

106TH CONGRESS  
1ST SESSION

# S. 1835

To restore Federal remedies for violations of intellectual property rights  
by States, and for other purposes.

---

IN THE SENATE OF THE UNITED STATES

OCTOBER 29, 1999

Mr. LEAHY introduced the following bill; which was read twice and referred  
to the Committee on the Judiciary

---

## A BILL

To restore Federal remedies for violations of intellectual  
property rights by States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCES; TABLE OF CON-**  
4 **TENTS.**

5 (a) SHORT TITLE.—This Act may be cited as the  
6 “Intellectual Property Protection Restoration Act of  
7 1999”.

8 (b) REFERENCES.—Any reference in this Act to the  
9 Trademark Act of 1946 shall be a reference to the Act  
10 entitled “An Act to provide for the registration and protec-

1 tion of trade-marks used in commerce, to carry out the  
 2 provisions of certain international conventions, and for  
 3 other purposes”, approved July 5, 1946 (15 U.S.C. 1051  
 4 et seq.).

5 (c) TABLE OF CONTENTS.—The table of contents for  
 6 this Act is as follows:

- Sec. 1. Short title; references; table of contents.  
 Sec. 2. Findings and purposes.

#### TITLE I—STATE PARTICIPATION IN THE FEDERAL INTELLECTUAL PROPERTY SYSTEM

##### SUBTITLE A—DEFINITIONS

- Sec. 101. Definitions.

##### SUBTITLE B—PROCEDURES FOR STATE PARTICIPATION IN THE FEDERAL INTELLECTUAL PROPERTY SYSTEM

- Sec. 111. Opt-in procedure.  
 Sec. 112. Breach of assurance by a State.  
 Sec. 113. Consequences of breach of assurance by a State.

##### SUBTITLE C—ADMINISTRATION OF PROCEDURES FOR STATE PARTICIPATION IN THE FEDERAL INTELLECTUAL PROPERTY SYSTEM

- Sec. 121. Notification by court of State assertion of sovereign immunity.  
 Sec. 122. Confirmation by Commissioner of Patents and Trademarks of State  
assertion of sovereign immunity.  
 Sec. 123. Publication by Commissioner of Patents and Trademarks of State as-  
sertion of sovereign immunity.  
 Sec. 124. Rulemaking authority.

##### SUBTITLE D—AMENDMENTS TO THE FEDERAL INTELLECTUAL PROPERTY LAWS

- Sec. 131. Conditions for State participation in the Federal patent system.  
 Sec. 132. Conditions for State participation in the Federal plant variety protec-  
tion system.  
 Sec. 133. Conditions for State participation in the Federal copyright system.  
 Sec. 134. Conditions for State participation in the Federal mask work system.  
 Sec. 135. Conditions for State participation in the Federal original design sys-  
tem.  
 Sec. 136. Conditions for State participation in the Federal trademark system.  
 Sec. 137. No retroactive effect.

#### TITLE II—RESTORATION OF PROTECTION FOR FEDERAL INTELLECTUAL PROPERTY RIGHTS

- Sec. 201. Liability of States for patent violations.  
 Sec. 202. Liability of States for violation of plant variety protection.

- Sec. 203. Liability of States for copyright violations.  
 Sec. 204. Liability of States for mask work violations.  
 Sec. 205. Liability of States for original design violations.  
 Sec. 206. Liability of States for trademark violations.  
 Sec. 207. Rules of construction.

TITLE III—EFFECTIVE DATES

- Sec. 301. Effective dates.  
 Sec. 302. Severability.

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) FINDINGS.—Congress makes the following find-  
 3 ings:

4 (1) The protection of Federal intellectual prop-  
 5 erty rights is of critical importance to the Nation’s  
 6 ability to compete in the global market.

7 (2) There is a strong Federal interest in the de-  
 8 velopment of uniform and consistent law regarding  
 9 Federal intellectual property rights, and in the ful-  
 10 fillment of international treaty obligations that the  
 11 Federal Government has undertaken.

12 (3) Prior to 1985 and the Supreme Court rul-  
 13 ing in *Atascadero State Hospital v. Scanlon*, 473  
 14 U.S. 234 (1985) (in this section referred to as  
 15 “Atascadero”), owners of Federal intellectual prop-  
 16 erty rights could fully protect their rights against in-  
 17 fringement by States.

18 (4) Following *Atascadero*, a number of courts  
 19 held that Federal patent, copyright and trademark  
 20 laws failed to contain the clear statement of intent  
 21 to abrogate State sovereign immunity necessary to

1 permit owners of Federal intellectual property rights  
2 to protect their rights against infringement by  
3 States.

4 (5) In 1990, Congress passed the Copyright  
5 Remedy Clarification Act (Public Law 101–553), to  
6 clarify its intent to abrogate State sovereign immu-  
7 nity from suits for infringement of copyrights and  
8 exclusive rights in mask works.

9 (6) In 1992, Congress passed the Patent and  
10 Plant Variety Protection Remedy Clarification Act  
11 (Public Law 102–206) and the Trademark Remedy  
12 Clarification Act (Public Law 102–542) to clarify its  
13 intent to abrogate State sovereign immunity from  
14 suits for infringement of patents, protected plant va-  
15 rieties and trademarks.

16 (7) In 1996, the Supreme Court held in *Semi-*  
17 *nole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)  
18 (in this section referred to as “Seminole Tribe”)  
19 that Congress may not abrogate State sovereign im-  
20 munity under article I of the United States Con-  
21 stitution. Under the Supreme Court decision in *Sem-*  
22 *inole Tribe*, the Copyright Remedy Clarification Act,  
23 the Patent and Plant Variety Protection Remedy  
24 Clarification Act, and the Trademark Remedy Clari-  
25 fication Act could not be sustained under clause 3

1 or 8 of section 8 of article I of the United States  
2 Constitution.

3 (8) In 1999, the Supreme Court held in Florida  
4 Prepaid Postsecondary Education Expense Board v.  
5 College Savings Bank, 119 S. Ct. 2199 (1999) (in  
6 this section referred to as “Florida Prepaid”) that  
7 the Patent and Plant Variety Protection Remedy  
8 Clarification Act could not be sustained as legisla-  
9 tion enacted to enforce the guarantees of the due  
10 process clause of the fourteenth amendment of the  
11 United States Constitution.

12 (9) As a result of the Supreme Court’s decision  
13 in Florida Prepaid, and absent remedial legislation,  
14 a patent owner’s only remedy under the Federal pat-  
15 ent laws against a State infringer of a patent is pro-  
16 spective relief under the doctrine of *Ex parte Young*,  
17 209 U.S. 123 (1908).

18 (10) On the same day that it decided Florida  
19 Prepaid, the Supreme Court in *College Savings*  
20 *Bank v. Florida Prepaid Postsecondary Education*  
21 *Expense Board*, 119 S. Ct. 2219 (1999) (in this sec-  
22 tion referred to as “College Savings Bank”) ex-  
23 tended State sovereign immunity to purely commer-  
24 cial activities of certain State entities.

