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# The One and the Many - The Expropriation of Intellectual Property by the States: Copyright and the Eleventh Amendment

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# ARTICLES

## THE ONE AND THE MANY—THE EXPROPRIATION OF INTELLECTUAL PROPERTY BY THE STATES: COPYRIGHT AND THE ELEVENTH AMENDMENT

*John M. DiJoseph\**

The enigma of the One and the Many has vexed philosophers from Plato to the present day. The One and the Many refers to the interplay between a unitary being and its "other," a plurality of beings. The root of the enigma is the conflict between the two beings as each tries to dominate its "other." The enigma extends to the political manifestation of the One and the Many; the conflict between ruler and ruled, or between a unitary political entity and multiple entities. The ubiquitous and seemingly intractable issue of states' rights is a paradigm of the enigma of the One and the Many.<sup>1</sup>

The conflict over states' rights has raised the specter of the expropriation of intellectual property rights by the Many, the states. The progenitor of the current crisis are recent court decisions including, *inter alia*, *Richard Anderson Photography v. Radford University*.<sup>2</sup> In *Anderson*, Richard Anderson brought suit against Deborah Brown, the Publications Director of Radford University, alleging contributory infringe-

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1. See PAUL WEISS, TOWARD A PERFECTED STATE 284-87 (1985). See also PAUL WEISS, MODES OF BEING (1964).

2. 633 F. Supp. 1354 (W.D. Va. 1986), *aff'd in part and rev'd in part*, 852 F.2d 114 (4th Cir. 1988). See also *BV Eng'g v. University of Cal.*, Los Angeles, 657 F. Supp. 1246 (C.D. Cal. 1987); *Mihalek Corp. v. Michigan*, 595 F. Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds*, 814 F.2d 290 (6th Cir. 1987); *Woelfer v. Happy States of America, Inc.*, 626 F. Supp. 499 (N.D. Ill. 1985).

ment.<sup>3</sup> The suit was filed against Brown in her individual capacity.<sup>4</sup> The District Court for the Western District of Virginia upheld the state's eleventh amendment immunity from copyright and patent infringement.<sup>5</sup> The Fourth Circuit Court of Appeals upheld the district court's decision.<sup>6</sup> However, the Fourth Circuit reversed the trial court on the issue of the liability of individual state officials, holding such officials liable and rejecting their claim of eleventh amendment immunity.<sup>7</sup>

The rationale of *Anderson* and other similar cases is predicated on *Atascadero State Hospital and California Department of Mental Health v. Scanlon*.<sup>8</sup> In *Atascadero*, Douglas Scanlon, a graduate student, brought suit against a state hospital, alleging that the hospital had denied him employment solely because of his physical handicaps in violation of the Rehabilitation Act of 1973.<sup>9</sup> The United States Supreme Court, in overruling the Ninth Circuit Court of Appeals' decision to affirm the district court's dismissal,<sup>10</sup> held "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention [to do so] unmistakably clear in the language of the statute."<sup>11</sup> In *Anderson*, the Fourth Circuit did not find language in the Copyright Act of 1976 indicating Congress' intent to abrogate the states' sovereign immunity.<sup>12</sup>

The clash between the eleventh amendment and the Copyright Act of 1976 focuses on a conundrum which is the marrow of the states' rights issue—how to enforce constitutionally protected rights against the states. The conundrum was succinctly stated by Justice Shiras:

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States

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3. *Anderson*, 852 F.2d at 116.

4. *Id.*

5. The eleventh amendment provides: "The 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." U.S. CONST. amend. XI.

6. 852 F.2d 114 (4th Cir. 1988).

7. *Id.* at 122. Judge Boyle sharply disagreed with the majority in a dissenting opinion. *Id.* at 123.

8. 473 U.S. 234 (1985).

9. 29 U.S.C. §§ 701-96 (1988).

10. *Scanlon v. Atascadero State Hosp. & Cal. Dept. of Mental Health*, 677 F.2d 1271 (9th Cir. 1982).

11. *Atascadero*, 473 U.S. at 242.

12. *Anderson*, 852 F.2d at 117.

from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.<sup>13</sup>

The conundrum can be minimized by structuring a doctrine of eleventh amendment immunity which is in consonance with Congress' plenary powers under article I.<sup>14</sup> My thesis grounds the consonance in the nature of Congress' article I powers, which delineates areas where eleventh amendment immunity is inapplicable. If my thesis is correct, then Congress has the power to create causes of action against the states, the federal judiciary can enforce the congressional will against the states and the states are liable for copyright and patent infringement.

My thesis is grounded in the history of the eleventh amendment and the concept of sovereign immunity which is the soul of the states' rights issue. Therefore, a brief *excursus* into the history of the Constitutional Convention of 1787 as it pertains to the concept of sovereignty is necessary. The *excursus* will focus on *The Federalist Papers*<sup>15</sup> and the writings of the opponents of the Constitution, the Antifederalists. Once the historical *mise en scene* has been established, I will explicate the conceptual foundation for my thesis. Lastly, accepting the flawed reasoning of *Atascadero*, I will demonstrate that the text of the Copyright Act clearly evidences a congressional intent to waive the states' eleventh amendment immunity.

#### SOVEREIGN IMMUNITY AND THE FOUNDING FATHERS

In February of 1787, the Continental Congress issued a call to the

13. *Prout v. Starr*, 188 U.S. 537, 543 (1903).

