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I. INTRODUCTION

In the Fall of 1988, the United States Ninth Circuit Court of Appeals rendered a decision of great significance to authors, artists and computer programmers alike. Although only four pages in length, the decision in *B.V. Engineering v. University of California, Los Angeles*,[1] casts a wide shadow of doubt over the ability of copyright owners to enforce their rights of ownership against the states. The case unified circuit court opinion on the issues raised and attracted significant input from the U.S. Copyright Office and amici counsel representing interested industry organizations.

II. FACTS

Plaintiff, B.V. Engineering (B.V.), is the author and vendor of a series of seven programs used by scientists and engineers. In 1986, Defendant, University of California, Los Angeles (UCLA), purchased one copy of this program series and the accompanying user manual. Each program contained a valid copyright notice and had been previously registered with the Copyright Office. UCLA made three copies of each program and ten copies of the user manuals. Such copying was unauthorized by B.V.

In July, 1986, B.V. sued UCLA for, *inter alia,* copyright infringement under Section 501 of the Copyright Act of 1976. All claims other than the copyright infringement action were dismissed

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1. B.V. Engineering v. Univ. of Cal., Los Angeles, 657 F. Supp. 1246 (C.D. Cal. 1987), *aff'd*, 858 F.2d 1394 (9th Cir. 1988).

with prejudice by the district court. Later, on motion for summary judgment, the district court also denied the copyright infringement claim based on UCLA's assertion of the eleventh amendment as a defense.

B.V. appealed the summary judgment decision. This decision was subsequently affirmed by the Ninth Circuit Court of Appeals in an opinion filed on October 3, 1988.

III. THE DECISION

In *B.V. Engineering v. University of California*, the Ninth Circuit Court of Appeals was presented with the question of whether the eleventh amendment immunized the University of California from an infringement action under the Copyright Act of 1976. 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."[2] Although not expressly set forth within its terms, the eleventh amendment has repeatedly been recognized to prohibit an action against a state by one of the state's own citizens.[3]

In order to defeat the eleventh amendment immunity defense, the court in *B.V. Engineering* looked for the existence of either of two circumstances. The first was a showing that the state had waived its immunity and had consented to suit in federal court. The second involved a demonstration that Congress had exercised some legitimate power and chosen to abrogate the immunity.

Addressing the first circumstance, B.V. argued that the existence of several California statutes demonstrates the intent of the State of California to subject itself to federal copyright laws. These statutes involve the recognition and approval of payment of royalties.[4]

The court, however, took the position that, pursuant to *Collins v. Alaska*,[5] any waiver by the state must be: (a) express; (b) provided by statute; or (c) clearly intended by Congress as a condition to the state's participation in the activity related to the state's waiver of immunity.[6] In addressing these three prongs, the court

2. U.S. CONST. amend XI.

3. *See, e.g.*, Welch v. Tex. Dep't of Highways and Public Transp., 107 S. Ct. 2941, 2945 (1987) (plurality) (citing Hans v. Louisiana, 134 U.S. 1, 10, 10 S. Ct. 504, 505 (1890)).

4. *See*, CAL. EDUC. CODE §§ 60289, 60291 (West 1978 & Supp. 1987).

5. Collins v. Alaska, 823 F.2d 329 (9th Cir. 1987).

6. *Id.* at 331-32.

found first that any such waiver was implied and not express. Second, the court found that California's statutory provisions did not meet the requisite specificity to demonstrate "the State's intention to subject itself to suit in federal court."[7] Finally, the court was unable to find any indication of Congressional intent to condition the states' participation in the national copyright scheme on a waiver of immunity.

Having analyzed and disposed of the issue of waiver of immunity by the state, the court turned to a more difficult question: Did Congress abrogate the eleventh amendment immunity of the states through enactment of the Copyright Act?

