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REPORT
102-280

PATENT AND PLANT VARIETY PROTECTION REMEDY CLARIFICATION ACT AND THE TRADEMARK REMEDY CLARIFICATION ACT

MAY 12, (legislative day, MARCH 26), 1992.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 758 and S. 759]

The Committee on the Judiciary, to which was referred the bills S. 758 and S. 759 amending titles 7 and 35, and title 15, United States Code respectively, having considered the same, reports favorably thereon without amendment and recommends that both bills do pass.

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I. PURPOSE

The purpose of S. 758 is to clarify Congress' intent that States and State entities are not immune from infringement suits under the Patent Code and the Plant Variety Protection Act.

The purpose of S. 759 is to clarify Congress' intent that States and State entities are not immune from infringement suits under the Lanham Trademark Act [Trademark Act].

II. Legislative History

During the 100th Congress, legislation was enacted which clarified that States were not immune under the eleventh amendment from liability for copyright infringement. Efforts were also made with respect to patents. Senator DeConcini with Senators Hatch and Simon introduced S. 2193, the predecessor to the patent provision of S. 758. S. 2193 was added as an amendment to S. 198, the Computer Software Rental Amendments Act, and was approved by the Senate. It was later deleted by the House.

In the House, Representatives Kastenmeier and Moorhead introduced H.R. 3886, a companion measure. The House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice held a hearing on H.R. 3886 in which witnesses, including the Acting Commissioner of the Patent and Trademark Office, testified in strong support of the measure. The House subcommittee invited State attorneys general and representatives of State universities to testify, but none accepted the invitation.

H.R. 3886 was favorably reported by the House Judiciary Committee as a title to H.R. 5598, the Patent Competitiveness and Technological Innovation Act of 1990. No further was action taken on H.R. 5598.

During the 102d Congress, Senator DeConcini, with Senator Hatch, introduced S. 758 and S. 759 on March 21, 1991, at which time they were referred to the Judiciary Subcommittee on Patents, Copyrights and Trademarks. On July 17, 1991, S. 758 and S. 759 were reported favorably to the full committee by a vote of 5 to 0. On February 6, 1992, both bills were considered together before the Senate Judiciary Committee. After an amendment limiting attorney fees and damages, offered to S. 758 by Senators Thurmond and Grassley, was defeated, both bills were passed by a voice vote.

III. Discussion

A. BACKGROUND

The Eleventh Amendment [1] was proposed on March 4, 1794, and within less than a year the necessary number of States [2] had ratified it. The amendment was a direct result of *Chisholm* v. *Georgia* [3] in which the Supreme Court held that the State of Georgia could be sued by a citizen.[4] This decision met with swift opposition across the land. As the Court's basis for deciding *Chisholm* was constitu-

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[1] "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] At that time the United States consisted of 15 States, 12 of which were needed to ratify.

[3] 2 U.S. (2 Dall.) 419 (1793).

[4] Robert Farquhar, a South Carolinian, claimed that the State of Georgia had failed to compensate him for goods he had supplied to them during the Revolutionary War. After losing at the lower Federal court, Farquhar invoked original jurisdiction of the Supreme Court under article III, sec. 2, cl. 2, of the U.S. Constitution.

tionally grounded, the only remedy available to the States was an amendment to the Constitution.

The simplicity of the language of the eleventh amendment is countered by the often confusing legal interpretations that followed its enactment. During the 1800's, courts interpreted the amendment to bar only diversity suits.[5] However, in 1890, the Supreme Court expanded the scope of the eleventh amendment, stating that the amendment also barred suits against a State by citizens of that State, even though the amendment does not expressly include such language.[6]

In the mid-1900's, the Supreme Court held that it was possible, through a theory of implied waiver, to abrogate the immunity of the States.[7] In 1964, the Court expanded the theory of implied waiver and held that a State's willingness to be sued in Federal court could be utilized as a condition of entry into an activity regulated by the Federal Government.[8] However, in 1973, the Court began to limit the theory of implied waiver.[9] The practical feasibility of an implied waiver theory was virtually eliminated a year later in *Edelman* v. *Jordan,*[10] when the high Court held that State waiver may only be found by, "'* * * the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'." [11]

Later decisions held, however, that Congress could abrogate State sovereign immunity in the absence of waiver by the State. The groundwork for Congress' ability to do this was explicitly established in the Supreme Court decision in *Fitzpatrick* v. *Bitzer.*[12] Although the case dealt with Congress' ability to abrogate State sovereign immunity under the fourteenth amendment, the Court recognized that a grant of power to the Federal Government is necessarily a diminution of State sovereignty. The Court concluded that such power allowed Congress to provide for private suits against States or State officials, which would be constitutionally impermissible in other contexts.[13]

The *Fitzpatrick* holding was expanded in *Hutto* v. *Finney.*[14] In this case attorney's fees were awarded against the State in the context of a suit against a prison system for cruel and unusual punishment. The Court held that recovery was possible if the legislative history accompanying the statute under which the cause of action arose showed clear evidence of congressional intent to abrogate immunity.

