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Legal Sidebar

Piracy, Old and New: Copyright, State Sovereignty, and the *Queen Anne's Revenge*

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If a state reproduces a copyrighted work without permission, can it be sued for copyright infringement? In 1990, Congress expressed its view that the answer to this question should be "yes" by enacting the Copyright Remedy Clarification Act (CRCA). The CRCA, which is directed at remedying state copyright infringement, provides that any "State, and any [state] instrumentality, officer, or employee" shall be liable for copyright infringement "in the same manner and to the same extent as any nongovernmental entity." The CRCA further declares that states and their instrumentalities "shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit . . . for a violation of any the exclusive rights of a copyright owner."

Although the CRCA purports to abrogate state sovereignty immunity in copyright disputes, several lower courts have invalidated the statute as unconstitutional. In *Allen v. Cooper*, the Supreme Court is set to hear argument on whether the CRCA was within the constitutional powers of Congress. This Sidebar reviews the current law of state sovereign immunity, the facts of *Allen v. Cooper*, the arguments advanced by the parties, and the potential implications that the Court's decision may have for Congress.

The Law of State Sovereign Immunity

Because states are separate and independent sovereigns within the federal system, they generally cannot be sued in state or federal court without their consent. Although Congress has some authority to abrogate state sovereign immunity—that is, to enact statutes authorizing certain lawsuits against states—this authority is fairly narrow. First, Congress's intent to abrogate state sovereign immunity must be "unmistakably clear" from the statutory language. Second, even an unmistakably clear abrogation is effective only when made pursuant to a "valid grant of constitutional authority."

In the 1996 case of *Seminole Tribe v. Florida*, the Supreme Court held that Congress cannot abrogate state sovereign immunity pursuant to its Article I powers, such as the Commerce Clause. *Seminole Tribe*

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acknowledged, however, that Congress could rely on section 5 of the Fourteenth Amendment as a source of power to abrogate state immunity. In subsequent cases, the Court established that Congress may rely on the Fourteenth Amendment to abrogate state immunity only if there is "a congruence and proportionality" between the constitutional injuries that the abrogation legislation seeks to remedy, and the means Congress uses to redress them. In determining whether legislation is congruent and proportional (and thus constitutional), courts examine (1) the "scope of constitutional right" at issue; (2) whether Congress has identified a "history and pattern" of relevant constitutional violations by the states; and (3) whether the scope of law is "out of proportion" to a valid remedial or preventative objective.

Applying this test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Supreme Court in 1999 invalidated the Patent and Plant Variety Protection Remedy Clarification Act (the Patent Remedy Act), which purported to abrogate state sovereign immunity for patent infringement cases using nearly identical language as the CRCA. In enacting the Patent Remedy Act, Congress pointed to three sources of constitutional authority: the Commerce Clause; the Intellectual Property (IP) Clause, which provides Congress power to grant patents and copyrights; and the Fourteenth Amendment. In light of *Seminole Tribe*, however, the parties conceded that Article I powers could not support the Patent Remedy Act, and the Court thus agreed that "the Patent Remedy Act cannot be sustained under either the Commerce Clause or the [IP] Clause."

Instead, the primary issue in *Florida Prepaid* was whether the Patent Remedy Act could be sustained under Congress's powers to enforce the provisions of the Fourteenth Amendment, which, among other things, provides that states shall not "deprive any person of . . . property, without due process of law." On this issue, the Court found that although patents "may be considered 'property'" within the meaning of the Due Process Clause, not all patent infringement by states would violate the Constitution. Rather, state patent infringement violates the Due Process Clause only when the infringement is both (1) "intentional or reckless" and (2) without any adequate remedy under state law. Because the congressional record supporting the Patent Remedy Act revealed only "a handful of instances of state patent infringement" that did not necessarily violate the Constitution, *Florida Prepaid* held that the Patent Remedy Act's abrogation failed the congruence and proportionality test, and was therefore invalid.

In 2006, however, the Supreme Court limited the central holding of *Seminole Tribe* in *Central Virginia Community College v. Katz*, which addressed whether a bankruptcy trustee could sue to recover certain assets that a bankrupt business had transferred to several state-run schools. The state schools moved to dismiss the bankruptcy proceedings on the basis of state sovereign immunity. Although *Seminole Tribe* broadly stated that Congress could not abrogate state sovereign immunity pursuant to Article I powers, *Katz* held that at least one Article I power —the Bankruptcy Clause—*could* support the abrogation of state sovereign immunity. Rejecting the general statements of *Seminole Tribe* as "dicta," the Court concluded that the history and purposes of the Bankruptcy Clause amounted to a waiver of state sovereign immunity effected by the "plan of the [Constitutional] Convention" itself. In reaching this conclusion, the Court relied on the *in rem* (i.e., property-based) nature of bankruptcy jurisdiction, and the Bankruptcy Clause's purpose of establishing a uniform federal response to the problems created by the state-by-state patchwork of insolvency laws that existed before the Founding.

As a result, to date, the Court has found two constitutional provisions that may provide a basis for congressional abrogation of state sovereign immunity: the Bankruptcy Clause and the Fourteenth Amendment. *Allen v. Cooper* presents the question of whether, notwithstanding *Florida Prepaid*, the IP Clause belongs on that list.

Allen v. Cooper

In 1717, the pirate Edward Teach (better known as Blackbeard) captured a French vessel and renamed her *Queen Anne's Revenge*. The following year, the ship ran aground and Blackbeard abandoned her off the

coast of North Carolina. In 1996, the private salvage firm Intersal discovered the wreck. North Carolina's Department of Natural and Cultural Resources (the Department) entered into an agreement with Intersal to recover the wreck. Intersal retained Rick Allen, a videographer, to document the salvage effort, and Allen subsequently registered copyrights in his photographs and videos of the recovery.

In 2013, after the Department posted some of Allen's images online, Allen accused the Department of copyright infringement. The parties settled this dispute and entered into a settlement agreement. Subsequently, the Department posted several videos online that incorporated Allen's copyrighted footage. Allen then sued the Department and named state employees for copyright infringement. The Department moved to dismiss the suit based on state sovereign immunity.

The district court denied the motion to dismiss, holding that Congress had validly abrogated state sovereign immunity under section 5 of the Fourteenth Amendment. The court distinguished *Florida Prepaid*, finding that the CRCA's congressional record established "a pattern of current and anticipated abuse by the states of the copyrights held by their citizens" that Congress was empowered to remedy. On appeal, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) reversed. It first held that Congress could not rely on the IP Clause to abrogate state sovereign immunity in light of *Florida Prepaid* and *Seminole Tribe*. The court next rejected the argument that *Katz* had undermined those cases, concluding that *Katz* was limited to the "unique" context of the Bankruptcy Clause. Finally, as to the Fourteenth Amendment, the Fourth Circuit found that Congress did not actually invoke its Fourteenth Amendment powers in enacting the CRCA, and that even if Congress had done so, the CRCA was not congruent and proportional legislation. Like the Patent Remedy Act in *Florida Prepaid*, the Fourth Circuit concluded that the CRCA swept too broadly by revoking state immunity to all cases of state copyright infringement, even those that do not amount to a due process violation.

The Supreme Court granted certiorari on June 3, 2019 to address whether the CRCA validly abrogated state sovereign immunity under the IP Clause or section 5 of the Fourteenth Amendment.

Can Congress use the IP Clause to Abrogate State Sovereign Immunity?

Maintaining that the CRCA validly abrogated state sovereign immunity, Allen advances two alternative arguments. First, he asserts that the IP Clause reflects a "plan-of-the-Convention" waiver of state immunity for patent and copyright suits, much like the waiver under the Bankruptcy Clause that the Supreme Court found in *Katz*. Here, Allen emphasizes the text of the IP Clause, which grants 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." Allen argues that copyrights would be neither "secure" nor "exclusive" if Congress were powerless to prohibit copyright infringement by the states. Allen also points to the history and purposes of the IP Clause (such as encouraging national uniformity in IP rights) as supporting abrogation. To the extent that *Florida Prepaid* precludes that result, Allen urges the Court to overrule the decision.