14. Article I, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

15. *THE FEDERALIST PAPERS* (A. Hamilton, J. Madison, J. Jay) (C. Rossiter ed. 1961).

states to send delegates to Philadelphia to revise the Articles of Confederation.<sup>16</sup> The progenitor of the Convention of 1787 was a long simmering feud between the Nationalists, those who wanted a strong national government, and the Federalists, those who wanted a federation of independent sovereign states. After the Convention of 1787, the Nationalists, who favored ratification of the Constitution, expropriated the name "Federalists" for themselves and tagged those who opposed ratification with the misnomer "Antifederalists."<sup>17</sup> The Nationalists included James Madison, George Washington, Thomas Jefferson and Alexander Hamilton. The Antifederalists included Patrick Henry, George Mason, Elbridge Gerry and Richard Henry Lee.<sup>18</sup>

The *raison d'être* for the Convention of 1787 was the weakness of the Confederation government. That weakness was linked to the concept of sovereignty, ultimate political authority with the power to coerce.<sup>19</sup> The Articles of Confederation made the national government an acolyte of the states by vesting sovereignty in the Many, the states.<sup>20</sup> The Nationalists believed that the dispersal of sovereignty through the Many was the root of the ineffectiveness of the Confederation government.<sup>21</sup> Madison summarized the Nationalists' position in an essay, *Vices of the Political System of the United States*.<sup>22</sup> He severely criticized the state governments for failing to comply with the requisitions of the Continental Congress, encroaching on the federal authority and violating treaties and the law of nations.<sup>23</sup>

He also criticized the states for "want of uniformity in the laws concerning naturalization & literary property."<sup>24</sup> Madison was aware of the difficulties inventors and authors encountered in colonial times of secur-

16. Resolution of the Continental Congress (Feb. 21, 1787) (*reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 45 (J. Kaminski & G. Saladino eds. 1981)) [hereinafter *DOCUMENTARY HISTORY*].

17. Pennsylvania Gazette (Sept. 12, 1787) (*reprinted in DOCUMENTARY HISTORY, supra* note 16, at 193).

18. A thorough discussion of the Nationalist-Federalist controversy is beyond the scope of this paper. See M. JENSEN, *THE NEW NATION, A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789* (1962).

19. F. H. HINSLEY, *SOVEREIGNTY* (2d ed. 1986).

20. Article II of the Articles of Confederation provided: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." ART. OF CONFED. art. II.

21. M. MEYER, *THE MIND OF THE FOUNDER* 57 (1981).

22. J. Madison, *Vices of the Political System of the United States* (April 1787) (*reprinted in M. MEYER, THE MIND OF THE FOUNDER* 57-65 (1981)) [hereinafter *Madison's Essay*].

23. *Id.* at 59.

24. *Id.*

ing protection for their creative works. Noah Webster unsuccessfully attempted to protect his book, *A Grammatical Institute of the English Language* in at least six states.<sup>25</sup> John Fitch encountered similar difficulties when he tried to protect his invention of the steamboat.<sup>26</sup>

The Nationalists planned to correct the imbalance of sovereignty at the Convention as Madison indicated in a pre-Convention letter to George Washington:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful.

I would propose next that in addition to the present federal powers [of the Confederation government], the national Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports and imports, [and] the fixing of terms and forms of naturalization. . . .<sup>27</sup>

Other Nationalists echoed Madison's criticisms of the states. On June 18, 1787, Hamilton addressed the Convention. He expressed his opposition to the New Jersey plan, which would have retained the sovereignty of the states, because he was "fully convinced[] that no amendment of the Confederation, leaving the States in possession of their Sovereignty could possibly answer the purpose [for the revision of the Articles of Confederation]."<sup>28</sup> He chastised the states for constantly pursuing their "internal interests adverse to those of the whole,"<sup>29</sup> and he criticized their "love of power" and the "ambition of their demagogues."<sup>30</sup>

In *The Federalist No. 20*, Madison and Hamilton restated their opposition to the diffused sovereignty of the Confederation government:

25. B. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAWS* 120 (1967).

26. *Id.* at 126.

27. Letter from James Madison to George Washington (April 16, 1787) (*reprinted in M. MEYER, THE MIND OF THE FOUNDER* 66-69 (1981)).

28. J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 129 (Ohio University Press 1966) [hereinafter *MADISON'S NOTES*].

29. *Id.* at 130.

30. *Id.* at 131.

Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case is[] that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting *violence* in place of the mild and salutary *coercion* of the *magistracy*.<sup>31</sup>

The Antifederalists, who favored states' rights, conceded that the Articles of Confederation were not working and reluctantly admitted that the state governments were at least partially responsible. The Federal Farmer, who was believed to be Richard Henry Lee,<sup>32</sup> wrote: "It must, however, be admitted, that our federal system is defective, and that some of the state governments are not well administered. . . ."<sup>33</sup> The Antifederalist minority at the Pennsylvania ratifying convention prepared a report listing the deficiencies in the Confederation government attributable to the states.<sup>34</sup>

The Convention of 1787 accepted Madison's Virginia plan with its strong central government and changed the distribution of sovereignty of the Articles of Confederation. The federal government was vested with ultimate sovereignty in certain limited areas and concomitantly with the power of coercion. By unanimous vote, the Convention made the legislative acts of the national government and all treaties binding on the States.<sup>35</sup> Further, all state officials had to swear allegiance to the national government.<sup>36</sup>

In the ratification debate, the Nationalists, through *The Federalist Papers*,<sup>37</sup> emphasized the plenary authority of the national government in its sphere of responsibility. In *The Federalist No. 51*, Madison explained that the powers of government have been divided between the states and

31. THE FEDERALIST NO. 20, at 138 (J. Madison with A. Hamilton) (C. Rossiter, ed. 1961) (emphasis in original).

32. 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 215 (1981).

33. Letters From the Federal Farmer (Oct. 8, 1787) (reprinted in 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 225 (1981)).

34. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pennsylvania Packet And Daily Advertiser (Dec. 18, 1787) (reprinted in 3 H. STORING, THE COMPLETE ANTI-FEDERALIST 145-67 (1981)).

35. See MADISON'S NOTES, *supra* note 28, at 626.

36. *Id.* at 105.

37. The Supreme Court has stated that great weight should be given to the contemporaneous exposition of the Constitution in *The Federalist*. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821); See also *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878).

the federal government.<sup>38</sup> In *The Federalist No. 39*, he wrote that the idea of a national government involves an "indefinite supremacy over all persons and things"<sup>39</sup> within its plenary powers, although the states have a "residuary and inviolable sovereignty" in areas outside of the plenary powers of the national government.<sup>40</sup>

In *The Federalist No. 80*, Hamilton included within the jurisdiction of the federal judiciary cases "*arising under the Constitution*"<sup>41</sup> which he defined as the "restrictions upon the authority of the State legislatures"<sup>42</sup> i.e., Congress' article I powers. In *The Federalist No. 81*, Hamilton discussed the concept of state sovereignty in relation to the powers of the Supreme Court. He acknowledged that the states, as sovereigns, are generally immune from suit. However, "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . ."<sup>43</sup> The implication is clear; the states have retained their immunity except in those cases where they have surrendered it.

The Antifederalists agreed with Madison and Hamilton about the plenary powers of the federal government in certain areas. Brutus remarked that: "This government is to possess absolute and uncontrollable power, legislative, executive and judicial, with respect to every object to which it extends. . . . The government then, so far as it extends, is a complete one, and not a confederation. . . ."<sup>44</sup>

The Impartial Examiner stated that "[i]f this constitution should be adopted, here the sovereignty of America is ascertained and fixed in the federal body at the same time that it abolishes the present independent sovereignty of each state."<sup>45</sup> The Impartial Examiner continued that:

The natural understanding of all mankind perceives the apparent absurdity arising from such a supposition: since, if the word means anything at all, it must mean that *supreme power*, which must reside somewhere instate; or, in other terms, it is the united powers of each individual member of the state col-

38. THE FEDERALIST NO. 51, at 323 (J. Madison) (C. Rossiter, ed. 1961).

39. THE FEDERALIST NO. 39, at 245 (J. Madison) (C. Rossiter, ed. 1961).

40. *Id.*

41. THE FEDERALIST NO. 80, at 479 (A. Hamilton) (C. Rossiter, ed. 1961) (emphasis added).

42. *Id.*

43. *Id.* at 487-88.

44. Brutus, *To The Citizens of the State of New-York*, *The New York Journal* (Oct. 18, 1789) (reprinted in 2 H. STORING, *THE COMPLETE ANTI-FEDERALIST* 365 (1981)).

45. The Impartial Examiner, *To The Free People of Virginia*, *Virginia Independent Examiner* (Feb. 20, 1788) (reprinted in 5 H. STORING, *THE COMPLETE ANTI-FEDERALIST* 178 (1981)).



lected and consolidated into *one body*.<sup>46</sup>

The issue of the states' sovereign immunity and their ability to sue in federal court was mentioned in the ratification debates, but only in the context of suits against the states in their capacity as debtors.<sup>47</sup> In the Virginia debate over ratification, Edmund Randolph stated that the states should be amenable to suit because it "forces Virginia to pay her debts."<sup>48</sup> Patrick Henry and George Mason vehemently disagreed with Randolph.<sup>49</sup> Madison responded that a state should not be amenable to suit in federal court and that the Constitution only would allow states to sue as plaintiffs.<sup>50</sup> John Marshall seconded Madison.<sup>51</sup> Hamilton, in *The Federalist No. 81*, commented on states' power to sue *for their debts*: "[T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way. . . ."<sup>52</sup> In the ratification debates, the issue of the states' ability to sue in federal court focused on the issue of state debts and not the states' power to sue under the article I powers.

Justices Brennan, T. Marshall, Blackmun and Stevens contend that the historical evidence just cited reflects a consensus among the founding fathers that the states would be immune from suit in federal court.<sup>53</sup> This contention is only partially correct. When viewed in context with the evidence pertaining to the powers of the federal government and the Federalists' position on the national government, it appears that there might have been an agreement that the states would not be subjected to suit in federal court for their debts. The "agreement" did not encompass a limitation on the plenary powers of Congress. If it had, then the Federalists would have agreed to a form of confederation government similar

46. *Id.* (emphasis in original).

47. A paper money faction controlled the legislature of many states. The paper money forces favored the repudiation of state debts, particularly debts owed to loyalist sympathizers who, in many cases, had their property seized by the states. The states were particularly upset about being sued for their debts in federal court because they could defeat suits by their creditors in state courts by relying on the doctrine of sovereign immunity, which had been incorporated into the common law by the monarchist, William Blackstone. See Engdahl, *Immunity And Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 4-5 (1973). In *Vices of the Political System of the United States*, Madison criticized the states for failing to pay their debts. (reprinted in M. MEYER, *THE MIND OF THE FOUNDER* 58-59 (1981)).

48. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 207 (J. Elliot 2d ed. 1876) [hereinafter DEBATES] (statement of E. Randolph).

49. DEBATES, *supra* note 48, at 207, 526-27 (statements of P. Henry and G. Mason).

50. DEBATES, *supra* note 48, at 319, 533 (statement of J. Madison).

51. DEBATES, *supra* note 48, at 555-56 (statement of J. Marshall).

52. THE FEDERALIST NO. 81, at 488 (A. Hamilton) (C. Rossiter, ed. 1961).

53. *Atascadero*, 473 U.S. at 247-302 (Brennan, J., dissenting).

to the government under the Articles of Confederation, which is clearly not the case.