As the court acknowledged in *B.V. Engineering*, it has not yet been specifically decided whether Congress has the inherent power pursuant to Article I to abrogate the eleventh amendment immunity.[8] This power, however, has been recognized when derived from Section 5 of the fourteenth amendment.[9] Several courts, while assuming this to be the case for purposes of rendering a judgment, have reserved judgment on the issue as to whether Article I can also be a source of power to abrogate immunity.[10] This too, was the approach chosen by the court in *B.V. Engineering*.[11]

The next challenge for the court was whether such an abrogation actually existed. For this critical analysis the court relied on a line of cases including *Welch v. Texas Department of Highways and Public Transportation*[12] and *Atascadero State Hospital v. Scanlon*,[13] which provide a stringent test for discerning Congressional intent. In part, this test requires a finding that this intent be statutorily

7. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 3146-47 (1985).

8. *B.V. Engineering*, 858 F.2d at 1394, 1396-97.

9. *See, e.g., Collins*, 823 F.2d at 332.

10. United States v. Union Gas Co., 832 F.2d 1343, 1350-56 (3d Cir. 1987) (Commerce Clause, U.S. Const. Art.I, § 8, cl. 3), *cert. granted*, — U.S. —, 108 S. Ct. 1219 (1988).

11. *B.V. Engineering*, 858 F.2d at 1397, "We assume, without deciding, that Congress may abrogate the states' eleventh amendment immunity when acting under an Article I power."

12. *Welch*, 107 S. Ct. 2941 (1987) (holding that a Texas state employee, who was injured while working on a passenger ferry, was prohibited by the eleventh amendment from suing the state in federal court under the Jones Act). The Jones Act (46 U.S.C. § 688) provides for jurisdiction in suits arising from injuries suffered by seamen during the course of their employment.

13. *Atascadero*, 473 U.S. 234, 105 S. Ct. 3142 (1985) (holding that the eleventh amendment was a complete defense to a suit against the state). In *Atascadero*, respondent brought suit against the state of California for violation of § 504 of the Rehabilitation Act of 1973, alleging that he was wrongfully denied employment in a state hospital due to a physical handicap. Section 504 prohibits discrimination of handicapped persons by recipients of federal financial assistance.

expressed in "unmistakably clear" language and be "unequivocally" stated.[14] For purposes of this article, we shall refer to the line of cases mandating this test as the "strict scrutiny" cases.

Applying this heightened level of scrutiny, the court was unable to identify anything in Section 501 of the Copyright Act of 1976 which would demonstrate a clear Congressional intent to abrogate. The court specifically rejected the argument that the statutory use of the term "anyone" encompassed the states in "unequivocal statutory language."[15]

In addition, the court also rejected Plaintiff's arguments that certain specific sections of the Act itself demonstrated a Congressional intent to subject the states to liability for infringement under the Copyright Act. Sections 601 and 602[16] of the Act were specifically referenced by Plaintiff as examples demonstrative of such intent. Both sections specifically use the term "State" in allowing such entities exemptions from liability for certain infringing activities. Although the court found this argument "tenable" it felt constrained by "*Atascadero*'s requirement of clear and unmistakable statutory language."[17] Based on similar reasoning, the court also rejected the contention that other sections of the Act which referred to the term "governmental bodies" were not sufficient to defeat this high strict scrutiny standard.

Lastly, the court, with brevity, and also some reluctance, dismissed two powerful issues. The first was whether or not the affirmance of the eleventh amendment immunity defeats the right of exclusivity an author or inventor is granted under the U.S. Constitution, Article I, Section 8, clause 8. The second, was whether or not the policies underlying the eleventh amendment protection to the States are defeated by the abrogation of immunity. For example, there is no fear of a drain on state treasuries because the state is not required to infringe on copyrights. Despite the merit of these arguments, the court felt constrained by the strict interpretation cases, such as *Atascadero* and *Welch*, and affirmed the lower court deci-

14. *B.V. Engineering*, 858 F.2d at 1397 (citing *Atascadero*, 473 U.S. at 242); *Welch*, 107 S. Ct. at 2947.

15. *B.V. Engineering*, 858 F.2d at 1398.

16. 17 U.S.C. § 601(b)(3) (1982) ("The provisions of subsection (a) do not apply. . .(3) where importation is sought under the authority or for the use, other than in schools, of the Government of the United States or of any State or political subdivision of a State. . ."); § 602(a)(1) ("This subsection does not apply to. . .(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use. . .").

17. *B.V. Engineering*, 858 F.2d at 1399.

sion. In the end, the court suggested that it is for the legislature to change the adverse consequences of the case.

