

Supreme Court Rules That States Cannot be Sued for Copyright Infringement, For Now...

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The U.S. Supreme Court's busy intellectual property term (with six copyright and trademark cases) rolls on. On March 23, SCOTUS ruled in [Allen v. Cooper](#), 589 U.S. ___, No. 18-877 (Mar. 23, 2020), that states, absent consent, may not be sued for copyright infringement. In particular, SCOTUS held that Congress did not have a sufficient constitutional basis to abrogate states' sovereign immunity in copyright infringement actions when it passed the [Copyright Remedy Clarification Act of 1990](#) (CRCA). However, the Court noted that, going forward, the ruling would not prohibit Congress from passing a more "tailored" copyright remedy statute if it found a valid basis to suspend sovereign immunity in copyright infringement cases against states.

Allen v. Cooper began in 1996 when the plaintiff, Frederick Allen ("Allen"), was hired to film and photograph the salvage of Blackbeard's infamous pirate ship, the *Queen Anne's Revenge*, which ran aground off the coast of North Carolina in 1718. Allen registered his copyrights in the photos and videos, but North Carolina later posted his work online without his permission.

Allen sued North Carolina for copyright infringement. North Carolina moved to dismiss the lawsuit based on sovereign immunity, a doctrine under which a federal court may not hear a suit brought by any person against a non-consenting state. However, Allen argued that the CRCA removed sovereign immunity in copyright infringement actions, providing that a state "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 in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner provided by [federal copyright law]." North Carolina, meanwhile, challenged the constitutionality of the CRCA.

The District Court [held](#) that Congress had a constitutional basis under the CRCA to suspend sovereign immunity under Section 5 of the Fourteenth Amendment, but not under Article I of the Constitution (e.g., the Intellectual Property Clause). The Fourth Circuit [reversed](#) the District Court, holding that Congress did not have a basis to remove sovereign immunity under the CRCA on either basis.

SCOTUS affirmed the Fourth Circuit's decision. Under Court precedent, in order to remove sovereign immunity, Congress must (i) enact "unequivocal statutory language" abrogating sovereign immunity from the suit and (ii) have some constitutional basis to encroach on such immunity. No one disputed that Congress unequivocally intended to suspend sovereign immunity in copyright infringement suits under the CRCA. As for whether Congress had a constitutional basis, SCOTUS first disposed of Allen's argument that Congress had the power under the Intellectual Property Clause of Article I of the Constitution. Relying on *stare decisis*, SCOTUS pointed to an earlier case in which it refused to allow Congress to use its Article I Intellectual Property Clause to pass a similar statute that circumvented limits of sovereign immunity in patent suits. Regarding the Fourteenth Amendment basis for enacting the CRCA, without a record of discernible constitutional harm (i.e., a pattern of copyright infringement and disrespect of copyright by states), the Court found that the Congressional attempt to categorically remove sovereign immunity for copyright infringement suits would not be "congruent and proportional" to the remedy sought. Therefore, without any constitutional basis under Article I or the Fourteenth Amendment, the CRCA did not validly suspend sovereign immunity and North Carolina is free to use it as a shield against Allen's claims.

Importantly, the SCOTUS holding does not hold states immune from copyright infringement – sovereign immunity already provided that protection to states. Rather, the Court merely held that the CRCA did not meet the standards necessary to suspend sovereign immunity. SCOTUS noted that the CRCA was passed before SCOTUS’s key rulings on Congressional Article I powers to abrogate sovereign immunity, so going forward Congress may look to this opinion to craft a law that would permit copyright infringement suits against states, with a sound constitutional basis (i.e., by detecting violations of due process and building a legislative record before enacting a proportionate response). Notably, in his concurrence, Justice Thomas, among other things, disagreed with Justice Kagan’s discussion in the majority opinion about future legislation, arguing that SCOTUS should not advise Congress “on how it might exercise its legislative authority, nor give our blessing to hypothetical statutes or legislative records not at issue here.”

Until Congress takes further action, a state cannot be sued for copyright infringement without the state’s consent. It remains to be seen whether Congress will take action, but SCOTUS has certainly laid the groundwork to salvage the pieces of the CRCA.