The approval of the Constitution by the people seemingly settled the Nationalists-Federalists feud. *E Pluribus Unum*, "from many one" and the Many had ceded to the One certain plenary powers, including the power over intellectual property. Madison explained why in *The Federalist No. 43*: "The utility of this power will scarcely be questioned. . . . The public good fully coincides in both cases with the claims of individuals. The States cannot make effectual provision for either of the cases [copyright and patent]. . . ."54

#### SOVEREIGNTY AND THE ELEVENTH AMENDMENT

Did the passage of the eleventh amendment change the plan of the Convention of 1787 *vis-a-vis* sovereignty? This would seem to be the case if the amendment is a bar to the enforcement of Congress' article I powers, for without a judicial remedy, Congress would have no means to coerce compliance.

The history of the eleventh amendment does not support this expansive interpretation. The issue of the states' liability for their debts was the progenitor of the eleventh amendment.<sup>55</sup> The case of *Chisholm v. Georgia*<sup>56</sup> resulted in the enactment of the eleventh amendment.<sup>57</sup> In *Chisholm*, two South Carolina citizens brought suit against the State of Georgia to collect a debt owed an estate. The Supreme Court, applying article III literally, refused to condition the constitutional grant of authority to the federal courts to adjudicate "[c]ontroversies . . . between a State and Citizens of another state."<sup>58</sup>

*Chisholm* is particularly interesting because the five justices who composed the Court at the time were Federalists.<sup>59</sup> Two of the justices, John Blair of Virginia and James Wilson of Pennsylvania, were delegates to the Convention of 1787.<sup>60</sup> Justices Wilson and Madison were the intellectual theoreticians of the Federalists. The Chief Justice, John Jay, was one of the authors of *The Federalist Papers*. The other two justices,

54. THE FEDERALIST NO. 43, at 271-72 (J. Madison) (C. Rossiter, ed. 1961).

55. The first suit filed, *Vanstophorst v. Maryland*, 2 Dall. 401 (1791), was typical of these types of suits. In *Vanstophorst*, two Dutch financiers who had loaned the states and the Continental Congress large amounts of money during the Revolutionary War, sued to recoup their loan with interest.

56. 2 Dall. 419 (1793).

57. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 64-65 (1972).

58. *Chisholm*, 2 Dall. at 420.

59. C. JACOBS, *supra* note 57, at 64-65.

60. *Id.*

William Cushing of Massachusetts and James Iredell of North Carolina, argued the Federalists' case for ratification at their state conventions.<sup>61</sup>

Justice Iredell was the lone dissenter. He opined that Congress had not authorized the federal judiciary to hear suits based on assumpsit actions against the States.<sup>62</sup> Justice Iredell argued that since Congress had not authorized such suits, the common law doctrine of sovereign immunity protected Georgia from Chisholm's claim.<sup>63</sup> However, Justice Iredell conceded that the states had surrendered at least part of their immunity to the national government and that "[t]he United States are sovereign as to all powers of Government actually surrendered. . . ."<sup>64</sup> The other justices, led by Justices Wilson and Jay, rejected Georgia's immunity claim.<sup>65</sup> Wilson's opinion was a polemic on the inapplicability of sovereign immunity in a democracy where sovereignty ultimately is vested in the people.<sup>66</sup>

As a result of the *Chisholm* decision, the eleventh amendment was quickly proposed and passed.<sup>67</sup> The amendment passed the Senate 23 to 2, and the House by 81 to 9.<sup>68</sup> Ratification was complete by February 1795,<sup>69</sup> and on January 8, 1798, President Adams certified that the required number of States had ratified.<sup>70</sup>

The Federalists overwhelmingly supported the amendment. Why? Did the Federalists after the long and acrimonious battle for a strong national government, in the afterglow of victory, decide that the Antifederalists had been right all along? There is not a scintilla of evidence to support such a conclusion. The key factor in the Federalists' support were the decisions in *Chisholm* and the other cases concerning the states' liability for their debts.<sup>71</sup> None of the suits impugned the federal judiciary's power to enforce article I powers against the states.

At the time of the amendment's passage, the issue of state debts was being resolved by Hamilton's fiscal program, under which the national

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61. *Id.*

62. *Chisholm*, 2 Dall. at 436-37.

63. *Id.* at 433-35.

64. *Id.* at 435.

65. *Id.* at 453-80.

66. *Id.* at 454-65.

67. C. JACOBS, *supra* note 57, at 66.

68. *Id.* at 66.

69. *Id.* at 67.

70. *Id.*

71. Justice Story attributed the amendment's passage to the state debt issue. See J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 250 (1986).

government assumed state debts.<sup>72</sup> Thus, the Federalists could support the amendment with the expectation that there was little likelihood that the states would be forced into federal court over their debts. No evidence has been uncovered which supports the contention that the supporters of the amendment regarded it as a limitation on Congress' article I powers or the federal judiciary's power to enforce those powers. Surely, if the issue had been the article I powers, some of the Federalists would have raised a hue and cry.