Later cases held that States could be subject to suit in Federal court for alleged patent infringement, but courts differed as to what remedies were constitutionally permissible. For example, the district court in *Hercules, Inc.* v. *Minnesota State Highway Depart-*

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[5] See, Senate Judiciary Committee Report on the Copyright Clarification Act, Rept. No. 101-305, at p. 6. June 5, 1990, 101st Cong., 2d sess.

[6] *Hans* v. *Louisiana,* 134 U.S. 1 (1890).

[7] *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959).

[8] *Parden* v. *Terminal Railway of Alabama,* 377 U.S. 184 (1964).

[9] *Employees of the Department of Public Health and Welfare* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973).

[10] 415 U.S. 651 (1974).

[11] Id. at 673 (quoting from *Murray* v. *Wilson Distilling Co.,* 231 U.S. 151, 171 (1909)).

[12] 427 U.S. 445 (1975).

[13] Id. at 456.

[14] 437 U.S. 678 (1978).

ment [15] held that the State could be enjoined from using a patented process for chemical weed and pest control, but held the State remained immune from damages on eleventh amendment grounds. Conversely, the court in *Lemelson* v. *Ampex Corp.*[15] held the State was subject to both an injunction and damages.

In 1979, the Court of Appeals for the Ninth Circuit defined the relationship between the Patent and Copyright Clause [17] and the eleventh amendment in *Mills Music Inc.* v. *State of Arizona.*[18] The court found that the sweeping language of the Patent and Copyright Clause indicative that States were intended to be part of the definition of persons who could be sued in Federal court. As an exclusive grant of power to the Federal Government, the Patent and Copyright Clause necessarily contains limitations on State sovereignty.[19] The court reached this conclusion by reviewing the language of the statute, the legislative history, and the context in which it applies. After determining that the term "anyone" in the Copyright Act [20] included States,[21] the court held the imposition of damages was constitutionally permissible. However, in 1985 the face of sovereign immunity was dramatically altered by the holding of *Atascadero State Hospital* v. *Scanlon.*[22]

B. *ATASCADERO* AND THE ELEVENTH AMENDMENT

In *Atascadero,* the Court held that congressional intent to abrogate State sovereign immunity must be explicitly and unambiguously stated in the statute itself.[23] Scanlon brought suit against Atascadero State Hospital for compensatory, injunctive, and declaratory relief, alleging that he was refused employment solely due to his handicap in violation of the Rehabilitation Act of 1973.[24]

The Supreme Court granted certiorari to decide the question of whether a State may be subject to suit in Federal court in light of the eleventh amendment.[25] Because the eleventh amendment represents a "constitutionally mandated balance of power" between the Federal Government and the States,[26] the Court determined that Congress must make its intent to abrogate State sovereign immunity "unmistakably clear in the language of the statute itself." [27] This language, the Court determined, provided the necessary clarity to ensure that Congress intended to override the eleventh

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[15] 337 F. Supp. 795 (D. Minn. 1972).
[16] 372 F. Supp. 708 (N.D. Ill. 1974).
[17] U.S. Constitution, article I, § 8 provides that the Congress shall have the power, "[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
[18] 591 F. 2d 1278 (1979).
[19] *Id.* at 1285.
[20] 17 U.S.C. 1 et seq.
[21] Supra, note 24, at 1284.
[22] 473 U.S. 234 (1985).
[23] Id. at 246.
[24] 29 U.S.C. 795.
[25] Although the Court decided issues regarding State waiver of its immunity and State consent to suit in Federal court, that portion of the decision is not relevant here.
[26] Supra, note 28, at 242, citing *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572 (1985).
[27] Id.

amendment as an appropriate way to enforce the provisions of the fourteenth amendment.[28]

Following the *Atascadero* decision, the Supreme Court applied that holding to preclude suit in Federal court against States in various contexts. In *Dellmuth* v. *Muth*,[29] the Court found that "parties aggrieved by the Administrative process" was not sufficient language to abrogate sovereign immunity in relation to the Education of the Handicapped Act.[30] In *Welch* v. *Texas Department of Highways and Public Transportation*,[31] the Court applied the same rule in denying a claim under the Jones Act,[32] finding "any seaman" insufficient to meet the stringent rule. In *Will* v. *Michigan Department of State Police*,[33] the term "persons" was insufficient under 42 U.S.C. 1983.

Similarly, sovereign immunity was upheld under the Bankruptcy Code [34] in *Hoffman* v. *Connecticut Department of Income Maintenance*,[35] as it was under the Civil Rights Attorney's Fees Awards Act of 1976 [36] in *Missouri* v. *Jenkins*.[37] By the time a case arose which challenged the Federal courts' jurisdiction to decide a patent infringement suit against a State, the *Atascadero* rule was well defined.[38]

C. PATENT INFRINGEMENT SUITS AFTER ATASCADERO

In 1990, *Atascadero* was utilized to justify denial of a patent infringement claim based on sovereign immunity. In *Chew* v. *State of California*,[39] an Ohio resident sued the State of California, asserting that California's process for testing automobile exhaust emissions infringed a patent which she held. The State asserted eleventh amendment immunity and the suit was dismissed by the district court. On appeal to the Court of Appeals for the Federal Circuit, Chew argued that Congress had abrogated the State's immunity by provisions in the patent statute and thereby conferred exclusive jurisdiction on the Federal courts.