IV. ANALYSIS

From B.V. Engineering's perspective, several factors distinguish the situation posed in *B.V. Engineering* from that presented in *Welch*, *Atascadero* and the other strict scrutiny cases. It was stressed that there are different policy considerations underlying the grant of rights under Article I which make clear that the strict construction rule of "unequivocal expression" should be inapplicable in the present instance.

Article I, Section 8 of the United States Constitution provides in part:

> The Congress shall have 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.

This provision, as ratified by the states, provides Congress with a specific grant of power for the purpose of regulating copyrights and patents. By its very nature the provision becomes a limitation on the power of the states to act in these areas.

This limitation on the power of the States creates the difference between the present case and the strict scrutiny cases. In those cases the underlying grant of power was broad and expansive, not nearly so specific as the Article I empowerment relating to copyrights. In broad and expansive instances, the unequivocal expression rule is necessary to maintain the proper balance between the state and federal government. Because it is the federal courts which are determining the extent of the immunity provided to the states under the eleventh amendment the strict scrutiny requirement also serves as a further protection against federal expansion.

This reasoning makes sense when applied to the line of strict scrutiny cases such as *Welch*, *Atascadero*, and *Pennhurst State School & Hospital v. Halderman*,[18] where the grant of power to the States was broad. However, in the present situation it has no application. Pursuant to 28 USC section 1338(a), Congress has provided that the federal courts shall have *exclusive* jurisdiction over copyright infringement suits and that equivalent state laws "to any of the

18. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900 (1984) (holding that the eleventh amendment prohibited the district court from ordering state officials to conform their conduct to state law).

exclusive rights within the general scope of copyright" are preempted.[19] Consequently, there is no tension between state and federal sovereignty. Exclusive jurisdiction in the federal courts has already been conceded pursuant to the limited grant of authority contained in Article I. Thus, the source of federal power is of itself a limitation on federal encroachment.

Another supporting rationale which has been raised in the strict scrutiny cases is the need to protect the states from fiscal burdens imposed by legislation enacted by Congress under expansive grants of authority.[20] Again, however, this rationale does not apply because the copyright laws were enacted pursuant to a specific grant of power. Any possible fiscal impact to the states, should their immunity be removed, is de minimis. The fiscal impact would only arise in situations in which the state conducted an infringing activity; something which they obviously are not required to do.

In other instances, the state may be required to pay amounts for the proper use of copyrighted material such as fees for licenses or royalties. However, these payments are expenses for which California and many other states have already recognized an obligation to pay.[21]

Unfortunately, the greatest distinction between the strict scrutiny cases and the present case is also the most deleterious. In the strict scrutiny line of cases the injured party had the opportunity for redress in an alternative forum. In Atascadero, for example, although the state was not subject to suit in federal court it was still subject to an action in state court.[22] Similarly, in *Employees*, employees still had relief in state court for FLSA violations.[23] The court in *Welch* also acknowledged that although the state was immune from federal suit under the Jones Act, the plaintiff was "not without a remedy" for she could still file a state worker's compensation action.[24] This alternative forum, however, is not available in any copyright infringement action because the federal court is the

19. 17 U.S.C. § 301(a) (1982).

20. Employees v. Dep't of Public Health and Welfare, 411 U.S. 279, 284-285 93 S. Ct. 1614, 1618 (1973). In *Employees*, the employees of a Missouri state hospital brought suit against the State of Missouri for overtime pay under Section 16(b) of the Fair Labor Standards Act (FLSA). This Act provides for suits against employers for recovery of damages, including minimum wages and overtime compensation. It is based on the power of Congress to regulate the working conditions of persons engaged in the production of goods for commerce.

21. *See* CAL. EDUC. CODE §§ 60289, 60291 (West 1978 & Supp. 1987).

22. *Atascadero*, 473 U.S. at 240 n.2, 105 S. Ct. at 3145.

23. *Employees*, 411 U.S. at 287, 93 S. Ct. at 1616.

24. *Welch*, 107 S. Ct. at 2953 n.19.

exclusive forum for such actions. As a consequence, the court in *B.V. Engineering*, by upholding the eleventh amendment defense leaves victims of infringement without a remedy. B.V. Engineering, amici and the U.S. Copyright Office all take the position that it is inconceivable that Congress could have intended this drastic result.