In 1821, when *Cohens v. Virginia*,<sup>73</sup> a case seeking to impugn the appellate jurisdiction of the Supreme Court, came before the Supreme Court, Chief Justice John Marshall, an ardent Federalist, rejected any contention that the amendment was a limitation on the federal judiciary.<sup>74</sup> In his opinion, the Chief Justice also restated the classic Federalist conception of the Constitution as a limitation on the States' sovereignty:

The general government, though limited as to its objects, is supreme with respect to those objects. . . . The powers of the Union, on the great subjects of war, peace, and commerce, and so many others, are in themselves limitations of the sovereignty of the States, but in addition to these, sovereignty is surrendered in many instances where surrender can only operate to the benefit of the people, and, where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution.<sup>75</sup>

Chief Justice Marshall's ruling in *Cohens* sparked a firestorm among the advocates of states' rights. Chief Justice Spencer Roane of the Virginia Supreme Court was livid. Prior to *Cohens*, Justice Roane sharply criticized Marshall's ruling in *McCulloch v. Maryland*<sup>76</sup> in letters to the *Richmond Enquirer*.<sup>77</sup> He attacked Chief Justice Marshall's ruling in *Cohens* in the same publication, writing under the *non de plume* of "Algernon Sydney."<sup>78</sup> In both instances, Justice Roane requested the support of the two Republican sages, Jefferson and Madison. Jefferson wholeheartedly supported Roane's attacks on Marshall.<sup>79</sup>

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72. J. MILLER, *THE FEDERALIST ERA 1789-1801*, at 33-45 (1960).

73. 19 U.S. (6 Wheat.) 264 (1821).

74. *Id.* at 405-23.

75. *Id.* at 381-82.

76. 17 U.S. (4 Wheat.) 316 (1819).

77. Letters from Spencer Roane to the Editor of the *Richmond Enquirer* (June 11, 1819, June 15, 1819, June 18, 1819, June 22 1819) (*reprinted in* G. GUNTHER, *JOHN MARSHALL'S DEFENSE OF McCulloch v. Maryland* 107-54 (G. Gunther ed.) (1969)).

78. M. MEYER, *THE MIND OF THE FOUNDER* 359 (1981).

79. Letter from Thomas Jefferson to Spencer Roane (March 9, 1821) (*reprinted in* 15 *THE*

However, Madison's replies to Justice Roane are a model of diplomacy. He told Roane that the federal government's prerogatives were not unlimited and that the eleventh amendment "introduces exceptions" to the power of the federal judiciary to consider suits against the states.<sup>80</sup> Madison did not say that Chief Justice Marshall had incorrectly interpreted the eleventh amendment in *Cohens*. Nor did Madison say that the eleventh amendment, *contra* to Chief Justice Marshall, barred the federal judiciary from enforcing the article I powers of Congress.<sup>81</sup>

Chief Justice Marshall's rationale in *Cohens* was accepted by the national political figures of the era immediately after the amendment's passage. During this time, states' rights were emerging as the central political issue. For example, the architect of the states' rights movement, John C. Calhoun of South Carolina, in *The South Carolina Exposition*, a treatise on the Constitution, wrote:

The general powers, expressly delegated to the General Government, are subject to its sole and separate control; and the States cannot, without violating the constitutional compact, interpose their authority to check, or in any manner to counteract its movements, so long as they are confined to the proper sphere.<sup>82</sup>

The parameters of the eleventh amendment were further defined within the context of a state-debt case in *Hans v. Louisiana*,<sup>83</sup> decided almost a century after *Chisholm*. *Hans* has been cited for the proposition that the eleventh amendment immunity bars a suit by a state's own citizen for a claim arising under federal law.<sup>84</sup> In that case, Hans, a citizen of Louisiana, brought suit against the state of Louisiana to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of a legislative act.<sup>85</sup> Hans alleged that the State violated

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WRITINGS OF THOMAS JEFFERSON 325 (A. Lipscomb ed.) (Washington, D.C. 1903)). At this time Jefferson was hostile to the Supreme Court. He told Roane that "[t]he great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is ingulfing insiduously the special governments into the jaws of that which feeds them." *Id.* at 326.

80. Letter from James Madison to Spencer Roane (May 6, 1821) (reprinted in M. MEYER, *THE MIND OF THE FOUNDER* 366 (1981)).

81. Letters from James Madison to Spencer Roane (Sept. 2, 1819, May 6, 1821, June 29, 1821) (reprinted in M. MEYER, *THE MIND OF THE FOUNDER* 357-69 (1981)).

82. J. Calhoun, *The South Carolina Exposition* (reprinted in R. CRALLE, 6 *THE WORKS OF JOHN C. CALHOUN* 36 (1863)).

83. 134 U.S. 1 (1889).

84. See *Great Northern Insurance Co. v. Read*, 322 U.S. 47 (1944); *Papasan v. Allain*, 478 U.S. 265 (1986); *Atascadero State Hosp. and Cal. Dept. of Mental Health v. Scanlon*, 473 U.S. 234 (1985).

85. *Hans*, 134 U.S. at 1.

its contract with bondholders by amending its constitution to reallocate the money collected for the purposes of paying the bond debts to defray the expenses of the state government.<sup>86</sup> The United States Supreme Court held that a state cannot, without its consent, be sued in a federal circuit court by one of its citizens upon a claim arising under the United States Constitution or the laws of the United States.<sup>87</sup>

The history of the amendment and its meaning have aroused considerable interest. Scholars who have examined this issue have reached the same conclusion—that the amendment was meant to be a limitation on the power of the federal judiciary to imply private damage remedies against the states under diversity jurisdiction rather than a restraint on the exercise of a valid congressional power.<sup>88</sup>

#### ANALYSIS IN CONSONANCE WITH THE CONSTITUTIONAL SCHEME

The lodestar for a constitutional analysis of the eleventh amendment in consonance with the scheme of federalism envisioned by the Founding Fathers is the post-*Atascadero*<sup>89</sup> case *McVey Trucking, Inc. v. Secretary of State of Illinois*,<sup>90</sup> in which the Seventh Circuit Court of Appeals, citing *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>91</sup> rejected Illinois' claim of eleventh amendment immunity.<sup>92</sup> The Seventh Circuit held that Congress, acting pursuant to its plenary powers under article I, can create causes of action enforceable against the states and that the eleventh amendment did not limit Congress' power to do so, or the power of the federal courts to entertain suits to enforce the congressional will.<sup>93</sup> The Seventh Circuit discussed *Atascadero* at length and found

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86. *Id.* at 2.