Although the *Chew* court recognized that Congress could abrogate the State's immunity,[40] it determined that the Patent Code

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[28] Id. at 241-246. The Rehabilitation Act provided remedies for violation of the act against "any recipient of Federal assistance." However, the Court found that a general authorization for a suit in Federal court was not the unequivocal statutory language sufficient to abrogate the eleventh amendment. Furthermore, the Court held that although article III, § 5 of the California Constitution provided that "suits may be brought against the State in such manner and in such courts as shall be directed by law", this did not constitute a "willingness to be sued in federal court." Rather the provision merely authorizes the California Legislature to waive sovereign immunity. Therefore, following this holding, participation in federally funded programs no longer constituted waiver, and the theory of implied waiver was completely abrogated, with the new standard requiring explicit waiver.

[29] 491 U.S. 223 (1989).

[30] 20 U.S.C. 1400(b)(9).

[31] 483 U.S. 468 (1987).

[32] 46 U.S.C. App. 688.

[33] 491 U.S. 58 (1989).

[34] 11 U.S.C. 106(c).

[35] 492 U.S. 96 (1989).

[36] 42 U.S.C. 1988.

[37] 491 U.S. 274 (1989).

[38] Although *Atascadero* established the congressional ability to expressly abrogate sovereign immunity, the case of *Bonito Boats* v. *Thunder Craft Boats*, 109 S.Ct 971 (1989), held that States did retain the ability to establish rules which would serve to promote intellectual creation. However, this must be done without interfering with the Federal patent scheme.

[39] 893 F.2d 331 (Fed. Cir. 1990).

[40] *Chew* at 334, citing *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989).

did not meet the stringent test required by *Atascadero.* The court found that the patent statute used only the general term of "whoever" when stating what parties were subject to suit for patent infringement.[41] As the Supreme Court had stated in *Atascadero,* the *Chew* court held that, "When Congress chooses to subject states to federal jurisdiction, it must do so specifically." [42] By permitting the sovereign immunity defense to deny Chew recovery, the plaintiff was literally left without any recourse.

In *Jacobs Wind Electric Co., Inc.* v. *Florida Department of Transportation,*[43] the Federal Circuit held that a suit brought against a State by a citizen of that State was barred under the eleventh amendment. Jacobs held a patent on a tidal flow system which improved water quality. The State of Florida installed the system without authorization from Jacobs, prompting a patent infringement complaint. Florida defended on grounds of sovereign immunity and the district court granted their motion to dismiss based upon that theory.

The Federal Circuit found the case to be indistinguishable from *Chew.*[44] Therefore, in light of *Atascadero,* plaintiffs in patent infringement cases against a State are foreclosed from damages, regardless of the State conduct.

D. TRADEMARKS

The *Atascadero* standard has had a similar effect in the context of trademark infringement, where courts have held that States are not liable for their actions under the Trademark Act. Despite distinctions between patents and trademarks, in terms of the availability of State court remedies, the remedies available under State and common law for trademarks are limited in scope and inconsistent to such an extent that they serve as a meaningless substitute for Federal remedies.

In *Woelffer* v. *Happy States of America,*[45] the District Court of Illinois dismissed a counterclaim of injunctive relief under section 43(a) of the Trademark Act against the Illinois Department of Commerce and Community Affairs [DCCA] holding that by filing a declaratory complaint, the State did not waive its immunity. Relying on *Atascadero,* the court held that Congress had not expressed its intention to abrogate State immunity in clear and unmistakable terms. However, the court granted injunctive relief against Woeffler, the director of the DCCA, pursuant to the *Edelman* v. *Jordan* [46] case, which allows an injunction governing an official's future conduct, as long as it does not award retroactive monetary relief. The court refused to grant attorney's fees in conjunction with the counterclaim as the award would not be ancillary to the court's power as is required by *Edelman.*[47]

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[41] 35 U.S.C. 271(a) (1982).
[42] *Atascadero,* 473 U.S. at 246.
[43] 919 F.2d 726 (Fed. Cir. 1990).
[44] Id. at 728, Although Jacobs attempted to distinguish the *Chew* decision on the fact that Chew was not a resident of the State she sued, while Jacobs was, the court cited Supreme Court cases which held that the eleventh amendment immunity acted to bar suits by a resident or a non-resident. *See also, Welch* v. *Texas Department of Highways and Public Transportation,* 483 U.S. 468, 472, 479–88 (1987), and *Hans* v. *Louisiana,* 134 U.S. 1, 10 (1890).
[45] 626 F. Supp. 499 (N.D. Ill. 1985).
[46] Supra, note 16, at 677.
[47] Id. at 668.

