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Bill	Date	Page(s)
S.497	March 2, 1989 (21)	S2012-2013

Action: Introduced by Mr. DeConcini et al.

By Mr. DECONCINI (for himself, Mr. SIMON, and Mr. HATCH):

S. 497. A bill entitled the "Copyright Remedy Clarification Act"; to the Committee on the Judiciary.

COPYRIGHT REMEDY CLARIFICATION ACT

● Mr. DECONCINI. Mr. President, I rise today to introduce a bill with my colleagues Senator SIMON and Senator HATCH to reaffirm Congress' intent that States be subject to suit under the 1976 Copyright Act for copyright infringement. This bill has been made necessary by recent Federal Circuit Court opinions which, contrary to what I believe was the clear intent of the Congress when enacting the Copyright Act of 1976, have held that States are immune from suit in Federal court for infringement of copyright material. If these decisions are allowed to stand, without further congressional action, the intolerable result will be that States are entirely immune from prosecution for infringement under the comprehensive scheme of copyright protection the Congress provided in the Copyright Act. This lack of protection for American copyrighted material cannot be allowed to continue, and Congress must act now to restore to the law the degree of protection that has been thought to exist since Congress originally enacted the copyright law. The act must be amended to make clear that States are subject to suit in Federal district court for claims of copyright infringement.

On October 3, 1988, the U.S. Court of Appeals for the Ninth Circuit held that States and their instrumentalities are immune from damage suits for copyright infringement under the sovereign immunity clause of the 11th amendment to the U.S. Constitution. That decision, together with a recent similar holding in the fourth circuit, critically impairs creative incentive and business investments throughout this country's copyright industries—all of which serve important market segments which contain at least some State entities. Particularly vulnerable are the educational publishers among whose principal markets are State universities. The anomalous result of these decisions is that public universities can infringe without liability upon copyrighted material and essentially steal information from private universities, but private universities cannot similarly infringe with immunity on public institutions. In other words, UCLA can sue USC for copyright infringement, but USC cannot sue UCLA.

A State assertion of sovereign immunity in copyright claims has a particularly devastating effect on copyright owners who—unlike others foreclosed by 11th amendment immunity only from the Federal courts—are deprived of any forum for effective relief. Following the ninth circuit decision, the Register of Copyrights reported to Congress that "copyright proprietors have demonstrated that they will suffer immediate harm if they are unable to sue infringing States". The ninth circuit court itself concluded that:

> Although we find the arguments [of plaintiff copyright owner and amici copyright industries] compelling, we are constrained by the Supreme Court's mandate that we find an abrogation of immunity only when Congress has included * * * unequivocal and specific language indicating an intent to subject States to suit in Federal court. Such language is absent from the Copyright Act of 1976. We recognize that our holding will allow States to violate the Federal copyright laws with virtual impunity. It is for the Congress, however, to remedy this problem.

Congressional reimposition of State liability for damage actions for copyright infringement is not a complicated matter and should not be a controversial one. The simple fact is that protecting copyright from this particular form of infringement does not render any conduct unlawful that is not already unlawful. it does not take away any "rights" from States that they now possess. It does provide fair opportunity for copyright owners to have their day in court, and it does provide relief for what is now and will remain infringing State conduct. Most importantly, congressional action to restore protection from infringement by States also serves to restore the careful, delicate balances struck by the 1976 Copyright Act—indeed, restoring this form of protection is essential to

restoring that balance and perfecting the Congress' clear intent. As the Register of Copyrights recently concluded:

The legislative history of the Copyright Act demonstrates that, in enacting the 1976 copyright statute, Congress specifically focused debate on the extent to which the States and their agencies utilize copyrighted works and should either be liable for or exempt from infringement. * * * The Copyright Office is convinced that Congress intended to hold States responsible under the Federal copyright laws. * * * If the outcome of [the ninth circuit opinion] leaves open any possibility that States are immune from suits for damages in Federal courts for copyright infringement, Congress should act quickly to amend the act to ensure that States comply with the copyright law.

For nearly a decade following the 1976 Copyright Act, it was generally believed that States were not immune from copyright infringement suits. What the 101st Congress must do is what the 94th Congress thought it had done, only to find 9 years later that the Supreme Court had changed the legislative ground rules. Congress should now reaffirm its original intent in a manner consistent with the Supreme Court's recently announced guidelines and provide full protection for copyright owners, the very protection it thought it had provided in the 1976 act.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 497

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 INSTRUMENTLITIES 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.●

● Mr. SIMON. Mr. President, I am happy to join with my friend and colleague, Senator DECONCINI, as primary cosponsor, with Senator HATCH, of the Copyright Remedy Clarification Act. This bill is necessary to ensure that the intent of Congress in the 1976 Copyright Act is not undermined by recent court decisions; and that creators of American books, music, films, computer programs, and other works continue to have protection against illegal use of their copyrighted material.

Article 1 of the U.S. Constitution grants Congress the power—

[t]o 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.

Accordingly, Congress has provided copyright protection to stimulate investment and creativity by promising copyright holders certain exclusive rights to their works.

The remedies for copyright infringement are exclusively in Federal courts. Some recent lower court decisions, however, have cast shadow of doubt on the ability of copyright holders to successfully seek damage against certain infringers. State entities may now hide behind the doctrine of sovereign immunity, which exempts them from damages in a copyright infringement suit.

This was clearly not the intent of Congress when it revised the Copyright Act in 1976. As noted in a study of this issue by the U.S. Copyright Office—

[t]he legislative history of the Copyright Act demonstrates that, in enacting the 1976 Copyright statute, Congress specifically focused debate on the extent to which states and their agencies utilize copyrighted works and should be either liable or exempt from infringement.

The Federal Court of Appeals for the Ninth Circuit, in the case BV Engineering versus University of California, decided in October 1988, rejected evidence of congressional intent. The court required "unequivocal and specific language indicating an intent to subject States to suit in Federal court." The Ninth Circuit then stated, "It is for the Congress * * * to remedy this problem."

In the Copyright Remedy Clarification Act, we accept the invitation of the ninth circuit. Our bill does not create new rights, or alter the delicate balance between the copyright holder and the public. It does not take away any of the exemptions for State use already provided in the Copyright Act. This legislation merely clarifies congressional intent that copyright owners have a remedy against State entities for damages when they illegally copy or distribute copyrighted works.

As an author and publisher, I know how important copyright protection is to creativity. And as a member of the Judiciary Committee, I am proud to cosponsor this legislation, and to work toward its enactment.●