87. *Id.* at 3.

88. See Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978); Also see Nowak, *The Scope of Congressional Power To Create Causes of Action Against State Governments And The History of the Eleventh And Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1442 (1975); Tribe, *Intergovernmental Immunities In Litigation, Taxation and Regulation: Separation of Powers Issues In Controversies*, 89 HARV. L. REV. 682, 693-94 (1976); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

89. In *Atascadero*, the Court held that Congress can abrogate the states' constitutionally secured immunity only by unequivocally stating its intention to do so in the statute itself. *Atascadero*, 473 U.S. at 242.

90. 812 F.2d 311 (7th Cir. 1987). *McVey Trucking* has been followed by the Third Circuit in *U.S. v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987).

91. 469 U.S. 528, 550-52 (1985).

92. *McVey Trucking*, 812 F.2d at 320.

93. *Id.* at 316-19.

that it was not dispositive.<sup>94</sup>

The Seventh Circuit's analysis began with a comparison between Congress' article I powers and section 5 of the fourteenth amendment. The court concluded that the law is settled that Congress can abrogate when legislating pursuant to section 5.<sup>95</sup> The Seventh Circuit found that "Article I and [section 5 of] the Fourteenth Amendment are both plenary grants of power to Congress."<sup>96</sup> The court rejected the contention that section 5 granted "ultraplenary" powers to Congress.<sup>97</sup> Instead, the court held that there was no constitutionally significant distinction between the two plenary grants.<sup>98</sup>

The Seventh Circuit also analyzed *Hans v. Louisiana*.<sup>99</sup> Judge Flaum, writing for the court, noted that *Hans* was a breach of contract case and that the *Hans* Court did not rely on the eleventh amendment in deciding the case.<sup>100</sup> Furthermore, the court recognized that the court in *Hans* did not reach the issue of whether Congress, acting pursuant to its plenary powers under article I, can abrogate the states' common law sovereign immunity.<sup>101</sup>

## CONGRESS' POWER TO ELIMINATE STATE'S SOVEREIGN IMMUNITY THROUGH THE COPYRIGHT ACT OF 1976

### A. Waiver and Abrogation

If the article I powers are plenary Congress can abrogate or eliminate the states' immunity. Congress' intent to do so should be assumed or construed from general language such as the "anyone" is liable provision of the Copyright Act of 1976.<sup>102</sup> The Court has not directly addressed the issue of Congress' power to abrogate the states' immunity. However, in *Oneida v. Oneida Indian Nation*, the Court assumed that the power to abrogate exists.<sup>103</sup> In *Goldstein v. California*,<sup>104</sup> the Court recognized the unlimited scope of Congress' plenary power in copyright: "[T]he States cannot exercise a sovereign power, which under the Consti-

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94. *Id.* at 324-26.

95. *Id.* at 319-21.

96. *Id.* at 315.

97. *McVey Trucking*, 812 F.2d at 319.

98. *Id.* at 316.

99. 134 U.S. 1 (1889).

100. *McVey Trucking*, 812 F.2d at 318.

101. *Id.*

102. 17 U.S.C. § 501(a) (1982).

103. *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985).

104. 412 U.S. 546 (1973).

tution, they have relinquished to the Federal Government for its exclusive exercise."<sup>105</sup> The Court concluded: "When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach."<sup>106</sup>

Waiver, on the other hand, is a legal fiction in the eleventh amendment context, which has been employed by the Supreme Court to vindicate congressional authority. Waiver is "the intentional relinquishment or abandonment of a known right or privilege."<sup>107</sup> Under the waiver theory, Congress somehow waives the states' immunity for them.<sup>108</sup> The Supreme Court has never satisfactorily explained how Congress can waive a constitutional right for the states.

### B. Analysis Under the *Atascadero* Decision

Under the court's holding in *Atascadero*, that "Congress may abrogate the states' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute[.]"<sup>109</sup> an analysis of the text of the Copyright Act of 1976 indicates a congressional intent to hold the states liable. Limitations on the exclusive rights of the copyright owner are set forth in sections 107-118 of the Act.<sup>110</sup> Several of the limitations apply to state activities. Section 110(6) allows performance of nondramatic musical works by a "government body" at an agricultural fair without permission of the copyright owner.<sup>111</sup> The state fair exemption also exempts the states from vicarious liability for copyright infringements by private concessionaires, business establishments, or other persons at state fairs.<sup>112</sup> Ex-

105. *Id.* at 552.

106. *Id.* at 560. See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549-50 (1985) (test of congressional power to impose financial burdens on a state is simply whether the Constitution "has not divested them of their original powers and transferred those powers to the Federal Government. . . . [T]he Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (Congress can create cause of action against state under its extradition power); *Peel v. Florida*, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (cause of action under war powers clauses permitted).

107. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

108. *Parden v. Terminal Railway Co.*, 377 U.S. 184, 191-92 (1964). See also *Edelman v. Jordan*, 415 U.S. 651 (1974).

109. *Atascadero*, 473 U.S. at 242.

110. 17 U.S.C. §§ 107-118 (1982).

111. 17 U.S.C. § 110(6) (1982).

