. See Robyn Carroll, *Apologies as a Legal Remedy*, 35 SYDNEY L. REV. 317, 328 (2013).

291. *Id.* at 321.

292. See Zwart-Hink et al., *supra* note 286, at 101.

293. See, e.g., *id.*

294. See Vines, *supra* note 277, at 11.

295. See, e.g., British Columbia Apology Act, S.B.C. 2006, c. 19 (Can.).

296. See White, *supra* note 267, at 1303.

297. *Id.*; 42 U.S.C. § 1983. *But see, e.g.,* Minneapolis v. Richardson, 239 N.W.2d

new CRCA and state copyright laws to clearly indicate apology as a type of equitable remedy for copyright owners against states.

C. *Voluntary State Apologies*

Addressing the policy goal of promoting settlement and innovation, a state entity may consider voluntarily offering apologies to copyright owners. In this circumstance, psychological literature suggests the timing of apologies matters to their effectiveness.²⁹⁸ Several scholars propose that injured parties care about the timing of apologies²⁹⁹ and psychological data suggest that early apologies are effective in comforting injured parties.³⁰⁰ However, delayed apologies may also be effective if injured parties perceive the apologies as sincere.³⁰¹ The timing of apologies may depend on the economic or emotional status of injured parties, as that status relates to whether they are ready to accept apologies as sincere. Accordingly, state apologies can be given in stages depending on the needs of copyright owners.

It likely does not harm the beneficial effect of apology if a state entity provides an early apology. An early apology is to publicly acknowledge the source and the contributors of

197, 205–06 (Minn. 1976) (refusing to admit compelled apologies as proper injunctive relief).

298. See Robyn Carroll et al., *Apologies, Mediation and the Law: Resolution of Civil Disputes*, 7 ONATI SOCIO-LEGAL SERIES 569, 577 (2017) (reviewing the psychological literature about the timing of apologies).

299. See, e.g., Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanations to Manage Conflict*, 46 HUM. RELS. 349 (1993); Alfred Allan et al., *Parties' Perceptions of Apologies in Resolving Equal Opportunity Complaints*, 17 PSYCHIATRY, PSYCH. & L. 538, 544 (2010).

300. See John F. Kremer & Laura Stephens, *Attributions and Arousal as Mediators of Mitigation's Effect on Retaliation*, 45 J. PERSONALITY & SOC. PSYCH., 335, 335 (1983); Dolf Zillman & Joanne Cantor, *The Timing of Information About Mitigating Circumstances on Emotional Responses to Provocation and Retaliatory Behaviour*, 12 J. EXPERIMENTAL SOC. PSYCH. 38, 38 (1967).

301. See Cynthia M. Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. EXPERIMENTAL SOC. PSYCH. 201, 201 (2005).

copyrighted works that a state uses publicly and remind the public of the respective rights embedded in the works. This form of apology attempts to prevent recurrent copyright infringement by parties other than the state entity. However, obviously, such an early apology did not effectively comfort Mr. Allen, who insisted on great monetary damages.³⁰² By itself, the early apology does not satisfy due process or suggest how states respect copyrights or property rights. Therefore, state entities should also be ready to actively respond to the continuing concerns of copyright owners.

An active response to copyright owners is the next stage of an apology. Dialogues between a state offender and a copyright owner facilitate an understanding of each other's needs and promote settlement. Building in dialogues as part of a normal process may avoid social condemnation of a state as a result of perceptions that it does not respect copyrights or property rights and function as due process. States may offer authors agreeable remedies during the dialogues in the communication process itself or some limited licensing fees. In order to sustain and even promote innovation incentives, states may use this opportunity to propose a "prize-formed apology" to restore or even improve the reputation of the injured copyright owners, even though they may lack the legal basis to pursue litigation, because of the fair-use doctrine or state sovereignty immunity. A "prize-formed apology" can be as minimal as a nominal award, such as officially introducing the photographers whose photographs won the highest click-through rate in a year. Offering a "prize-formed apology" can be the last stage of a state's voluntary apology.

D. *A Protection Foundation for Adopting State Apologies*

Apology protection should be in place before adopting apologies as a legislative remedy for copyright infringement.

