
This paper examines the application of federal procedural, jurisdictional, and substantive rules that apply to libraries and their adversaries in determining their appropriate role as plaintiff or defendant in copyright litigation. In recent years, libraries and their host institutions have been called into court to answer complaints of copyright infringement for large-scale uses of copyrighted works. Associations, class representatives, and publishers represent copyright owners’ interests as plaintiffs, while libraries and universities act on behalf of the interests of users as defendants. These proxy-representations implicate complex areas of federal jurisdictional, procedural, and substantive rules that are not well understood in this setting. This paper explains the importance of those rules in the context of libraries and the roles that they have traditionally filled with respect to users, and suggests clarifications that would maintain the position of appropriate parties as litigants, while leaving others to seek relief through legislation or other avenues.

Headings:

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LIBRARIES IN LITIGATION: THE ROLE OF PROCEDURAL AND JURISDICTIONAL RULES IN LARGE-SCALE COPYRIGHT USE CASES

by

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Table of Contents

Introduction ...................................................................................................................................... 2

Background .................................................................................................................................... 4

The Rules of Litigation .................................................................................................................... 13
  Who is Responsible for Copyright Infringement? ...................................................................... 14
  Who Can Bring a Lawsuit? ........................................................................................................... 23

Conclusions and Recommendations ............................................................................................ 33

Cases .............................................................................................................................................. 36

Bibliography .................................................................................................................................... 39
Introduction

This paper examines how library activities fit within the relatively complex set of procedural, jurisdictional, and substantive rules that determine the appropriate roles for plaintiff and defendant in copyright litigation. Although libraries have managed creative works since before the first copyright act took effect,¹ they have only recently been hailed into court to answer for a variety of large-scale uses of copyrighted works. In particular, plaintiffs have contested library and related institutional use of copyrighted works in mass digitization projects,² institutional streaming-media systems,³ and in creation of electronic reserves⁴ and coursepacks.⁵ In all of these cases, libraries and their host

¹ Francis Wormald, *The English Library Before 1700: Studies in History* (London: University of London, Athlone Press, 1958). Wormald, like others writing on this time period, provides some vivid descriptions of the innovations libraries employed as they attempted to balance user access with protection of both the physical and intellectual integrity of the work. Wormald recounts, for example, how English libraries struggled with changing the method by which libraries would chain books to the shelf, in an attempt to better balance preservation with increased user access. Ibid., 215.


⁵ *American Psychological Association v. Chapple*, Case No. 2:2011cv00751, Complaint (W.D. Wash., May 2, 2011). This case follows in a long line of copyshop litigation cases, but is unique in that Seattle University and individual faculty members have been joined as third-party defendants. Other similar cases include *Basic Books, Inc., v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), and *Princeton...
institutions are forced to act as defendants, in effect representing both their own interests and the interests of their users. Likewise, associations, class representatives, and publishers attempt to represent authors and copyright owners’ interests as plaintiffs in these suits.

Whether and to what extent those parties are the proper plaintiffs and defendants in copyright litigation is determined by a complex set of federal procedural, jurisdictional, and substantive rules. As some commentators have already observed in the context of the Google Book Search Settlement, these rules are not mere formalities, but form a substantive parts of the legal code; they are designed to preserve the appropriate role of courts and legislature in the policy making decision. These rules also exist to create a balance of responsibility between users and owners, and to ensure that their rights are not unduly interfered with by outsiders with adverse interests. This paper explains the importance of those rules in the context of libraries and the roles that they have traditionally filled with respect to users. It concludes with suggested clarifications


These activities have been most visibly contested at the academic library level, probably because of the scale with which those libraries operate. Some larger public libraries, such as the Boston Public Library, have also made similar uses. David Rapp, “Internet Archive Tests New Ebook Lending Waters: In-Library, and License-Free,” *Library Journal* (March 2, 2011), [http://www.libraryjournal.com/lj/home/889508-264/internet_archive_tests_new_ebook.html.csp](http://www.libraryjournal.com/lj/home/889508-264/internet_archive_tests_new_ebook.html.csp) (accessed February 26, 2012).


that would maintain the position of appropriate parties as litigants, while leaving others to seek relief through legislation or other avenues.

This paper first outlines the background legal issues and cases that have confronted libraries and similar organizations as they attempt to manage and provide access to the copyrighted works in their collections on a large scale. Second, the paper explains the basic procedural, jurisdictional, and substantive rules that determine who the appropriate plaintiff and defendant are in copyright litigation. In this section, the paper also compares these rules to existing cases that are relevant to libraries. Finally, the paper concludes by making suggestions for libraries to move forward in light of these rules, and by identifying areas where additional judicial or legislative guidance is needed.

**Background**

When the British Parliament passed the world’s first true copyright act, *The Statute of Anne* in 1710, it did so with the auspicious goal of providing direct protection (and therefore incentives) to authors, rather than the publishers, printers, and associated guilds that had historically benefited from similar legal protections. In the United States, the drafters of the Constitution embraced this approach when they granted Congress the ability to “promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive right to their respective Writings . . .”

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8 Statute, 1710, 8 Ann., c. 19.


reason that the exclusive rights of copyright vest initially in the author of the work,\textsuperscript{11} and that, absent an explicit transfer, those rights are presumed to remain with the author.\textsuperscript{12}

Despite the emphasis on directly incentivizing authors, U.S. copyright has always permitted authors to transfer some or all of their rights (including the right to sue to protect those rights)\textsuperscript{13} to third parties, who could then enforce rights as they chose. In recent years, however, the authority of plaintiffs to act on author-created works has been extended even further by application of two particular legal mechanisms. First are class actions, a litigation device which allows parties to extend the resolution of a common dispute in one case to all members of a class, which is itself defined to include members with certain common features. Class action lawsuits in the copyright context have been used for some time,\textsuperscript{14} but the class definitions employed have tended to turn on relatively

\textsuperscript{11} Copyright Act of 1976, U.S. Code 17 (2006), § 201(a). Although U.S. law has always granted rights to authors, modern law has realigned itself with authors in a way that prior acts had not. In the words of former Register of Copyrights Barbara Ringer, the 1976 Act marked a “break with the two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.” Barbara Ringer, “First Thoughts on the Copyright Act of 1976,” New York Law School Law Review 22 (1977): 477, 490.