112. *Id.* The "state fair" exemption was designed to protect "a State or any political subdivision thereof." *Copyright Law Revision, Hearings on S. 597, Before the Subcomm. on Patent, Trademark and Copyrights, Comm. on Judiciary*, 90th Cong., 1st Sess. 31 (1967) (letter of Sen. Frank Lausche).



ceptions are also provided for the use of copyrighted material by libraries and archives in section 108;<sup>113</sup> certain nondramatic performances by a "governmental body"<sup>114</sup> under section 110(2)(A);<sup>115</sup> a secondary cable transmission by a "governmental body" under section 111(a)(4);<sup>116</sup> and any use of an ephemeral recording by a "governmental body" under sections 112(b) and 112(d)(1).<sup>117</sup> Further limitations on state liability are found in sections 601 and 602.<sup>118</sup>

Nothing in the Copyright Act of 1976 or its legislative history indicates that Congress enacted the exemptions for any other purpose than to delineate specific instances when the states would be immune from liability. The legislative history of the Act is replete with testimony on the states' use of copyrighted material and, why, in certain instances, liability should not attach.<sup>119</sup> If Congress did not intend to waive or abrogate the states' eleventh amendment immunity, the exceptions noted above are mere surplusage and Congress wasted enormous amounts of time and money in a feckless exercise.

Moreover, Congress demonstrated its plenary power over copyright by abolishing all state protection of copyright<sup>120</sup> and mandating that the federal judiciary have exclusive jurisdiction of suits for copyright infringement.<sup>121</sup> The vesting of the federal judiciary with exclusive jurisdiction over all copyright defendants provides additional *indicia* that Congress intended the states to be sued in federal court for infringing activities.

113. 17 U.S.C. § 108 (1982).

114. It is beyond peradventure that "governmental body" applies to the states. See HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, 87th Cong., 1st Sess. 129 (Comm. Print, July, 1961) (Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law stating that the law contained "nothing to prevent *governmental bodies*, at least of the States [added emphasis] from securing copyright. . .").

Four months prior to the passage of the Copyright Act of 1976 the Supreme Court held that "governments" and "governmental agencies" included the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449, n.2 (1976).

115. 17 U.S.C. § 110(2)(A) (1982).

116. 17 U.S.C. § 111(a)(4) (1982).

117. 17 U.S.C. §§ 112(b), 112(d)(1) (1982).

118. 17 U.S.C. §§ 601-602 (1982).

119. See, e.g., *Meeting On Preliminary Draft for Revised U.S. Copyright Law: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 485-92 (1966) [hereinafter *Hearings*] (statement of Eugene N. Aleinikoff, Nat. Educ. Television & Radio Center).

120. 17 U.S.C. § 301 (1982). Congress' intention to "preempt and abolish" all state protection of copyright is stated in H.R. REP. DOC. NO. 94-1476, 94th Congress, 2d Sess. 130-31.

121. 28 U.S.C.A. § 1338(a) (1982).

C. *Anderson Under the Atscadero Decision*

The Fourth Circuit Court of Appeals rejected the foregoing analysis in *Anderson*<sup>122</sup> and bypassed the issue of whether Congress can abrogate eleventh amendment immunity when legislating pursuant to article I. Instead, the majority focused on the issue of congressional intent to abrogate or constructively waive, contending that these "conceptually different theories" are subsumed within the issue of congressional intent.<sup>123</sup> This is a horse before the cart approach because if Congress does not have the power to abrogate, its intention to do so is irrelevant. Judge Phillips, writing for the majority, found that the test for abrogation and/or waiver is "a most stringent one, couched deliberately in terms of constraints both upon the legislative and the judicial interpretive process."<sup>124</sup> The constraints are predicated upon "the vital role of the doctrine of sovereign immunity in our federal system."<sup>125</sup>

The majority then proceeded to analyze the Copyright Act in terms of the *Atscadero* standard. Judge Phillips concentrated his analysis on the various exemptions from liability provided for by the Copyright Act.<sup>126</sup> He concluded that the various exemptions were intended to apply only to local government units.<sup>127</sup> Judge Phillips ignored the well documented fact that state government officials testified in favor of the exemptions in the congressional hearings.<sup>128</sup> Moreover, there is not a scintilla of evidence from the legislative history or the language of the statute to support the conclusion of Judge Phillips that the exemptions were only for the benefit of local government units.

The *Anderson* court unanimously found that state officials are individually liable for copyright infringement.<sup>129</sup> Generally, government officials who violate constitutional rights can raise a qualified or good faith immunity defense.<sup>130</sup> The court, however, rejected any immunity defense for officials who violate the Copyright Act, leaving those officials with only the defenses provided for in the Copyright Act itself, i.e., fair use, estoppel, etc.<sup>131</sup> The court specifically rejected the contention that a state official is acting in his/her official capacity when handling copyright

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122. *Anderson*, 852 F.2d at 117.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 119-20.

127. *Anderson*, 852 F.2d at 119.

128. *Hearings, supra* note 119.

129. *Anderson*, 852 F.2d at 122.

130. *Malley v. Briggs*, 475 U.S. 335 (1986).

131. *Anderson*, 852 F.2d at 122.

material for the state.<sup>132</sup> The *Anderson* court stated that “[t]he mere fact that her conduct was undertaken in the course of her state employment does not of course relieve her of individual liability, even if her employer could not be sued for it.”<sup>133</sup> Undoubtedly, *Anderson* will cause state officials to think twice before commencing infringing activities, thus lessening the possibility that states will expropriate intellectual property.

