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September 2, 2020

Regan A. Smith  
General Counsel and Associate Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000  
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**Re: State Sovereign Immunity Study [Docket No. 2020-9]**

Dear Counsel and Associate Register Smith,

I write in response to the U.S. Copyright Office's Notice and Request for Public Comment: Sovereign Immunity Study [Docket No. 2020-9].

**Background**

The University of Massachusetts Amherst Libraries hired me in 2012 to run a copyright education program for the University's faculty, staff, students, and affiliated institutions. As a copyright and information policy attorney, and librarian, I specialize in law and policy that affects teaching and research--including copyright law, licensing, and contracts.

I was hired, not in response to complaints from rightsholders about infringement, but out of the proactive desire of the University to assist faculty and staff in understanding their rights and responsibilities under copyright, such as making fair use or public domain determinations in their teaching and research, and to help authors be better positioned in negotiations with publishers of their research.

Below I respond briefly to questions 1, 6, and 7.

**1. Specific instances of infringing conduct.**

After eight years at the University of Massachusetts, I can say confidently that far from "intentional or reckless conduct", faculty and staff are overwhelmingly careful, conscientious, and often overcautious about relying

on their plain statutory rights. I have worked with hundreds of individual faculty members, graduate students, and other staff over the years, mostly on copyright-related matters. The vast majority of consultations have been at their own initiative, to ensure that they understand how to use content appropriately and lawfully. Another large share of matters have been University-affiliated authors and creators hoping to protect their own rights over their works. A small minority of matters have related to conflicts between rightsholders, such as apportioning credit between authors.

In more than 1600 different consultations within the Libraries, and with individual faculty, grad students, and other departments, I have seen only a handful of inquiries from non-University rightsholders about University use of their content—too few to warrant their own category in my reporting. In most of those instances, the inquiry was the result of a confusion or misunderstanding; for instance, a complaint or question about a vendor’s (such as ProQuest) use of their content. Other questions have related to inclusion of content in a donated collection or a student’s thesis. To my knowledge, none of these inquiries have led to litigation.

While my work is a subset of the University’s work in this area—the University’s Information Technology (IT) office handles DMCA Section 512(a) and 512(c) takedown notices, for instance, the Technology Transfer Offices handle licensing, and the Office of General Counsel handles other matters—it is notable to me that after eight years I have seen so few instances of rightsholder complaints. Having previously studied DMCA takedown notices sent to large and small ISPs, I came to this position prepared to deal with a wide variety of complaints and concerns. I was surprised, and gratified, by the lack of such complaints.

## **6. How do different states handle claims of infringement?**

My copyright education program, and the work of the University more generally, is aimed at *preventing* potential infringement, by proactively educating campus members about both their rights and their responsibilities in using copyrighted content. The culture of higher education is naturally attuned to questions of rights, with extensive norms of providing attribution even for ideas. The University of Massachusetts Amherst, like most campuses, treats plagiarism and lack of citation as a serious ethical matter warranting disciplinary action. In this culture, copyright infringement is viewed as a related ethical issue, and significant educational outreach is done to prevent such issues before they occur.

Nevertheless, any staff, faculty, or student who receives a claim of infringement or any other type of claim or inquiry has numerous resources, from campus trainings on copyright, to individual consultations with personal attorneys (at the Student Legal Services Office), to legal education

and consultation (with the Ombuds Office or my office, to name two), to University General Counsel. As I described above, in eight years I have seen virtually no complaints of infringement, either directly to the Libraries or among hundreds of faculty and staff who have sought me out for consultation on copyright matters.

The Libraries' staff work closely with electronic resource vendors to ensure that licensed resources are accessed and used in accordance with the license and our campus acceptable use policy. Numerous library and campus IT staff work to ensure that licensed resources are accessed only by authorized users, and that access is within authorized limits.

Based on my experience working within the Libraries and with administrative and academic offices across the campus, any claims of a legal nature are taken seriously, and if not easily clarified or quickly resolved, are routed swiftly to General Counsel.

## **7. Additional pertinent issues.**

I began this position in late 2012, and over that time, I have conducted hundreds of hours of consultations and trainings on my campus, as well as participated in and many other trainings and workshops supporting faculty and staff on other campuses. Additionally I have organized and participated in many other trainings aimed at librarians, in a "train the trainer" model aimed at increasing librarians' capacity to support other members of the campus community.

