

# Your copyrights, trademarks and patents are not as effective as you think.

By Philip L. Marcus

The copyright you hold on your novel, your non-fiction, your artwork, play or film, is quite useful. It is the basis—if it is registered with the Copyright Office—to force an unauthorized copyist (a pirate) to stop copying and turn over all the copies he has made to the US Marshall Service for destroying, and to pay damages. Similarly for patents and trademarks.

Still, the damages may not always be forthcoming. I am not talking about penniless pirates who will not pay a judgment. I am pointing at states of the union. They may be hard up, but they have some money to pay workers, governors, legislators, etc. But then there is the 11<sup>th</sup> Amendment that shields them from claimants like you.

The 11<sup>th</sup> Amendment says, “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.” What exactly this means has been the subject of litigation over the centuries since its passage in 1794. It remains controversial, often producing 5-4 split decisions.

Still, the current state of the law is this: *You probably cannot get a state to pay you damages for infringing your copyright, patent or trademark.* A suit to enforce the Copyright Act or the Lanham Act (trademarks) or the Patent Act must, by federal law, be filed and tried in a federal district court. (The purpose is to ensure the interpretations of these federal laws do not vary from state to state.) However, these courts may not, according to a set of cases from around 1990, award money judgments against the states for infringement of patents, trademarks or copyrights.

*This is despite the Congress expressly saying it intended the three respective laws to apply to the states.* The Supreme Court said, 5-4, that Congress exceeded its power in extending the three kinds of I.P. protection to money damages for state infringement.

Many states have Tort Claims laws that allow money claims of the sort of car and truck accidents, etc. against those states. Still, most if not all such laws require the claims be tried in the state courts, *which may not take copyright, patent or trademark cases.* So there you are. You can get an injunction against infringement, and get infringing articles confiscated, but you cannot get compensation from the state, unless it decides to pay without suit. (To be clear, cities, towns, counties and other sub-divisions do *not* have 11<sup>th</sup> Amendment or inherent sovereign immunity, and are subject to suits in federal courts.)

Still, there is one narrow area where a powerful remedy exists. Let’s say a state copies some of your registered copyright material and puts it on a state website. Then the Digital Millennium Copyright Act provides that you can get the offending pages removed from the Web, same as for a private infringer.

But if you were, say, Jimmy Carter, and the State of Georgia made unauthorized copies of your books, you probably could not get a nickel out of them. They would use the 11<sup>th</sup>

Amendment, despite the express intent of Congress, to keep you from collecting the damages that any other pirate would have to pay. Sorry.

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410-292-6989