E. PLANT VARIETY PROTECTION ACT

S. 758 includes a provision abrogating State sovereign immunity in suits for violations of plant variety protection. The Plant Variety Protection Act of 1970 [48] was enacted to encourage the development of novel, sexually reproduced plants. It provides an economic incentive for companies to undertake the costs and risks inherent in producing new varieties and hybrids. Protection under this act is for a period of 18 years. The justification of providing plant variety protection is similar to that for granting patents.

No suits have occurred to date in which a State defended on eleventh amendment grounds, but it is clear that such a defense is probable in future cases based on the *Atascadero* standard. By acting now, Congress will avoid the need to revisit the issue of sovereign immunity in this area of intellectual property.

F. EXPLICIT ABROGATION OF SOVEREIGN IMMUNITY

To remedy the application of *Atascadero* to intellectual property laws, Senator DeConcini introduced S. 758 to explicitly establish that Congress did intend to subject States to patent infringement suits in Federal court. This legislation amends the Patent Code by adding a definition for the term "whoever" which includes States, as well as their instrumentalities, officers and employees. In addition, the bill clarifies that any remedy which is available against a private entity is also available against a State or State entity.

S. 758 applies the language of the Copyright Remedy Clarification Act of 1991 [49] to the Patent Code. Based on the cases decided since *Atascadero,* the bill was crafted to specifically meet all the requirements of the *Atascadero,* holding.

Similar legislation is required to rectify the inherent inequity plaguing the area of trademark protection. Accordingly, Senator DeConcini introduced S. 759, the Trademark Remedy Clarification Act. Trademark remedies available in State court are less than adequate substitutes for Federal provisions. S. 759 will allow the trademark plaintiff equal access to the Federal and State forums.

The existence of State trademark remedies should not be interpreted as evidence that sovereign immunity does not harm trademark owners. Preemptive in nature, the passage of this legislation will eliminate any ambiguity of whether Congress intended to abrogate State sovereign immunity under the Trademark Act.

G. THE CONSTITUTIONAL POWER TO ABROGATE

Because the Federal Government is one of enumerated powers, a law which abrogates State sovereign immunity in patent infringement and trademark actions must be justified under one of the Constitution's express grants of power to the Federal Government.[50] The provisions of S. 758 are justified under the Patent Clause, the Commerce Clause and the enforcement provision of the

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[48] 7 U.S.C. 2321 et seq.

[49] Public Law 101-553, 104 Stat. 2749 (1990) (codified as amended at 17 U.S.C. 101).

[50] See Letter from Professor Glenn Harlan Reynolds to Chairman Robert W. Kastenmeier (dated Sept. 12, 1989).

fourteenth amendment. S. 759 is justified under the Commerce Clause and the fourteenth amendment.

Under the Patent Clause, Congress is granted exclusive power to promote the sciences by granting limited exclusive rights to a patented product.[51] Congress' ability to abrogate State sovereign immunity logically falls within the Government's power to protect patent holders, having the effect of promoting future innovation.

The authority to abrogate State immunity in relation to patent and trademark infringement suits also falls within the Commerce Clause.[52] The Patent Clause was included in the Constitution because of the failure of individual State patent systems under the Articles of Confederation to be effective. Thus, the need for a uniform system of patents is clear. Furthermore, the Supreme Court in *Pennsylvania* v. *Union Gas* [53] held that the States gave up their right to sovereign immunity in granting Congress the right to regulate interstate commerce, making the bill a justified application of the Federal Government's Commerce Clause powers.

In the context of trademarks, utilizing the Commerce Clause is the proper response to the limited and inconsistent substitutes available on the state level. Without this legislation, the potential chilling effect on the development of trademarks would become a reality. This legislation is illustrative of the intent of the framers to encourage commerce.

Finally, the bill is justified as an acceptable method of enforcing the provisions of the fourteenth amendment.[54] The Court in *Lemelson* v. *Ampex Corp.* recognized that a patent is a form of property, holding that a right to compensation exists for patent infringement.[55] Additionally, because courts have continually recognized patent rights as property, the fourteenth amendment prohibits a State from depriving a person of property without due process of law.[56] The same holds true in the area of trademarks. Furthermore, the fourteenth amendment gives Congress the authority to enforce this right. S. 758 and S. 759 represent a valid extension of Congress' right to protect the property rights of patent and trademark holders.

The need to abrogate State sovereign immunity for intellectual property is clear for several reasons. The primary reason is that allowing such immunity cuts against article 1, sec. 8, clause 8 of the U.S. Constitution, which grants Congress the power to issue patents for limited periods to promote the progress of science. This provision provides the inventor with a period to recoup the expenses involved with the discovery of important inventions, as well as to receive a reward for his or her efforts.