I am joined in the growing field of library-based copyright educators by now approximately 100 attorneys at major academic institutions, and hundreds more librarians at all levels of academic institutions who have become known as the campus copyright experts. Collectively, we donate our professional expertise — gained through work in acquiring and managing billions of dollars of copyrighted works in all fields — to support one of our nation's foremost engines of creativity, higher education.

### **Educators are Authors and Creators:**

A key point that is often overlooked in conversations about higher education within copyright circles is that higher education is, like copyright itself, an engine of creativity. Of course, libraries and universities support the publishing industries through purchase and licensing of millions of dollars of works annually, supporting entire commercial sectors valued in the tens of billions of dollars. But higher education also directly supports creativity, by directly supporting the individual creators who power those multi-billion dollar publishing sectors.

We are used to understanding that large research universities are major engines of invention, as demonstrated by the inclusion each year of scores of universities in the PTO’s “Patenting by Organizations” report.<sup>1</sup> But, although rarely counted as a discrete contributor to the copyright economy, the higher education sector creates hundreds of thousands of copyrighted works each year.

Works of scholarship are perhaps the most obvious contribution by creators within higher education. The scientific, technical, and medical (STM) publishing sector *alone* is valued at \$25 billion (2017) annually.<sup>2</sup> Add to that scholarship in the humanities and social sciences, published by university presses, scholarly societies, and many small and independent publishers, as well as by large commercial presses.

But higher education’s contributions to the copyright industry go far beyond works of scholarship. Faculty at higher education institutions create hundreds of thousands of creative and fine arts works, ranging from works of fiction by creative writing faculty, to works of art from our music, film, animation, dance, theater, and fine arts programs, to works of architecture and design, and software from computer science departments. Award-winning poet, essayist, and novelist Ocean Vuong is a University of Massachusetts assistant professor,<sup>3</sup> and hundreds of his author colleagues staff the English, comparative literature, and related departments at my university, the Five Colleges, and other colleges and universities in Massachusetts. Writing—creating copyrightable literary works—is a major part of their jobs, and tenure is awarded in part on the basis of their creative output. The same is true of UMass’ storied Jazz and African-American Music Studies program, as well as our film, animation, dance, theater, fine arts, architecture, music, and design programs. Faculty are hired in each program *to create*; their creative authorship and performance are a significant part of their work at the University. Beyond the arts and humanities, numerous faculty and departments develop copyrighted works as part of their work. And this is the story of faculty throughout higher education. They are paid, by universities, to create. It is worth noting that this comment will be submitted through a graphic web browser—thanks to the work of researchers at the University of

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<sup>1</sup> See, e.g., U.S. Patent and Trademark Office, “[Patenting by Organizations \(Utility Patents\) 2019](#)”, Part B.

<sup>2</sup> International Association of Scientific, Technical and Medical Publishers, [The STM Report: An Overview of Scientific and Technical Publishing](#), 5th Edition, Oct. 2018 (see executive summary p.5, and Section 2.4).

<sup>3</sup> See “[Faculty Profile, Ocean Vuong, Assistant Professor](#)”, University of Massachusetts and “[Ocean Vuong](#)” entry, Wikipedia.

Illinois at Urbana-Champaign, who developed Mosaic, the first widely-distributed graphical web browser.<sup>4</sup>

Beyond creative works, beyond works of scholarship, educators at colleges and universities also create hundreds of thousands of copyrighted works each year in support of our teaching mission. These works, rarely traditionally published, are nevertheless copyrighted works; creative works of authorship, fixed in tangible media; highly valuable and widely used. These works range from syllabi, lecture notes, slide decks, tests, problem sets, and study guides, to recorded lectures, animated videos, diagrams, software, and many other lecture, study, and learning materials.

Lastly, the creators within higher education are also responsible for vast numbers of “public intellectual” work, shared through both traditional and nontraditional publishing venues such as newspapers, magazines, radio and TV programs, podcasts, and blogs.

I have yet to see a Copyright Office study accounting for higher education as one of the creative sectors.<sup>5</sup> Yet there should be no question that the higher education sector directly subsidizes one of the largest sectors of creators, whether considered through numerosity of creators, quantity of creative works, quality of works, or value to the larger economy.