\textsuperscript{12} Cohen v. Paramount Pictures Corp., 845 F.2d 851, 854 (9th Cir. 1988); Cohen v. United States, 98 Fed. Cl. 156, 162 (Fed. Cl. Apr. 2011).


definable class commonalities such as members that employed a particular licensing agency through which all members of the class made their works available.\textsuperscript{15}

More recently, however, plaintiffs in class actions suits have attempted to apply wide-ranging class definitions that allow plaintiff class representatives to represent the interests of a large and diverse group of copyright owners—and, more specifically, authors—against defendants who engaged in mass digitization.\textsuperscript{16} The proposed class representatives in \textit{The Authors Guild, Inc. v. Google},\textsuperscript{17} for example, (contesting the Google Book Search project of scanning and digitizing millions of copyrighted works) proposed that the class in that case would be defined as “[a]ll persons residing in the United States who hold a United States copyright interest in one or more Books

\textsuperscript{15} \textit{In re Napster, Inc. Copyright Litig.}, 377 F. Supp. 2d 796, 799 (N.D. Cal. 2005); \textit{Peer Int'l Corp. v. Pausa Records, Inc.}, 909 F.2d 1332 (9th Cir. 1990).

\textsuperscript{16} One might resist describing these suits as against digital libraries as such. While entities like Google have engaged in mass digitization with the result of library-like online collections, its profit seeking motivation may serve to distinguish its activities both in ideological terms and in terms of its legal position (especially with respect to its fair use argument) from more traditional libraries. The precise distinction between this project and “true” libraries is debated. Pamela Samuelson, “Google Books is not a Library,” \textit{Huffington Post} (October 13, 2009), \url{http://www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html} (accessed February 28, 2012). A related definitional issue is what one considers “mass digitization.” Clearly Google Books or HathiTrust are such projects, but what about a single library digitizing an entire special collection? The legal implications of such a classification are not yet clear, but could become important if legislation passed to cover these projects.


reproduced by Google as part of its Library Project, who are either . . . authors of such Books or [certain] heirs, successors in interest or assigns of such authors.” 18 Even in cases aimed against more defined digitized collections—most recently, court records and briefs—have requested similarly broad class definitions (e.g., “all attorneys and law firms . . . that authored works . . . that are contained in [Westlaw and LexisNexis] databases.”). 19 In response to these broad definitions and generalizations about author interests, subsets of authors (especially academic authors) 20 have objected. 21 Federal rules governing class action suits are designed to ensure that classes are defined in a way that member and outsiders’ interests are truly protected, but the operation of those rules in this mass-digitization context remains untested as none of the suits has reached the judicial decision stage.

For libraries (especially those that seek to engage in mass digitization projects involving a large number of works), a clear understanding of these rules is important to help decision-makers determine the categories of works and authors that might raise or lower risk of a class action suit opposing digitization initiatives. At the same time, many libraries (mainly, academic) also have a concern for protecting the interests of local or

institutional authors. Understanding and aligning library actions with these authors, within the context of these rules, may be useful in protecting the interests of both in a more thoughtful and accurate way than when a variety of authors are swept up together in a far-reaching class action suit.

The second mechanism by which the role of plaintiffs has extended is through the assertion by associations of the ability to bring copyright infringement suits on their members’ behalf. In Association for Information Media and Equipment v. The Regents of the University of California, for example, plaintiffs (“AIME”) alleged that the university defendants had infringed copyright by duplicating DVDs for use in a digital video stream, which was then made available through a closed course content system. The associational plaintiff (AIME) is comprised of members that are themselves copyright owners, brought suit based on its members’ copyright interests. The association argued that it was permitted to do so under judicially-developed constitutional rules governing associational standing.

The Authors Guild, in its suits against both Google and the HathiTrust digital library, stakes out a similar position based on the copyright interests of its members. In

22 Association for Information Media and Equipment v. The Regents of the University of California, Case No. 2:2010cv09378, Complaint (C.D. Ca., Dec. 7, 2010).

23 Ibid.

24 Association for Information Media and Equipment v. The Regents of the University of California, Case No. 2:2010cv09378, Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss (C.D. Ca., April 4, 2011).


both of those cases, however, the Authors Guild takes the position one step further by asserting standing on behalf of its members, and requesting relief yet more broadly, asking the court to enjoin the defendants from using or displaying the works of the plaintiff, and in addition, any other works protected by copyright. Ultimately, it asks that the court order the impoundment of “all unauthorized digital copies of works protected by copyright.”27

Based on the limited constitutional grant of authority to federal courts over “cases” and “controversies,”28 federal courts permit a party to bring suit asserting only her own particularized rights;29 generally, the protestations of third parties are considered insufficient to constitute a justiciable case or controversy in the constitutional or prudential sense of those terms. The doctrine of associational standing, which allows associations to bring suit on their members’ behalf when the members would have standing in their own right, is one limited exception to that rule.30 Because of the uniqueness of each copyrighted work and the particular rights attached to those works, the ability of an association to represent the interest of many (sometimes undisclosed) authors through associational standing remains contested. Authorities are split on the applicability of the doctrine in the copyright context.31


28 U.S. Con


31 William F. Patry, Patry on Copyright (Eagan, Minn.: West Publishing, 2012), § 21:28 (“[A]ssociational standing is not permitted under the Copyright Act, which expressly limits standing to legal or beneficial
allows further-removed plaintiffs into court to contest mass uses of copyrighted works is an issue with which libraries must grapple.

