UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TC REINER,

Plaintiff,

vs.

SAGINAW VALLEY STATE UNIVERSITY, a Michigan non-profit corporation, and THE BOARD OF CONTROL OF SAGINAW VALLEY STATE UNIVERSITY,

Defendants.

Case No. 2:16-cv-11728

Hon. Paul D. Borman

Mag. Patricia T. Morris

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**DEFENDANTS' MOTION TO DISMISS**

NOW COME the Defendants, Saginaw Valley State University and the Board of Control of Saginaw Valley State University, by and through their Attorneys, Braun Kendrick Finkbeiner P.L.C., and for their Motion to Dismiss Plaintiff's Complaint state as follows:

1. The Plaintiff, TC Reiner ("Plaintiff"), brings this action against the Defendants, Saginaw Valley State University ("SVSU") and the Board of Control of Saginaw Valley State University, alleging copyright infringement in violation of the Copyright Act, 17 USC §§ 106 and 501, and wrongful removal of copyright information in violation of the Digital Millennium Copyright Act, 17 USC § 1202

*et seq*. Plaintiff seeks money damages, declaratory relief and injunctive relief against the Defendants.

2. SVSU is a state university. The Board of Control is SVSU's governing body responsible for the general supervision of the University.

3. SVSU and its Board of Control are arms of the State entitled to Eleventh Amendment immunity which shields them from suit in federal court.

4. As is more fully set forth in the supporting Brief filed herewith, the Copyright Remedy Clarification Act, 17 USC § 511, is not a valid abrogation of the States' Eleventh Amendment immunity. Therefore, Plaintiff's Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

5. Pursuant to Local Rule 7.1(a), concurrence of Plaintiff's counsel was requested on June 17, 2016, and concurrence was not granted.

WHEREFORE, the Defendants respectfully request this Honorable Court grant their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

Dated: July 27, 2016

By: s/Jamie Hecht Nisidis

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**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

PREPARED BY:

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## ISSUE PRESENTED

I. ARE PLAINTIFF'S COPYRIGHT CLAIMS AGAINST SVSU AND ITS BOARD OF CONTROL BARRED BY THE ELEVENTH AMENDMENT?

Defendants answer "Yes".

Plaintiff answers "No".

## CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

The Eleventh Amendment to the United States Constitution provides that "[t]he 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." US CONST, Amend XI.

To validly abrogate the States' Eleventh Amendment immunity, (1) Congress must unequivocally express its intent to abrogate the immunity, and (2) Congress must act pursuant to a valid exercise of power. *Florida Prepaid Postsecondary Educ Expense Bd v College Sav Bank*, 527 US 627, 635 (1999). Congress may not abrogate state sovereign immunity pursuant to its Article I powers. *Id* at 637. However, Congress has the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment. *Id.*

Every federal court to address the issue has determined that the Copyright Remedy Clarification Act, 17 USC § 511, is not a valid exercise of Congress' powers under the Fourteenth Amendment. See, eg, *Chavez v Arte Publico Press*, 204 F3d 601 (5th Cir 2000); *National Association of Boards of Pharmacy v Board of Regents*, 633 F3d 1297 (11th Cir 2011); *Issaenko v University of Minnesota*, 57 F Supp 3d 985 (D Minn 2014); *Jacobs v Memphis Convention & Visitors Bureau*,

710 F Supp 2d 663 (WD Tenn 2010); *Coyle v Univ of Kentucky*, 2 F Supp 3d 1014 (ED Ky 2014); *Mktg Info Masters, Inc v Bd of Trustees*, 552 F Supp 2d 1088 (SD Cal 2008); *InfoMath, Inc v Univ of Arkansas*, 633 F Supp 2d 674 (ED Ark 2007); *De Romero v Institute of Puerto Rican Culture*, 466 F Supp 2d 410 (D Puerto Rico 2006); *Campinha-Bacote v Tenney*, 2011 US Dist LEXIS 22669 (EDNY 2011); *Campinha-Bacote v Regents of the University of Michigan*, 2016 US Dist LEXIS 5958 (SD Ohio 2016).

