



# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

*state immunity*

## REQUEST FOR INFORMATION

### REQUEST FOR INFORMATION, ELEVENTH AMENDMENT

The following excerpt is taken from Volume 52, Number 211 of the Federal Register for Monday, November 2, 1987 (pp.42045-42046)

#### LIBRARY OF CONGRESS

Copyright Office

[Docket No. RI 87-5]

#### Request for Information, Eleventh Amendment

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Request for information.

**SUMMARY:** This Request for Information is issued to advise the public that the Copyright Office of the Library of Congress is investigating the issue of states' Eleventh Amendment immunity from suit for money damages in copyright infringement cases. The purpose of this notice is to elicit public comments, views, and information which will inform the Copyright Office as to (1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers, and (2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials. The Copyright Office also invites comment concerning the legal interpretation of Eleventh Amendment immunity in copyright infringement cases.

**DATE:** Comments should be received on or before February 1, 1988.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail, to: Office of the General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20559.

If delivered by hand, copies should be brought to: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room 407, First and Independence Avenues SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20559. Telephone: (202) 287-8380.

**SUPPLEMENTARY INFORMATION:** At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, the Copyright Office is conducting a study and preparing a report <sup>1</sup> on the issue of states' immunity from suit for money damages in copyright infringement cases.

The Copyright Act of 1976, Title 17 of the United States Code, grants copyright owners certain exclusive rights in their works. 17 U.S.C. 106. Although 28 U.S.C. 1338(a) grants Federal courts exclusive subject matter jurisdiction over cases

concerning the Federal copyright law, the Eleventh Amendment to the Constitution generally prohibits Federal courts from entertaining suits brought by citizens of one state against another state. The question has arisen whether Congress, in enacting the Copyright Act of 1976 under the Copyright Clause of the Constitution, has subjected the states to copyright liability and overcome any claim of immunity under the Eleventh Amendment.<sup>2</sup>

In actual practice, most state agencies have traditionally recognized the rights of copyright owners and have paid royalties for their use of copyrighted works. At least eight state Attorneys General have issued opinions interpreting the Copyright Act to provide guidance for a state and its agencies.<sup>3</sup> This suggests that these states recognized their liability under the federal copyright statutes. However, a

<sup>2</sup> The same issue arose under the Copyright Act of 1909, Title 17 U.S.C. in effect through December 31, 1977: the Ninth Circuit in *Mills Music, Inc. v. State of Arizona*, 591 F.2d 1278 (9th Cir. 1979) held that states were not immune to copyright damage suits under the Eleventh Amendment, on the ground of the Copyright Clause. In this Request for Information we focus on the interpretation of the current Act because any cause of action against a state presumably arises under the Copyright Act of 1976, effective January 1, 1978.

<sup>3</sup> 107 Op. Att'y Gen. Alas. (1983); 366 Inf. Op. Att'y Gen. Alas. 404 (1982); 187 Slip Op. Att'y Gen. Ariz. 106 (1986); 65 Op. Att'y Gen. Cal. 106 (1982); 64 Op. Att'y Gen. Cal. 186 (1981); 82 Op. Att'y Gen. Fla. 148 (1982); Slip Op. Att'y Gen. Kan. 202 (1981); 84 Slip Op. Att'y Gen. La. 436 (1985); 82 Slip Op. Att'y Gen. La. 662 (1982); Slip Op. Att'y Gen. S.C. (1977); 82 Slip Op. Att'y Gen. Ut. 03 (1982).

<sup>1</sup> This is not in any sense a rulemaking proceeding. The Office will, however, seek the widest possible public comment through this publication in the Federal Register and through other channels, such as associations representing state government and copyright interests.



recent line of Federal court cases interpreting the application of states' Eleventh Amendment immunity in copyright infringement cases might influence states to change their practices of recognizing the rights of copyright owners. Applying recent Supreme Court decisions in Eleventh Amendment cases (not involving copyright law), Federal district courts in five states have found state governments immune from suit for money damages in copyright infringement lawsuits.<sup>4</sup>

Concern has been expressed about these cases because they appear to remove copyright owners' only pecuniary remedy against state governments that violate Federal copyright law. On the other hand, it is sometimes alleged that some copyright owners or their representatives may put undue pressure on state governments to pay for their uses of copyrighted works that might, in fact, be "fair use" under section 107 of the Copyright Act of 1976 or exempt under another provision of the Act.

By letter dated August 3, 1987, the Subcommittee requested that the Copyright Office completely assess the nature and extent of the clash between the Eleventh Amendment and Federal copyright law. As a part of this assessment, the Subcommittee specifically instructed the Office to conduct the following inquiries:

(1) An inquiry concerning the practical problems relative to the enforcement of copyright against state governments;

(2) An inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state governments with respect to copyright issues.

It is the purpose of this Request for Information to solicit public comments, views, and information which will inform the Copyright Office on these issues.

The Copyright Office also invites comments and arguments concerning the legal interpretation of Eleventh Amendment immunity in copyright infringement cases.

Dated: October 19, 1987.

Ralph Oman,  
Register of Copyrights.

Approved:  
William J. Welsh,  
Acting Librarian of Congress.

[FR Doc. 87-25288 Filed 10-30-87; 8:45 am]

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<sup>4</sup> See *BV Engineering v. Univ. of California, Los Angeles*, CV 86-4708, slip. op., 3 U.S.P.Q. 2d 1064 (D.C. Calif. April 17, 1987); *Mihaleck Corp. v. Michigan*, 595 F. Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds*, 814 F.2d 290 (6th Cir. 1987); *Cardinal Indus. v. Anderson Parrish Assoc.*, No. 83-1038-Civ-T-13 (M.D. Fla. Sept. 6, 1985), *aff'd* 811 F.2d 609 (11th Cir. 1987); *Richard Anderson Photography v. Radford Univ.*, 633 F. Supp. 1154 (W.D. Va. 1986); *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499 (N.D. Ill. 1985).