Rules governing who could be liable for copyright infringement are similarly important for libraries to understand. At least two theories of secondary liability—based either on the relationship of the institution with the particular user (vicarious liability), or on the actions of the institution with respect to that user (contributory liability)—are well accepted as ways to hail institutional-copyright users into court. 32

Other efforts to bring libraries into court to answer for alleged infringements are less straightforward. One major reason is because many state libraries and academic libraries that are state supported are considered arms of the state in which they reside. Because states enjoy immunity from suit in federal court due to the Eleventh Amendment doctrine of sovereign immunity, 33 plaintiffs must followed a twisted path through a history of judge-created legal fictions to enforce their rights. In almost all situations, a state defendant will survive the lawsuit unscathed by monetary damages, 34 but even in suits seeking only injunctive relief, identifying and naming the proper party as defendant can be a challenge.

owners of exclusive rights.


Typically, plaintiffs can proceed with their suit for injunctive relief if they file the suit against a state official whose actions are alleged to violate federal law.\textsuperscript{35} The doctrine that permits this, occasionally referred to as the “Young fiction” after the case which established the rule,\textsuperscript{36} is the lone avenue through which plaintiffs may request a federal court to order state officials to cease unlawful activity. One important question is “which state official?” Unlike most infringement suits where traditional principles of agency and employment law apply to make it a simple task of naming the employer, who is ultimately responsible for the acts of its employees, sovereign immunity and the Young doctrine obfuscate the chain of responsibility for state defendants.

In \textit{Cambridge University Press, Inc., v. Patton} (“Georgia State”),\textsuperscript{37} plaintiffs alleged that Georgia State University infringed its copyrights based on the copying and distribution of copies of materials placed in university’s electronic reserves system at the direction of instructors. Plaintiffs named as defendants were members of the university administration and members of the university board of trustees.\textsuperscript{38} Because the \textit{Ex Parte Young} doctrine allows federal courts only to enjoin defendants who have acted illegally, the named defendants objected that their place in the suit, based on their “supervisory authority” to implement copyright policies at the university, did not sufficiently connect them with the alleged violation.\textsuperscript{39} The judge in that case, concluding that the defendants

\begin{itemize}
\item \textsuperscript{35} \textit{Ex Parte Young}, 209 U.S. 123 (1908).
\item \textsuperscript{36} \textit{Idaho v. Coeur d'Alene Tribe of Idaho}, 521 U.S. 261, 262 (1997).
\item \textsuperscript{37} \textit{Cambridge University Press v. Patton}, Case No. 1:2008cv01425, Complaint (N.D. Ga., April 15, 2008).
\item \textsuperscript{38} \textit{Cambridge University Press v. Patton}, Case No. 1:2008cv01425, Order (N.D. Ga., March 17, 2011).
\item \textsuperscript{39} \textit{Cambridge University Press v. Patton}, Case No. 1:2008cv01425, Reply Brief in Support of Defendant’s Motion to Dismiss (N.D. Ga., January 13, 2011).
\end{itemize}
must have “‘some connection’ with the alleged misconduct by virtue of his office,”\textsuperscript{40} was unable to say as a matter of law that this connection did not exist in the case before it, and required that the parties submit evidence and argument at trial for the court to determine whether the \textit{Ex Parte Young} doctrine applied to the members of the board administration named as defendants.\textsuperscript{41}

At first blush, the solution to this problem is simple; a plaintiff must simply name the parties who actually engaged in the infringing activity in order to bring a successful action for an injunction. At least two practical considerations make this a difficult task. First, in the university context, publisher-plaintiffs may be reticent to name the actual individuals who scan, post, and distribute their works or who request that they be so copied and distributed, as with many e-reserve and course management systems, those individuals are not just users of copyrighted content, but also its creators; in large measure, these works are produced by faculty members upon whom publishers rely for their content. Second, for mass-digitization projects, tracking down the actual individual (or individuals) who completed the steps required to scan and upload each individual copy of a work would be tedious and difficult to establish for systems involving numerous employees.

The next section of this paper explores in more detail these more contentious issues in the broader context of the rules of litigation that determine who is allowed into court as plaintiff and defendant. These rules form a part of the legal code that is not often

\textsuperscript{40} Cambridge University Press v. Patton, Case No. 1:2008cv01425, Order, at 13 (N.D. Ga., March 17, 2011).

\textsuperscript{41} Ibid., 13–14.
discussed in the context of copyright as applied to libraries,\textsuperscript{42} but nonetheless are important, if not determinative, when weighing the risk of litigation for many large-scale projects with copyright implications. Libraries that are increasingly aware of the need to approach substantive copyright matters from a risk-management standpoint,\textsuperscript{43} should build into those risk calculations an understanding of when and by whom they can be brought into court.

**The Rules of Litigation**

Copyright protection exists almost exclusively as a creature of federal law.\textsuperscript{44} Determination of copyright infringement suits is the exclusive domain of the federal courts,\textsuperscript{45} and as such, is governed by federal litigation rules.\textsuperscript{46} In determining the appropriateness of the parties involved in litigation, courts must look to the text of the

\textsuperscript{42}This is probably because consideration of these issues has been unnecessary to resolve most copyright issues in the library context. See Kenneth D. Crews, *Copyright Law For Librarians and Educators: Creative Strategies and Practical Solutions* (Chicago: American Library Association, 2012). This paper serves to point out the number of emerging situations where they are important and worth consideration.


