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Client Alert: Supreme Court finds Blackbeard is the only Pirate in North Carolina Copyright Case: State Sovereign Immunity Upheld against Infringement Claims

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The Supreme Court upheld North Carolina's sovereign immunity from copyright infringement claims in a unanimous opinion handed down on Monday, March 23, 2020. The Court struck down the provision of the Copyright Remedy Clarification Act of 1990 (CRCA) abrogating state sovereign immunity, finding Congress lacked authority to abrogate the State's immunity under the 11th Amendment. Justice Elena Kagan, writing for the Court, relied heavily on the 1999 ruling in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999), in which the Court struck down the nearly identical Patent Remedy Act for likewise abrogating the State's immunity against claims of patent infringement.

In *Allen v. Cooper*, the copyright infringement claims were brought against North Carolina by a videographer, Frederick Allen. Allen was contracted by the marine salvage company Intersal, Inc., who discovered the shipwreck of the *Queen Anne's Revenge* off the North Carolina coast in 1996. The *Queen Anne's Revenge* was best known as a flagship by Edward Teach, the infamous pirate known as Blackbeard. On June 10, 1718, Blackbeard ran the *Queen Anne's Revenge* aground while entering Beaufort Inlet, North Carolina. Blackbeard and most of his crew escaped unharmed and later surrendered to the Governor. The State of North Carolina is the legal owner of the nearly 300-year old shipwreck because it lies in state waters (within the three-mile limit).

During the recovery effort, videographer Allen recorded videos and took photographs to document the recovery effort for over a decade. Allen registered copyrights in all of his works. North Carolina later published some of Allen's videos and photos ultimately leading to Allen bringing a copyright infringement

suit against the state of North Carolina in Federal District Court.

In response to North Carolina's motion to dismiss on the basis of sovereign immunity, Allen argued two constitutional bases for Congress to abrogate the State's immunity from copyright infringement suits in the CRCA. First, Allen pointed to the Intellectual Property Clause, Art. I, § 8, cl. 8, which enables Congress to grant both copyrights and patents. Second, Allen pointed to Section 5 of the 14th Amendment, which authorizes Congress to "enforce" the commands of the Due Process Clause. For Congress's action to fall within its Section Five authority, it must consider the nature and extent of state conduct violating the 14th Amendment and examine the scope of Congress's response to the injury – the "congruence and proportionality" test.

The District Court agreed with Allen, finding clear congressional intent to abrogate state sovereign immunity in the CRCA. The District Court acknowledged that *Florida Prepaid* precluded Congress from using its Article I powers to deprive states of sovereign immunity, but found that Congress could accomplish its intent under Section Five of the 14th Amendment.

The Fourth Circuit reversed; holding that *Florida Prepaid* prevented Congress from abrogating the State's sovereign immunity under either provision of the Constitution: Article I or Section Five of the 14th Amendment.

The Supreme Court noted that in considering the same question in the context of patent infringement in *Florida Prepaid*, the Court previously defined the scope of unconstitutional patent infringement as intentional conduct for which there was no adequate state remedy. Because Congress failed to identify a pattern of unconstitutional patent infringement when it enacted the Patent Remedy Act, the Court held the Act was too broad under the "congruence and proportionality" test.

Justice Kagan wrote, "Our decision in *Florida Prepaid* compels the same conclusion [in this case]," where the record likewise could not support Congress's attempt to strip the states of their sovereign immunity in all copyright infringement cases under Section Five when it enacted the CRCA. "Despite undertaking an exhaustive search, [the Copyright Office] came up with only a dozen possible examples of state infringement," the justice wrote. "This is not, to put the matter charitably, the stuff from which [such] legislation ordinarily arises."

Justice Kagan continued, "[T]hat conclusion, however, need not prevent Congress from passing a valid copyright abrogation law in the future," noting Congress had enacted the CRCA before the Court created the "congruence and proportionality" test. In affirming the Fourth Circuit, the opinion goes on to conclude:

But going forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop states from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.

To read the Supreme Court's full opinion, please click here.

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