1           (11) The Seminole Tribe, Florida Prepaid and  
2 College Savings Bank decisions have the potential  
3 to—

4           (A) deprive private intellectual property  
5 owners of effective protection for both their  
6 Federal intellectual property rights and their  
7 constitutional rights under the fifth and four-  
8 teenth amendments of the United States Con-  
9 stitution; and

10          (B) compromise the ability of the United  
11 States to fulfill its obligations under a variety  
12 of international treaties.

13          (12) Article I of the United States Constitution  
14 empowers, but does not require, Congress to offer  
15 Federal intellectual property protection to any per-  
16 son on such terms as appear reasonable and appro-  
17 priate to serve the public interest by encouraging  
18 scientific and artistic innovation and promoting com-  
19 merce and fair competition.

20          (13) Congress can best accomplish the public  
21 interests described under paragraph (12) by pro-  
22 viding clear and certain national rules protecting  
23 Federal intellectual property rights that establish a  
24 level playing field for everyone, including States.

1           (14) In recent years, States have increasingly  
2           elected to avail themselves of the benefits of the  
3           Federal intellectual property system by obtaining  
4           and enforcing Federal intellectual property rights.

5           (15) Any State should continue to enjoy the  
6           benefits of the Federal intellectual property system,  
7           if that State accepts the burdens with the benefits.

8           (16) A State should not enjoy the benefits of  
9           the Federal intellectual property laws unless it is  
10          prepared to have those same laws enforced against  
11          that State.

12          (17) Limiting the ability of a State to enjoy the  
13          benefits of the Federal intellectual property system  
14          will neither prevent the State from providing any  
15          services to citizens of that State, nor stop the State  
16          from engaging in any commercial activity.

17          (18) If a State waives its sovereign immunity  
18          from suit under the Federal intellectual property  
19          laws, any constitutional violation resulting from its  
20          infringement of a Federal intellectual property right  
21          may be remedied in an infringement suit in Federal  
22          court.

23          (19) If a State does not waive sovereign immu-  
24          nity with respect to Federal intellectual property  
25          laws, it is necessary and appropriate for Congress to

1 exercise its power under section 5 of the fourteenth  
2 amendment to the United States Constitution to  
3 protect the constitutional rights of owners of Federal  
4 intellectual property rights, which are property inter-  
5 ests protected by the fifth and fourteenth amend-  
6 ments of the United States Constitution.

7 (20) According to the Supreme Court in *College*  
8 *Savings Bank*, “The hallmark of a protected prop-  
9 erty interest is the right to exclude others.”. Pat-  
10 ents, copyrights, and trademarks are constitutionally  
11 cognizable species of property because they secure  
12 for their owners rights of exclusion against others.

13 (21) A State may not exercise any of the rights  
14 conferred by a Federal intellectual property law  
15 without the authorization of the right holder, except  
16 in the manner and to the extent authorized by such  
17 law. In *Goldstein v. California*, 412 U.S. 546  
18 (1973), the Supreme Court stated “When Congress  
19 grants an exclusive right or monopoly, its effects are  
20 pervasive; no citizen or State may escape its reach.”.

21 (22) Because a State engaged in an infringing  
22 use of a Federal intellectual property right is acting  
23 outside the scope of its sovereign power, such State  
24 fails to meet the public use requirement for a taking  
25 of property imposed by the fifth amendment of the



1 United States Constitution (made applicable to the  
2 States through the fourteenth amendment).

3 (23) According to the Supreme Court in Hawaii  
4 Housing Authority v. Midkiff, 467 U.S. 229 (1984),  
5 a claim for the taking of property in violation of the  
6 public use requirement is ripe at the time of the tak-  
7 ing.

8 (24) A violation of the Federal intellectual  
9 property laws by a State may also constitute an un-  
10 constitutional deprivation of property under the due  
11 process clause of the fourteenth amendment of the  
12 United States Constitution.

13 (25) In order to enforce Federal intellectual  
14 property rights against States under the fifth and  
15 fourteenth amendments of the United States Con-  
16 stitution, it is appropriate to provide a right to en-  
17 join any continuing or future constitutional violation  
18 and a right to recover sufficient damages to make  
19 the injured party whole.

20 (26) Violations of the Federal intellectual prop-  
21 erty laws by States not only impair the constitu-  
22 tional rights of the individual intellectual property  
23 owner, but also discourage technological innovation  
24 and artistic creation. Moreover, the potential for fu-  
25 ture violations to go unremedied as a result of State

1 sovereign immunity prevents intellectual property  
2 owners from securing fair and efficient fees in li-  
3 censing negotiations.

4 (27) States and instrumentalities of States have  
5 been involved in many intellectual property cases.  
6 Some States have violated Federal intellectual prop-  
7 erty rights and the constitutional provisions which  
8 protect such rights and have refused to waive their  
9 constitutional immunities, thereby securing unfair  
10 economic advantages over other States and private  
11 entities with whom such States may be in competi-  
12 tion.

13 (28) States and instrumentalities of States have  
14 become increasingly involved in commerce involving  
15 intellectual property rights in recent years, and this  
16 trend is likely to continue. As a result, violations of  
17 Federal intellectual property rights by States have  
18 become increasingly more widespread.

19 (29) It is not practical for Congress to engage  
20 in an ongoing particularized inquiry as to which  
21 States are violating the United States Constitution  
22 at any given time. Accordingly, a national, uniform  
23 remedy for constitutional violations is appropriate.

24 (b) PURPOSES.—The purposes of this Act are to—

1           (1) provide States an opportunity to participate  
2           in the Federal intellectual property system on equal  
3           terms with private entities;

4           (2) reaffirm the availability of prospective relief  
5           to prevent State officials from violating Federal in-  
6           tellectual property laws, and to allow challenges to  
7           assertions by State officials of rights secured under  
8           such laws, on the same terms and in the same man-  
9           ner as if such State officials were private parties;

10          (3) provide other Federal remedies to owners of  
11          Federal intellectual property rights as against the  
12          States, State instrumentalities and State officials, to  
13          the maximum extent permitted by the United States  
14          Constitution; and

15          (4) abrogate State sovereign immunity in suits  
16          alleging violations of Federal intellectual property  
17          laws or challenging assertions of Federal intellectual  
18          property rights by States to the maximum extent  
19          permitted by the United States Constitution, pursu-  
20          ant to Congress's powers under the fifth and four-  
21          teenth amendments of the United States Constitu-  
22          tion and any other applicable provisions.