## INTRODUCTION

The Plaintiff, TC Reiner ("Plaintiff"), brings this action against the Defendants, Saginaw Valley State University ("SVSU") and the Board of Control of Saginaw Valley State University, alleging copyright infringement in violation of the Copyright Act, 17 USC §§ 106 and 501, and wrongful removal of copyright information in violation of the Digital Millennium Copyright Act, 17 USC § 1202 *et seq*. Plaintiff seeks money damages, declaratory relief and injunctive relief against the Defendants.

SVSU is a state university. The Board of Control is SVSU's governing body responsible for the general supervision of the University. SVSU and its Board of Control are arms of the State entitled to Eleventh Amendment immunity which shields them from suit in federal court. As is more fully set forth below, the Copyright Remedy Clarification Act, 17 USC § 511, is not a valid abrogation of the States' Eleventh Amendment immunity. Therefore, Plaintiff's Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

# ARGUMENT

## I. SVSU AND ITS BOARD OF CONTROL ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The Eleventh Amendment to the United States Constitution provides that "[t]he 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." US CONST, Amend XI. The Eleventh Amendment also bars suits by citizens against their own States. *Bd of Trustees of Univ of Alabama v Garrett*, 531 US 356, 363 (2001). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.*

### A. SVSU And Its Board of Control Are Arms Of The State.

Federal Courts have routinely found that state universities in Michigan are arms of the State entitled to Eleventh Amendment immunity. See *Estate of Ritter v University of Michigan*, 851 F2d 846 (6th Cir 1988) (University of Michigan); *Hill v Board of Trustees of Michigan State University*, 182 F Supp 2d 621 (WD Mich 2001) (Michigan State University); *Wunderlin v Western Michigan University*, 2001 US Dist LEXIS 5243 (WD Mich 2001) (Western Michigan University) (Exhibit A); *United States ex rel Kreipke v Wayne State University*, 2014 US Dist LEXIS 159546 (ED Mich 2014) (Wayne State University) (Exhibit B); *McPike-*

*McDyess v Regents of the University of Michigan*, 2015 US Dist LEXIS 17159 (University of Michigan) (Exhibit C).

The relevant constitutional and statutory provisions governing SVSU likewise establish that SVSU and its Board of Control are arms of the State entitled to Eleventh Amendment immunity. The Michigan Constitution of 1963 provides that the Legislature shall appropriate moneys to maintain institutions of higher education established by law. MICH CONST of 1963, art 8, § 4. The Constitution further provides that institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. MICH CONST of 1963, art 8, § 6. SVSU is established pursuant to MCL 390.711(1), which provides:

> There is established a state institution of higher education known as Saginaw valley state university to be located in a 3-county area comprising the counties of Bay, Midland, and Saginaw. The institution shall be maintained by the state and its facilities shall be made equally available and upon the same basis to all qualified residents of this state. The conduct of its affairs and control of its property shall be vested in a board of control, the members of which shall constitute a body corporate.

The SVSU Board of Control is appointed by the Governor with the advice and consent of the Senate. MCL 390.712.

In *Ross v Bachand, et al*, No. 14-cv-14122 (ED Mich April 20, 2015 and May 11, 2015) (Exhibit D), Judge Ludington found that SVSU is an arm of the State entitled to Eleventh Amendment immunity.

### B. The Copyright Remedy Clarification Act Is Not A Valid Abrogation Of The States' Eleventh Amendment Immunity.

Congress may abrogate the States' Eleventh Amendment immune when it both (1) unequivocally intends to do so and (2) acts pursuant to a valid grant of constitutional authority. *Garrett*, 531 US at 363. In 1990, Congress attempted to abrogate the States' Eleventh Amendment immunity for alleged violations of the Copyright Act by enacting the Copyright Remedy Clarification Act ("CRCA"), 17 USC § 511(a), which provides:

> 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 sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

While Congress unequivocally stated its intention to abrogate Eleventh Amendment immunity for copyright claims by the enactment of the CRCA, in order to constitute a valid abrogation of Eleventh Amendment immunity, Congress must have acted within its constitutional authority.