An analysis of the court's holding in *B.V. Engineering* does reveal some inconsistencies. For example, the court's conclusion that there has not been an unequivocal expression of jurisdictional intent renders useless many provisions of the Copyright Act which provide immunity to the states under certain circumstances. 17 USC Section 602(a) allows "any State or political subdivision of a State" to import certain material from outside the United States with immunity from infringement actions arising out of Section 501. Only the conclusion that Congress intended the states to be subject to the Act's provisions provides a logical explanation as to why such exclusionary language was included.

Other sections of the Act provide immunity from otherwise infringing activities of "governmental bodies," a term which includes the states.[25] These activities include: reproduction of certain broadcast transmissions;[26] reproduction of sound recordings;[27] performances of copyrighted works in the course of transmissions for the handicapped;[28] performances or displays of nondramatic literary or musical works;[29] performances of certain copyrighted material during annual agricultural or horticultural fairs;[30] and secondary transmissions of copyrighted work.[31] Clearly these sections, and especially Section 110, serve no purpose unless Congress intended to abrogate eleventh Amendment immunity.

In the opinion of the authors, the correct approach in analyzing the application of the eleventh amendment immunity is one which recognizes the unique limitations presented by Article I. This is the view which was adopted in *Mills Music, Inc. v. State of Arizona*.[32] In *Mills*, the Ninth Circuit reviewed a case factually similar to *B.V. Engineering*. The plaintiff in *Mills* was the composer of a musical work which was used, without consent, as the theme song

25. *See* HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS. at 1229 (Comm. Print July 1961).

26. 17 U.S.C. § 118(d)(3) (1982).

27. 17 U.S.C. §§ 112 (b)-(d) (1982).

28. 17 U.S.C. § 111(8) (1982).

29. 17 U.S.C. § 110(2) (1982).

30. 17 U.S.C. § 110(6) (1982).

31. 17 U.S.C. § 111(a)(4) (1982).

32. Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979).

for the Arizona State Fair. Plaintiff brought suit against the state of Arizona for copyright infringement. The State of Arizona raised the eleventh amendment as a defense. Despite the similarities, the conclusion of the Ninth Circuit in this case was the opposite of that reached in *B.V. Engineering*. As the court stated:

> [A] state may not, consistent with the Constitution, infringe the federally protected Rights of the copyright holder, and thereafter avoid the federal system of statutory protections. The "exclusive rights" of an author, guaranteed under the Constitution and Copyright Act, would surely be illusory were a state permitted to appropriate with impunity the rights of a lawful copyright holder.[33]

Of course, the court in *B.V. Engineering* determined that *Mills* was no longer the law in view of *Atascadero*. However, it seems incongruous that the state may utilize the Copyright Act as a sword against infringers, yet raise the eleventh amendment as a veil of protection when the state itself conducts the infringing activity. In fact, it is interesting to note that the California Attorney General's Office has for many years accepted the opinion that California may be sued under the Copyright Act.[34] Other state attorney general offices agree with California's position.

Given the number and size of state agencies, the dangers created by the Ninth Circuit's decision in *B.V. Engineering* should be evident, and of concern not only to computer programmers, but to all of the computer industry. An accurate estimate of the potential dollar damage that could result from the decision is beyond the scope of this article, but a list of some of the goods commonly purchased by state governments from the private sector provides an indication of the tremendous implications of the decision. Software, movies, television programming and other audiovisual materials, textbooks, novels, magazines and other printed text materials, recorded music, and artwork and graphic designs are just some of the copyrighted works and products purchased in volume by the state of California and other state governments nationwide.

V. IMPLICATIONS OF THE DECISION

The Ninth Circuit's decision in the case confirms a loophole in federal copyright law that has the potential of causing hundreds of millions of dollars in damages and lost profits to affected industries.

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33. *Mills Music, Inc.*, 591 F.2d at 1286.

34. *See* 64 Ops. Cal. Att'y. Gen. 186 (1981); 65 Ops. Cal. Att'y. Gen. 106 (1982).