1 **TITLE I—STATE PARTICIPATION**  
2 **IN THE FEDERAL INTELLEC-**  
3 **TUAL PROPERTY SYSTEM**

4 **Subtitle A—Definitions**

5 **SEC. 101. DEFINITIONS.**

6 In this title:

7 (1) FEDERAL INTELLECTUAL PROPERTY  
8 LAW.—The term “Federal intellectual property law”  
9 means a statute or regulation of the United States  
10 that governs the creation or protection of any form  
11 of intellectual property, including a patent, protected  
12 plant variety, copyright, mask work, original design,  
13 trademark, or service mark.

14 (2) FEDERAL INTELLECTUAL PROPERTY  
15 RIGHT.—The term “Federal intellectual property  
16 right” means any of the rights secured under a Fed-  
17 eral intellectual property law.

18 (3) FEDERAL INTELLECTUAL PROPERTY SYS-  
19 TEM.—The term “Federal intellectual property sys-  
20 tem” means the system established under the Fed-  
21 eral intellectual property laws for protecting and en-  
22 forcing Federal intellectual property rights, includ-  
23 ing through the award of damages, injunctions, and  
24 declaratory relief.

1 **Subtitle B—Procedures for State**  
2 **Participation in the Federal In-**  
3 **tellectual Property System**

4 **SEC. 111. OPT-IN PROCEDURE.**

5 (a) IN GENERAL.—No State or any instrumentality  
6 of that State may acquire a Federal intellectual property  
7 right unless the State opts into the Federal intellectual  
8 property system.

9 (b) AGREEMENT TO WAIVE SOVEREIGN IMMUN-  
10 NITY.—A State opts into the Federal intellectual property  
11 system by providing an assurance under the procedures  
12 established in subtitle D of this title with respect to the  
13 State’s agreement to waive sovereign immunity from suit  
14 in Federal court in any action against the State or any  
15 instrumentality or official of that State—

16 (1) arising under a Federal intellectual property  
17 law; or

18 (2) seeking a declaration with respect to a Fed-  
19 eral intellectual property right.

20 **SEC. 112. BREACH OF ASSURANCE BY A STATE.**

21 (a) IN GENERAL.—If a State asserts sovereign immu-  
22 nity contrary to an assurance provided under the proce-  
23 dures established in subtitle D of this title, such State  
24 shall be deemed to have breached such assurance.

1 (b) ASSERTION OF IMMUNITY.—A State asserts sov-  
2 ereign immunity for purposes of subsection (a) if—

3 (1) the State or any instrumentality or official  
4 of that State is found to have asserted the State’s  
5 sovereign immunity in an action against the State or  
6 any instrumentality or official of that State—

7 (A) arising under a Federal intellectual  
8 property law; or

9 (B) seeking a declaration with respect to a  
10 Federal intellectual property right; and

11 (2) such State, instrumentality, or official does  
12 not, within a period of 60 days after such finding,  
13 withdraw such assertion of immunity and consent to  
14 the continuation or refileing of the action in which  
15 the finding was made.

16 (c) EFFECTIVE DATE OF BREACH OF ASSURANCE.—  
17 A State shall be deemed to have breached an assurance  
18 on the day after the end of the 60-day period provided  
19 in subsection (b)(2).

20 **SEC. 113. CONSEQUENCES OF BREACH OF ASSURANCE BY A**  
21 **STATE.**

22 (a) ABANDONMENT OF PENDING APPLICATIONS.—  
23 Any application by or on behalf of a State or any instru-  
24 mentality or official of that State for protection arising  
25 under a Federal intellectual property law shall be regarded

1 as abandoned and shall not be subject to revival after the  
2 date referred to under paragraph (2), if that application—

3 (1) contains an assurance provided under the  
4 procedures established in subtitle D; and

5 (2) is pending on the date upon which such  
6 State is deemed to have breached an assurance  
7 under section 112.

8 (b) ESTABLISHMENT OF DEFENSE TO LIABILITY.—

9 (1) IN GENERAL.—No damages or other mone-  
10 tary relief shall be awarded in any action to enforce  
11 a Federal intellectual property right that is or has  
12 been owned by or on behalf of a State or any instru-  
13 mentality of that State at any time during the 5-  
14 year period preceding the date upon which such  
15 State is deemed to have breached an assurance  
16 under section 122.

17 (2) NO RETROACTIVE EFFECT.—The defense  
18 under paragraph (1) shall not be available in any ac-  
19 tion to enforce a Federal intellectual property right  
20 that was owned by or on behalf of a State or an in-  
21 strumentality of a State before the effective date of  
22 this title.

23 (c) ONE-YEAR BAR ON ACQUISITION OF NEW  
24 RIGHTS.—

1           (1) IN GENERAL.—A State may not opt back  
2 into the Federal intellectual property system under  
3 section 111 during the 1-year period following the  
4 date upon which that State was deemed to have  
5 breached an assurance under section 112.

6           (2) NEW RIGHTS UNENCUMBERED.—Federal  
7 intellectual property rights acquired by or on behalf  
8 of a State or any instrumentality or official of that  
9 State after the State has opted back into the Fed-  
10 eral intellectual property system shall be  
11 unencumbered by any prior breach of an assurance.

12 **Subtitle C—Administration of Pro-**  
13 **cedures for State Participation**  
14 **in the Federal Intellectual Prop-**  
15 **erty System**

16 **SEC. 121. NOTIFICATION BY COURT OF STATE ASSERTION**  
17 **OF SOVEREIGN IMMUNITY.**

18           Not later than 20 days after any finding by a Federal  
19 court that a State or any instrumentality or official of that  
20 State has asserted the State's sovereign immunity from  
21 suit in that court in an action against the State or any  
22 instrumentality or official of that State arising under a  
23 Federal intellectual property law, or seeking a declaration  
24 with respect to a Federal intellectual property right, the  
25 clerk of the court shall notify the Commissioner of Patents



1 and Trademarks. The clerk shall send with the notification  
2 a copy of any order, judgment, or written opinion of the  
3 court.

4 **SEC. 122. CONFIRMATION BY COMMISSIONER OF PATENTS**  
5 **AND TRADEMARKS OF STATE ASSERTION OF**  
6 **SOVEREIGN IMMUNITY.**

7 Not later than 20 days after receiving a notification  
8 under section 121, the Commissioner of Patents and  
9 Trademarks shall—

10 (1) forward such notification to the attorney  
11 general of the State whose sovereign immunity has  
12 been found to have been asserted, together with a  
13 copy of this title; and

14 (2) inquire of the attorney general whether the  
15 State intends to withdraw such assertion of immu-  
16 nity and consent to the continuation or refiling of  
17 the action in which the finding was made within the  
18 60-day period provided in section 112(b)(2).

19 **SEC. 123. PUBLICATION BY COMMISSIONER OF PATENTS**  
20 **AND TRADEMARKS OF STATE ASSERTION OF**  
21 **SOVEREIGN IMMUNITY.**

22 (a) IN GENERAL.—The Commissioner of Patents and  
23 Trademarks, in consultation with the Secretary of Agri-  
24 culture and the Register of Copyrights, shall publish in  
25 the Federal Register and maintain on the Internet infor-

1 mation concerning the participation of each State in the  
2 Federal intellectual property system.

