United States General Accounting Office

GAO

Congressional Record, 101st Congress, Extension of Remarks

Bill	Date	Page(s)
H.R. 1131	Feb. 27, 1989 (18)	E524-525

Remarks: Introduced by Mr. Kastenmeier

COPYRIGHT REMEDY CLARIFICATION ACT

HON. ROBERT W. KASTENMEIER

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

Monday, February 27, 1989

Mr. KASTENMEIER. Mr. Speaker, I am pleased to introduce today the Copyright Remedy Clarification Act at the request of the Copyright Office, and to be joined in this effort by my colleague, CARLOS MOORHEAD, the ranking member of the Subcommittee on Courts, Intellectual Property and the Administration of Justice, which I chair. This bill implements the recommendations of a study issued by the Register of Copyrights late last year.

BACKGROUND

The U.S. copyright law grants creators exclusive rights in their works. The law gives Federal courts exclusive jurisdiction to decide copyright cases. However, the 11th amendment to the Constitution generally prohibits Federal courts from hearing damage suits brought against a State by citizens of another State or country, and the Supreme Court has extended the principle of States' sovereign immunity to prohibit suits brought against a State by its own citizens.

In recent years a number of Federal courts have applied the Supreme Court's interpretation of the 11th amendment in copyright infringement suits brought against States, and have found that the States are immune from

damage suits.[1] The legal issue presented in these cases was whether Congress, in enacting the Copyright Act of 1976 pursuant to its constitutional power to enact copyright legislation, subjected the States to copyright liability in Federal courts, notwithstanding the 11th amendment.

It is well established that Congress has the power to abrogate the States' 11th amendment immunity in statutes enacted pursuant to its plenary powers. However, in 1985 the Supreme Court announced a stringent test for determining whether Congress intended in a particular statute to create a cause of action against the States: "Congress may abrogate the State's constitutionally secured immunity from suit in Federal court only by making its intention unmistakably clear in the language of the statute." [2] Applying this test to the Copyright Act of 1976, five U.S. district courts and three U.S. Circuit Courts of Appeals have held that the language of the Federal copyright statute is not sufficiently clear to demonstrate Congress' intent to abrogate States' 11th amendment immunity from suit in Federal courts in copyright infringement cases.[3]

When this clash between the Copyright Act and the 11th amendment first became apparent, the ranking minority member of the Subcommittee on Courts, Intellectual Property and the Administration of Justice, Mr. MOORHEAD, and I asked Ralph Oman, the Registrar of Copyrights, to study the practical problems concerning the enforcement of copyrights against State governments, and to prepare a report on the current state of law in the area. The Copyright Office received public comments to assist in writing the report. A few States submitted copies of briefs they had filed in defending copyright infringement actions, but no State official asserted that the States could not do State business without immunity from copyright violations. The Copyright Office report concluded that if States are not held responsible under the Federal copyright statute (as all other users of copyrighted works are) the potential exists for immediate harm to copyright proprietors and authors in the form of widespread copying, especially in the area of State educational publishing, resulting increased prices of the infringed works and diminished creativity on the part of authors.[4]

As chairman of the subcommittee and responsible for the copyright law revision effort which culminated in the present law, I cannot help but recall that enacting the 1976 Copyright Act, Congress specifically focused debate on the extent to which States and their agencies utilized copyrighted works and should be either liable for or exempt from infringement. The Copyright Act contains several exemptions from liability in the case of activities of a "governmental body," which Congress thought encompassed not only the Federal Government but also State and local government. Until the recent application of the Supreme Court's strict test of 11th amendment abrogation, it seemed clear that the language and history of the 1976 statute reflected Congress' intent to hold States responsible under the Federal copyright law.

This bill, which is being introduced at the request of the Register of Copyrights, would amend the Copyright Act in order to clarify Congress' intent that States be subject to damage suits in Federal court for their violations of the Copyright Act. Eleventh amendment jurisprudence dictates that in order to carry out the original intent of the Congress, we must now amend the Copyright Act to make unmistakably clear in the language of the copyright statute that the States are subject to copyright liability. This amendment does not in any way change the substantive rights of copyright owners.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Copyright Remedy Clarification Act".

SEC. 2. LIABILITY OF STATES AND INSTRUMENTALITIES OF STATES FOR INFRINGEMENT OF COPYRIGHT AND EXCLUSIVE RIGHTS IN MASK WORKS.

(a) COPYRIGHT INFRINGEMENT.—Section 501(a) of title 17, United States Code, is amended by adding at the end the following: "As used in this subsection, the term 'anyone' includes any State and any instrumentality of a State, both of which shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.".

(b) INFRINGEMENT OF EXCLUSIVE RIGHTS IN MASK WORKS.—Section 910(a) of title 17, United States Code, is amended by adding at the end the following: "As used in this subsection, the term 'any person' includes any State and any instrumentality of a State, both of which shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act but shall not apply to any case filed before such date.

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[1] *See, e.g.*, BV Engineering v. Univ. of Calif., — F. 2d — (9th Cir. 1988); Richard Anderson Photography v. Brown, — F. 2d — (4th Cir. 1988), cert. denied, — U.S. — (Feb. 21, 1989).

[2] *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985).

[3] Register of Copyrights, Copyright Liability of States and the Eleventh Amendment (1988).

[4] *Id.*