Allowing a State to freely infringe upon the protection granted by the Patent Code and the Trademark Act effectively discourages future innovative. While this is certainly true in general, it is especially true with respect to any problem which is unique to States or

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[51] U.S. Const., art. I, sec. 8, cl. 8.

[52] U.S. Const., art. I, sec. 8, cl. 3. The Congress shall have the power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[53] 491 U.S. 1 (1989).

[54] U.S. Const., amend. 14, secs. 1, 5.

[55] 372 F. Supp. 708 (N.D. Ill. 1974). *See also supra*, text accompanying footnote 20.

[56] U.S. Const., amend. 14, sec. 1.

State entities. A similar problem existed with copyright laws prior to passage of the Copyright Remedy Clarification Act of 1991.

In addition, the current state of the law leaves the protection afforded to patent and trademark holders dependant on the status of the infringing party. A public school such as UCLA can sue a private school such as USC for patent infringement, yet USC cannot sue UCLA for the same act.[57] The status of an infringing party should have no relation to the amount of investment made in a product. State universities should not have an unjustified advantage in the commercial arena over private universities for funding because of the potential for immunity from patent infringement actions.

The Federal Government has already consented to suit in Federal court for patent infringement,[58] leaving only States immune from possible liability for patent infringement. To promote innovation, the Patent Code and the Trademark Act must be applied uniformly. Just as there is no distinction between a State versus a private school, there is no distinction between the Federal Government and a State government, especially to the patent or trademark holder who must sacrifice the results of his/her investments at the hands of an immune governmental body. This legislation will rectify the situation and provide uniform protection throughout the patent and trademark systems.

Furthermore, there is no indication that Congress intended to provide States with immunity from patent or trademark infringement suits. In fact, the text of the Patent Code and relevant authority demonstrates that Congress did not intend to exclude States from liability.[59]

H. DAMAGES AND ATTORNEY'S FEES

During the committee consideration of S. 758 and S. 759, an amendment to S. 758 was offered by Senator Thurmond, on behalf of Senator Grassley and himself, that would have limited reimbursement for attorney's fees and costs and prohibited recovery of treble damage awards in suits against States and their instrumentalities. The Thurmond-Grassley amendment allowed for attorney's fees and expenses against the States only in cases brought by businesses with not more than 500 employees and a net worth of not more than $5 million, tax exempt organizations, and individuals with a net worth of not more than $1 million.

The language of the amendment was similar to an amendment offered by Senator Grassley to the Copyright Clarification Act of 1990.[60] During consideration of that bill, the Grassley amendment was passed out of committee by voice vote after minimal debate. However, it was removed after further review in conference.

A restriction on attorney's fees does not limit costs, rather it limits the plaintiff's ability to obtain full and equitable compensa-

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[57] 135 Congressional Record 21 (Mar. 2, 1990, statement of Senator Dennis DeConcini).
[58] 28 U.S.C. 1498.
[59] See House Judiciary Committee Report on Patent Competitiveness and Technological Innovation, H. Rept. 101-960, pt. 1, Oct. 26, 1990, 101st Cong. 2d sess.
[60] Public Law 101-553, 104 Stat. 2749 (1990).

tion.[61] Limiting attorney's fees creates a deterrent to enforcing valid rights of plaintiffs and makes the defendant States more likely to force litigation rather than seek reasonable settlements.[62] Furthermore, the Thurmond-Grassley amendment would have established a de facto compulsory patent license, as States and their entities would be liable for only actual damages. These damages constitute nothing more than a royalty for the illegal use of the protected property of others.[63] Unlike a legitimate compulsory license, these royalties would only be paid under the threat of litigation, if then.

In July 1990, the Register of Copyrights, addressing the Grassley amendment to the Copyright Remedy Clarification Act, found the amendment to be unnecessary and unwise.[64] The Register noted that judges do not generally award large fees for the benefit of affluent plaintiffs who sue nonprofit defendants. He advocated preserving the discretionary right of a judge to award attorney's fees in the event of an outrageous or flagrant infringement. The Register concluded that, "[I]f the States violate the copyright law, they are injuring the property rights of citizens and the status of the citizen should not affect the remedies available. Moreover, by depriving more affluent citizens of attorney's fees, you will discourage some of them from filing lawsuits to vindicate their property rights." [65]

The Thurmond-Grassley amendment also contained language which would have eliminated recovery of treble damages against the States.[66] The standard for receiving treble damages in a patent suit is very difficult to attain. A plaintiff must prove that the infringement was willful under 35 U.S.C. 284. In testimony before the House Hearings on the Patent Remedy Clarification Act, Professor Robert Merges testified that:

> [n]ormally, willful infringement is reserved for cases of egregious conduct—typically where a competitor, a commercial competitor, knows about the patent and flagrantly violated it * * * It is not always clear that with all the products that [government] buy[s], that anyone is really aware of the patent status of any particular invention or device or product.

