

Keyword(s): sovereign immunity, copyright infringement

General: Sovereign immunity can be used by states as a shield from copyright suits in federal court. Abrogation of that immunity by Congress requires an explicit statement to do so and must meet the congruent and proportional test between the injury to be prevented or remedied and the means adopted to that end.

Allen et al. v. Cooper, Governor of North Carolina, et al.
589 U.S. _____ (2020) Supreme Court No. 18-877
Decided: March 23, 2020

I. Facts

In 1996, Intersal, Inc. (a marine salvage company) discovered the infamous pirate Blackbeard's ship *Queen Anne's Revenge*. Under federal and state law, the wreck belonged to North Carolina, who contracted with Intersal to take over the recovery activities. Intersal then hired Frederick Allen, a local photographer, to document the operation. Allen did so for over a decade, registering copyrights in all of his works. In 2013, Allen protested use of his copyrighted work when the state uploaded some of his work to the state's website without his permission. Settlement negotiations broke down and Allen filed in the Federal District Court.

North Carolina moved to dismiss the suit on the grounds of sovereign immunity, invoking the rule that federal courts cannot hear suits brought by individuals against nonconsenting states. Allen responded that an exception applied because Congress had abrogated the states' sovereign immunity from copyright cases in the Copyright Remedy Clarification Act of 1990 (CRCA). The CRCA specifies that in copyright cases, states will be liable and subject to remedies in the same manner and to the same extent as a private party. 17 U.S.C. § 511(a); see § 511(b).

The District Court agreed with Allen, finding that Congress clearly stated their intent to abrogate sovereign immunity for copyright claims against a state. The court further found that although precedent (namely *Florida Prepaid Postsecondary Ed. Expense Bd. V. College Savings Bank*) precluded Congress from abrogating state sovereign immunity under article 1 powers, there was a proper constitutional basis to do so under section 5 of the fourteenth amendment. North Carolina appealed and the Fourth Circuit Court of Appeals reversed, reading *Florida Prepaid* to prevent both article 1 and section 5 abrogation. The court stated that an abrogation under section 5 of the fourteenth amendment must be congruent and proportional to the injury it seeks to remedy. Further, the court found that the CRCA (similar to the Patent Remedy Act at issue in *Florida Prepaid*) was too broad and rested on too minor a constitutional harm.

II. Issues

- Did Congress enact “unequivocal statutory language” abrogating the States’ immunity from the suit?
- Did some constitutional provision allow Congress to encroach on the States’ sovereignty?
 - Can Article 1 of the Constitution accomplish this?
 - Can Section 5 of the Fourteenth amendment accomplish this?

III. Discussion

All parties agreed that the CRCA consisted of “unequivocal statutory language” designed to abrogate the states’ immunity from copyright infringement suits. Specifically, the CRCA states that States “shall not be immune” from those actions in federal court. § 511(a). Like the Patent Remedy Act at issue in *Florida Prepaid*, “[it] could not have made any clearer” Congress’s intent to remove the States’ immunity. *Florida Prepaid* at 635.

Article 1

Under Article 1 of the Constitution, Congress has 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.” § 8, cl. 8. The Court recognized that the article provides Congress a reason to put states on the same footing as private parties in patent litigation; to ensure uniform protection of intellectual property. However, the Court previously distinguished the Article 1, Section 8 power of Congress from the power to abrogate a state’s sovereign immunity in *Seminole Tribe v. Florida*, where it was decided that Article 1 cannot be used to circumvent the limits sovereign immunity places upon federal jurisdiction. This holding was subsequently applied to patents in *Florida Prepaid*.

Subsequent to *Florida Prepaid*, the Court in *Central Va. Community College v. Katz*, held that Article 1’s Bankruptcy Clause enabled Congress to subject nonconsenting states to bankruptcy proceedings. Allen argued that this exception to the rule expressed in *Seminole Tribe v. Florida* should likewise be extended to copyright cases. However, the Court distinguished the bankruptcy exception because of the unique history of the Bankruptcy Clause, which was created to meet a felt need to curb states’ authority, which often had wildly divergent schemes for discharging debt, and often refused to respect one another’s discharge orders. The Court further distinguished copyright from the Bankruptcy Clause by noting that the authority to abrogate states’ sovereign immunity came directly from Article 1’s Bankruptcy Clause, rather than a later written Congressional act, such as the CRCA. Thus, the Court concluded that *stare decisis* doomed Allen’s argument in view of the previously decided and nearly identical *Florida Prepaid* case.

Section 5 of the Fourteenth Amendment

The Court began by noting that the Fourteenth Amendment “fundamentally altered the balance of state and federal power” and can authorize Congress to abrogate sovereign immunity. *Seminole Tribe*, 517 U. S., at 59. It states, in part, that states may not “deprive any person of life, liberty, or property, without due process of law.” The Court also recognized that section 5 gives Congress the “power to enforce, by appropriate legislation,” those limitations on the States’ authority, which may include abrogating sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U. S. 445, 456 (1976).

However, the Court also noted that in order for an abrogation statute to be proper under Section 5, it must sufficiently connect to conduct that Section 1 is designed to protect. Specifically, it must be tailored to “remedy or prevent” conduct infringing the Fourteenth amendment’s substantive prohibitions. *City of Boerne v. Flores*, 521 U. S. 507, 519 (1997). In

Boerne, the Court established a rule that there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Id.* at 520. Citing precedent, the Court also noted that a negligent act does not “deprive” a person of property. See *Daniels v. Williams*, 474 U. S. 327, 328 (1986). Therefore, the court reasoned that an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause. Additionally, the court determined that a state cannot violate the Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of due process. Thus, the Court found that within the broader world of state copyright infringement is a smaller one where the Due Process Clause comes into play.

The Court returned to *Florida Prepaid*, in which it was decided that the lack of recorded intentional patent infringement by States indicated that abrogating state sovereign immunity was entirely out of proportion to the harm done. *Florida Prepaid* at 640. In fact, there, “most state infringement was innocent or at worst negligent”. *Id.* at 645. Because the harm was not consistently intentional or reckless, the abrogation of sovereign immunity was too “out of proportion” to any due process problem. *Id.* at 646-647.

The Court found similarities in the case at issue; that there was little to no evidence of intentional infringement of copyright protection by states. To the contrary, a detailed report produced by the then-Register of Copyrights, while stating that “copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court,” actually indicated that state infringement is “not widespread.” Hearings on H. R. 1131 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, 101st Cong., 1st Sess., 53 (1989) (House Hearings). Oman, the then-Register of Copyrights, further stated that [States] are all respectful of the copyright law.” *Id.* Therefore, the Court concluded that the CRCA failed the congruence and proportionality test, and could not therefore have constitutional backing under section 5 of the 14th amendment. However, the Court left open the possibility for Congress to revise the CRCA, or to draft other legislation, that limited the abrogation of state sovereign immunity to cases of intentional or reckless infringement, and indicated that such an act may pass the congruence and proportionality test under which the CRCA fell.

IV. Conclusion

To abrogate sovereign immunity, a congressional act must be explicit in its desire to do so and must have constitutional support. Article 1 itself does not provide this support, as was decided in *Seminole Tribe v. Florida*. Section 5 of the Fourteenth amendment may provide the constitutional support, but only if the harm is proportional to the remedy of abrogating sovereign immunity. In cases of innocent or negligent infringement, that proportionality test is not satisfied.