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Pirate treasure? SCOTUS unanimously rules states are immune from copyright infringement suits in Blackbeard case

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"Arrr, matey… the crown bested me again. Me buried treasure is awash without remedy." Perhaps Blackbeard would utter this upon learning that the U.S. Supreme Court unanimously ruled that states are immune from copyright infringement actions. Specifically, on Monday, March 23, 2020, the Supreme Court held that the Copyright Remedy Clarification Act of 1990 (the "CRCA") abolishing states' sovereign immunity against copyright infringement suits is invalid.[1]

The story begins over three hundred years ago off the coast of Beaufort, North Carolina, where Edward Teach, more well known as the infamous pirate Blackbeard, ran into unfortunate luck, when his vessel, *Queen Anne's Revenge,* ran aground on a sand bar near shore and sank. *Queen Anne's Revenge* remained untouched underwater for centuries until 1996, when Intersal, Inc. ("Intersal") discovered her wreck. While according to federal and state law, the wreck belongs to the State of North Carolina, North Carolina engaged Intersal to excavate the ship. Intersal hired Frederick Allen ("Allen") to record the excavation. Allen captured videos and photos relating to the unearthing of *Queen Anne's Revenge* and registered copyrights in these works.

North Carolina subsequently published many of the works despite Allen's objections, in what Justice Kagan referred to as "a modern form of piracy."[2] As a result, Allen filed a complaint in Federal District Court alleging copyright infringement against the State of North Carolina. North Carolina moved to dismiss the suit on the grounds of sovereign immunity under the Eleventh Amendment. Allen rebutted on the basis that Congress had abrogated the State's sovereign immunity from copyright infringement pursuant to the CRCA, which states that a state "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in [f]ederal court" for copyright infringement.[3] Agreeing with Allen, the district court allowed the suit to proceed against North Carolina. The State appealed and the Fourth Circuit reversed, relying on authority ("*Florida Prepaid*") that negated a similar patent statute (commonly called the

[1] *Allen v. Cooper*, No. 18-877, 589 U.S. ____ (2020).

[2] *Allen*, slip op. at 2.

[3] 17 U. S. C. §511(a).

"Patent Remedy Act").[4] The Supreme Court granted certiorari, and affirmed the appellate court's decision finding the CRCA invalid.

Like the Fourth Circuit, Justice Kagan relies heavily on *Florida Prepaid* in her opinion and goes as far as to say that such precedent "forecloses each of Allen's arguments."[5] Allen raises the argument that abrogation of sovereign immunity from copyright infringement is supported by the Intellectual Property Clause of the Constitution.[6] But *Florida Prepaid* addressed this argument, finding that Congress could not use its Article I power with respect to patents to abrogate a state's immunity.[7] Justice Kagan states the same reasoning applies to copyrights as well. The Court concludes that "the power to secure an intellectual property owner's exclusive [r]ight under Article I stops when it runs into sovereign immunity."[8]

The Court also considers the Fourteenth Amendment as a way to remove a state's sovereign immunity. For a statute abrogating immunity to be allowed under the Fourteenth Amendment, "it must be tailored to remedy or prevent conduct infringing the Fourteenth Amendment's substantive prohibitions."[9] In other words, Congress can allow suits against states for the violation of rights protected under the Fourteenth Amendment, but only when the abrogation statute satisfies a means-end test (whereby the law must be proportional to the injury to be prevented or remedied and the means adopted to that end). In considering this argument, the Court poses the question, "When does the Fourteenth Amendment care about copyright infringement?"[10] Justice Kagan again looks to *Florida Prepaid* for guidance in answering this question. The *Florida Prepaid* court found that the Patent Remedy Act did not meet the means-end test and went too far, having no limitations whatsoever on the abrogation of sovereign immunity for patent suits. Similarly, the present Court reasoned the CRCA also goes too far and is not proportional to the injury it aims to fix. Justice Kagan does note, however, that this conclusion does not prevent Congress from enacting an abrogation law in the future that meets the means-end test.

The Court's decision is well founded in precedent and constitutional law; however, it does not resolve the underlying problem copyright holders may face in the future. Without the CRCA, states are free to infringe copyrights without repercussion. Copyright stakeholders like the American Society of Media Photographers, Inc., the Recording Industry Association of America, and the Software & Information Industry Association, to name a few, submitted amicus briefs in support of Allen for this reason. Only time will tell if these fears are realized, and whether Congress attempts to enact a narrower abrogation law tailored to the problem.

Blackbeard was killed and beheaded on Ocracoke Island, North Carolina, by Lt. Maynard of Virginia. His head was placed on Lt. Maynard's vessel and sailed to Bath, North Carolina, where it

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[4] *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999).

[5] *Allen*, slip op. at 5-6.

[6] Article I § 8, cl. 8, which provides "[t]o 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."

[7] (citing *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 73 (1996), that similarly held that "Article I cannot be used to circumvent" sovereign immunity.)

[8] *Allen*, slip op. at 7 (internal quotations omitted).

[9] *Id* at 10 (internal citation omitted).

[10] *Id* at 11.

was put on display. Legend has it that the beheaded Blackbeard swam around Lt. Maynard's vessel three times before he sank to his demise. His legend lives on in a Supreme Court decision for advocates and copyright stakeholders to discuss for years to come.

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