The fact that treble damages are awarded in only the most flagrant cases is justification for the retention of the remedy. The standard currently utilized protects defendants, including States, from undue hardship, extending liability only when the court finds

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[61] Letter to Senator Charles Grassley from Michael J. Roth, corporate patent counsel, Pioneer Hi-Bred International, Inc., Des Moines, IA, dated July 15, 1991, p. 1.

[62] Id.

[63] Letter to Senator Dennis DeConcini from Donald W. Banner, president, Intellectual Property Owners, Inc., Washington, DC, dated Feb. 5, 1992, p. 2.

[64] Letter from Ralph Oman, Register of Copyrights, to Robert W. Kastenmeier (July 30, 1990).

[65] Id.

[66] See Senate Judiciary Committee Executive Meeting, Feb. 6, 1992. In response to Senator Thurmond's contention, Senator DeConcini Responded:

> If the States violate citizen's rights, they ought to be subject to the same penalty as anybody else, and that is all this [bill] does; plus, it is totally discretionary. You have to prove a willful and malicious act in order to get treble damages, and then it is discretionary if the judge wants to award them. On attorney's fees, you have to prove an exceptional case and then the judge can approve attorney's fees. It is only the right thing to do for anybody.

the conduct to be so offensive that treble recovery is justified. There is no reason to extend liability to the States, but to then limit it in instances where the States' improprieties are particularly egregious.

During the 101st Congress, the House Judiciary Committee also considered limitations on State liability for patent infringement. However, proposals to retain State immunity with respect to attorney's fees and treble damages were rejected by that committee. Opposition to the Thurmond-Grassley amendment was voiced by several groups including the American Chemical Society, the American Intellectual Property Law Association, and Intellectual Property Owners, Inc.[67]

I. CONCLUSION

The committee concludes that both S. 758 and S. 759 are proper exercises of Congress' constitutional authority to abrogate State sovereign immunity. Congress never intended for States to be immune from patent and/or trademark infringement suits in Federal court. The Supreme Court held that Congress may abrogate State sovereign immunity only by the clear terms in the text of the act. Based on previous court decisions, S. 758 and S. 759 will constitutionally abrogate State sovereign immunity, providing a uniform system of protection. If Congress is to fulfill its constitutional obligation to protect, and promote the sciences, S. 758 and S. 759 are measures that merit enactment.

IV. VOTE OF THE COMMITTEE

On February 6, 1992, with a quorum present, the Senate Judiciary Committee considered S. 758 and S. 759. The Grassley/Thurmond amendment failed by a vote of 4 to 9 with the vote as indicated below:

YEAS (4)	NAYS (9)	NOT VOTING
Thurmond	Biden	Specter
Simpson	Kennedy	
Grassley (by proxy)	Metzenbaum	
Brown	DeConcini	
	Hatch	
	Heflin	
	Leahy (by proxy)	
	Simon	
	Kohl (by proxy)	

Following the vote on the amendment, the committee approved both bills by voice vote.

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[67] Letter to Senator Joseph Biden, from Ernest L. Eliel, president, American Chemical Society, Washington, DC, dated Jan. 29, 1992.

V. TEXT OF S. 758

[102d Cong., 1st sess.]

A BILL To clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents and plant variety protections, and that all the remedies can be obtained in such suit that can be obtained in a suit against a private entity

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Patent and Plant Variety Protection Remedy Clarification Act".

SEC. 2. LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS FOR INFRINGEMENT OF PATENTS.

(a) LIABILITY AND REMEDIES.—(1) Section 271 of title 35, United States Code, is amended by adding at the end the following:

"(h) As used in this section, the term 'whoever' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.".

(2) Chapter 29 of title 35, United States Code, is amended by adding at the end the following new section:

"§ 296. Liability of States, instrumentalities of States, and State officials for infringement of patents

"(a) IN GENERAL.—Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent under section 271, or for any other violation under this title.

"(b) REMEDIES.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any private entity. Such remedies include damages, interest, costs, and treble damages under section 284, attorney fees under section 285, and the additional remedy for infringement of design patents under section 289.".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 29 of title 35, United States Code, is amended by adding at the end the following new item:

"Sec. 296. Liability of States, instrumentalities of States, and State officials for infringement of patents.".

SEC. 3. LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS FOR INFRINGEMENT OF PLANT VARIETY PROTECTION.

(a) INFRINGEMENT OF PLANT VARIETY PROTECTION.—Section 111 of the Plant Variety Protection Act (7 U.S.C. 2541) is amended—

(1) by inserting "(a)" before "Except as otherwise provided"; and

(2) by adding at the end thereof the following new subsection:

"(b) As used in this section, the term 'perform without authority' includes performance without authority by any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same extent as any nongovernmental entity.".

(b) LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS FOR INFRINGEMENT OF PLANT VARIETY PROTECTION.—Chapter 12 of the Plant Variety Protection Act (7 U.S.C. 2561 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 130. LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS FOR INFRINGEMENT OF PLANT VARIETY PROTECTION.

"(a) Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of plant variety protection under section 111, or for any other violation under this title.