302. See *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

Under apology protection, apologies to copyright owners per se do not suggest evidence of intentional or negligent copyright infringement or any liability. Therefore, apology protection allows the advantages of apologies to victims and society³⁰³ but precludes those who expresses apology from liability raised by the apologies.³⁰⁴

Carroll lists thirty-six states introducing apology protection in their civil-action legislation.³⁰⁵ Regardless of whether apology is introduced in relation to copyrights or not, the purposes of those statutes or codes are to protect apologetic discourse or behaviors in civil actions and exclude admission of apologies as evidence for showing liability. For example, in Massachusetts, the first state in the U.S. to introduce apology in state legislation,

[s]tatements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as

303. *See supra* Part II.

304. *See Vines, supra* note 277, at 224–30 tbls. 1–2 (showing the types of liabilities excluded by apology protection statutes in some jurisdictions).

305. Carroll et al., *supra* note 286, at 116 n.3; *see, e.g.*, ARIZ. REV. STAT. ANN. § 12-2605 (2005); CAL. EVID. CODE § 1160 (West 2000); COLO. REV. STAT. § 13-25-135 (2003); CONN. GEN. STAT. § 52-184d (2005); DEL. CODE ANN. tit. 10, § 4318 (2006); D.C. CODE § 16-2841 (2007); FLA. STAT. § 90.4026 (2001); GA. CODE ANN. § 24-4-416 (2011); HAW. REV. STAT. § 626-1, Rule 409.5 (2007); IDAHO CODE § 9-207 (2006); 735 ILL. COMP. STAT. 5 / 8-1901 (2013); IND. CODE § 34-43.5-1-3 (2006); IOWA CODE § 622.31 (2007); LA. STAT. ANN. § 13:3715.5 (2005); ME. STAT. tit. 24, § 2907 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (West 2004); MASS. GEN. LAWS ch. 233, § 23D (1986); MO. REV. STAT. § 538.229 (2005); MONT. CODE ANN. § 26-1-814 (2005); NEB. REV. STAT. § 27-1201 (2007); N.H. REV. STAT. ANN. § 507-E:4 (2005); N.C. GEN. STAT. § 8C-1, Rule 413 (2004); N.D. CENT. CODE § 31-04-12 (2007); OHIO REV. CODE ANN. § 2317.43 (West 2004); OKLA. STAT. tit. 63, § 1-1708.1H (2004); OR. REV. STAT. § 677.082 (2011); S.C. CODE ANN. § 19-1-190 (2006); S.D. CODIFIED LAWS § 19-19-411.1 (2005); TENN. CODE ANN. § 409.1 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (1999); UTAH R. EVID. 409 (2010); VT. STAT. ANN. tit. 12, § 1912 (2005); VA. CODE ANN. § 8.01-581.20:1 (2005); WASH. REV. CODE § 5.64.010 (2006); W. VA. CODE § 55-7-11a (2005); WYO. STAT. ANN. § 1-1-130 (2004).

evidence of an admission of liability in a civil action.”³⁰⁶

After Massachusetts, other states adopted provisions to protect apologies from creating liability during the 1990s and early 2000s,³⁰⁷ responding to the “tort crisis” beginning in the 1960s.³⁰⁸ The scope of the protection varies among states. Some states only protect apologies given by healthcare providers: Arizona,³⁰⁹ Colorado,³¹⁰ and the District of Columbia.³¹¹ Some states protect apologies for negligence actions or accidents: Florida,³¹² Tennessee,³¹³ and Texas.³¹⁴ Some states broadly protect apologies for any civil actions: Hawaii,³¹⁵ Missouri,³¹⁶ and South Carolina.³¹⁷ Therefore, one step before the copyright regime adopts compelled or voluntary state apologies, congressional- and state-level legislators should approve the protection of “partial” apologies in copyright infringement cases.³¹⁸

306. MASS. GEN. LAWS ch. 233, § 23D (1986) (“‘Accident’, an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.”).

307. Vines, *supra* note 277, at 2.

308. *See id.*; *see also* Stephen D Sugarman, United States Tort Reform Wars, 2 (Aug. 2002)(unpublished manuscript) (on file with University of California, Berkeley), https://www.law.berkeley.edu/files/United_States_Tort_Reform_Wars_A.TORTS.pdf (“Throughout the 1960s and into the 1970s tort law became increasingly pro-victim.”).