However, whether or not the potential damages are real or will remain imagined depends upon several factors.

Many amici counsel and other interested parties held out a slim hope for certiorari review by the U.S. Supreme Court. Plaintiff did petition the U.S. Supreme Court for a writ of certiorari. However, the U.S. Supreme Court recently denied certiorari. In the author's view, the Supreme Court's denial of certiorari was a foregone conclusion. Plaintiff faced an uphill battle, as the circuit courts were aligned in support of the position expressed by the court in *B.V. Engineering*, and because a similar case involving Radford University was also recently denied certiorari.[35] The two cases which provided the greatest support for the plaintiff's position in *B.V. Engineering*, *Mills Music* and *Johnson* faced a precarious existence.[36] The *Johnson* case was decided before *Atascadero* and it is likely that had the *Atascadero* decision been available, the outcome would have been reversed. *Mills Music* was overruled by the court in *B.V. Engineering*. Thus, there was not a pressing need for review of *B.V. Engineering* by the Supreme Court.

A second factor is legislative action. As the court in *B.V. Engineering* recognized, Congress is a potential solution to the loophole in federal copyright law. Legislative action which expressly subjects state governments to liability under the federal Copyright Act would indeed solve any legal protection dilemma created by the court's decision. The court's analysis was premised in part upon the belief that existing provisions of the Act do not contain sufficient language indicating the express intent of Congress to abrogate state immunity with regard to copyright infringement. This conclusion was reached despite the several express provisions in the Act in which Congress saw fit to grant to the states certain exceptions for use which would otherwise constitute copyright infringement. The Act's language can be amended expressly to include state governments.

For example, Chapter Five of the Act defines an infringer of a copyright as "anyone" that violates any of the exclusive rights of the copyright owner. Obviously, the Act's definition of an infringer can easily be expanded to include express references to state governments and state liability for copyright infringement. Similarly, independent express references to state liability could appear in sections setting forth the various limited exceptions to liability for

35. Richard Anderson Photography v. Radford Univ., 633 F. Supp. 1154 (W.D. Va. 1986).

36. Johnson v. Univ. of Va., 606 F. Supp. 321 (W.D. Va. 1985).

otherwise infringing actions.[37]

While legislative action could indeed be the cure-all, as suggested by the *B.V. Engineering* court, the ability of Congress to fashion a speedy remedy is always suspect. Dependence upon immediate Congressional action to remedy the decision's implications is not likely to produce sighs of relief from the private sector. Given the inherent delays of the legislative process, it could take more than a year or two for Congress to push an amendment through both houses and close the state government copyright loophole. Certainly, efforts can be made to to galvanize Congress into action. Commercial interests may be able to focus Congressional attention on the situation. The affected industries, such as the television and motion picture industries, have an active lobbying presence in Washington. It is also possible that significant legal and political commentary can assist in accelerating Congress' review of the situation.

A third factor which will impact the ramifications of the decision is the future conduct of the various state governments themselves. As mentioned above, many state attorney generals, including California's, have in the past expressly declared that state action was subject to the federal copyright laws.[38] Despite the closing dicta of the *B.V. Engineering* decision, in which the court refers to the states' ability "to violate the federal copyright laws with virtual impunity," state governments in general have long recognized and respected the rights of intellectual property owners. There is no evidence to suggest that the havoc foretold by Plaintiff and amici, such as unrestricted reproduction of text materials and software, will result merely because of the *B.V. Engineering* decision. Whether or not state governments will in the future use the case as a license to steal remains to be seen.

In light of the court's holding, and until Congress addresses the situation, vendors to state governments must look for alternative courses of action and remedies providing legal protection from potential infringement. Vendors of intellectual property will not simply stop doing business with state governments. Therefore, protective measures not dependent upon copyright should be emphasized. Such measures would appear to fall into three general categories: injunctive relief from the courts, commercial practices and technological protections.

Copyright infringement lawsuits seeking monetary damages

37. *See* 17 U.S.C. §§ 601(b)(3), 602(a)(1) (1982).