In the alternative, Allen argues that the CRCA is a valid exercise of Congress's authority to enforce the Fourteenth Amendment's Due Process Clause. Here, Allen accepts the basic "premise" of *Florida Prepaid*—that deprivations of intellectual property rights by the states may violate the Fourteenth Amendment. However, Allen argues that the CRCA's legislative record, in contrast to the record before the Court in *Florida Prepaid*, establishes a pattern of copyright infringement by the states that Congress was empowered to remedy. In particular, Allen relies on a 1988 report of the Register of Copyrights and subsequent congressional hearings, which, in Allen's view, found "numerous examples" of unremedied copyright infringement by the states.

In response, North Carolina argues that the IP Clause does not provide a basis for the CRCA, emphasizing that the Court has permitted abrogation of state sovereign immunity only in "rare" situations. Observing that the Court has already held that the IP Clause does not permit abrogation for patent infringement

claims, North Carolina argues that there is no reason for the Court to reconsider *Florida Prepaid*'s holding in the copyright context, as copyrights and patents are both based on the same constitutional provision. Even if the Court were inclined to reconsider *Florida Prepaid*, North Carolina argues that the text of the IP Clause does not support a plan-of-the-Convention waiver: the IP Clause merely provides that Congress may grant authors *rights* that are "exclusive," not that Congress has the exclusive authority to protect copyrights, or that states necessarily surrendered their immunity to copyright suits. In contrast, North Carolina casts the abrogation in *Katz* as largely premised on the *in rem* nature of bankruptcy jurisdiction and clear historical evidence of waiver, both of which are absent in the IP Clause context.

As to Allen's Fourteenth Amendment argument, North Carolina maintains that the CRCA is not a congruent and proportional remedy for due process violations for two basic reasons. First, North Carolina claims that Congress did not identify a "widespread" pattern of unconstitutional actions by states when it enacted the CRCA, but instead only a handful of isolated examples of state copyright infringement, which may or may not be unconstitutional. Second, North Carolina argues that Congress did not tailor the CRCA by limiting abrogation to actual constitutional violations, instead sweeping in all copyright infringements by the states, regardless of whether they were intentional or whether adequate alternative remedies were available.

Implications for Congress

As a practical matter, the most direct effects of the decision in *Allen v. Cooper* are for copyright holders and users of copyrighted works. Amici supporting Allen fear that a decision upholding state sovereign immunity will increase uncompensated use of copyrighted works by states and their instrumentalities, such as state universities, harming the creators of those works economically and undermining the incentives to create provided by copyright. Amici supporting North Carolina, for their part, respond that practical and institutional constraints prevent states from abusing their sovereign immunity, and argue that immunity from copyright suits can facilitate the public mission of state universities and libraries.

The broader legal effects of *Allen v. Cooper* could be even more significant. Depending on how the Court rules, the decision could significantly expand or contract the scope of Congress's powers to abrogate state sovereign immunity, with potential effects in many contexts outside of copyright law. As noted above, congressional authorities to abrogate state sovereign immunity are currently limited to the Bankruptcy Clause and section 5 of the Fourteenth Amendment, with the exercise of the latter power further constrained by the "congruence and proportionality" requirement. If the Court agrees with Allen and extends *Katz*'s holding to the IP Clause, this would potentially open the door to later arguments that other Article I powers of Congress effected "plan-of the-Convention" waivers as well.

On the other hand, in light of the *Franchise Tax Board of California v. Hyatt* decision just last term, which overruled precedent to *extend* the scope of state sovereign immunity, some observers believe that the Court is likely to rule in favor of North Carolina. To the extent that the Court is headed in that direction, the ruling in *Allen v. Cooper* could undermine the doctrinal basis of *Katz* or establish that *Katz*'s reasoning is strictly limited to the bankruptcy context.

Alternatively, the Court could rule more narrowly and focus on the relatively fact-bound Fourteenth Amendment issues, finding either that the legislative record of the CRCA is sufficient to support abrogation, or that the CRCA's legislative history is not materially different from the record found lacking in *Florida Prepaid*. Such a ruling could clarify what Congress must do to comply with the "congruence and proportionality" test, which Justice Scalia once criticized as "mak[ing] no sense." The result could either increase or diminish the importance of developing a substantial legislative record and carefully tailoring remedies when Congress legislates to enforce the provisions of the Fourteenth Amendment.

The Supreme Court is scheduled to hear oral argument in *Allen v. Cooper* on November 5, 2019.