



THINK FORWARD

Allen v. Cooper: Supreme Court Holds States Immune from Copyright Suit

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Brief Background

The U.S. Supreme Court has held that Congress lacks authority to abrogate the states' immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990 (CRCA). [Allen v. Cooper, No. 18-877](#) (slip opinion) (March 23, 2020).

Frederick Allen, a videographer hired to document efforts to recover the shipwreck of the Queen Anne's Revenge, commandeered by the pirate Blackbeard in the 18th century, off the North Carolina coast. Allen acquired federal copyright registrations in all videos and photographs taken over the course of the decade-long project. North Carolina published some of Allen's videos and photos on its website, and used one photo in a newsletter.

Allen sued the state of North Carolina in District Court for copyright infringement, and sought monetary damages. The District Court held that Congress, in enacting the CRCA, abrogated the states' sovereign immunity, as granted by the Eleventh Amendment, to allow copyright infringement cases against the states. The Fourth Circuit reversed, finding the CRCA unconstitutional in light of the Supreme Court's decision in *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999), where it held unconstitutional a similar statute that purportedly allowed patent infringement lawsuits against the states.

Supreme Court Decision

The Court unanimously affirmed. The majority cited the *Florida Prepaid* decision and *stare decisis*. In analyzing whether a copyright infringement lawsuit against a state would be constitutional, the Court said that a federal court is permitted to entertain a suit against a nonconsenting state on two conditions: (1) Congress must have engaged "unequivocal statutory language" abrogating the states' sovereign immunity; and (2) a constitutional provision must allow Congress to permit this abrogation. (Slip opinion at 5.) While it was clear that the CRCA indicates that states shall not be immune from federal court actions, the Court cited *Florida Prepaid* in holding that Article I's Intellectual Property Clause could not provide a basis for an abrogation of sovereign immunity. (*Id.* at 16-17.) Essentially, the Court held, Congress is not authorized to use its Article I power over patents or copyrights to remove the states' immunity from suit as provided by the Eleventh Amendment.

Additionally, Section 5 of the Fourteenth Amendment, which gives Congress the "power to enforce, by appropriate legislation" limits on a state's authority, did not provide a valid basis for abrogating the state's immunity. The Court observed that under Section 5 jurisprudence, the abrogation statute must be tailored to "remedy or prevent" conduct infringing the Fourteenth Amendment's substantive prohibitions. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Specifically, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted

to that end.” *Id.* at 520. Here, where there were only a dozen possible examples of state infringement identified by the Copyright Office, the Court found an absence of constitutional harm or violation of due process, which did not support a blanket abrogation of immunity, namely, allowing every infringement case against a state.

Implications

The majority opinion suggests that it may be possible in limited circumstances for Congress to enact a law that would abrogate the states’ immunity from copyright infringement suit provided it “link[s] the scope of its abrogation to the redress or prevention of unconstitutional injuries—and [creates] a legislative record to back up that connection.” (Slip opinion at 16.) However, the CRCA does not provide such a link.