

Shiver Me Timbers: Can the States Now Legitimately Hornswoggle Copyright Owners?

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In a case where the subject matter (copyrights relating to footage of a salvaged pirate ship) is arguably more intriguing than the question presented, the Supreme Court held that a section of the Copyright Act allowing copyright lawsuits against States is unconstitutional.

Under the statute in question—the Copyright Remedy Clarification Act of 1990 (“CRCA”)—a State “shall not be immune [under the Constitution] or any other doctrine of sovereign immunity from suit in Federal court” for copyright infringement. The statute further

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indicates that States can be held liable for infringement in the same manner, and to the same extent, as private parties. Based on this statute, a videographer named Frederick Allen sued the State of North Carolina for copyright infringement. The specific facts and background on the case can be found in our earlier post [here](#).

The Court acknowledges that its precedent allows a federal lawsuit against a State under two conditions: (1) Congress must have enacted unequivocal statutory language abrogating State immunity; and (2) Congress must have had authority to abrogate the State immunity. There is no question that the CRCA satisfies the first question due to its clear language. The second question is the source of the controversy.

Allen argued that there are two constitutional provisions that provided Congress appropriate authority to abrogate State immunity for copyright infringement. First, Article I of the Constitution empowers Congress to provide copyright protection (“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”). Therefore, abrogation of immunity is perhaps the only way to secure a copyright owner’s exclusive rights against State intrusion. In other words, if a State is allowed to use a copyright without permission of the owner, then the owner no longer holds exclusive rights in the copyright. Allen’s second rationale is based on an argument that a copyright is a property right, and is thus subject to due process under the Fourteenth Amendment (“nor shall any state deprive any person of life, liberty, or property, without due process of law”).

Writing the majority opinion for the Court, Justice Kagan indicates that the first question has already been answered by the Court’s earlier decision in *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*. In that case, the Court held that the Patent Remedy Act, which stripped the States of immunity for patent suits, was unconstitutional. And, therefore, given the similarity of copyrights and patents as well as the respective statutory provisions at issue, ruling in Allen’s favor would require overruling *Florida Prepaid*.

As for the Fourteenth Amendment question, the Court indicates that for an abrogation statute to be appropriate, it must “be tailored to ‘remedy or prevent’ conduct infringing the Fourteenth Amendment’s substantive prohibitions.” The Court further holds that copyright infringement must “be intentional, or at least reckless” to come within reach of the due process clause. In *Florida Prepaid*, the Court found that Congress did not identify a pattern of such infringement. Likewise, looking to the legislative history of the CRCA, the Court found that Congress’s findings on copyright infringement were similarly lacking.

The majority, however, leaves the door open for Congress by indicating that its holding does not prevent Congress from passing a “tailored statute [that] can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, [Congress] can bring digital Blackbeards to justice.” (Justice Thomas concurs with the opinion of the majority, but not with respect to the suggestion to Congress, because “[w]e should not purport to advise Congress on how it might exercise its legislative authority, nor give our blessing to hypothetical statutes or legislative records not at issue here.”).

So what does this all mean? As we wrote in our earlier post, without the protections of the CRCA, there is nothing to stop State governments or agencies from infringing the rights of copyright holders, because they can rely on sovereign immunity. That said, a copyright holder may still have a remedy against any private party who participates in a State's infringement (e.g., an independent contractor or a website host). And, if States begin acting like copyright pirates in a manner deemed intentional or reckless, the Court's decision here leaves open the door for Congress to enact another, more tailored, statute to address such action.