It is well-settled that Congress may not abrogate Eleventh Amendment immunity under its powers enumerated in Article I of the Constitution. *Garrett*, 531 US at 364. See also, *Seminole Tribe of Florida v Florida*, 517 US 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial powers under Article III,

and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Thus, if Congress enacted the CRCA pursuant to its powers under the Commerce Clause[1] or the Patent and Copyright Clause[2] -- both of which are in Article I of the Constitution -- the CRCA is not a valid abrogation of Eleventh Amendment immunity. See *National Association of Boards of Pharmacy v Board of Regents*, 633 F3d 1297, 1315 (11th Cir 2011) (holding that "Congress may not abrogate the States' sovereign immunity pursuant to the Copyright and Patent Clause."); see also, *Florida Prepaid Postsecondary Educ Expense Bd v College Sav Bank*, 527 US 627, 636 (1999) ("Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Clause cannot be sustained under either the Commerce Clause or the Patent Clause.").

It is also well-settled that Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its power under the Section 5 enforcement provisions of the Fourteenth Amendment. *Garrett*, 531 US at 364. See also, *Florida Prepaid*, 527 US at 637 ("Congress retains the authority

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[1] See US CONST, Art I, § 8, Clause 2 (providing that Congress has the power to "regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes").

[2] See US CONST, Art I, § 8, Clause 8 (providing that Congress has the 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").

to abrogate state sovereign immunity pursuant to the Fourteenth Amendment.”). The Fourteenth Amendment provides in relevant part:

> Section 1. . . . No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [US CONST, Amend XIV].

“Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting ‘appropriate legislation.’” *Garrett*, 531 US at 365. To invoke its powers under Section 5 of the Fourteenth Amendment, “[Congress] must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” *Florida Prepaid*, 527 US at 639. The power to enforce the Amendment includes the authority to both remedy and to deter violation of the rights guaranteed by the Fourteenth Amendment. *Garrett*, 531 US at 365. “[Section] 5 legislation reaching beyond the scope of Section 1’s actual guarantees must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Id.*

In *Florida Prepaid*, *supra*, the Supreme Court addressed whether the Patent Remedy Act can be "viewed as remedial or preventative legislation aimed at securing the protections of the Fourteenth Amendment for patent owners." *Florida Prepaid*, 527 US at 639. The Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id* at 640. Even though patents are considered "property" protected by due process under the Fourteenth Amendment, the Court found that "the legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act." *Id* at 642. The Court noted that "a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution." *Id* at 643. The Court concluded that:

> The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private actors under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*. [*Id* at 647-648].

While neither the Supreme Court nor the Sixth Circuit has yet had the opportunity to address whether the CRCA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, numerous federal courts, including the Fifth Circuit and the Eleventh Circuit, have addressed this issue and have uniformly held that the CRCA is <u>not</u> a valid exercise of Congress' Section 5

powers. Consequently, the States are immune from suit for alleged violations of the Copyright Act.

In *Chavez v Arte Publico Press*, 204 F3d 601 (5th Cir 2000), the Fifth Circuit addressed whether the CRCA is valid exercise of Congress' Section 5 enforcement powers under the Fourteenth Amendment. After examining the legislative record, the Court concluded that the legislative history of the CRCA exhibited "similar deficiencies" as those identified by the Supreme Court in *Florida Prepaid*. *Chavez*, 204 F3d at 605. The Court noted that "testimony before the House Subcommittee in favor of the CRCA acknowledged that 'the States are not going to get involved in wholesale violation of the copyright laws.'" *Chavez*, 204 F3d at 605-606 quoting Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings Before the Subcomm on Courts, Intellectual Property, and the Administration of Justice of the House Comm on the Judiciary, 101st Cong 53 (1989). The Court concluded:

> Since the record does not indicate that Congress was responding to the kind of massive constitutional violations that have prompted proper remedial legislation, that it considered the adequacy of state remedies that might have provided the required due process of law, or that it sought to limit the coverage to arguably constitutional violations, we concluded that the CRCA is, like the PRCA, an improper exercise of Congressional legislative power. [*Id* at 607].