309. ARIZ. REV. STAT. ANN. § 12-2605 (2005).

310. COLO. REV. STAT. § 13-25-135 (2003).

311. D.C. CODE § 16-2841 (2007).

312. FLA. STAT. § 90.4026 (2001).

313. TENN. CODE ANN. § 409.1 (2003).

314. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (1999).

315. HAW. REV. STAT. § 626-1, Rule 409.5 (2007).

316. MO. REV. STAT. § 538.229 (2005).

317. S.C. CODE ANN. § 19-1-190 (2006).

318. Carroll et al. define a “partial” apology as “an apology that offers an expression of regret or sympathy but that does not incorporate an admission of fault or wrongdoing . . . a ‘full’ apology [incorporates] both.” Carroll et al., *supra* note 286, at 126 (“In the US, more states have favoured the protection of a partial apology, as opposed to a full apology.”). Jonathan Cohen calls “partial” apologies

IV. THE EFFECTS OF STATE APOLOGIES IN
COPYRIGHT INFRINGEMENTS

The biggest concern in introducing apologies as compensation for copyright owners when copyright infringement is committed by a state entity is the effect of apologies on copyright owners, the government, and the society. While Part II discusses why apologies should be offered voluntarily by state offenders or ordered by courts against state infringers, are compelled or voluntary apologies actually effective manners to compensate copyright owners? How effective are apologies offered by a state offender in sustaining the injured author's innovation incentives and passions for creativity? What are the effects of the apologies on other authors and state entities? Based on these concerns, this Part discusses the justification of state apologies for using copyrighted works.

A. *No Extra Litigation for Compelled Apologies*

If compelled apologies become a legal remedy, there are three circumstances where a copyright owner will sue for a compelled apology against a state offender. First, his or her offended non-economic interests, such as emotional distress, can only be repaired by public apologies. Second, an apology request to a state suggests a powerless copyright owner's strong desire for copyright protection against the state offender.³¹⁹ Third, a copyright owner sues to protect other authors' interests and avoid similar harms happening to other authors.³²⁰ These three motives may collaboratively

"safe apologies." See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1067 (1999). Canadian legislation protects a full apology, defining apology as "an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate." British Columbia Apology Act, S.B.C. 2006, c. 19 (Can.).

319. See White, *supra* note 267, at 1298.

320. See generally HAZEL GENN & ALAN PATERSON, *PATHS TO JUSTICE SCOTLAND*:

induce a copyright owner to sue for an apology.³²¹ Compared to these three motives, the attribution of fault, which primarily motivates people to sue for apologies,³²² has not been suggested by the theory or practice of copyright infringement as a litigation incentive.³²³

It may be unlikely that copyright owners sue a state offender only for an apology. This is not a rational reason for filing a lawsuit because litigation is expensive and time-consuming. In such litigations, the economic interests for copyright owners cannot be recovered. The copyright owner also pays extra high litigation fees for non-economic interests or indirect economic interests, such as goodwill. Therefore, in most circumstances, a claim for a compelled apology will supplement, rather than substitute, other traditional remedies (*e.g.*, injunctive relief or monetary damages) sought by copyright owners.³²⁴ It does not mean that there are no copyright owners who will only sue for an apology.³²⁵ If their economic or non-economic damages, which a state apology can repair, are higher than the marginal litigation costs, they will sue only for an apology.

B. *Effective Compelled Apologies*

Whether compelled apologies are effective remedies for an injured party is controversial due to the unknown sincerity of compelled apologies. Some Australian courts

WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW 183 (2001).

321. See Vines, *supra* note 277, at 14.

322. See *id.* (citing D. HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 151 (1985)).

323. See, *e.g.*, Gildea, *supra* note 25, at 1021.

324. See Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 514, 543 (2012) (claiming an injunction should not be a reasonable substitute for damages when the infringer is a state).

