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Does Copyright Law Apply to States?: Analyzing Sovereign Immunity and Copyright Infringement

BY [DANIEL COHEN](#)/ ON APRIL 1, 2020



The premise that copyright holders can sue those who infringe on their property seems like a fundamental truth of our legal system. If one person or entity uses another's copyrighted material against their wishes, they can sue for possible damages and for an injunction to take it down. But what if the infringing party is not a regular entity, but a sovereign? If a State infringes on your copyright, does their sovereign immunity bar a suit? The Supreme Court is poised to decide later this year.

This case has its roots in the copyrighted media material of the salvage of *Queen Anne's Revenge*, the flagship of the famed pirate Edward Teach, also known as Blackbeard. Blackbeard was one of the most prolific pirates of the 18th century, so finding his ship off the coast of North Carolina in 1996 was an exciting discovery.^[1] The company who found it, Intersal, Inc. ("Intersal"), entered into an agreement with the North Carolina Department of Natural and Cultural Resources ("the Department"), where Intersal acknowledged that the State owned the shipwreck, and the State agreed that Intersal had the "exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video)" relating to the shipwreck, with the exception of non-commercial educational video and

documentaries.[\[2\]](#) Intersal then contracted with Frederick Allen's video production company to document the salvage of the shipwreck, and while doing so, Allen registered 13 copyrights with the U.S. Copyright Office, each covering one year of the process.[\[3\]](#)

In 2013, however, the Department published some of Allen's copyrighted material on the Internet without his consent.[\[4\]](#) North Carolina soon passed a statute called Blackbeard's Law, which states that all media materials regarding shipwrecks in the State's custody automatically go into the public record, and therefore there was no copyright to infringe upon.[\[5\]](#) Allen sued the Department, and sought damages for copyright infringement and a declaratory judgment that Blackbeard's Law was preempted by the Copyright Act, which established the basis of copyright law in the United States.[\[6\]](#) The State filed a motion to dismiss, claiming sovereign immunity, but the District Court denied the State's motion to dismiss, holding that Allen plausibly alleged that the Copyright Act preempted the statute, that the Copyright Remedy Clarification Act ("CRCA") abrogated the State's sovereign immunity from copyright infringement claims, and that Allen had a plausible claim for copyright infringement.[\[7\]](#) The Fourth Circuit, however, disagreed and reversed the District Court's decision.

The Eleventh Amendment confers sovereign immunity to States, and "it is well established that any abrogation of a State's Eleventh Amendment immunity requires both a clear statement of congressional intent... and a valid exercise of congressional power."[\[8\]](#) The CRCA declares that "any State... shall not be immune, under the Eleventh Amendment... 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 law]."[\[9\]](#) The Court thus acknowledged that the CRCA provides a clear statement of congressional intent, but what the Court was less certain about was if enacting the CRCA was a valid exercise of congressional power.[\[10\]](#)

While Article I of the Constitution seems like a strong justification for enacting the CRCA, since the Patent and Copyright Clause would afford Congress the proper authorization, the Supreme Court held in *Seminole Tribe of Florida v. Florida*, and affirmed in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, that relying solely on Article I powers is insufficient to abrogate state sovereign immunity.[\[11\]](#) The court in *Florida Prepaid*, however, did hold that a State's sovereign immunity could be validly abrogated under § 5 of the Fourteenth Amendment, which gives Congress the power to enforce the provisions of the Fourteenth Amendment with appropriate legislation.[\[12\]](#) However, in order for the legislation to be deemed appropriate under § 5, since Congress's enforcement power is remedial, the legislation-at-issue must deter, or provide a remedy for, identified substantive violations of the Fourteenth Amendment.[\[13\]](#) The Supreme Court in *Florida Prepaid* eventually held that, even if Congress did make clear that they were relying on § 5 in passing the legislation-at-issue and that the legislation was tailored to prevent the conduct, eight reported cases of offending conduct from 1180 to 1990 was not enough to create a prolific problem.[\[14\]](#)

Relying on this prior ruling, the Fourth Circuit held that the CRCA could not abrogate State's sovereign immunity and that Allen's lawsuit must be dismissed. Not only was § 5 not being relied upon, but even if it were relied upon, and the CRCA was meant to appropriately enforce the Fourteenth Amendment, there were not enough copyright infringement cases in the record to satisfy the threshold, and thus § 5 was inapplicable.^[15] When passing the CRCA, "the record before Congress contained at most a dozen incidents of copyright infringement by states that could be said to have violated the Fourteenth Amendment... [which] falls short of establishing the 'widespread and persisting deprivation of constitutional rights'... to warrant prophylactic legislation under § 5."^[16]

The Supreme Court agreed to hear the case in 2019, and oral arguments were held in November of that year.^[17] During oral arguments, some of the justices seemed to agree with the Fourth Circuit's reasoning, with Justices Sonia Sotomayor and Elena Kagan suggesting that they might hold to *Florida Prepaid* precedent since there are not enough instances of copyright infringement by the States to warrant abrogation by the CRCA.^[18] Justice Stephen Breyer, however, seemed concerned with allowing States to infringe on copyrighted material with impunity.^[19] With clear precedent on the issue, it is certainly probable that a decision in favor of North Carolina will be made, and the reasons for doing so hold water, but it should be easy for everyone to understand that allowing willful infringement of people's properties rights is not just. The Supreme Court will provide their decision on the case later this year, and the consequences of the decision will be far-reaching. It will be interesting to see if a decision in favor of North Carolina leads to further infringement cases and whether Congress will now take proper care to abrogate sovereign immunity in future legislation.

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^[1] Allen v. Cooper, 895 F.3d 337, 343 (4d Cir. 2018), *argued*, 139 S.Ct. 2664 (U.S. June 3, 2019) (No. 19-877).

^[2] *Id.*

^[3] *Id.* at 344.

^[4] *Id.*

^[5] Allen v. Cooper, 244 F.Supp.3d 525, 531 (E.D.N.C. 2017) *rev'd*, 895 F.3d 337 (2018); Jess Bravin, *Yo Ho Ho: Justices Ponder Rights to Blackbeard Ship-Salvage Images*, Wall St. J. (Nov. 5, 2019) <https://www.wsj.com/articles/yo-ho-ho-justices-ponders-rights-to-blackbeard-ship-salvage-images-11572992004>.

^[6] Allen, 244 F.Supp.3d at 531.

[7] *Id.* at 543-44.

[8] Allen, 895 F.3d at 347-48; *see* U.S. Const. amend. XI.

[9] 17 U.S.C. § 511(a) (1999).

[10] Allen, 895 F.3d at 348.

[11] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999).

[12] *Id.* at 637.

[13] *Id.* at 638-639 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997)).

[14] *Id.* at 640-641.

[15] Allen, 895 F.3d at 352-53.

[16] *Id.* at 353 (citing *City of Boerne*, 525 U.S. at 526).

[17] *Allen v. Cooper*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/allen-v-cooper/>.

[18] Bravin, *supra* note 5.

[19] *Id.*