"(b) In a suit described in subsection (a) for violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any private entity. Such remedies include damages, interest, costs, and treble damages under section 124, and attorney fees under section 125.".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect with respect to violations that occur on or after the date of the enactment of this Act.

VI. SECTION-BY-SECTION ANALYSIS OF S. 758

SECTION 1

This section establishes the short title of this legislation as the "Patent and Plant Variety Protection Remedy Clarification Act."

SECTION 2

This section has three main provisions intended to meet the *Atascadero* rule.

First, the section modifies the infringement section of the Patent Code (35 U.S.C. 271) to include a definition of the term "whoever." This definition makes it expressly clear that States and State entities are subject to liability for patent infringement in the same way as any other nongovernmental entity.

Second, the section adds a new section to chapter 29 of title 35 that expressly abrogates State sovereign immunity under the eleventh amendment. It ensures that States will be subject to suit in Federal court by eliminating State immunity under any doctrine of sovereign immunity.

The last section of S. 758 addresses the remedies available to patent holders who successfully prosecute a patent infringement claim. While courts differed in the past on what remedies were available, this section makes it clear that remedies in both law and equity are available against State and State entities to the same extent that such remedies are available against private entities. The section expressly provides for the recovery of damages, interest, costs, as well as treble damages under section 284 of title 35, attorney's fees under section 285, and a remedy for design infringement under section 289.

SECTION 3

This section provides clarification to the Plant Variety Protection Act (7 U.S.C. 2541) which is analogous to the clarification previously described for the Patent Code (sec. 2 of S. 758).

SECTION 4

The amendments under this act are effective only as to violations occurring on or after the effective date of the law. The effective date is the date of enactment.

VII. TEXT OF S. 759

[102d Cong., 1st sess.]

A BILL To amend certain trademark laws to clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of trademarks, and that all the remedies can be obtained in such suit that can be obtained in a suit against a private entity

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

SECTION 1. SHORT TITLE.

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

SEC. 2. REFERENCE TO THE TRADEMARK ACT OF 1946.

Except as otherwise expressly provided, whenever in this Act an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the Trademark Act of 1946).

SEC. 3. LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS.

(a) LIABILITY AND REMEDIES.—Section 32(1) of the Act (15 U.S.C. 1114(1)) is amended by adding at the end thereof the following:

"As used in this subsection, the term 'any person' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.".

(b) LIABILITY OF STATES, INSTRUMENTALITIES OF STATES, AND STATE OFFICIALS.—The Act is amended by inserting after section 39 (15 U.S.C. 1121) the following new section:

"SEC. 40. (a) Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act.

"(b) In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any person other than a State, instrumentality of a State, or officer or employee of a State or instrumentality of a State acting in his or her official capacity. Such remedies include injunctive relief under section 34, actual damages, profits, costs and attorney's fees under section 35, destruction of infringing articles under section 36, the remedies provided for under sections 32, 37, 38, 42 and 43, and for any other remedies provided under this Act.".

(c) FALSE DESIGNATION OF ORIGIN AND FALSE DESCRIPTIONS FORBIDDEN.—Section 43(a) of the Act (15 U.S.C. 1125(a)) is amended—

(1) by inserting "(1)" after "(a)"; and

(2) by adding at the end thereof:

"(2) As used in this subsection, the term 'any person' includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.".

(d) DEFINITION.—Section 45 of the Act (15 U.S.C. 1127) is amended by inserting after the fourth undesignated paragraph the following:

"The term 'person' also includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.".

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall take effect with respect to violations that occur on or after the date of the enactment of this Act.

VIII. Section-by-Section Analysis of S. 759

SECTION 1

This section established the short title of this legislation as the "Trademark Remedy Clarification Act."

SECTION 2

This section references the amendments contained within the "Trademark Remedy Clarification Act" as amending 15 U.S.C. 1051 et seq., commonly known as the "Trademark Act of 1946."

SECTION 3

This section amends section 32(1) of the Trademark Act (15 U.S.C. 1114(1)) to include in the term "any person", any State, or instrumentality of a State, and any officer or employee of a State or instrumentality.

Section 3 further amends section 39 (15 U.S.C. 1121) by expressly abrogating the sovereign immunity of the States under the eleventh amendment. By eliminating State immunity under any doctrine of sovereign immunity, this section ensures that States will be subject to suit in Federal court.

Under this section, it is expressly delineated that the remedies available for private actions are now available in actions against the State or instrumentalities thereof.

The section further incorporates the aforementioned definition expanding "any person" to include a State and its instrumentalities amending section 43(a) of the Trademark Act of 1946 (15 U.S.C. 1125(a)).

The final portion of section 3 amends the fourth paragraph of section 45 of the Trademark Act of 1946 (15 U.S.C. 1127) to include within the definition of "person" any State, or instrumentality of a State, and any officer or employee thereof.

SECTION 4

This section establishes the effective date of the bill and clarifies that it only applies to violations occurring on or after the effective date.