3 (b) CONTENT OF INFORMATION.—The information  
4 under subsection (a) shall include, for each State—

5 (1) whether the State’s sovereign immunity  
6 from suit in Federal court has been asserted under  
7 section 112(b); and

8 (2) the name of the case and court in which  
9 such assertion of immunity was made.

10 **SEC. 124. RULEMAKING AUTHORITY.**

11 The Commissioner of Patents and Trademarks may,  
12 pursuant to section 6 of title 35, United States Code, pro-  
13 mulgate such rules as necessary to implement the provi-  
14 sions of this subtitle.

15 **Subtitle D—Amendments to the**  
16 **Federal Intellectual Property Laws**

17 **SEC. 131. CONDITIONS FOR STATE PARTICIPATION IN THE**  
18 **FEDERAL PATENT SYSTEM.**

19 (a) APPLICATION FOR PATENT.—Section 111 of title  
20 35, United States Code, is amended by adding at the end  
21 the following:

22 “(c) APPLICATION BY OR ON BEHALF OF A STATE.—  
23 When an application for patent or a provisional applica-  
24 tion for patent is made by or on behalf of a State, an

1 instrumentality of a State, or a State official acting in an  
2 official capacity, the Commissioner shall require—

3 “(1) an assurance that, during the pendency of  
4 the application and the term of any patent resulting  
5 from that application, the State’s sovereign immu-  
6 nity from suit in Federal court will be waived in any  
7 action against the State or any instrumentality or  
8 official of that State—

9 “(A) arising under a Federal intellectual  
10 property law; or

11 “(B) seeking a declaration with respect to  
12 a Federal intellectual property right; and

13 “(2) a certification that, during the 1-year pe-  
14 riod preceding the date of the application, the  
15 State’s sovereign immunity from suit in Federal  
16 court has not been asserted in any action described  
17 in paragraph (1).”.

18 (b) ASSIGNMENT AND RECORDATION.—Section 261  
19 of title 35, United States Code, is amended—

20 (1) by striking “Subject to the provisions of  
21 this title” in the first sentence and inserting “(a) IN  
22 GENERAL.—Subject to the provisions of this title”;  
23 and

24 (2) by adding at the end the following:

1       “(b) RECORDATION BY OR ON BEHALF OF A  
2 STATE.—When an assignment, grant, or conveyance of an  
3 application for patent, patent, or any interest in that pat-  
4 ent, is recorded in the Patent and Trademark Office by  
5 or on behalf of a State, an instrumentality of a State, or  
6 a State official acting in an official capacity, the Commis-  
7 sioner shall require—

8               “(1) an assurance that, during the pendency of  
9 the application and the term of any patent resulting  
10 from that application, or during the remaining term  
11 of the patent or any interest in that patent, the  
12 State’s sovereign immunity from suit in Federal  
13 court will be waived in any action against the State  
14 or any instrumentality or official of that State—

15                       “(A) arising under a Federal intellectual  
16 property law; or

17                       “(B) seeking a declaration with respect to  
18 a Federal intellectual property right; and

19               “(2) a certification that, during the 1-year pe-  
20 riod preceding the date of the recordation, the  
21 State’s sovereign immunity from suit in Federal  
22 court has not been asserted in any action described  
23 in paragraph (1).”.

1 **SEC. 132. CONDITIONS FOR STATE PARTICIPATION IN THE**  
2 **FEDERAL PLANT VARIETY PROTECTION SYS-**  
3 **TEM.**

4 (a) APPLICATION FOR CERTIFICATE OF PROTEC-  
5 TION.—Section 52 of the Plant Variety Protection Act (7  
6 U.S.C. 2422) is amended—

7 (1) by striking “An application for a certifi-  
8 cate” in the first sentence and inserting “(a) An ap-  
9 plication for a certificate”; and

10 (2) by adding at the end the following:

11 “(b) When an application for plant variety protection  
12 is made by or on behalf of a State, an instrumentality  
13 of a State, or a State official acting in an official capacity,  
14 the Secretary shall require—

15 “(1) an assurance that, during the pendency of  
16 the application and the term of any plant variety  
17 protection resulting from that application, the  
18 State’s sovereign immunity from suit in Federal  
19 court will be waived in any action against the State  
20 or any instrumentality or official of that State—

21 “(A) arising under a Federal intellectual  
22 property law; or

23 “(B) seeking a declaration with respect to  
24 a Federal intellectual property right; and

25 “(2) a certification that, during the 1-year pe-  
26 riod preceding the date of the application, the

1 State’s sovereign immunity from suit in Federal  
2 court has not been asserted in any action described  
3 in paragraph (1).”.

4 (b) ASSIGNMENT AND RECORDATION.—Section 101  
5 of the Plant Variety Protection Act (7 U.S.C. 2531) is  
6 amended by adding at the end the following:

7 “(e) When an assignment, grant, conveyance, or li-  
8 cense of plant variety protection or application for plant  
9 variety protection is filed for recording in the Plant Vari-  
10 ety Protection Office by or on behalf of a State, an instru-  
11 mentality of a State, or a State official acting in an official  
12 capacity, the Secretary shall require—

13 “(1) an assurance that, during the remaining  
14 term of the plant variety protection, or during the  
15 pendency of the application and the term of any  
16 plant variety protection resulting from that applica-  
17 tion, the State’s sovereign immunity from suit in  
18 Federal court will be waived in any action against  
19 the State or any instrumentality or official of that  
20 State—

21 “(A) arising under a Federal intellectual  
22 property law; or

23 “(B) seeking a declaration with respect to  
24 a Federal intellectual property right; and

1           “(2) a certification that, during the 1-year pe-  
 2           riod preceding the date of the recordation, the  
 3           State’s sovereign immunity from suit in Federal  
 4           court has not been asserted in any action described  
 5           in paragraph (1).”.

6 **SEC. 133. CONDITIONS FOR STATE PARTICIPATION IN THE**  
 7                                   **FEDERAL COPYRIGHT SYSTEM.**

8           Section 409 of title 17, United States Code, is  
 9           amended—

10           (1) in paragraph (10), by striking “and” at the  
 11           end;

12           (2) by redesignating paragraph (11) as para-  
 13           graph (12); and

14           (3) by inserting after paragraph (10) the fol-  
 15           lowing:

16           “(11) if the application is by or on behalf of a  
 17           State or an instrumentality of a State—

18                           “(A) an assurance that, during the pend-  
 19                           ency of the application and the subsistence of  
 20                           any copyright identified in that application, the  
 21                           State’s sovereign immunity from suit in Federal  
 22                           court will be waived in any action against the  
 23                           State or any instrumentality or official of that  
 24                           State—

1           “(i) arising under a Federal intellec-  
2           tual property law; or

3           “(ii) seeking a declaration with re-  
4           spect to a Federal intellectual property  
5           right; and

6           “(B) a certification that, during the 1-year  
7           period preceding the date of the application, the  
8           State’s sovereign immunity from suit in Federal  
9           court has not been asserted in any action de-  
10          scribed in subparagraph (A); and”.

