In *Allen v. Cooper* [2] the Supreme Court held unanimously that a state cannot be sued for copyright infringement. In short, the Court found that Congress lacked the authority to strip states of their sovereign immunity in the Copyright Remedy Clarification Act (CRCA) of 1990.

After the pirate Blackbeard’s flagship *Queen Anne’s Revenge* was discovered in 1996 off the coast of Beaufort, North Carolina, the current owner of the ship, North Carolina, hired videographer Frederick Allen to document the ship’s recovery. After resolving one copyright dispute with North Carolina, Allen sued the state claiming it infringed on his copyright by impermissibly posting five of his videos online and using one of his photographs in a newsletter.

Eleventh Amendment sovereign immunity generally prevents states from being sued unless they consent. Congress may abrogate sovereign immunity if two conditions are met. First, Congress must use unequivocal statutory language stripping states of their sovereign immunity. Neither party argued that Congress failed to use such language in the CRCA.

So the question in this case was whether the second condition was met. Did some constitutional provision allow Congress to abrogate states’ sovereign immunity? The Court, in an opinion written by Justice Kagan, held no based on precedent.

Per the “Intellectual Property Clause” of Article I of the U.S. Constitution, Congress has the power “[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.” Allen argued that this Clause creates a duty on states, just like private parties, not to infringe on a copyright. According to Allen, “[a]brogation is the single best—or maybe . . . the only— way for Congress to ‘secur[e]’ a copyright holder’s ‘exclusive Right[s]’ as against a State’s intrusion.”


Allen argued that in *Central Virginia Community College v. Katz* [5] (2006), where the Court held that Article I’s Bankruptcy Clause enables Congress to subject nonconsenting states to bankruptcy proceedings, the Court “adopt[ed] a clause-by-clause approach to evaluating whether a particular clause of Article I” allows the abrogation of sovereign immunity. The Court disagreed with Allen’s interpretation of *Katz*: “everything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism.”

Finally, citing to *stare decisis* (let the decision stand) the Court the refused to overrule *Florida Prepaid* which it would need to do for Allen to win.
This case is significant for states in the big picture because the Court held the line on its sovereign immunity precedent. But as a practical matter the impact of this case is probably limited. It seems unlikely states are frequent violators of copyright law—especially after accidental violations are brought to their attention.

By:
Monday, March 23, 2020 at 05:25 PM

Tags: