

Testimony of

# **The Honorable Maria Cantwell**

February 27, 2002

Thank you, Mr. Chairman for holding this hearing. The issue before the committee today is not only important to intellectual property holders but also challenges this Committee and the Congress to properly exercise its powers to enact laws that support innovation while providing equal treatment for both state-run and private sector entities. I am cognizant of the constitutional framework within which we must craft our efforts. I am also concerned with any negative impacts that legislative proposals might have on the academic community. I look forward to exploring these issues with our witnesses with an eye towards supporting innovation and resolving current inequities in the marketplace.

The U.S. Constitution gives Congress the power to enact laws to give to authors and inventors certain rights in their creations for a limited time. In addition to encouraging new inventions and creative works, our system of strong intellectual property rights has created jobs, generated billions of dollars in revenue, and enriched the lives of the American people and the world. Our intellectual property laws have provided incentive to inventors and intellectual property owners by giving them the ability to enforce their rights against infringement in Federal court and recoup their investments. The issue of sovereign immunity is relatively new in the context of intellectual property law. If some actors in the marketplace are immune from infringement liability, the system may be less effective in achieving its goals. So I am concerned with the course that the Supreme Court has charted, and look forward to working with the Chairman to correct that course.

Congress first acted to clarify state sovereignty conflicts in intellectual property cases in the early 1990's. Congress passed three "Remedy Clarification" acts clarifying its intent to abrogate state sovereign immunity -- providing that no state could claim immunity from copyright, patent, or trademark infringement under the 11th amendment. In passing this legislation, Congress sought to clarify the law providing that all potential infringing parties were to be treated similarly.

Then in the late 1990s, the Supreme Court decided three cases that limited Congress' authority to abrogate state sovereign immunity in the context of patent and trademark law, *Seminole Tribe of Florida v. Florida*, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*. Subsequently, the 5th Circuit held that the Copyright Remedy Clarification Act does not abrogate state sovereign immunity. Taken together, these decisions essentially voided the three clarifying laws that Congress enacted in the early 1990's.

Currently, states are able to bring suit against those who infringe their intellectual property rights, while claiming immunity from similar suits against them. Unless some significant policy concern overcomes equity in application, those who infringe upon the intellectual property rights of another should be equally subject to federal infringement suits. Further, to be effective and

provide proper incentives to innovation, I believe that intellectual property laws should be applied equally to all players in the market.

I want to note a broader concern. The Supreme Court decisions driving our need to legislate in this area reflect an extremely disconcerting shift in the Supreme Court's perspective on the respective roles of Congress and the Court. We have an obligation to those who have elected us to preserve the appropriate Constitutional role of Congress.

The Supreme Court's decisions at issue today have produced a complex and daunting legal landscape, one that forces us to move forward carefully and within the proper constitutional framework. I am confident that balance and equity can be brought back to this legal setting, and I appreciate the Chairman's efforts to resolve this problem in a manner sensitive to both state interests and the interests of other intellectual property owners.

I look forward to hearing the witnesses today and exploring the constitutional challenges that face this committee.