\textsuperscript{44}Copyright Act of 1976, *U.S. Code* 17 (2006), § 301(a) (preempting competing state laws). State-law copyright continues to apply to sound recordings fixed prior to February 15, 1972, but that protection will expire on February 15, 2067. Ibid., § 301(c). The U.S. Copyright Office recently concluded a report recommending that Congress displace state law protections with special federal copyright law provisions. U.S. Copyright Office. *Federal Copyright Protection for Pre-1972 Sound Recordings* (Washington, D.C., 2011).


Copyright Act itself, the Federal Rules of Civil Procedure,\textsuperscript{47} jurisdiction statutes,\textsuperscript{48} and a history of interpretive case law. In general, these rules apply to define the parties that can bring a copyright infringement suit, and to define the parties which can be held responsible for copyright infringement.

Who is Responsible for Copyright Infringement?

The plaintiff in any copyright infringement suit must establish two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”\textsuperscript{49} In establishing direct liability, the plaintiff must generally be able to show that the defendant infringed one of the exclusive rights held by the plaintiff,\textsuperscript{50} through either direct evidence of copying, or, as if more often the case, through indirect evidence that the defendant had access to the work and that the resulting copy was substantially similar to the protectable elements of the original work.\textsuperscript{51} Direct liability always requires

\begin{itemize}
\item[(1)] to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. \textit{U.S. Code} 17 (2006). § 106.
\end{itemize}


\textsuperscript{50} \textit{UMG Recordings, Inc. v. Augusto}, 628 F.3d 1175, 1178 (9th Cir.2011). The exclusive rights include the right to do or authorize any of the following:

\textsuperscript{51} \textit{Arnstein v. Porter}, 154 F.2d 464 (2d Cir. 1946)
showing some volitional and “direct action or participation” on the part of defendants, however. In the library setting, directly liability is fairly easy to imagine; a librarian who freely and regularly copies and distributes copyrighted library holdings might be just one example.

Secondary Liability—In many cases, plaintiffs will seek remedies against centralized third-parties who, though not directly infringing themselves, have profited from or enabled allegedly infringing activities. Lawsuits against file-sharing services like Napster or Grokster, as well as earlier suits against online bulletin-board services, proceeded under a theory of secondary infringement as a way to centralize liability for a wide variety of alleged infringements perpetrated by users who were difficult if not impossible to locate.

Secondary liability in copyright generally comes in two varieties: contributory infringement and vicarious infringement. While the Copyright Act mentions neither species, the Supreme Court, recognizing a long line of case law before it, has recognized the validity of both. It explains that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, . . . and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”


More specifically, a contributory infringer is one who “with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”\textsuperscript{56} The rationale behind contributory infringement is intuitive; In MGM Studios, Inc. v. Grokster, Ltd., where plaintiffs contested Grokster’s file-sharing platform, the Supreme Court explained:

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast’s and Grokster’s software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.\textsuperscript{57}

Vicarious liability is built upon older principles of principal-agent, or master-servant liability, developed in tort law whereby an employer can be liable for the actions of her employee.\textsuperscript{58} The general formulation of the rule is that a defendant can be vicariously liable if it has “(1) the right and ability to exercise control over a directly infringing party and its activities and (2) obtained a direct financial benefit from the

\textsuperscript{56} Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1977); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).


\textsuperscript{58} “Under common law agency principles, ‘a master is subject to liability for the torts of his servants committed while acting in the scope of their employment.’ Restatement (Second) of Agency, § 219(1). In order for a servant's conduct to be properly considered ‘within the scope of employment’ it must: (1) be of the kind he is employed to perform; (2) occur substantially within the authorized time and space limits; and (3) be actuated, at least in part, by a purpose to serve the master. Id. at § 228(1). Alternatively, ‘conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.’ Id. at § 228(2).” Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 (11th Cir. 1987).
infringing activities."59 “Right and ability” is sometimes read as encompassing the ability of the defendant merely to guard against or police the activities of the third-party infringers in the past.60 and “direct financial benefit” requirement can mean both obvious and direct financial interest, 61 or a financial benefit that results from users drawn to the defendant because of the infringing activities of the third party (e.g., a bootleg record stand owner that draws in consumers to come shop at the flea market of the defendant). 62

Both varieties of secondary liability require an underlying act of direct infringement, 63 but do not require the plaintiff to pursue those underlying infringers themselves. Instead, plaintiffs can choose to proceed in an action against a centralized defendant who enabled the infringing activity. 64 For libraries, this secondary liability would most naturally be raised in the context of patrons; while it may difficult for a plaintiff to pursue many individuals who have used library holdings in allegedly infringing ways, the pursuit of the library (or, in the case of academic libraries, the host


60 Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963).

61 Ibid.

62 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).


64 In the online context, fears of the broad application of secondary liability against internet service providers or other intermediaries motivated Congress to enact the Online Copyright Infringement Liability Limitation Act, Title II of the Digital Millennium Copyright Act (DMCA), U.S. Code 17 (2006), § 512. That section provides service providers with a safe harbor against infringement if they comply with certain rules allowing third-parties to identify and request the removal of allegedly infringing content.
institution) as the central enabler might be attractive. The application of these rules, while still developing, is not highly contested, however.

*Sovereign Immunity*— The modern doctrine of sovereign immunity has its roots in the Eleventh amendment, which was ratified to overturn the decision of the Supreme Court in *Chisolm v. Georgia*, a 1793 case in which the Court asserted that the still-new federal judiciary had power to hear cases between private citizens and the States. The text of the amendment provides that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

Taken at face value, the amendment prevents only suits against a state by “Citizens of another state” (or foreign state), but not a state’s own citizens. A broader reading, however, views the statement of the Eleventh Amendment as emblematic of a greater point, that under pre-constitutional principles, a sovereign state cannot be sued—in its own courts or any other—unless it has consented to such suit. The principle applies generally to all arms of the state, including state supported libraries, state university libraries and other state actors.

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65 2 U.S. (2 Dall.) 419 (1793).

66 *U.S. Const.*, amend. XI.


68 The applicability of Eleventh Amendment sovereign immunity is limited to “States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Whether the doctrine would apply to public libraries, for example, would depend on factors such as the amount of state-level control, as
Certain narrow exceptions to the doctrine have developed. Sovereign immunity does not, for example, bar jurisdiction over suits brought by the United States against a state,\textsuperscript{69} nor against suits brought by other states.\textsuperscript{70} Courts may also find that a state has waived sovereign immunity by its actions,\textsuperscript{71} and Congress may, in certain limited circumstances, strip or abrogate state sovereign immunity.\textsuperscript{72} Outside of those limited circumstances, the general rule is that a state is not subject to suit in federal court based opposed to local or county-level control. Many are controlled locally and so would fall outside the scope of the Sovereign Immunity protections.

\textsuperscript{69} United States v. Texas, 143 U.S. 621, 642–46 (1892).

\textsuperscript{70} Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821).


\textsuperscript{72} Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). This ability is generally limited to situations implicating the Fourteenth Amendment’s civil rights and related due process guarantees, which were created in the wake of the Civil War and in the face of state laws that flagrantly violated the rights that the Fourteenth Amendment created. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73 (1996); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999). Congress attempted to abrogate state sovereign immunity to copyright infringement suits when it enacted the Copyright Remedies Clarification Act (“CRCA”), Pub. L. 101-553 (1990), which stated quite explicitly:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119 [of the Copyright Act]. U.S. Code 17 (2006). § 511.

Based on the Supreme Court’s decision in Florida Prepaid, which held that Congress could not, by virtue of the patent and copyright clause in Article I of the Constitution, validly abrogate state sovereign immunity, other courts have taken this to mean that the CRCA is likewise ineffective. Mktg. Info. Masters, Inc. v. Bd. of Trustees of California State Univ. Sys., 552 F. Supp. 2d 1088 (S.D. Cal. 2008); Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia, 633 F.3d 1297 (11th Cir. 2011); Rodriguez v. Texas Com’n on the Arts, 199 F.3d 279, 53 (5th Cir. 2000).
on its sovereign status. While the history and appropriateness of this shift are debated, the basic point is that states themselves are not subject to suit for damages in federal court for copyright infringement.

The *Ex Parte Young* doctrine is an important exception to this general rule. It allows plaintiffs to bring suit in federal court for prospective injunctive relief against particular officers of the state, but not the state itself. The *Young* doctrine is based on the idea that when an officer of the state acts in contravention of supreme federal law, she acts *ultra vires* is therefore without authority—and immunity—under the law. By acting illegally, the officer is “stripped of his official or representative character and is subjected to the consequences of his official conduct.” The *Young* doctrine has been circumscribed to allow only for prospective injunctive relief against the official’s future conduct, but prohibits a court from awarding any retroactive monetary relief. In the copyright context, this particular aspect of the doctrine is significant because it means

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

75 Ibid., at 160.

76 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984). The *Pennhurst* court explained, “when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young*, such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.” Ibid.
that, for state defendants such as public universities, the threat of large statutory damages (up to $150,000 per work infringed) is eliminated.\textsuperscript{77}

In considering which defendants are appropriate in copyright litigation, the doctrine is important because it requires that plaintiffs name particular state officials against whom the court would issue and injunction. In \textit{Pennington Seed, Inc. v. Produce Exch. No. 299},\textsuperscript{78} plaintiffs brought a patent infringement suit against officials at the University of Arkansas who were charged with overseeing the university’s patent policy.\textsuperscript{79} In dismissing the suit against the state officials, the court held that “allegations that a state official directs a University’s patent policy are insufficient to causally connect that state official to a violation of federal patent law—i.e., patent infringement.”\textsuperscript{80} The court went on to explain that the plaintiff must establish a connection between the alleged violation of federal law and the individual brought before the court.\textsuperscript{81} It is for this reason,


\textsuperscript{78} 457 F.3d 1334 (Fed. Cir. 2006).

\textsuperscript{79} Ibid., at 1342-43.

\textsuperscript{80} Ibid.

\textsuperscript{81} Ibid. The court explains that one must show “a nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual.” Ibid.
for example, that one cannot simply name the governor or some other high-level official to answer for any state-level act that might violate federal law. 82

Thus, determining the level of control that the named individual actually exercises is key. In the Georgia State University litigation, for example, named defendants were largely responsible for creating university policies regarding the e-reserves system; undetermined, however, was their ability to monitor and enforce the policy. The judge in that case refused to decide before trial, on the thin record of evidence before her, that defendants did or did not have this ability.

As explained above, determining the correct state-official defendant may be important for some plaintiffs, because (1) lower-level officials may be difficult to discover, and (2) some defendants may be unpopular or more sympathetic. Publishers that rely upon faculty-authored works may be hesitant to bring suit against those same individuals alleging copyright infringement. Indeed, in the relatively few modern copyright infringement suits that have been brought by publishers contesting widespread uses of copyrighted works in the academic environment, only two suits have named faculty members, 83 and only one has done so voluntarily. 84

82 Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979). The court held that “the mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute. Nor is the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested enough to make him a proper defendant in every such action.” Ibid.

83 Addison-Wesley Publ’g. Co. v. N. Y. Univ., No. 82-8333, Complaint (S.D.N.Y., Dec. 14, 1982).

84 American Psychological Association v. Chapple, Case No. 2:2011-cv-00751, Complaint (W.D. Wash., May 2, 2011). This suit was filed by the APA, Pearson Education, and Sage Publications against Rodney Chapple and Veronica De Saram (doing business as Copy Mart). Chapple in turn sued Seattle University and three faculty members (and their spouses) based on their actions in authorizing the copying in that case.
Who Can Bring a Lawsuit?

The U.S. Constitution extends the authority of the federal judiciary only to actual cases and controversies.85 As such, Federal Courts are referred to as courts of “limited jurisdiction,” because they are only able to hear cases in which the plaintiff has both the proper capacity to sue and a justiciable claim (i.e., a live dispute) for the court to decide.86 Leaving aside the issue of the claim itself, who can bring suit is largely determined by rules of standing, which are designed to ensure, among others things, that the plaintiff before the court has suffered an “injury in fact,” (i.e., an “invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical’ ”).87 The Federal Rules of Civil Procedure reinforce this rule by requiring that “an action must be prosecuted in the name of the real party in interest.”88 In addition to these more general statements about the ability of parties to gain entry to federal courts, the Copyright Act provides that only the “legal or beneficial owner of an exclusive right under copyright” is permitted to bring a copyright

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85 U.S. Const., Art. III.
87 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Standing also requires that that the injury be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” And third, that it must be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision.” Ibid.
infringement action. While most cases involving a copyright owner (or exclusive licensee) bringing suit on her own behalf fall neatly within these rules, at their edges lie the two mechanisms noted above—class actions and associational standing—that operate to allow the interests of unnamed parties to be litigated in copyright infringement suits.

Class Actions—The modern class action lawsuit is a mechanism by which multiple parties and claims with certain commonalities can be joined together for a unified judicial resolution. Rule 23(a) of the Federal Rules of Civil Procedure provides four criteria that must be complied with in order to bring a class action lawsuit: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” If the class complies with these four criteria, Rule 23(b) further provides that a class action can proceed only if it falls within three categories of suits: (1) lawsuits that, if maintained as separate actions, would create inconsistent judgments or that would impede the interests of other members not party to the action; (2) lawsuits where the party opposing the class has acted generally in a way toward the class that injunctive relief respecting the class as a whole is appropriate; and finally, (3) suits where “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class


91 Ibid., R. 23(a). In addition, courts have held that
action is superior to other available methods for fairly and efficiently adjudicating the controversy."\textsuperscript{92}

In the library setting, the most relevant class action copyright suit to date is the one filed against Google for the scanning of millions of books from the collections of academic libraries across the country. The suit was initiated by the Authors Guild and, as class representatives, several named authors.\textsuperscript{93} Although not clear from the earlier filings, the class plaintiffs—at least at the settlement stage—proceeded under the theory that the suit satisfied the test of Rule 23(b)(3), which requires that common questions of law and fact predominate over more individualized questions.\textsuperscript{94} For suits of this type, individual class members must be given notice of and opportunity to opt out of the litigation (or any resulting settlement). While thousands of authors have done so,\textsuperscript{95} the rights of many more are still caught up in the GBS litigation.

The Google Books Search ("GBS") case illustrates the problems with super-litigants like the Authors Guild and the three named class representatives taking on the mantle of representing an incredibly large class, defined as all U.S. authors of books

\textsuperscript{92} Ibid., R. 23(b)(1)–(3).


\textsuperscript{94} In general, the 23(b)(2) test may be easier to meet, but is appropriate only in situations where an injunction is the primary mechanism for relief. As Professor Samuelson points out, the GBS suit (at least at the settlement stage) would more appropriately be analyzed under 23(b)(3) because class members interests were primarily economic in nature, the settlement included a large damages award, and set up a complex commercial regime. Pamela Samuelson, “The Google Book Settlement as Copyright Reform,” Wisconsin Law Review (2011): 541.

scanned for GBS. As is often the case in class action suits, the parties sought to settle rather than proceed through a further protracted lawsuit. 96 Rule 23 contemplates the settlement of class actions suits, but requires that, where the settlement would bind class members—in this case, the millions of U.S. authors—the court must first hold a hearing to find if the settlement is fair, reasonable, and adequate.97

At the fairness hearing for the amended settlement in the GBS suit, two dozen supporters and objectors presented their concerns surrounding the settlement.98 Among the objectors was the Department of Justice (“DOJ”), which raised serious concerns about the effect on the broad-reaching settlement on competition and the appropriateness of the judiciary as a place to resolve the problems that Google Books raised. In the words of the DOJ counsel, the settlement “grafted on . . . a series of forward-looking commercial transactions,” that tend fit better as a legislative solution than a judicially-approved settlement.99 Many objectors focused on the substance of the settlement, which would have set up a forward-looking system through which Google could use and make available copyrighted works under a type of opt-out escrow system. Google would be


99 Ibid.
responsible to pay royalties to owners, but otherwise would escape liability.\footnote{100} Based in part on these concerns, the presiding judge rejected the proposed settlement.\footnote{101}

In terms of the appropriateness the class action representatives themselves, however, many others objected.\footnote{102} Academic authors objected to the idea that their interests could ever be fairly represented plaintiffs who agreed that “open access” and its advocates (an increasingly popular method of distribution for academic work) were “plainly inimical” to the class.\footnote{103} At the time of the writing this paper, three proposed class representatives remain.\footnote{104} These plaintiffs have largely authored popular literature; their publications included trade works, works of fiction, and children’s books.\footnote{105} None represent academic authors, whose works make up a large part of the Google Books corpus.\footnote{106} Indeed, as the suit has progressed and plaintiffs have now moved for a


\footnote{102} The judge also relied on these concerns in rejecting the settlement. Ibid., at 679-680.


\footnote{104} The Authors Guild, Inc., v. Google, Inc., Case No. 1:2005cv08136, Motion to Certify Class (S.D.N.Y., Dec. 11, 2011).