325. See Copyright Alliance, *supra* note 27, at 13 (stating 50% of the surveyed copyright owners expressed an intent to only sue for an injunction in the Copyright Alliance's 2020 survey while only 9% of the surveyed copyright owners plan not to file a lawsuit only for an injunction).

criticize that compelled apologies are “insincere, meaningless and therefore futile.”³²⁶ So do Dutch courts, most of which believe that compelled apologies do not add value to victims and are not enforceable.³²⁷ The conventional literature supports the argument that insincere apologies are ineffective.³²⁸ For example, Cohen criticized compelled apologies as insincere and carrying little meaning, and suggested that a voluntary apology is most effective.³²⁹ Similarly, the effectiveness of voluntary, but strategic, apologies made in hopes of inducing a settlement is also doubted for lack of sincerity.³³⁰

Recent psychological literature, however, disputes the above criticisms and suggests that compelled apologies are effective and valuable to whoever seeks them.³³¹ The rationale is that an apology’s sincerity does not make much difference in the purposes of delivering an apology.³³² Moreover, when a state is the offender and delivers an apology for its ultimate utilitarian purpose of promoting creative expressions and innovation, apology recipients

326. Robyn Carroll & Normann Witzleb, “*It’s Not Just About the Money*”—*Enhancing the Vindictory Effect of Private Law Remedies*, 37 *Monash U. L. Rev.* 216, 232 (2011).

327. Zwart-Hink et al., *supra* note 286, at 117.

328. See Cohen, *supra* note 318, at 1017 (“For an apology to comfort the injured party, it must be *sincere*, or at least perceived to be sincere.”); see also Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanation to Manage Conflict*, 46 *HUM. REL.* 349, 359 (1993).

329. Cohen, *supra* note 318, at 1018.

330. See Nick Smith, *The Categorical Apology*, 36 *J. SOC. PHIL.* 473, 491–92 (2005).

331. See Zwart-Hink et al., *supra* note 286, at 120; see also AARON LAZARE, *ON APOLOGY* 117 (2004).

332. See Zwart-Hink et al., *supra* note 286, at 120; see also Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 *J. PERSONALITY & SOC. PSYCHOL.*, 418, 418 (2007).

cannot tell³³³ or may not care³³⁴ about the apology's sincerity. Especially when a court does not order extra damages to be paid by a state in addition to a compelled apology, the apology's sincerity does not matter.³³⁵

C. *Rebuilding Legal and Social Standing of Copyright Owners*

Regardless of an apology's sincerity, the psychological literature suggests that an apology can serve two primary process purposes, which can be applied when a state infringes copyrights.³³⁶ First, an apology suggests acknowledgment of violation of social or moral contracts or rules, and functions as a reaffirmation of the legitimacy of those contracts or rules.³³⁷ In the copyright scenario, the key to an apology is not to acknowledge any faults of a state entity for its use of a copyrighted work.³³⁸ Instead, it is to acknowledge the value of the work and the robustness of copyright protection.³³⁹ Therefore, even though there are scholars like Brent White who implied that compelled apologies might humiliate state officials who deliver the

333. See Cohen, *supra* note 318, at 1050 ("Apologies are likely to be more powerful when they come from the client rather than the lawyer."). The state government offender always needs an agent, who may be a government official or a state's attorney who represents the state government, to deliver the apology. Therefore, whether the client or the lawyer makes an apology does not make a difference when the client is a state government.

334. See White, *supra* note 267, at 1279 (stating both "voluntary and forced apologies" offer "high expressive utility").

335. See Robbenolt, *supra* note 276, at 93.

336. See Risen & Gilovich, *supra* note 332, at 418 (summarizing several purposes of apologies in the literature, which can be distinguished between sincere and insincere apologies).

337. See Zwart-Hink et al., *supra* note 286, at 120; see also B. W. Darby & B. R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742, 742 (1982).

338. *But see* Vines, *supra* note 277, at 9 (emphasizing the importance of acknowledging fault in an effective apology).

339. See White, *supra* note 267, at 1295.

apologies,³⁴⁰ this should not be a concern in a copyright infringement context. *Allen* reconfirms state sovereign immunity in copyright issues, authoritatively preventing most copyright infringement litigations against a state.³⁴¹ The U.S. Supreme Court explained that Article I, Section 8 of the U.S. Constitution does not preempt the immunity.³⁴² However, when a state uses a copyrighted work without authorization from the author, either a compelled apology or a voluntary apology from this state offender acknowledges the principles in Article I, Section 8 that the society should protect copyrights and encourage innovation.

