

December 19, 2006

Attorney General Kelly A. Ayotte
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301

Dear Attorney General Ayotte:

This serves essentially as executive summary for an attached Pierce Law Intellectual Property Amicus Clinic memorandum. It respectfully calls on New Hampshire's chief legal and law enforcement officer for action on two copyright-related matters, one legislative and one judicial.

The first matter of concern is N.H. Rev. Stat. Ann. (RSA) §§ 352:1, :2. After Jan. 1, 1978, those sections have been preempted by 17 U.S.C. 301(a). Since then, states' jurisdiction over infringement has been limited to works not yet "fixed in a tangible medium of expression." *Id.*

Remaining State authority is illustrated by RSA § 352-A:2, the statute initially involved in *State v. Cohen*, 907 A.2d 983 (N.H. 2006). Unfortunately, *Cohen* also illustrates that the impact of 17 U.S.C. § 301(a) will escape the notice of New Hampshire prosecutors and judges as long as RSA §§ 352:1, :2 remain on the books. *See* 907 A.2d at 986 ("if Cohen himself did not produce these compact discs, whoever did so likely committed several hundred State misdemeanors.... *See* RSA 352:1, :2...")

We respectfully urge you to pursue repeal of RSA §§ 352:1, 2 as soon as possible. Meanwhile, federal preemption of those sections should be brought to the attention of all State prosecutors.

The second matter of concern is *State v. Nelson*, 150 N.H. 569 (2004). We neither have nor had any stake in that case, but I sent a letter (copy enclosed) to the Court and to both attorneys as soon as I learned of the opinion. My reasons for believing that Mr. Nelson's conviction is null and void were apparently too briefly sketched, but the enclosure should rectify that. Moreover, apparent failure of Mr. Heed and his associates to take action prior to your appointment seems unimportant if justice is to be served in that particular prosecution and future mischief is to be avoided here and elsewhere.

Two colleagues who teach or have taught copyright are in full accord and willing to so state if necessary. Moreover, I am the moderator of an IP Professors list and could get addition support if warranted.

Finally, of course, should you need further research with regard to either matter, the Clinic is eager to cooperate.

Sincerely,

Thomas G. Field, Jr.

Professor of Law

Director, Intellectual Property Amicus Clinic

enclosures

cc: Eileen Fox, Clerk of Court, New Hampshire Supreme Court