

US Supreme Court Strikes Down Decades-Old Statute Authorizing Copyright Infringement Suits Against States

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On March 23, 2020, the U.S. Supreme Court ruled unanimously in *Allen v. Cooper*, 589 U.S. ____, that the Copyright Remedy Clarification Act of 1990 violated the 11th Amendment by purporting to authorize private copyright infringement lawsuits against U.S. states.

Background

The Copyright Remedy Clarification Act of 1990 (CRCA), 17 U.S.C. § 511(a), provides that any state (or state instrumentality, officer or employee in their official capacity) “shall not be immune, under the Eleventh Amendment of the Constitution or under any other doctrine of sovereign immunity,” from federal copyright infringement lawsuits by “any person.” The statute was enacted contemporaneously with another federal law with virtually identical language that purported to strip states of their sovereign immunity in patent infringement lawsuits. The patent statute, however, was struck down by the Supreme Court as lacking a valid constitutional basis in its 1999 decision in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627.

The current case arose out of the state of North Carolina’s posting online of the respondent’s videos and photographs of the 300-year-old sunken wreckage of the pirate Blackbeard’s flagship. Although the shipwreck itself belongs to North Carolina, the state contracted with a marine salvage company in the 1990s to take charge of recovery activities; the company in turn retained the respondent, Frederick Allen, to document the operation. Mr. Allen registered copyright in all of his video and photographic works.

Mr. Allen first complained about North Carolina’s infringement in 2013, resulting in the state paying him \$15,000 in a settlement and a documentation of the parties’ respective rights in his works. Following that, however, North Carolina once again posted Mr. Allen’s materials. He filed a copyright infringement lawsuit in federal court, and North Carolina moved to dismiss on the grounds that federal courts cannot hear suits brought by individuals against nonconsenting states.

The district court denied the motion to dismiss, agreeing with Mr. Allen that the CRCA clearly abrogated state sovereign immunity, and that such abrogation had a proper constitutional basis. 244 F. Supp. 3d 525, 533 (E.D.N.C. 2017). On interlocutory appeal, the Fourth Circuit reversed, reading the Supreme Court’s *Florida Prepaid* decision to find that the CRCA was unconstitutional because the abrogation of state sovereign immunity was not “congruent and proportional” to the injury it sought to remedy. 895 F.3d 337, 350 (4th Cir. 2018).

The Supreme Court’s Ruling

All nine Supreme Court justices agreed that the CRCA was unconstitutional. The principal opinion was authored by Justice Elena Kagan, and joined by Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito, Sonia Sotomayor, Neil M. Gorsuch, Brett M. Kavanaugh and (in part) Clarence Thomas.

The Court explained that it has historically permitted federal courts to entertain private suits against nonconsenting states on two conditions: (1) Congress must have enacted “unequivocal statutory language” abrogating states’ immunity from the suit; and (2) some constitutional provision must allow Congress to have thus encroached on the states’ sovereignty. In this case, there was no question that the CRCA satisfied the first condition. But the Court concluded that the CRCA failed the second.

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The Court first rejected Mr. Allen’s argument that the Intellectual Property Clause of the Constitution, Art. I, Sec. 8, Cl. 8 — granting Congress power to “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” — permits abrogation of sovereign immunity in connection with copyright suits. The Court noted that it rejected that same theory in the *Florida Prepaid* decision, and disagreed that any subsequent jurisprudence had modified that result.

The Court then noted that Section 5 of the 14th Amendment *can* authorize Congress to strip states of immunity — including potentially in copyright infringement cases — but any abrogation statute “must be tailored to remedy or prevent conduct infringing” that amendment’s substantive prohibitions. Accordingly, for Congress to validly abrogate state sovereignty, “there must be a congruence and proportionality between the injury to be prevented or remedies and the means adopted to that end.”

The problem with the CRCA, the Court concluded, is that nothing in the legislative record or other relevant history suggested that there was any material or rampant infringement of copyrights by states that warranted such a broad abrogation of their sovereignty. To the contrary, the Court found that the evidence of 14th Amendment injury supporting the statute was “exceedingly slight.” The CRCA thus failed the “congruence and proportionality” test, in the same manner as did the analogous patent statute in *Florida Prepaid*.

Critically, the principal opinion concludes by recognizing that Congress *could* pass a valid copyright abrogation law in the future, provided that it can do so in a congruent and proportional

manner. Delighting in the puns that the specific facts of this case afforded, Justice Kagan recognized that a tailored statute could “effectively stop States from behaving as copyright pirates” and “bring digital Blackbeards to justice.”

Justice Thomas concurred in the judgment and concurred in the principal opinion in part. Most saliently, Justice Thomas found it inappropriate to comment on future copyright legislation abrogating sovereign immunity that may pass muster because that issue was not before the Court. Justice Thomas further reasoned that the question remains open as to whether copyrights are “property” within the meaning of the 14th Amendment.

Justice Stephen G. Breyer, joined by Justice Ruth Bader Ginsburg, also concurred in the judgment and concurred in the principal opinion in part. In Justice Breyer’s view, the Intellectual Property Clause (and not just the 14th Amendment) provides a sufficient basis to abrogate state sovereign immunity.

Looking Ahead

Notwithstanding the concurrences, the Supreme Court’s decision appears to leave little room for interpretation. As of the date of the ruling, nonconsenting states are unequivocally immune from copyright infringement lawsuits by private individuals, irrespective of how egregious any particular infringing activity by a state may be. To the extent that Congress either (1) is able to craft a more narrowly tailored statute, or (2) is able to identify a more substantial record of infringing activity by states (and resulting harm) than Congress was able to identify in 1990, a future abrogation law may be viable.