Yet these creators are, despite their numerosity and institutional privileges, greatly disadvantaged in the copyright world. They are generally “unrepresented” by attorneys in dealing with publishers. Until recently, no authors’ organizations explicitly represented the unique interests of academic authors in publishing scholarship.<sup>6</sup> No “do it yourself” publishing guides supported academic authors in negotiating with publishers, unlike the numerous guides aimed at supporting trade and popular authors.

And academic publishing is rife with abuses of authors. In the past eight years, I have seen publishing contracts that purported to describe works of scholarship as works made for hire and contracts that required academic authors to waive their moral rights. I have seen publishers suing against the

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<sup>4</sup> See “[Mosaic \(web browser\)](#)”, Wikipedia.

<sup>5</sup> One Copyright Office study pertaining to education, the 1999 Copyright Office Study on Distance Education, was primarily focused on “promot[ing] distance education through digital technologies...while maintaining an appropriate balance between the rights of copyright owners and the interests of users.” Rather than recognizing educators as creators, educators were primarily contrasted with “copyright owners”. <https://www.copyright.gov/disted/>

<sup>6</sup> The Authors Alliance, founded in 2014, is to my knowledge the first organization aimed at the unique interests of academic authors, described by them as “authors who want to serve the public good by sharing their creations broadly.” <https://www.authorsalliance.org/>

desires of their authors, and publishers that refused to address plagiarism of their authors' works despite their authors' pleas. I have seen bad faith bargaining and outright lies, and many, many publishers charging authors to reuse their own work—even individual figures, charts, or images—in subsequent works. It is entirely routine for academic publishers to charge authors various fees for publishing articles or books. These days, many large publishers require scholarly articles to be submitted through forms that purport to transfer copyright *on submission*. Needless to say, these forms offer no opportunity for negotiation. These and many other abusive contracting practices would be considered unconscionable in many other fields, yet academic authors often face pressures to publish with particular publishers or on a schedule, regardless of terms.

In the face of these and many other abusive contracting practices, authors who create and publish scholarly works, who create and share pedagogical works, and who create, publish, and perform creative works, are greatly disadvantaged. They are unrepresented by legal counsel and have little financial incentive to protect their interests, while the largest of the academic, pedagogical, and creative publishers have entire armies of in-house counsel, and significant financial interests at stake.

In this context, I work to support academic authors and librarians as they create, purchase, and use copyrighted works.

I help faculty understand their rights as creators of content to be used by others, as well as users of others' content in their own works. In this position, I regularly support the creators of our university in understanding their rights under the Copyright Act, to help them (as unrepresented parties) understand the substance of publishing contracts and how to negotiate those contracts, to help them affirmatively protect their rights by licensing, labeling, and asserting their rights via metadata, labels, etc., and to protect their rights by teaching them about the DMCA Section 512 process, litigation, and other options.

I help faculty understand their rights to use content, in their creation of new copyrightable works. I also support our creators by enabling them to understand their rights to use public domain materials, fair use, photographs of architectural works, and other works specifically authorized by use in various contexts. These include creative works of teaching -- syllabi, textbooks, slide decks, illustrative videos and lectures of all sorts.

The many matters I have consulted on present highly variable issues of copyrightability, public domain status, fair use, and exclusive rights issues, among others. The one consistent thread that runs through all my consultations is concern on the parts of librarians, academic authors, and administrators, for "doing the right thing." The University hired me, and

faculty, instructors, students, and staff seek me out, to assist them in doing the right thing. I often remark to my colleagues that it is odd how the education sector, the “most favored nation” within copyright law, favored with numerous exceptions and limitations to “promot[e] the progress of art and science”—how members of that community are the most conscientious, the most concerned with getting it right.

In sum, I feel confident in asserting that not only do educators and librarians *not* infringe “intentionally or recklessly”, but that our community is among the most respectful and supportive of rightsholders’ interests and prerogatives.

Sincerely,

A handwritten signature in black ink that reads "Laura M. Quilter". The signature is written in a cursive, flowing style.

Laura Quilter  
Copyright and Information Policy Librarian  
University of Massachusetts, Amherst