Second, an apology can restore the injured party's social standing.³⁴³ When a state entity publicly acknowledges the author's copyrighted work, the work's value and the author's contribution to the public are acknowledged.³⁴⁴ The acknowledgment also prevents further copyright infringements by the public or any follow-on infringers. The key to effective apologies is recognizing the needs and feelings of the injured party.³⁴⁵ Here, the author's concern that relates to his or her innovation incentives is about effective copyright protection and his or her authorship-related rights. Moreover, when a state entity explains its use of the work without any payments, or only with limited payments, and highlights its concerns about the public interest, the author is more likely to understand the message that his or her self-sacrifice for the common good is necessary and is more likely to allow the use. By contrast, if the state entity is silent about the concerns regarding its use of the

340. *See id.* at 1297.

341. *See generally* *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020).

342. *See* Calandrillo, *supra* note 213, at 312–13.

343. *See* Ken-Ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. SOC. PSYCHOL. 5, 5 (1994); *see also* Goffman, *supra* note 274, at 213.

344. *See* White, *supra* note 267, at 1267 (suggesting that public apologies can convey important social messages).

345. *See id.* at 1292–93.

copyrighted work based on constitutional immunity, it is not only unpleasant to the author, but the state entity may also lack due process to claim sovereign immunity and avoid potential litigation.

D. *Repairing Rewards for Copyright Owners*

The monopoly power of copyrights is not secure because of sovereign immunity.³⁴⁶ States may not be incentivized to intentionally infringe copyrights after the U.S. Supreme Court clarified the application of sovereign immunity in *Allen*.³⁴⁷ Moreover, some particular state entities put efforts in training about copyright protection and avoiding copyright infringement.³⁴⁸ However, the monopoly power is still deprived when copyright owners are prevented from receiving expected rewards for a state's impermissible use of copyrighted works because of the immunity.³⁴⁹

The monopoly deprivation by a state offender can be compensated by social rewards in the state's apologies so as to maintain the innovation incentives of authors.³⁵⁰ A state apology, either compelled or voluntary, constitutes rewards for copyright owners, compensating their economic or non-economic interests. Even though the apology is different from monetary damages, it suggests a monetizable benefit,³⁵¹ such

346. See Benjamin N. Roin, *Intellectual Property versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999, 1014 (2014).

347. *Allen v. Cooper*, 140 S. Ct. 994 (2020).

348. See, e.g., *Learn about Copyright*, UCLA LIBRARY, <https://www.library.ucla.edu/support/publishing-data-management/scholarly-communication-resources-education/learn-about-copyright> (last visited July 18, 2020); *Copyright Services*, THE OHIO STATE UNIVERSITY UNIVERSITY LIBRARIES, <https://library.osu.edu/copyright> (last visited July 18, 2020).

349. See, e.g., Copyright Alliance, *supra* note 27, at 19 (“[Dr. Keith Bell] estimates that all told, the misappropriation of his works [by states] has deprived him of approximately \$100 million in sales or licensing opportunities.”).

350. See Michael Kremer, *Patent Buyouts: A Mechanism for Encouraging Innovation*, 113 Q. J. ECON. 1137, 1139 (1998) (suggesting that proper patent buyouts or expropriation of patents results in positive innovation outcomes).

351. Cf. Lindsay Church, *Government Subsidies and Intellectual Property*

as positive goodwill or remarkable achievements valuable to the public. By delivering apologies, state entities have the discretion to subsidize or reward authors for their copyrighted works.³⁵²

There is vast literature comparing a prize mechanism (providing government rewards or subsidies) and an IP regime (providing monopoly rights) in exploring an optimal policy for promoting creative expressions and innovation. In theory, there are no differences between direct rewards given by the government and indirect rewards given by the IP regime and acquired from the market.³⁵³ Direct government funding or subsidies for innovation could be more effective in spurring innovation than the IP regime.³⁵⁴ However, the government needs to understand the innovation's (social) value in order to provide effective rewards, which results in high administrative costs and inefficiency.³⁵⁵ The high administrative and time costs are the primary drawbacks of using direct rewards, making the IP regime superior to government funding or subsidies for innovation and creative expressions.³⁵⁶

While apologies as government rewards do not eliminate the high administrative and time costs in a prize mechanism, apologies are superior to monetary rewards or subsidies in

Rights: Confining the Applicability of the Subsidies Doctrine to Cash Benefits, 30 HARV. J. L. & TECH. 263, 278 (2016) (analyzing alternative benefits for IP rights owners in addition to cash).