11 **SEC. 134. CONDITIONS FOR STATE PARTICIPATION IN THE**  
12 **FEDERAL MASK WORK SYSTEM.**

13          Section 908 of title 17, United States Code, is  
14 amended by adding at the end the following:

15          “(h) When an application for registration of a mask  
16 work is made by or on behalf of a State or an instrumen-  
17 tality of a State, the Register of Copyrights shall  
18 require—

19           “(1) an assurance that, during the pendency of  
20           the application and any term of protection resulting  
21           from that application, the State’s sovereign immu-  
22           nity from suit in Federal court will be waived in any  
23           action against the State or any instrumentality or  
24           official of that State—



1           “(A) arising under a Federal intellectual  
2           property law; or

3           “(B) seeking a declaration with respect to  
4           a Federal intellectual property right; and

5           “(2) a certification that, during the 1-year pe-  
6           riod preceding the date of the application, the  
7           State’s sovereign immunity from suit in Federal  
8           court has not been asserted in any action described  
9           in paragraph (1).”.

10 **SEC. 135. CONDITIONS FOR STATE PARTICIPATION IN THE**  
11 **FEDERAL ORIGINAL DESIGN SYSTEM.**

12           Section 1310 of title 17, United States Code, is  
13 amended by adding at the end the following:

14           “(k) APPLICATION BY OR ON BEHALF OF A STATE  
15 OR AN INSTRUMENTALITY OF A STATE.—When an appli-  
16 cation for registration of a design is made by or on behalf  
17 of a State or an instrumentality of a State, the Adminis-  
18 trator shall require—

19           “(1) an assurance that, during the pendency of  
20           the application and any term of protection resulting  
21           from that application, the State’s sovereign immu-  
22           nity from suit in Federal court will be waived in any  
23           action against the State or any instrumentality or  
24           official of that State—

1           “(A) arising under a Federal intellectual  
2           property law; or

3           “(B) seeking a declaration with respect to  
4           a Federal intellectual property right; and

5           “(2) a certification that, during the 1-year pe-  
6           riod preceding the date of the application, the  
7           State’s sovereign immunity from suit in Federal  
8           court has not been asserted in any action described  
9           in paragraph (1).”.

10 **SEC. 136. CONDITIONS FOR STATE PARTICIPATION IN THE**  
11 **FEDERAL TRADEMARK SYSTEM.**

12           (a) APPLICATION FOR USE OF TRADEMARK OR  
13 SERVICE MARK.—Section 1 of the Trademark Act of 1946  
14 (15 U.S.C. 1051) is amended by adding at the end the  
15 following:

16           “(f) When an application under subsection (a) or (b)  
17 of this section is made by or on behalf of a State or an  
18 instrumentality of a State, the Commissioner shall  
19 require—

20           “(1) an assurance that, during the pendency of  
21 the application and for as long as the mark is reg-  
22 istered, the State’s sovereign immunity from suit in  
23 Federal court will be waived in any action against  
24 the State or any instrumentality or official of that  
25 State—

1           “(A) arising under a Federal intellectual  
2           property law; or

3           “(B) seeking a declaration with respect to  
4           a Federal intellectual property right; and

5           “(2) a certification that, during the 1-year pe-  
6           riod preceding the date of the application, the  
7           State’s sovereign immunity from suit in Federal  
8           court has not been asserted in any action described  
9           in paragraph (1).”.

10          (b) ASSIGNMENT AND RECORDATION.—Section 10 of  
11 the Trademark Act of 1946 (15 U.S.C. 1060) is  
12 amended—

13           (1) by inserting “(a)” before “A registered  
14           mark”;

15           (2) by inserting “(b)” before “An assignee not  
16           domiciled”; and

17           (3) by adding at the end the following:

18           “(c) When an assignment of a registered mark or a  
19           mark for which an application to register has been filed  
20           is recorded in the Patent and Trademark Office by or on  
21           behalf of a State or an instrumentality of a State, the  
22           Commissioner shall require—

23           “(1) an assurance that, during the pendency of  
24           any application and for as long as any mark is reg-  
25           istered, the State’s sovereign immunity from suit in

1 Federal court will be waived in any action against  
2 the State or any instrumentality or official of that  
3 State—

4 “(A) arising under a Federal intellectual  
5 property law; or

6 “(B) seeking a declaration with respect to  
7 a Federal intellectual property right; and

8 “(2) a certification that, during the 1-year pe-  
9 riod preceding the date of the recordation, the  
10 State’s sovereign immunity from suit in Federal  
11 court has not been asserted in any action described  
12 in paragraph (1).”.

13 **SEC. 137. NO RETROACTIVE EFFECT.**

14 The amendments made by this subtitle shall not  
15 apply to—

16 (1) any application pending before the effective  
17 date of this title; or

18 (2) any assertion of sovereign immunity made  
19 before the effective date of this title.

1 **TITLE II—RESTORATION OF**  
2 **PROTECTION FOR FEDERAL**  
3 **INTELLECTUAL PROPERTY**  
4 **RIGHTS**

5 **SEC. 201. LIABILITY OF STATES FOR PATENT VIOLATIONS.**

6 Section 296 of title 35, United States Code, is  
7 amended to read as follows:

8 **“§ 296. Liability of States, instrumentalities of States,**  
9 **and State officials for infringement of**  
10 **patents**

11 “(a) REMEDY FOR STATUTORY VIOLATION.—In any  
12 action against an officer or employee of a State for in-  
13 fringement of a patent under section 271, or for any other  
14 violation under this title, prospective relief is available  
15 against the officer or employee in the same manner and  
16 to the same extent as such relief is available in an action  
17 against a private individual under like circumstances. Pro-  
18 spective relief may include injunctions under section 283,  
19 attorney fees under section 285, and declaratory relief  
20 under section 2201 of title 28.

21 “(b) REMEDY FOR CONSTITUTIONAL VIOLATION.—

22 “(1) DEFINITION.—In this subsection, the term  
23 ‘State’ includes a State, an instrumentality of a  
24 State, and an officer or employee of a State acting  
25 in an official capacity.

1 “(2) IN GENERAL.—

2 “(A) REMEDIES.—Any State that takes  
3 any of the rights of exclusion secured under  
4 this chapter in violation of the fifth amendment  
5 of the United States Constitution, or deprives  
6 any person of any of the rights of exclusion se-  
7 cured under this chapter without due process of  
8 law in violation of the fourteenth amendment—

9 “(i) shall be liable to the party injured  
10 in a civil action against the State for the  
11 recovery of that party’s reasonable and en-  
12 tire compensation; and

13 “(ii) may be enjoined from continuing  
14 or future constitutional violations, in ac-  
15 cordance with the principles of equity and  
16 upon such terms as the court may deter-  
17 mine reasonable.

18 “(B) COMPENSATION.—Reasonable and  
19 entire compensation may include damages, in-  
20 terest, and costs under section 284, attorney  
21 fees under section 285, and the additional rem-  
22 edy for infringement of design patents under  
23 section 289.

24 “(3) LIMITATIONS.—

1           “(A) IN GENERAL.—The remedy provided  
2           under paragraph (2) is not available in an ac-  
3           tion against—

4                   “(i) a State that has waived its sov-  
5                   ereign immunity from suit in Federal court  
6                   for damages resulting from a violation of  
7                   this title; or

8                   “(ii) a State official in an individual  
9                   capacity.

10           “(B) REMEDIES.—Remedies (including  
11           remedies both at law and in equity) are avail-  
12           able against such State or State official in the  
13           same manner and to the same extent as such  
14           remedies are available in an action against a  
15           private entity or individual under like cir-  
16           cumstances.

17           “(4) BURDEN OF PROOF.—If a claimant pro-  
18           duces prima facie evidence to support a claim under  
19           paragraph (2), the burden of proof shall be on the  
20           State, except as to any elements of the claim that  
21           would have to be proved if the action were brought  
22           under another provision of this title. The burden of  
23           proof shall be unaffected with respect to any such  
24           element.

1       “(c) PREEMPTION.—No State may use or manufac-  
2       ture the invention described in or covered by a patent  
3       without the authorization or consent of the patent owner,  
4       except in the manner and to the extent authorized by Fed-  
5       eral law.”.

6       **SEC. 202. LIABILITY OF STATES FOR VIOLATION OF PLANT**  
7                       **VARIETY PROTECTION.**

8       Section 130 of the Plant Variety Protection Act (7  
9       U.S.C. 2570) is amended to read as follows:

10      **“SEC. 130. LIABILITY OF STATES, INSTRUMENTALITIES OF**  
11                       **STATES, AND STATE OFFICIALS FOR IN-**  
12                       **FRINGEMENT OF PLANT VARIETY PROTEC-**  
13                       **TION.**

14      “(a) In any action against an officer or employee of  
15      a State for infringement of plant variety protection under  
16      section 111, or for any other violation under this chapter,  
17      prospective relief is available against the officer or em-  
18      ployee in the same manner and to the same extent as such  
19      relief is available in an action against a private individual  
20      under like circumstances. Prospective relief may include  
21      injunctions under section 123, attorney fees under section  
22      125, and declaratory relief under section 2201 of title 28,  
23      United States Code.



1       “(b)(1) In this subsection, the term ‘State’ includes  
2 a State, an instrumentality of a State, and an officer or  
3 employee of a State acting in an official capacity.

4       “(2)(A) Any State that takes any of the rights of ex-  
5 clusion secured under this chapter in violation of the fifth  
6 amendment of the United States Constitution, or deprives  
7 any person of any of the rights of exclusion secured under  
8 this chapter without due process of law in violation of the  
9 fourteenth amendment—

10           “(i) shall be liable to the party injured in a civil  
11 action against the State for the recovery of that par-  
12 ty’s reasonable and entire compensation; and

13           “(ii) may be enjoined from continuing or future  
14 constitutional violations, in accordance with the prin-  
15 ciples of equity and upon such terms as the court  
16 may determine reasonable.

17       “(B) Reasonable and entire compensation may in-  
18 clude damages, interest, and costs under section 124, and  
19 attorney fees under section 125.

20       “(3)(A) The remedy provided under paragraph (2) is  
21 not available in an action against—

22           “(i) a State that has waived its sovereign im-  
23 munity from suit in Federal court for damages re-  
24 sulting from a violation of this chapter; or

25           “(ii) a State official in an individual capacity.

1       “(B) Remedies (including remedies both at law and  
2 in equity) are available against such State or State official  
3 in the same manner and to the same extent as such rem-  
4 edies are available in an action against a private entity  
5 or individual under like circumstances.

6       “(4) If a claimant produces prima facie evidence to  
7 support a claim under paragraph (2), the burden of proof  
8 shall be on the State, except as to any elements of the  
9 claim that would have to be proved if the action were  
10 brought under another provision of this chapter. The bur-  
11 den of proof shall be unaffected with respect to any such  
12 element.

13       “(c) No State may exercise any rights of the owner  
14 of a plant variety protected by a certificate of plant variety  
15 protection under this chapter without the authorization or  
16 consent of such owner, except in the manner and to the  
17 extent authorized by Federal law.”.

18 **SEC. 203. LIABILITY OF STATES FOR COPYRIGHT VIOLA-**  
19 **TIONS.**

20       Section 511 of title 17, United States Code, is  
21 amended to read as follows:

1 **“§ 511. Liability of States, instrumentalities of States,**  
2 **and State officials for infringement of**  
3 **copyright**

4 “(a) REMEDY FOR STATUTORY VIOLATION.—In any  
5 action against an officer or employee of a State for viola-  
6 tion of any rights of a copyright owner as provided in sec-  
7 tions 106 through 121 or of an author as provided in sec-  
8 tion 106A, or for any other violation under this title, pro-  
9 spective relief is available against the officer or employee  
10 in the same manner and to the same extent as such relief  
11 is available in an action against a private individual under  
12 like circumstances. Prospective relief may include injunc-  
13 tions under section 502, impounding and disposition of in-  
14 fringing articles under section 503, costs and attorney fees  
15 under section 505, and declaratory relief under section  
16 2201 of title 28.

17 “(b) REMEDY FOR CONSTITUTIONAL VIOLATION.—

18 “(1) DEFINITION.—In this subsection, the term  
19 ‘State’ includes a State, an instrumentality of a  
20 State, and an officer or employee of a State acting  
21 in an official capacity.

22 “(2) IN GENERAL.—

23 “(A) REMEDIES.—Any State that takes  
24 any of the rights of exclusion secured under  
25 this title in violation of the fifth amendment of  
26 the United States Constitution, or deprives any

1 person of any of the rights of exclusion secured  
2 under this title without due process of law in  
3 violation of the fourteenth amendment—

4 “(i) shall be liable to the party injured  
5 in a civil action against the State for the  
6 recovery of that party’s reasonable and en-  
7 tire compensation; and

8 “(ii) may be enjoined from continuing  
9 or future constitutional violations, in ac-  
10 cordance with the principles of equity and  
11 upon such terms as the court may deter-  
12 mine reasonable.

13 “(B) COMPENSATION.—Reasonable and  
14 entire compensation may include actual dam-  
15 ages and profits or statutory damages under  
16 section 504, and costs and attorney fees under  
17 section 505.

18 “(3) LIMITATIONS.—

19 “(A) IN GENERAL.—The remedy provided  
20 under paragraph (2) is not available in an ac-  
21 tion against—

22 “(i) a State that has waived its sov-  
23 ereign immunity from suit in Federal court  
24 for damages resulting from a violation of  
25 this title; or

1                   “(ii) a State official in an individual  
2                   capacity.

3                   “(B) REMEDIES.—Remedies (including  
4                   remedies both at law and in equity) are avail-  
5                   able against such State or State official in the  
6                   same manner and to the same extent as such  
7                   remedies are available in an action against a  
8                   private entity or individual under like cir-  
9                   cumstances.

10                  “(4) BURDEN OF PROOF.—If a claimant pro-  
11                  duces prima facie evidence to support a claim under  
12                  paragraph (2), the burden of proof shall be on the  
13                  State, except as to any elements of the claim that  
14                  would have to be proved if the action were brought  
15                  under another provision of this title. The burden of  
16                  proof shall be unaffected with respect to any such  
17                  element.

18                  “(c) PREEMPTION.—No State may exercise any  
19                  rights of a copyright owner protected under this title with-  
20                  out the authorization or consent of such owner, except in  
21                  the manner and to the extent authorized by Federal law.”.

22   **SEC. 204. LIABILITY OF STATES FOR MASK WORK VIOLA-**  
23                                   **TIONS.**

24                  (a) IN GENERAL.—Chapter 9 of title 17, United  
25                  States Code, is amended—

1 (1) in section 911, by striking subsection (g);

2 and

3 (2) by adding at the end the following:

4 **“§ 915. Liability of States, instrumentalities of States,**  
 5 **and State officials for violation of mask**  
 6 **works**

7 “(a) REMEDY FOR STATUTORY VIOLATION.—In any  
 8 action against an officer or employee of a State for in-  
 9 fringement of any rights in a mask work protected under  
 10 this chapter, or for any other violation under this chapter,  
 11 prospective relief is available against the officer or em-  
 12 ployee in the same manner and to the same extent as such  
 13 relief is available in an action against a private individual  
 14 under like circumstances. Prospective relief may include  
 15 injunctive relief under section 911(a), impounding and de-  
 16 struction of infringing products under section 911(e),  
 17 costs and attorney fees under section 911(f), and declara-  
 18 tory relief under section 2201 of title 28.

19 “(b) REMEDY FOR CONSTITUTIONAL VIOLATION.—

20 “(1) DEFINITION.—In this subsection, the term  
 21 ‘State’ includes a State, an instrumentality of a  
 22 State, and an officer or employee of a State acting  
 23 in an official capacity.

24 “(2) IN GENERAL.—

1           “(A) REMEDIES.—Any State that takes  
2 any of the rights of exclusion secured under  
3 this chapter in violation of the fifth amendment  
4 of the United States Constitution, or deprives  
5 any person of any of the rights of exclusion se-  
6 cured under this chapter without due process of  
7 law in violation of the fourteenth amendment—

8           “(i) shall be liable to the party injured  
9 in a civil action against the State for the  
10 recovery of that party’s reasonable and en-  
11 tire compensation; and

12           “(ii) may be enjoined from continuing  
13 or future constitutional violations, in ac-  
14 cordance with the principles of equity and  
15 upon such terms as the court may deter-  
16 mine reasonable.

17           “(B) COMPENSATION.—Reasonable and  
18 entire compensation may include actual dam-  
19 ages and profits under section 911(b) or statu-  
20 tory damages under section 911(c), and costs  
21 and attorney fees under section 911(f).

22           “(3) LIMITATIONS.—

23           “(A) IN GENERAL.—The remedy provided  
24 under paragraph (2) is not available in an ac-  
25 tion against—

1                   “(i) a State that has waived its sov-  
2                   ereign immunity from suit in Federal court  
3                   for damages resulting from a violation of  
4                   this title; or

5                   “(ii) a State official in an individual  
6                   capacity.

7                   “(B) REMEDIES.—Remedies (including  
8                   remedies both at law and in equity) are avail-  
9                   able against such State or State official in the  
10                  same manner and to the same extent as such  
11                  remedies are available in an action against a  
12                  private entity or individual under like cir-  
13                  cumstances.

14                  “(4) BURDEN OF PROOF.—If a claimant pro-  
15                  duces prima facie evidence to support a claim under  
16                  paragraph (2), the burden of proof shall be on the  
17                  State, except as to any elements of the claim that  
18                  would have to be proved if the action were brought  
19                  under another provision of this chapter. The burden  
20                  of proof shall be unaffected with respect to any such  
21                  element.

22                  “(c) PREEMPTION.—No State may exercise any  
23                  rights of the owner of a mask work protected under this  
24                  chapter without the authorization or consent of such



1 owner, except in the manner and to the extent authorized  
2 by Federal law.”.

3 (b) CONFORMING AMENDMENT.—The table of sec-  
4 tions for chapter 9 of title 17, United States Code, is  
5 amended by adding at the end the following:

“915. Liability of States, instrumentalities of States, and State officials for vio-  
lation of mask works.”.

6 **SEC. 205. LIABILITY OF STATES FOR ORIGINAL DESIGN**  
7 **VIOLATIONS.**

8 (a) IN GENERAL.—Chapter 13 of title 17, United  
9 States Code, is amended—

10 (1) in section 1309(a), by adding at the end the  
11 following: “In this subsection, the term ‘any person’  
12 includes any State, any instrumentality of a State,  
13 and any officer or employee of a State or instrumen-  
14 tality of a State acting in an official capacity. Any  
15 State, and any such instrumentality, officer, or em-  
16 ployee, shall be subject to the provisions of this  
17 chapter in the same manner and to the same extent  
18 as any nongovernmental entity.”; and

19 (2) by adding at the end the following:

20 **“§ 1333. Liability of States, instrumentalities of**  
21 **States, and State officials for violation of**  
22 **original designs**

23 “(a) REMEDY FOR STATUTORY VIOLATION.—In any  
24 action against an officer or employee of a State for in-

1 fringement of any rights in a design protected under this  
2 chapter, or for any other violation under this chapter, pro-  
3 spective relief is available against the officer or employee  
4 in the same manner and to the same extent as such relief  
5 is available in an action against a private individual under  
6 like circumstances. Prospective relief may include injunc-  
7 tions under section 1322, attorney fees under section  
8 1323(d), disposition of infringing and other articles under  
9 section 1323(e), and declaratory relief under section 2201  
10 of title 28.

11 “(b) REMEDY FOR CONSTITUTIONAL VIOLATION.—

12 “(1) DEFINITION.—In this subsection, the term  
13 ‘State’ includes a State, an instrumentality of a  
14 State, and an officer or employee of a State acting  
15 in an official capacity.

16 “(2) IN GENERAL.—

17 “(A) REMEDIES.—Any State that takes  
18 any of the rights of exclusion secured under  
19 this chapter in violation of the fifth amendment  
20 of the United States Constitution, or deprives  
21 any person of any of the rights of exclusion se-  
22 cured under this chapter without due process of  
23 law in violation of the fourteenth amendment—

24 “(i) shall be liable to the party injured  
25 in a civil action against the State for the

1 recovery of that party's reasonable and en-  
2 tire compensation; and

3 “(ii) may be enjoined from continuing  
4 or future constitutional violations, in ac-  
5 cordance with the principles of equity and  
6 upon such terms as the court may deter-  
7 mine reasonable.

8 “(B) COMPENSATION.—Reasonable and  
9 entire compensation may include damages, prof-  
10 its, and attorney fees under section 1323.

11 “(3) LIMITATIONS.—

12 “(A) IN GENERAL.—The remedy provided  
13 under paragraph (2) is not available in an ac-  
14 tion against—

15 “(i) a State that has waived its sov-  
16 ereign immunity from suit in Federal court  
17 for damages resulting from a violation of  
18 this title; or

19 “(ii) a State official in an individual  
20 capacity.

21 “(B) REMEDIES.—Remedies (including  
22 remedies both at law and in equity) are avail-  
23 able against such State or State official in the  
24 same manner and to the same extent as such  
25 remedies are available in an action against a

1 private entity or individual under like cir-  
2 cumstances.

3 “(4) BURDEN OF PROOF.—If a claimant pro-  
4 duces prima facie evidence to support a claim under  
5 paragraph (2), the burden of proof shall be on the  
6 State, except as to any elements of the claim that  
7 would have to be proved if the action were brought  
8 under another provision of this chapter. The burden  
9 of proof shall be unaffected with respect to any such  
10 element.

11 “(c) PREEMPTION.—No State may exercise any  
12 rights of the owner of a design protected under this chap-  
13 ter without the authorization or consent of such owner,  
14 except in the manner and to the extent authorized by Fed-  
15 eral law.”.

16 (b) CONFORMING AMENDMENT.—The table of sec-  
17 tions for chapter 13 of title 17, United States Code, is  
18 amended by adding at the end the following:

“1333. Liability of States, instrumentalities of States, and State officials for vio-  
lation of original designs.”.

19 **SEC. 206. LIABILITY OF STATES FOR TRADEMARK VIOLA-**  
20 **TIONS.**

21 Section 40 of the Trademark Act of 1946 (15 U.S.C.  
22 1122) is amended to read as follows:

1 **“SEC. 40. LIABILITY OF STATES, INSTRUMENTALITIES OF**  
2 **STATES, AND STATE OFFICIALS FOR IN-**  
3 **FRINGEMENT OF TRADEMARKS.**

4 “(a) REMEDY FOR STATUTORY VIOLATION.—In any  
5 action against an officer or employee of a State for in-  
6 fringement of a trademark under section 32, or for any  
7 other violation under this Act, prospective relief is avail-  
8 able against the officer or employee in the same manner  
9 and to the same extent as such relief is available in an  
10 action against a private individual under like cir-  
11 cumstances. Prospective relief may include injunctive re-  
12 lief under section 34, costs and attorney fees under section  
13 35, destruction of infringing articles under section 36, and  
14 declaratory relief under section 2201 of title 28, United  
15 States Code.

16 “(b) REMEDY FOR CONSTITUTIONAL VIOLATION.—

17 “(1) DEFINITION.—In this subsection, the term  
18 ‘State’ includes a State, an instrumentality of a  
19 State, and an officer or employee of a State acting  
20 in an official capacity.

21 “(2) IN GENERAL.—

22 “(A) REMEDIES.—Any State that takes  
23 any of the rights of exclusion secured under  
24 this Act in violation of the fifth amendment of  
25 the United States Constitution, or deprives any  
26 person of any of the rights of exclusion secured

1 under this Act without due process of law in  
2 violation of the fourteenth amendment—

3 “(i) shall be liable to the party injured  
4 in a civil action against the State for the  
5 recovery of that party’s reasonable and en-  
6 tire compensation; and

7 “(ii) may be enjoined from continuing  
8 or future constitutional violations, in ac-  
9 cordance with the principles of equity and  
10 upon such terms as the court may deter-  
11 mine reasonable.

12 “(B) COMPENSATION.—Reasonable and  
13 entire compensation may include actual dam-  
14 ages and profits or statutory damages, and  
15 costs and attorney fees under section 35.

16 “(3) LIMITATIONS.—

17 “(A) IN GENERAL.—The remedy provided  
18 under paragraph (2) is not available in an ac-  
19 tion against—

20 “(i) a State that has waived its sov-  
21 ereign immunity from suit in Federal court  
22 for damages resulting from a violation of  
23 this title; or

24 “(ii) a State official in an individual  
25 capacity.

1           “(B) REMEDIES.—Remedies (including  
2 remedies both at law and in equity) are avail-  
3 able against such State or State official in the  
4 same manner and to the same extent as such  
5 remedies are available in an action against a  
6 private entity or individual under like cir-  
7 cumstances.

8           “(4) BURDEN OF PROOF.—If a claimant pro-  
9 duces prima facie evidence to support a claim under  
10 paragraph (2), the burden of proof shall be on the  
11 State, except as to any elements of the claim that  
12 would have to be proved if the action were brought  
13 under another provision of this Act. The burden of  
14 proof shall be unaffected with respect to any such  
15 element.

16           “(c) PREEMPTION.—No State may use a federally  
17 registered mark for the same or similar goods or service  
18 without the authorization or consent of the owner of the  
19 mark, except in the manner and to the extent authorized  
20 by Federal law.”.

21 **SEC. 207. RULES OF CONSTRUCTION.**

22           (a) JURISDICTION.—The district courts shall have  
23 original jurisdiction of any action arising under this title  
24 and the amendments made by this title under section 1338  
25 of title 28, United States Code.

1 (b) BROAD CONSTRUCTION.—This title and the  
2 amendments made by this title shall be construed in favor  
3 of a broad protection of Federal intellectual property  
4 rights, to the maximum extent permitted by this title and  
5 the United States Constitution.

## 6 **TITLE III—EFFECTIVE DATES**

### 7 **SEC. 301. EFFECTIVE DATES.**

8 (a) TITLE I.—Title I of this Act and the amendments  
9 made by that title shall take effect 90 days after the date  
10 of enactment of this Act.

11 (b) TITLE II.—The amendments made by title II of  
12 this Act shall take effect with respect to violations that  
13 occur on or after the date of enactment of this Act.

### 14 **SEC. 302. SEVERABILITY.**

15 If any provision of this Act or of an amendment made  
16 by this Act, or any application of such provision to any  
17 person or circumstance, is held to be unconstitutional, the  
18 remainder of this Act, the amendments made by this Act,  
19 and the application of the provision to any other person  
20 or circumstance shall not be affected.

○