Judge Boyle,<sup>134</sup> in a well reasoned dissent, found that the “eleventh amendment cannot be construed so as to ‘repeal’ article I.”<sup>135</sup> Judge Boyle stated that the states’ sovereign immunity had been diminished when they ratified the Constitution and was, in effect, subservient to the sovereignty of the One, the federal government.<sup>136</sup> Judge Boyle concluded that Congress’ power to enact copyright legislation, coupled with the supremacy clause,<sup>137</sup> overrides whatever subsidiary sovereignty the states have as a result of the eleventh amendment.<sup>138</sup>

Judge Boyle also noted that Congress had expanded liability for copyright infringement in the Copyright Act of 1976 by changing the language of Section 501 from imposing liability on “any person” to “anyone.”<sup>139</sup> Although the change standing alone was not sufficient evidence of congressional intent to abrogate/waive, the change supplemented by an analysis of the exemptions to liability were enough to convince Judge Boyle that Congress intended to abrogate.<sup>140</sup> Judge Boyle concluded that “to make all of the foregoing exemption provisions applicable only to local governments is to render nugatory a great volume of work done by Congress.”<sup>141</sup>

#### D. Consequences of *Anderson*

By holding state officials individually liable, the Fourth Circuit was

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132. *Id.*

133. *Id.*

134. Judge Boyle, a district court judge from North Carolina, sat on the court by designation.

135. *Anderson*, 852 F.2d at 125.

136. *Id.*

137. Article VI provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. The supremacy clause is another example of how the sovereignty of the states was bound by the sovereignty of the federal government.

138. *Anderson*, 852 F.2d at 124.

139. *Id.* at 126.

140. *Id.*

141. *Id.* at 129.

continuing the fiction of *Ex Parte Young*.<sup>142</sup> In *Ex Parte Young*, a stockholder brought suit against a railroad company and the State Railroad and Warehouse Commission to prevent the company from complying with a Minnesota law requiring that railway companies adopt and publish a specified rate schedule that was below that which the market would bear.<sup>143</sup> The plaintiff alleged that the Minnesota laws violated the eleventh amendment because the state did not have a pecuniary interest in the litigation.<sup>144</sup> The Court negotiated an end run around its previous eleventh amendment rulings, such as in *Chisholm*, by rationalizing that state officials who violate federally protected rights are acting *ultra vires*, and therefore, the states' sovereign immunity is not tarnished by enjoining the officials.<sup>145</sup> *Ex Parte Young* has been the Supreme Court's escape hatch from the conceptual box of the constitutionalization of sovereign immunity inherent in the Court's eleventh amendment jurisprudence.

The Fourth Circuit's rationale in imposing liability on state officials for copyright infringement is conceptually sound. The Copyright Act provides liability for "anyone" who infringes.<sup>146</sup> The starting point for the interpretation of a statute is the language of the statute. Thus, "anyone" means anyone including state officials. The liability of all who participate in the infringement is settled.<sup>147</sup> Moreover, the violation of a copyright is not a spur-of-the-moment tort. Unlike the policeman who often must make an instantaneous decision which may violate constitutional rights, the putative infringer has time for reflection and inquiry. The copyright notice alerts the putative infringer that the material is federally protected. Lastly, the Copyright Act has incorporated good faith

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142. 209 U.S. 123 (1908).

143. *Id.* at 129.

144. *Id.* at 138.

145. *Id.* at 168. In *Penhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Supreme Court further muddied the waters of eleventh amendment jurisprudence by retreating from the rationale of *Ex Parte Young*. Justices Stevens, Marshall, Brennan, and Blackmun in dissent criticized the majority for denying injunctive relief against an official who violates state law as inconsistent with *Ex Parte Young*. Justice Powell, writing for the majority questioned the "continued vitality of the ultra vires doctrine in the Eleventh Amendment context." *Id.* at 114, n.25. See also, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 189-95 (2d ed. 1988).

146. 17 U.S.C. § 501 (1982).

147. See 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 12.04, at 12-35 (1987). See also *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Dist. Pty. Ltd.*, 647 F.2d 200, 207 (D.C. Cir. 1981) ("Courts have long held in patent, trademark, literary property, and copyright cases, that any member of the distribution chain can be sued as an alleged tortfeasor"); Gilbourne and Meyer, *Liability For Copyright Infringement Committed by Third Parties or by Employees*, 2 *COMPUTER LAWYER* No. 4, at 1 (1985).

in the "fair use" defense which exculpates putative infringers from liability.<sup>148</sup>

### CONCLUSION

The Supreme Court must define the eleventh amendment's place in a system of federalism which not only recognizes the limited sovereignty of the states, but vindicates the federally protected rights of individuals against the states. The conceptual foundation for such a doctrine can be grounded in Congress' plenary powers under article I, which delineates areas of uniquely national interests such as foreign affairs, postal services, copyright and patent, and immigration, etc. A doctrine grounded in the article I powers would be consistent with the intent of the Framers of the Constitution who recognized the need for a One, supreme in areas of national interests while allocating to a Many responsibilities in areas which are uniquely local.

### POSTSCRIPT

While *Anderson* was under consideration by the Fourth Circuit, the Register of Copyrights completed a study on the relationship of copyright and the eleventh amendment, undertaken at the request of Representatives Robert Kastenmeier and Carlos Moorhead of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice.<sup>149</sup> The Register concluded that Congress intended the states to be liable for copyright infringement.<sup>150</sup> The Register recommends that Congress amend section 501 of the Copyright Act to clearly state the congressional intention that "anyone" includes the states.<sup>151</sup> The Register prefers a legislative solution to the problem "since this action would merely confirm Congress' original intent about the states' amenability to damage suits under the federal Copyright Act."<sup>152</sup>

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148. 17 U.S.C. § 107 (1982). See also W. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985).

149. UNITED STATES COPYRIGHT OFFICE, *COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT* (1988).

150. *Id.* at vii.

151. *Id.* at ix.

152. *Id.*