352. See *id.* at 274 (indicating that the government has a direction to fund or subsidize inventors, which functions as substitutes of IP protection).

353. See Michael B. Abramowicz, *Prize and Reward Alternatives to Intellectual Property*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 350, 350-51 (2019); Shavell & Ypersele, *supra* note 197, at 532-33.

354. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 137-66 (2004) (expressing concerns about unavoidable deadweight loss in an IP regime in promoting innovation).

355. See Shavell & Ypersele, *supra* note 197, 543-47; Abramowicz, *supra* note 353, at 352.

356. Ana Ramalho, *Intellectual Property and Social Justice*, SSRN, <http://ssrn.com/abstract=2033102> (last visited July 12, 2020).

terms of efficiency and superior to a pure copyright regime in promoting innovation and creative expressions. One reason for this is that apologies, as rewards or subsidies, do not replace monopoly profits of copyrights but merely supplement the monopoly profits supported by copyrights.³⁵⁷ The rewards, in the form of a state apology, are also ex-post as copyright rights. Copyright owners can only seek rewards after the value of the copyrighted work has been recognized by a state user. The difficulty in setting proper rewards or subsidies due to lack of information will be overcome by the government in delivering or trying to deliver an apology to a copyright owner.³⁵⁸ Therefore, by rewarding through apologies, there is no efficiency concern in excessive rewards.³⁵⁹

E. *Social Influence on Promoting Innovation*

According to the psychological literature, compelled or voluntary state apologies do not only comfort copyright owners but also have social influences.³⁶⁰ Recall the utilitarian goal of states in offering voluntary apologies in copyright cases, which is to repair and rebuild the relationship between a state offender and a harmed author.³⁶¹ Offering or delivering apologies is a process through which a state entity shows its efforts to avoid copyright infringement and not intentionally infringe

357. *But see* SHAVELL, *supra* note 354, at 161 (suggesting that prizes are “a fundamental alternative” to the property rights in copyrights).

358. *See* Roin, *supra* note 346, at 1008.

359. *Cf.* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 623 (1962) (expressing doubts as to the accurate calculation of ex-post returns).

360. *See* Mark Bennett & Christopher Dewberry, “*I’ve Said I’m Sorry, Haven’t I?*” *A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients*, 13 *CURRENT PSYCH.* 10, 19–20 (1994) (arguing that apologies have individualistic meanings and social meanings).

361. *See supra* Part IV.B.2.

copyrights.³⁶² In psychology, that process helps to rebuild the trust of a harmed author and any authors in authority (e.g., the government and the copyright regime).³⁶³ Therefore, people can rely on the copyright regime and maintain their innovation incentives.

A probable disagreement is that apologies, especially court-ordered apologies, are not effective. Then, how could ineffective apologies affect a group of people or firms beyond direct victims? The literature suggests that an apology's sincerity does not matter to a victim but only matters to observers, who may complain that the apology is flattery.³⁶⁴ However, state apologies serve a real purpose, are not flattery, and authors are not merely observers but also participants in this circumstance of copyright infringement.

On the one hand, after understanding how state apologies secure the innovation incentives of authors received from the copyright regime, states have incentives to apologize for their impermissible use of copyrighted works.³⁶⁵ An apology is given under its discretion. Moreover, even though a state entity is compelled to apologize to a copyright owner, a compelled apology can heighten its awareness of copyright protection overall.³⁶⁶ Psychological theories

362. See Bennett & Dewberry, *supra* note 360, at 11 (explaining that in an apology "efforts are made to persuade the audience that the offending behavior is not a valid representation of the actor's character").