\footnote{105} The Authors Guild, Inc., et al. v. Google Inc., Case No. 05 CV 8136 (DC), Letter from Pamela Samuelson to Judge Denny Chin, Re: Academic Author Objections to Plaintiff’s Motion for Class Certification (February 13, 2012), \url{http://www.law.berkeley.edu/files/Academic_authors_letter_to_Judge_Chin_021312_final.pdf}.

certification of their class, it has become clear that the interests of not just academic authors differ from the class representatives, but also of authors more generally.\textsuperscript{107}

So far, the class actions rules seem to have worked. The fairness hearing, which required judicial oversight of the proposed settlement, prevented a deal to be struck that would harm the interests of rightsholders not privy to the suit. The class certification process (which is still pending) requires that a district court first consider whether the Rule 23(a) requirements, listed above, are met.\textsuperscript{108}

For libraries, the precise contours of class action litigation rules may seem to be of little consequence. With shallow pockets and relatively diffuse digitized holdings among even the largest academic libraries, the risk of becoming the target of a massive class action suit on the scale of the Google Books Search suit is probably low. As

\begin{enumerate}
\item The Authors Guild, Inc., v. Google, Inc., Case No. 1:2005cv08136, Declaration of Hal Poret in Opposition re: 989 Motion to Certify Class., Exhibit 1. (S.D.N.Y., Feb. 8, 2011). Exhibit 1 is an expert report submitted by Google reporting the results of a survey of nearly 1,000 authors. Of those, more than half indicated approval of the Google Book Search scanning and displays, around 30% neither approved nor objected, and only 15% affirmatively objected. Most also thought that Google’s activities would have little or no financial impact on them.
\item Academic authors have continued to protest their inclusion in the class. Letter from Pamela Samuelson to Judge Denny Chin, Re: Academic Author Objections to Plaintiff’s Motion for Class Certification, The Authors Guild, Inc., et al. v. Google Inc., Case No. 05 CV 8136 (DC) (February 13, 2012), \url{http://www.law.berkeley.edu/files/Academic_authors_letter_to_Judge_Chin_021312_final.pdf}.
\end{enumerate}

\textsuperscript{107} At this point in the GBS class certification, two questions under Rule 23(a) seem to be of most importance: (1) whether the class representatives can adequately represent the proposed class, and (2) whether individual issues predominate over common issues. Because proof of individual ownership of each work is typically required in a copyright infringement suit, the second issue also arises in the associational standing context.
collections merge and access to reformatted digital copies of copyrighted works becomes more widespread, however, the specter of large-scale litigation may become more real. Understanding these rules may become more important, as will understanding strategies that might help both libraries themselves and the authors that they inevitably interact with to avoid costly and litigation that does not represent the real concerns of those parties.

**Associational Standing**—The same concerns that exist in the class-action context can also arise in cases where plaintiffs allege associational standing. Associational standing, however, raises the additional problem that, unlike class action suits that are subject to specific rules that insure the fair representation of class members, it is unclear what mechanisms or rules exist or will need to be developed to guarantee that the broad relief requested by associational plaintiffs is limited in a way that protects non-association members’ interests.

“Associational standing carves only a narrow exception from the ordinary rule that a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”\(^{109}\) To define that narrow exception, courts follow a three part test to determine whether associational litigants comply: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”\(^{110}\) The first two parts of the test are considered constitutional requirements; without compliance, there is not a proper case or controversy that the court can hear. The

\(^{109}\) *Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004).

third part of the test is considered “prudential,” meaning it is a self-imposed judicial restraint on authority, and one that can be altered if circumstances permit.

In most copyright litigation, the first two parts of the test are easy enough to satisfy. Members either do or do not have interests sufficient to make a claim themselves. Similarly, for the second part of the test, the organization’s purpose is relatively easy to discern. Applying the third part of this test (necessity of participation of individual members) is more difficult, however, for two reasons. First, because establishing copyright ownership is an essential element in any copyright infringement suit, a plaintiff would ordinarily need to produce evidence pertaining to the rights in each individual work alleged to have been infringed. Plaintiffs could, at least in theory, satisfy this burden by producing registration certificates for the works of association members. Registration certificates count as prima facie evidence of a valid copyright and authorship, but can be disputed. Even this requirement would be quite burdensome for a large association to manage, and in almost all cases would be something that would require individual participation of members. To make matters more difficult, the specific rights in many works may also be split among many different owners under private contracts. In those situations, individual participation is almost certainly required to resolve ownership. This may be especially important in the context of digitized versions of works; courts have already been asked to address contractual disputes between publishers and authors regarding the scope of e-book rights. Whether contracts that

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113 Random House, Inc. v. Rosetta Books, LLC, 283 F.3d 490 (2d Cir. 2002).
allocate rights to publish a “book” also include e-books is unclear and would need to be resolved on a work-by-work basis in suits involving many works, especially if those works are older and subject to contracts that are less clear about electronic rights.

Second, individualized notice about particular works is also intrinsic to the scheme of limitations and exceptions found in the Copyright Act. Fair use, for example, evaluates the particular work at issue to understand the nature of the work (e.g., is the work fact or fiction?) and to evaluate its potential market. Other more specific exceptions—such as those found in Section 108—require even more detailed analysis, not just of the work at issue, but also the particular copies. Libraries and archives are, for example, permitted to digitize books that are damaged or deteriorating, but only after the library makes a reasonable effort to purchase a copy at a fair price. They can also make interlibrary loan copies for users that request works, copies of which cannot be obtained at a fair price. Without sufficient notice of which exact works are alleged to have been infringed, defendants cannot even begin to claim their rights under these specific limitations and exceptions.

