

SOVEREIGN IMMUNITY BARS COPYRIGHT INFRINGEMENT CLAIMS AGAINST STATES

Hodgson Russ Media & First Amendment Alert
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In a ruling likely to frustrate individuals and companies in the media industry, the Supreme Court held this week that the U.S. Constitution prohibits states from being sued for copyright infringement in federal court. The prohibition is based on the Constitutional protection under the Eleventh Amendment, known as state sovereign immunity, which immunizes states from being sued in federal court.

On March 23, 2020, the Supreme Court issued its decision in *Allen et al. v. Cooper, Governor of North Carolina, et al.* (589 U.S. ____ 2020), a copyright infringement case brought against the State of North Carolina. The key facts of the case trace back to the early 1700s. A French slave ship was captured by Blackbeard (aka Peter Teach) in the West Indies in 1717, which he renamed the *Queen Anne's Revenge*. The *Revenge* sailed around the Caribbean and up the North American coast, capturing and acquiring prizes during its ventures. In 1718, the *Revenge* hit a sandbar one mile off the coast of North Carolina, sank and has remained there undisturbed for over 300 years. The ship, under federal and state law, belongs to North Carolina.

A marine salvage company, Intersal, discovered the wreckage in 1996 and North Carolina hired Intersal to manage the recovery operations. Intersal hired the plaintiff, a local videographer, to memorialize the recovery operations, which the plaintiff did, for over 10 years. He created photographs and videos of the divers' recovery efforts to salvage contents of the shipwreck and registered copyrights of all of his works.

When the State of North Carolina posted five of the plaintiff's videos online and placed one of his photos in a newsletter, without his permission, the plaintiff sued, alleging copyright infringement by the State. While North Carolina, in defense, "...invoked the general rule that federal courts cannot hear suits brought by individuals against nonconsenting States," the plaintiff claimed that, by virtue of the Copyright Remedy Clarification Act of 1990 (CRCA), Congress removed sovereign immunity as a defense to copyright infringement suits.

At issue in this case was whether Congress had the authority to remove state sovereign immunity in copyright infringement cases. Plaintiff identified two bases for the removal: Article 1 of the Intellectual Property Clause of the CRCA and Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the Due Process Clause.

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As to the claim under Article 1 of the CRCA, the Court held that the Intellectual Property Clause “could not provide the basis for the abrogation of sovereign immunity.” Generally, sovereign immunity bars suits by persons against nonconsenting states in federal court. That sovereign immunity, notes the Court, can only be rescinded if there exists: (1) “unequivocal statutory language” which rescinds that sovereign immunity and (2) “some constitutional provision must allow Congress to have thus encroached on the States’ sovereignty.”

Although the CRCA does, indeed, rescind sovereign immunity in copyright infringement cases, the Supreme Court held that the second part of the test was not met—*i.e.*, there was no other constitutional provision that would allow Congress to waive the states’ sovereign immunity. The Court relied on its prior decision in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999).

As to the Fourteenth Amendment claim, the Court held that such an exception could apply only where the record shows a pattern of unconstitutional copyright infringement. Here, the Court held that there was no such record. Therefore, “Section 5 of the Fourteenth Amendment could not support an abrogation on a legislative record like this one.”

Takeaway: Companies and individuals in the media industry have little recourse in federal court and under federal copyright law against states that infringe upon or reproduce their copyrighted works. However, the courts typically have not extended this protection to cities, counties, towns, and villages. Thus, if the information is republished by a local government, there could be liability. Moreover, there are some protections under state common law, meaning the owner of the copyrighted work could attempt enforcement of his or her property rights in state court. Additionally, it is unlikely that there would be protection for companies and individuals who “rip” the copyrighted work from a state’s website.

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