The Eleventh Circuit in *National Association of Boards of Pharmacy*, *supra*, also held that the CRCA is on not valid abrogation of the States' sovereign immunity based on Section 5 of the Fourteenth Amendment. *Id* at 1315-1319.

In 2014, the District Court in *Issaenko v University of Minnesota*, 57 F Supp 3d 985, 1007 (D Minn 2014), surveyed decisions addressing this issue and found that "all of the other courts to consider the question to date have concluded that Congress lacked a valid grant of constitutional authority to abrogate the states' sovereign immunity under the CRCA." Relying on the reasoning in *Chavez*, *supra*, the Court concluded that "Congress failed to act pursuant to a valid exercise of its enforcement powers under Section 5 when it sought to abrogate state sovereign immunity in the CRCA." *Id* at 1008.

The District Court also addressed and specifically rejected the plaintiff's attempt to validate the CRCA as an enforcement of the Privileges and Immunities Clause of the Fourteenth Amendment (in addition to the Due Process Clause), explaining:

> [I]n order to be a valid exercise of its Section 5 power, Congress must still have been able to identify constitutional violations by states -- whether they be of the Due Process Clause or the Privileges and Immunities Clause -- prior to passing remedial legislation. Furthermore, Congress must craft legislation that is congruent and proportional to those problems. Because the Court has already concluded that Congress did not identify a pattern of states infringing the copyrights in an unconstitutional manner and did not tailor the remedies in the CRCA to address any constitutional violations by states, the Court concludes that Congress did not act pursuant to a

> valid exercise of its power to enforce the Privileges and Immunities Clause in passing the CRCA. [*Issaenko*, 57 F Supp 3d at 1010].

The District Court in *Jacobs v Memphis Convention & Visitors Bureau*, 710 F Supp 2d 663, 682 (WD Tenn 2010), undertook a detailed analysis of the CRCA's legislative history and held that the CRCA "cannot be sustained as appropriate prophylactic legislation under § 5 of the Fourteenth Amendment." The Court summarized its reasoning as follows:

> In reaching this conclusion, the Court does not disparage the importance of intellectual property rights. . . .
>
> The importance of the interest to be protected, however, cannot override the obligation of Congress to abide by the limitations placed upon it by the Constitution. Examination of the legislative history behind enactment of the Copyright Remedy Clarification Act first reveals that Congress passed this legislation pursuant to Article I rather than the Fourteenth Amendment. Additionally, Congress did not create a record sufficient to justify prophylactic legislation abrogating state sovereign immunity under § 5 of the Fourteenth Amendment. Specifically, the record fails to establish a pattern of unconstitutional conduct, fails to demonstrate that existing state law remedies are inadequate, and fails to show that the federal remedy proscribes and makes actionable no more facially constitutional state conduct than reasonably necessary in relation to the nature of the constitutional harm to be addressed. [*Jacobs*, 710 F Supp 2d at 681-82].

Other cases finding that the CRCA is not a valid exercise of the Section 5 enforcement provisions of the Fourteenth Amendment include: *Coyle v Univ of Kentucky*, 2 F Supp 3d 1014, 1018 (ED Ky 2014); *Mktg Info Masters, Inc v Bd of Trustees*, 552 F Supp 2d 1088, 1094-1095 (SD Cal 2008); *InfoMath, Inc v Univ of*

*Arkansas*, 633 F Supp 2d 674, 679-680 (ED Ark 2007); *De Romero v Institute of Puerto Rican Culture*, 466 F Supp 2d 410, 418 (D Puerto Rico 2006); *Campinha-Bacote v Tenney*, 2011 US Dist LEXIS 22669, *8-10 (EDNY 2011) (Exhibit E). Most recently, the District Court for the Southern District of Ohio in *Campinha-Bacote v Regents of the University of Michigan*, 2016 US Dist LEXIS 5958, *11 (SD Ohio 2016) (Exhibit F), held that the CRCA does not validly abrogate the States' Eleventh Amendment immunity and specifically rejected the plaintiff's Section 5 argument.