363. See Cohen, *supra* note 318, at 1021 (suggesting that an apology secures or even improves the offender's reputation).

364. See Risen & Gilovich, *supra* note 332, at 418.

365. See generally Frank J. Chaloupka, *Mechanisms of Legal Effect: Perspectives from Economics* (Mar. 15, 2012), <http://publichealthlawresearch.org/sites/default/files/downloads/resource/Chaloupka-EconomicPerspectives-15March2012.pdf> (explaining how the law affects behaviors from an economic perspective of the balance between economic demands and supplies).

366. See White, *supra* note 267, at 1285 (suggesting that government apologies can justify the government's attitudes towards and recognition of particular things).

suggest such an intrinsic change.³⁶⁷ It can also undoubtedly prevent an opposite intrinsic change that creators worry about: *Allen* may give state entities confidence to willfully or recklessly infringe copyrights.³⁶⁸ Furthermore, a state apology is more powerful than an apology given by a private party. A state apology delivers critical information to the public that the state respects copyrights and creative works and copyright owners can seek fair treatment, even if the infringer is a state.³⁶⁹

On the other hand, all artists, authors, creators, or even the whole society, are not merely observers of a state apology to a copyright owner, but rather participants or potential recipients. Artists or authors are empathetic towards the injured authors who seek pleasant recovery from an alleged state infringer.³⁷⁰ Their perception of the copyright regime and state governments is influenced by the perception of judgment by their peers—the injured copyright owners.³⁷¹ The interviews conducted by the Copyright Alliance indicate that the constant ignorance or perfunctory attitudes received from state entities after copyright owners sent concerns about copyright infringement by the state entities resulted in self-doubt and self-devaluation.³⁷² Therefore, creators need positive signals from the public sector, emboldening

367. See *id.* at 1291–92 (asserting that public apology can affect organizational behavior); Bennett & Dewberry, *supra* note 360, at 11.

368. David Newhoff, *Allen v. Cooper Revisited III: Data Suggests States Willfully Infringe Copyrights*, THE ILLUSION OF MORE (Sep. 15, 2020), <https://illusionofmore.com/allen-v-cooper-revisited-iii-data-suggests-states-willfully-infringe-copyrights>.

369. Bennett & Dewberry, *supra* note 360, at 19; see generally Mark Greenberg, *How Law Affects Behavior*, 9 JURIS. 374 (2018) (explaining that law consistent with moral standards can affect people's behavior); LAWRENCE M. FRIEDMAN, *IMPACT: HOW LAW AFFECTS BEHAVIOR* (2016) (suggesting that the experience of peers and moral issues affect how people react to a law).

370. Risen & Gilovich, *supra* note 332, at 419.

371. See Ariel Zuckerbrot, *Impact: How Law Affects Behavior*, by Lawrence M. Friedman, 55 OSGOODE HALL L.J. 846, 851 (2019).

372. See Copyright Alliance, *supra* note 27, at 17–25.

their creative incentives. Regardless of the frequency that a state entity will be compelled, or voluntarily offer, to provide apologies to copyright owners, adding state apology for copyright infringement issues in legislation will give people confidence in copyright protection, stabilizing or promoting their innovation incentives and enthusiasm for creativity.

V. OBSTACLES TO INTRODUCING STATE APOLOGIES

There are primarily two criticisms of using apologies in copyright issues. First, the First Amendment prohibits the enforcement of court-ordered apologies. Second, the use of apology does not fit within American culture. Nevertheless, neither of the two criticisms matter when a state is asked to apologize for its impermissible use of copyrighted work.

The First Amendment, which protects freedom of speech, precludes compelled apologies given by private parties but not the government. Practically, courts reject claims requesting an apology by citing the First Amendment.³⁷³ However, in academia, White, the first scholar to thoroughly analyze the legal obstacles of adopting compelled apologies in the U.S., suggests the First Amendment precludes apologies ordered against individuals and firms.³⁷⁴ After White, scholars consensually agree that a compelled apology is not enforceable due to the First Amendment.³⁷⁵ However, White distinguishes government apologies from apologies given by private parties and argues that government apologies do not raise First Amendment concerns.³⁷⁶ Even though he indicated that compelling government officials to

373. See, e.g., *Griffith v. Clarke*, 30 Va. Cir. 250, 270 (Cir. Ct. City of Rich. 1993) ("First Amendment concerns preclude the Court from ordering the apology originally suggested by [the plaintiff].").