IX. Cost Estimate

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 13, 1992.

Hon. JOSEPH R. BIDEN, JR.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN. The Congressional Budget Office has reviewed S. 758, the Patent and Plant Variety Protection Remedy Clarification Act, as ordered reported by the Senate Committee on the Judiciary on February 6, 1992. CBO estimates that enacting this bill would result in no significant cost to the federal government. S. 758 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

In 1985, the U.S. Supreme Court, in *Atascadero State Hospital* v. *Scanlon,* held that the Congress may abrogate state sovereign immunity only by an explicit statement in law. A number of federal circuit courts have applied this reasoning to patent law, deciding that sovereign immunity bars plaintiffs from recovering monetary damages in patent and plant variety infringement suits against state governments. S. 758 would specify that courts may hold states and their instrumentalities liable for monetary damages for infringing upon registered patients and plant varieties.

Enacting S. 758 would result in some increased costs to the federal judiciary because their would be additional lawsuits in federal courts. We estimate that such costs are not likely to be significant. Enactment of this bill would result in increased costs to state and local governments to the extent that courts award monetary damages against states and local governments for patent and plant variety infringements. We cannot estimate these costs, however, because they would depend on the results of legal actions the outcome of which we cannot predict. It is unlikely that the costs incurred by states and localities would be substantial.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are John Webb and Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

X. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that these acts will not have direct regulatory impact.

XI. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 758, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new material is printed in italic; existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 7—AGRICULTURE

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CHAPTER 57—PLANT VARIETY PROTECTION

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§ 2541. Infringement of plant variety protection

(a) Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

(1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;

* * * * * * *

(8) instigate or actively induce performance of any of the foregoing acts.

(b) As used in this section, the term "perform without authority" includes performance without authority by any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

* * * * * * *

§ 2561. Remedy for infringement of plant variety protection

An owner shall have remedy by civil action for infringement of his plant variety protection under section 2541 of this title. If a variety is sold under the name of a variety shown in a certificate, there is a prima facie presumption that it is the same variety.

(a) Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of plant variety protection under section 111, or for any other violation under this title.

(b) In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such

remedies are available for such a violation in a suit against any private entity. Such remedies include damages, interest, costs, and treble damages under section 124, and attorney fees under section 125.

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TITLE 35—PATENTS

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CHAPTER 29—REMEDIES FOR INFRINGEMENT OF PATENT, AND OTHER ACTIONS

Sec.
281. Remedy for infringement of patent.
* * * * * * *
295. Presumption: Product made by patented process.
296. Liability of States, instrumentalities of States, and State officials for infringement of patents.
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§ 271. Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefore, infringes the patent.

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(g) Whoever without authority imports into the United States or sells or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after—

(1) it is materially changed by subsequent processes; or

(2) it becomes a trivial and nonessential component of another product.

(h) As used in this section, the term "whoever" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernment entity.

* * * * * * *

§ 296. Liability of States, instrumentalities of States, and State officials for infringement of patents

(a) IN GENERAL.—Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the elev-

enth amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent under section 271, or for any other violation under this title.

(b) REMEDIES.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any private entity. Such remedies include damages, interest, costs, and treble damages under section 284, attorney fees under section 285, and the additional remedy for infringement of design patents under section 289.

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XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 759, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new material is printed in italic; existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 15—COMMERCE AND TRADE

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CHAPTER 22—TRADE-MARKS

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§ 1114. Remedies; infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the regis-

trant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

As used in this subsection, the term "any person" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(2) Notwithstanding any other provision of this Act, the remedies given to the owner of a right infringed under this Act or to a person bringing an action under section 43(a) shall be limited as follows:

(A) Where an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he or she was an innocent infringer or innocent violator, the owner of the right infringed or person bringing the action under section 43(a) shall be entitled as against such infringer or violator only to an injunction against future printing.

* * * * * * *

§ 1121. Jurisdiction of Federal courts; State and local requirements that registered trademarks be altered or displayed differently; prohibition

(a) The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

SEC. 40. (a) Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act.

(b) In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any

person other than a State, instrumentality of a State, or officer or employee of a State or instrumentality of a State acting in his or her official capacity. Such remedies include injunctive relief under section 34, actual damages, profits, costs and attorney's fees under section 35, destruction of infringing articles under section 36, the remedies provided for under sections 32, 37, 38, 42 and 43, and for any other remedies provided under this Act.

* * * * * * *

§ 1125. False designations of origin and false descriptions forbidden

(a)*(1)* Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(b) Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

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§ 1127. Construction and definitions; intent of chapter

In the construction of this chapter, unless the contrary is plainly apparent from the context—

The United States includes and embraces all territory which is under its jurisdiction and control.

The word "commerce" means all commerce which may lawfully be regulated by Congress.

The term "principal register" refers to the register provided for by sections 1051 to 1072 of this title, and the term "supple-

mental register" refers to the register provided for by sections 1091 to 1096 of this title.

The term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.

The term "person" also includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

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