There are no grounds to distinguish this case from the cases in which federal courts have uniformly held that the CRCA is not a valid abrogation of the States' Eleventh Amendment immunity. Thus, Defendants are entitled to Eleventh Amendment immunity, and Plaintiff's copyright claims should be dismissed.

### C. Eleventh Amendment Immunity Also Applies To Claims Under 17 USC § 1202.

Plaintiff may argue that Count II, alleging violations of the Digital Millennium Copyright Act, 17 USC § 1202 *et seq*, should be treated differently for purposes of Eleventh Amendment immunity. The CRCA, however, applies to all violations of Title 17. See 17 USC § 511(a) (providing that States shall not be immune for violation of Sections 106 to 122, for violation of Section 602 and "for any other violation under this title"). Thus, there is no basis for separately analyzing this claim. If the CRCA is not a valid abrogation of Eleventh

Amendment immunity for purposes of alleged copyright violations under Sections 106 and 501 of the Copyright Act, it is not a valid abrogation of Eleventh Amendment immunity for alleged violations of other sections of Title 17.

### D. Plaintiff's Claims For Prospective Relief Are Also Barred By The Eleventh Amendment.

"While on its face the Eleventh Amendment bars 'any suit in law or equity, commenced or prosecuted against one of the United States,' the Supreme Court announced an exception to Eleventh Amendment sovereign immunity in *Ex parte Young* for claims for injunctive relief against individual state officials in their official capacities." *Diaz v Mich Dep't of Corrections*, 703 F3d 956, 964 (6th Cir 2013) (emphasis added). In order to fall within the exception, a claim must seek prospective relief to end a continuing violation of federal law. *Id.* Retroactive relief is barred by the Eleventh Amendment. *Id.* However, the *Ex parte Young* exception does not apply to the States or their agencies which may not be sued for injunctive relief in federal court. *Sessions v Rusk State Hosp*, 648 F2d 1066, 1069 (5th Cir 1981). SVSU is not a state official and, therefore, is immune from claims for prospective relief.

The same is true for the SVSU Board of Control which is a state agency, not an individual state official. See MCL 390.711(1) (providing that the conduct of SVSU's affairs and control of its property shall be vested in a board of control, the members of which shall constitute a body corporate). The Court in *Eubank v*

*Leslie*, 210 Fed Appx 837, 844-845; 2006 US App LEXIS 30855 (11th Cir 2006) (Exhibit G), held that the University of Alabama Board of Trustees is a state agency, not a state official acting in its official capacity. Thus, the *Ex parte Young* exception to Eleventh Amendment immunity did not apply to any claims against the Board of Trustees, including a claim for prospective relief. *Id* at 845.

Numerous district courts have reached the same conclusion and found state university boards immune from claims for prospective relief. See, eg, *Steshenko v Gayrard*, 44 F Supp 3d 941, 951 (ND Cal 2014) (holding the *Ex parte Young* exception does not apply to claims against the University of California, Santa Cruz, Board of Trustees); *Yul Chu v Mississippi State Univ*, 901 F Supp 2d 761 (ND Miss 2012) (claims for injunctive relief against MSU and the Board of Trustees barred by the Eleventh Amendment; neither are state officials responsible for enforcing the federal law at issue); *Rittenhouse v Board of Trustees of Southern Illinois Univ*, 628 F Supp 2d 887, 893 (SD Ill 2008) ("because the Board is a state agency, and not a state official acting in an official capacity, the exception to Eleventh Amendment immunity set out in *Ex parte Young* does not apply to claims against it"). Thus, the SVSU Board of Control is immune from claims for prospective relief.

## RELIEF REQUESTED

WHEREFORE, the Defendants, Saginaw Valley State University and the Board of Control of Saginaw Valley State University, respectfully request this Honorable Court grant their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

Dated: July 27, 2016

By: s/Jamie Hecht Nisidis

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## CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys registered with the ECF system.

s/ Jamie Hecht Nisidis

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