374. See White, *supra* note 267, at 1299.

375. See Robyn Carroll, *You Can't Order Sorrow, So Is There Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 UNSW L. J. 360, 361 n.4 (2010).

376. White, *supra* note 267, at 1299 ("First Amendment concerns do not arise in compelling state actors to apologize . . .").

apologize may still be barred by the First Amendment,³⁷⁷ requiring government officials to do so may not raise such concerns when the apologies function as rewards, strengthening the faith of authors in the copyright regime so as to promote innovation and settlements, rather than express regrets or trigger infringement liability.

American culture is not incompatible with apology.³⁷⁸ It is a conventional view that America and Asian countries have divergent cultures on apology.³⁷⁹ Japanese people and firms use apologies to present group hierarchy and harmony.³⁸⁰ By contrast, American people may be frightened by apology because of perceived legal consequences or liability raised by an apology.³⁸¹ However, as apology protection is broadly adopted in many states in the U.S., scholars have started recognizing that this apparent cultural divergence was a misunderstanding in the use of apology for dispute resolution.³⁸² People or firms in the U.S., Japan, other Asian countries, and other countries similarly value apology as an injured party and consider litigation risks and costs in delivering an apology as an offender.³⁸³ In criminal actions, compelled apologies are broadly accepted by the U.S. legal mechanism as a “cost-effective means of deterring

377. *See id.* at 1300.

378. *See* Xuan-Thao Nguyen, *Apologies as Intellectual Property Remedies: Lessons from China*, 44 CONN. L. REV. 883, 884 (2012) (“American culture values apology.”); White, *supra* note 267, at 1265 (“Apology is important in American culture.”).

379. *See* Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1, 2 (2005).

380. *See* Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 J. L. & SOC’Y ASSOC. 461, 493 (2016).

381. *See id.* at 464.

382. *See* White, *supra* note 267, at 1282–83; *cf.* Nguyen, *supra* note 378, at 885 (showing that many American people believe that apology is a norm of Chinese or Asian culture).

383. *See* Wagatsuma & Rosett, *supra* note 380, at 484.

crime, exacting retribution, and reinforcing social norms, . . . healing psychic wounds.”³⁸⁴ In civil proceedings, apologies are also increasingly recommended by scholars for promoting settlement.³⁸⁵ What makes the difference in the use of apology in civil proceedings is not the difference in culture but rather the legal consequences of apologizing.³⁸⁶ Now is the moment to introduce both compelled and voluntary state apologies to the copyright regime.

CONCLUSION

The U.S. Supreme Court decision in *Allen* is a double-edged sword. On the one hand, it solves a constitutional question and can promote litigation efficiency. On the other hand, it aggravates the imbalanced bargaining power between states and copyright owners and may harm innovation incentives because of uncompensated economic and non-economic losses borne by copyright owners. Therefore, when enjoying the benefits of sovereign immunity, legislators and state entities should consider using compelled or voluntary apologies to repair the relationships between a state offender and a harmed copyright owner. By offering apologies, not only can litigation efficiency be achieved, but states can also secure their purpose of promoting innovation and creative expressions. Congress and the federal government may also consider this apology proposal for copyright infringement against the federal government.³⁸⁷ This proposal relies on the effectiveness of apology in copyright infringement cases. This effectiveness still requires further research and empirical evidence. If apology is found ineffective, an alternative

384. White, *supra* note 267, at 1268.

385. See, e.g., Robbennolt, *supra* note 276, at 91.

386. See Vines, *supra* note 277, at 1–2 (discussing the history of apology, which was considered unpopular because it resulted in tort liability).

387. Federal sovereign immunity is waived by the Administrative Procedure Act if plaintiffs pursue equitable relief. 5 U.S.C. § 702 (2020).

proposal after *Allen* may be to implement compulsory licenses for state use, rather than argue under the fair-use doctrine or sovereign immunity.