Beyond the practical questions of litigating a copyright infringement lawsuit without reference to the individual copyrights involved, the text of the Copyright Act itself may pose a more insurmountable problem. Recall that the Copyright Act provides


that only the “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”\textsuperscript{118} This section has not been interpreted in the associational standing context, but would seem to require an actual ownership interest or exclusive right to some of the rights associated with the work. Collective rights organizations (e.g., ASCAP) have avoided the problem by naming particular members and their respective copyrights in suits where those organizations are plaintiffs.\textsuperscript{119} On a small scale, naming as plaintiffs each member and their works entirely avoids the associational standing issue. But for contesting mass digitization projects, litigants such as the Author’s Guild may find the task of naming and identifying each interest a monumental task. Indeed, for the HathiTrust orphan works project that the Authors Guild is contesting, the task of identifying owners of the works involved is the very crux of the orphan works problem.

\textsuperscript{118} U.S. Code 17 (2006), § 501(b).

\textsuperscript{119} Several copyright infringement suits involving large numbers of works have been brought, but each has followed the pattern of alleging and offering proof of ownership for each work for which relief is sought, and assessing defenses for each work. These include \textit{UMG Recordings, Inc. v. MP3.com, Inc.}, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), and \textit{A&M Records, Inc. v. Napster, Inc.}, 239 F.3d 1004 (9th Cir.2001) One novel approach is that taken by the parties in \textit{American Geophysical Union v. Texaco}, 60 F.3d 913 (1994). That litigation, funded by the Association of American Publishers and actually denominated as a class action (with six publishers acting as class representatives, on behalf of other publishers registered with the Copyright Clearance Center), contested Texaco’s practice of photocopying a wide variety of copyrighted works for internal, company-wide distribution. Though the alleged copying was widespread, to avoid unnecessary discovery the parties stipulated that they would proceed on a written record by evaluating a test case, examining activities of a few Texaco scientists. The articles in question were selected by the plaintiffs and no effort was made “to determine quantitatively how much photocopying of copyrighted material, if any, has taken place.” Ibid.
Conclusions and Recommendations

The first conclusion is that libraries should be aware of litigation scenarios that would enable a copyright infringement suit against large or unwieldy groups of plaintiffs. Likewise, libraries must remain aware of the various ways in which the actions of their users can land them in court. As this paper attempts to make clear, the rules that determine who gets into court, and on behalf of whom, are important to consider when evaluating a giving library project or service. Beyond simple awareness, however, is the conclusion that libraries need to be astute and proactive in understanding the changing legal landscape in which they reside. The hypotheticals discussed in the previous section are all current, live legal disputes with many unanswered questions. Several modest, but specific suggestions may also be heeded to limit risk in the face of these litigation scenarios.

First, libraries should pay careful attention when making large-scale uses of copyrighted works that may be owners by a heterogeneous group of owners. Libraries should recognize that a broadly defined position of potential class and association litigants may not be tenable under current law, but those questions are still unanswered until Google Books Search and HathiTrust suits are resolved. In the meantime, by understanding the dangers of such suits and evaluating the set of potential plaintiffs, libraries may be better able to assess risk for certain discrete collections that are unlikely to generate a class or associational objection (e.g., certain special collections, academic-authored work).

Libraries should also be careful to understand their positions with respect to users. Direct, vicarious, and contributory liability are all real possibilities for libraries with user-
managed content. Whether it be e-reserve systems, library-managed publishing platforms,\textsuperscript{120} or any of the new electronic services that libraries are now providing, where users are asked to make copyright determinations on their own, the library should be sure to provide guidance and support. Indeed, under current law libraries and archives are required to give at least minimal notice about Copyright restrictions to certain users if the library seeks to fall within the special exceptions provided for them under Section 108 of the Copyright Act.\textsuperscript{121} Those requirements are relatively basic and do not, for example, guide the user through a fair use determination or any of the other areas of copyright law that one must evaluate when making many ordinary uses of copyrighted works. Enhanced guidance (and perhaps control) is especially important for state libraries and universities that seek to take advantage of sovereign immunity. Keeping in mind the importance of a decision in the Georgia State University litigation, care should be taken to understand how to structure workflows, policies, and acts of copying so that the appropriate parties are brought into court as a state-official defendants.

All of these practical considerations are tempered by the uncertain status of law in this area. Numerous opportunities for judicial or legislative clarification exist for both sides of the litigation equation. The Georgia State University litigation represents an opportunity to clarify the way that sovereign immunity affects liability for copyright infringement. Clarifying the role of state officials in their supervisory roles will be important for wide variety of suits against states. This may be of particular importance in the copyright context because existing theories of liability (direct, secondary) are defined

\textsuperscript{120} Public Knowledge Project, “California Digital Library Joins PKP as Major Development Partner in Open Access Scholarly Publishing,” Feb. 7, 2012, \url{http://pkp.sfu.ca/node/4609}

\textsuperscript{121} \textit{U.S. Code} 17 (2006), § 108(d)-(e), (f)(1).
in a way that could make it difficult for plaintiffs to identify and pursue cases against state actors in any meaningful way.

For the role of plaintiffs, a clearer understanding of how (or whether) mass digitization litigation can continue to proceed in the class action context, is critical. The factors that serve to differentiate potential plaintiff classes should be further developed; mapping commonalities and difference among rights holders based on those factors could help determine those areas that are most susceptible to large group opposition. Some answers are sure to surface if the class certification process proceeds in the Google Book Search case proceeds. As the Google Books Search litigation has illustrated to this point, special care should also be taken to ensure that class certification and settlements take into consideration the legislative prerogative of Congress.

The associational standing question is another area that the courts or Congress should clarify— is associational standing permitted at all in copyright litigation of this type? While Section 501(b)’s requirement of a legal or beneficial interest is a clear obstacle, if associational standing is allowed, it should be implemented in a way that circumscribes remedies in those cases to apply only in response to the particular rights owned by association members. While Rule 23 provides safeguards to protect class members, associational standing rules have no parallel system. Without such limitations, associational standing could stand as a subterfuge to the class action process.
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