

Copyright Developments

U.S. Supreme Court Rules that States Cannot be Sued for Copyright Infringement

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In *Allen v. Cooper*, No. 18-877, 589 U.S. ____ (2020), the U.S. Supreme Court affirmed that the Copyright Remedy Clarification Act of 1990, known as CRCA, did not abrogate the sovereign immunity of States because Congress lacked the authority to abrogate sovereign immunity.

Petitioner Fredrick Allen was hired to document the recovery of the ship the Queen Anne's Revenge, which was discovered off the coast of North Carolina in 1996. Allen took numerous videos and photos and registered copyrights in all of his works. The State of North Carolina uploaded some of his photos and videos to their website in 2013 without Allen's permission.

Allen sued for copyright infringement, and North Carolina moved to dismiss the suit on the ground of State sovereign immunity. Allen argued that the CRCA removed States' sovereign immunity, thus allowing North Carolina to be liable for copyright infringement.

The Supreme Court affirmed the Fourth Circuit ruling that the CRCA did not abrogate the sovereign immunity of States.

Generally, federal courts cannot hear suits brought by individuals against non-consenting States. The Court has permitted suits against non-consenting States when (1) Congress uses "unequivocal statutory language" abrogating the States' immunity, and (2) there is a constitutional provision that gives Congress the authority to abrogate States' sovereign immunity. Since the CRCA has clear language intending States' immunity to be abrogated, the question turned on whether or not Congress had the authority to abrogate sovereign immunity.

Allen argued that Article I, which empowers Congress to provide copyright protection, provides that authority. The Court, finding that its decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), "made clear that Article I's Intellectual Property Clause could not provide the basis for an abrogation of sovereign immunity," held that Article I does not provide Congress with the requisite authority.

Allen also argued that Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the commands of the due process clause, also gives Congress the authority to abrogate States' sovereign immunity. The Court once again disagreed. In order for an abrogation statute to be "appropriate" under Section 5, it must be tailored to "remedy or prevent" conduct infringing the Fourteenth Amendment's substantive prohibitions. The test turns on whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Congress found, as it had in *Florida Prepaid* with respect to patent infringement, that there was not a pattern of unconstitutional copyright infringement by the States, and thus the test was not met. Section 5 of the Fourteenth Amendment was not sufficient to authorize Congress to abrogate States' sovereign immunity.

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