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## Supreme Court Says: States Maintain Sovereign Immunity for “Piracy”

**Allen v. Cooper, No. 18-877, 2020 WL 1325815 (U.S. Mar. 23, 2020)**

By: Lisa Holubar & Nick Wheeler | March 27, 2020

In an opinion by Justice Kagan, the Supreme Court recently held that the Copyright Remedy Clarification Act of 1990 (CRCA) did not validly abrogate States’ sovereign immunity for copyright infringement.<sup>1</sup> The Supreme Court relied on its 1999 decision in *Florida Prepaid*;<sup>2</sup> which held that Congress could not use its powers under the intellectual property clause of Article 1, Section 8, Clause 8 of the Constitution nor Section 5 of the Fourteenth Amendment to abrogate States’ sovereign immunity for patent infringement cases in the Patent Remedy Act.

The *Allen* case centered on videos and a photograph taken by Petitioner Frederick Allen of salvage operations of the *Queen’s Anne’s Revenge*, ship of the infamous pirate Blackbeard. Allen registered copyrights in the videos and photo he recorded. North Carolina published some of Allen’s materials online. Allen sued North Carolina for copyright infringement. In the District Court, North Carolina moved to dismiss the case on the basis of sovereign immunity. The District Court agreed with Allen in that the text of the CRCA demonstrated a clear congressional intent to remove State sovereign immunity in copyright infringement cases. The District Court justified this abrogation under Section 5 of the Fourteenth Amendment, which allows Congress to enforce the commands of due process, as the District Court recognized Congress could not abrogate under Article I in light of *Florida Prepaid*. The Fourth Circuit reversed, finding that the holding *Florida Prepaid* prevented Congress from using either Article 1 or Section 5 of the Fourteenth Amendment.

Like the Fourth Circuit, the Supreme Court rejected Allen’s Article I and Fourteenth Amendment arguments. The Supreme Court noted that generally under the Eleventh Amendment a federal court may not hear a case brought by a person against a nonconsenting state, but a case may be heard if: (1) Congress has enacted “unequivocal statutory language” abrogating the States’ immunity from the suit and (2) if some constitutional provision allows Congress to encroach on the States’ sovereignty.<sup>3</sup> The Court agreed that Congress used clear language for abrogation in the CRCA. But the Court found Congress did not have authority under the Intellectual Property Clause of Article I under the Court’s holding in *Florida Prepaid* as Congress’s power under the Intellectual Property Clause stops when it runs into sovereign immunity. Allen’s argument under the Fourteenth Amendment also failed. The Court found CRCA’s scope was “indiscriminate” and “out of proportion” to address any actual Fourteenth Amendment due process problem. Specifically, despite a year-long effort to gather evidence of state copyright infringement examples in support of the CRCA, only 12 instances of such infringement were reported, many of them accidental or honest mistakes.

The Court left open, however, the possibility that Congress could pass a valid copyright abrogation law in the future, if the law can properly link its scope to a proportionate response as this is the only way to “stop States from behaving as copyright pirates.”<sup>4</sup>

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<sup>1</sup> *Allen v. Cooper*, No. 18-877, 2020 WL 1325815 (U.S. Mar. 23, 2020).

<sup>2</sup> *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

<sup>3</sup> *Allen*, 2020 WL 1325815 at \* 4.

<sup>4</sup> *Id.* at \* 9.