38. *See supra* note 34 and accompanying text.

under federal copyright law against state governments are foreclosed by *B.V. Engineering*. However, case law has established that the 11th Amendment does not bar federal suits against states to obtain injunctions to prevent future violations of federal law.[39] Thus, the possibility exists that injunctive relief is still available under federal copyright law. The effectiveness of federal injunctive relief as a sole remedy is questionable, as infringement is difficult to detect and the relief does not address past conduct. However, federal injunctive relief may be the only remedy available to plaintiffs who do not have a non-copyright cause of action.

For causes of action not grounded in copyright, plaintiffs may still resort to federal and state courts seeking monetary damages. However, from a procedural standpoint, if a claim for copyright infringement does not exist, on what basis does a vendor seek damages? Breach of contract is a possibility if indeed a written contract prohibiting copying or reproduction is in place. But in those situations where the state merely purchases goods pursuant to an invoice or purchase order, what grounds exist to support the damage claim? For many plaintiffs, non-copyright causes of action may not exist, and federal injunctive relief is the only possible remedy. These questions were not addressed in *B.V. Engineering* as the case only involved a copyright infringement damage claim. Contractual claims and injunctive relief were not pursued by Plaintiff.

Contractual remedies remain a commercial alternative to copyright protection. For example, purchase, rental and license agreements should be utilized by vendors to set forth strong remedies for unauthorized reproduction and use of intellectual property. License agreements governing reproduction and use of software programs are common in the computer industry, and vendors of other copyrighted property can benefit by following the lead of the computer industry. Vendors that in the past have simply sold products to state governments pursuant to simple purchase orders or invoices may benefit from utilizing more complex agreements containing contractual provisions restricting the use of the vendors' products. Contractual limitations on copying and reproduction similar to the protections granted under the Copyright Act could be utilized by vendors in written agreements with state governments.

State governments will still have a negotiating advantage, as the competition for state government business is usually intense. Especially in competitive bidding or supply situations, vendors may

39. *Pennhurst*, 465 U.S. 89, 104 S. Ct. 900; Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).

be unable to insist upon the use of such protective contract provisions. Nonetheless, the vendor selling directly to state governments will in many instances have an opportunity to implement some protective contractual measures. It may be that manufacturers will have to refuse some business opportunities because of the risk of unrestrained product use and reproduction.

Vendors will also need to police their product distribution channels to ensure that the contractual protections are implemented in all sales to state governments. Products sold to state governments through distribution channels such as distributors or manufacturer representatives present a difficult control challenge for the original vendor or manufacturer. Distributors and sales representatives obviously have much less incentive to hamper purchase negotiations by insisting on long term contractual protections benefitting the manufacturer.

Another area of relief from the potential consequences of *B.V. Engineering* involves the implementation of technological strategies preventing the unrestrained use or reproduction of intellectual property. Many computer software publishers have utilized anti-copying technology in their products, ranging from so-called hardware locks or keys to copy protection programming tricks written into the program code. While not generally favored by either the industry or the consumer, such technology offers a measure of added protection when dealing with state governments under *B.V. Engineering*.

Unfortunately, not all inventions, works and products are subject to protection through technological means. It is difficult to imagine practical technological means to prevent the unauthorized use or reproduction of books, movies or artwork. Thus, technology offers limited protection for many vendors dealing with state governments.

VI. CONCLUSION

The court addressed two key inquiries in its opinion in *B.V. Engineering*. The first inquiry was whether the state had waived its immunity to suit for copyright infringement, and the second inquiry was whether Congress abrogated the immunity from suit provided the states under the eleventh Amendment. The authors feel that the court's decision reasonably held that the state of California had not expressly waived its immunity. However, there are significant grounds on which to differ with the court's conclusion that Con-

gress had not abrogated the state's eleventh Amendment immunity when it enacted the federal Copyright Act.

The express provisions of the Act exempting certain state conduct from liability for copyright infringement appear to be a clear expression of Congressional intent that states are subject to the Copyright Act. Furthermore, the application of the *Atascadero* strict scrutiny standard seems inappropriate when the federal courts have exclusive jurisdiction over copyright infringement claims. A lower level of scrutiny may well have resulted in a contrary ruling.

A large and potentially devastating loophole in federal copyright law has been opened by *B.V. Engineering*, and it is likely that it will take the proverbial act of Congress to remedy the situation.