



## **ARE Copyright Law Alert: SUPREME COURT HOLDS THAT STATES ARE IMMUNE FROM FEDERAL COPYRIGHT INFRINGEMENT**

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On Monday, March 23, 2020, the Supreme Court unanimously decided in *Allen v. Cooper* that Congress lacked authority and invalidly abrogated states' sovereign immunity when it enacted the Copyright Remedy Clarification Act ("CRCA") of 1990. *Allen v. Cooper*, No. 18-877, 2020 U.S. LEXIS 1909 (U.S. Mar. 23, 2020). The practical effect of this ruling is that copyright holders cannot sue states for damages for federal copyright infringement.

### **Background and Procedural History**

By way of background, the 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 at the same time as the Patent Remedy Act ("PRA") with "basically identical" language that eliminated the states' sovereign immunity from patent infringement suits. However, the PRA was struck down by the Supreme Court as lacking a valid constitutional basis in 1999 in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

As relevant here, petitioner Fredrick Allen documented the salvage of Blackbeard's flagship vessel *Queen Anne's Revenge*, which sank off the coast of North Carolina in the early 1700s. Allen brought suit against North Carolina when the state published some of Allen's photos and videos without his permission and without payment. North Carolina moved to dismiss the lawsuit on the ground of state sovereign immunity. Allen argued that the CRCA removed the states' sovereign immunity in copyright infringement cases. 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, relying on 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).



## **Majority Opinion of the Supreme Court**

The unanimous Supreme Court opinion was authored by Justice Kagan, and joined by Chief Justice Roberts and Justices Alito, Sotomayor, Gorsuch, Kavanaugh, and Thomas (in part). First, the Court rejected Mr. Allen’s argument that the Intellectual Property Clause of the Constitution, Art. I, Sec. 8, Cl. 8 permits abrogation of sovereign immunity in connection with federal copyright suits. Significantly, the Court noted that it rejected that same theory in *Florida Prepaid*, and disagreed that any subsequent jurisprudence has modified that result. The Court noted that there was no “special justification” to overrule *Florida Prepaid*.

Then the Court addressed Allen’s second argument that the CRCA was a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment. The Court noted that Section 5 of the Fourteenth Amendment can authorize Congress to strip states of immunity but any abrogation statute “must be tailored to remedy or prevent conduct infringing” that amendment’s substantive prohibitions.

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.” However, the CRCA did not validly abrogate because it lacked the necessary “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The Court concluded that nothing in the legislative record or other relevant history of the CRCA suggested that there was any significant or widespread infringement of copyrights by states that warranted a broad abrogation of their sovereignty. Thus, the CRCA failed the “congruence and proportionality” test just like the PRA did in *Florida Prepaid*.

Ultimately, the Court left the door open to future legislation noting that Congress could pass a valid copyright abrogation statute in the future, provided that it do so in a congruent and proportional manner. The Court also recognized that a tailored statute could “effectively stop States from behaving as copyright pirates” and “bring digital Blackbeards to justice.”

## **Thomas Concurrence**

Justice Thomas concurred in the judgment and concurred in the principal opinion in part.



Significantly, Justice Thomas took issue with the majority’s “special justification” standard for overruling the Court’s precedent, its endorsement of future Fourteenth Amendment abrogation legislation, and its acknowledgement that copyrights could qualify as property deprived thereunder.

### **Breyer Concurrence**

Justice Breyer also wrote a concurring opinion, joined by Justice Ginsburg. The opinion maintained that the Court “went astray” in *Seminole Tribe* and “erred again” in *Florida Prepaid*. In Justices Breyer’s and Ginsburg’s views, the Intellectual Property Clause provides a sufficient basis to abrogate state sovereign immunity. However, they ultimately joined the Court’s judgment, recognizing that “their longstanding view has not carried the day” and that the precedent controls.

We will continue to monitor and report on developments in this area of copyright law. In the meantime, please feel free to contact us to learn more.

### **About the Authors**

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