

Blog Post

# The Final Revenge of Queen Anne's Revenge: State's Use of Photographs Is Not Piracy

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On March 23, 2020, in *Allen v. Cooper*, the Supreme Court held that Allen, who spent over two decades, photographing the shipwreck of *Queen Anne's Revenge*, better known as the flagship for the pirate Blackbeard, cannot sue the State of North Carolina (State) for copyright infringement of his photographs. The Court's decision was based on its prior decision in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999). According to the Court, that precedent made clear that Article 1, Section 8, Clause 8 of the Constitution (the Intellectual Property Clause) could not provide the basis for an abrogation of sovereign immunity and that Section 5 of the Fourteenth Amendment could not support an abrogation on a legislative record like the one at issue here.

As we explained in our [previous blog](#), Allen sued the State for copyright infringement of his photographs of *Queen Anne's Revenge*. The State moved to dismiss, arguing that the suit was barred by sovereign immunity and that Congress had exceeded its constitutional authority in enacting the Copyright Remedy Clarification Act of 1990 (CRCA), which purports to abrogate state sovereign immunity for copyright infringement claims. Allen argued that the CRCA removed the State's sovereign immunity in copyright infringement cases. The district court

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agreed with Allen and held that the CRCA validly abrogated the State's sovereign immunity from suit and that such an abrogation was congruent and proportional to a clear pattern of states' abuses of their citizens' copyrights. The Fourth Circuit reversed, holding that the CRCA did not validly abrogate the State's sovereign immunity. The Supreme Court upheld the Fourth Circuit's decision and held that Congress lacked authority to abrogate the State's immunity from copyright infringement suits in the CRCA. Justice Kagan wrote for the Court with the exception of two portions of the opinion in which Justice Thomas did not join. Justice Breyer wrote a concurring opinion joined by Justice Ginsburg.

In Justice Kagan's opinion, the Court acknowledged that while a federal court generally may not hear a suit brought by any person against a non-consenting state, that immunity is not absolute. For the exception to apply two conditions must be met. First, Congress must have enacted "unequivocal statutory language" abrogating the states' immunity from such suits and second, some constitutional provision must allow Congress to have thus encroached on the states' sovereignty. The Court confirmed that the first prong was indisputably met in this case, where Congress used clear language to abrogate the States' immunity from copyright infringement suits in the CRCA. See 17 U. S. C. §§ 501(a), 511(a)(b). Regarding the second prong, Allen relied on Article I's Intellectual Property Clause to empower Congress to grant copyright protection, and the Fourteenth Amendment, which authorizes Congress to "enforce" the commands of the Due Process Clause. The Court rejected both of these contentions, relying on *Florida Prepaid*, along with other precedent.

The Court noted that the Intellectual Property Clause (Art. I, § 8, cl. 8) enables Congress to grant both copyrights and patents, but it also imposes a corresponding duty (*i.e.*, not to infringe) on states no less than on private parties. The Court disagreed with Allen's view that Congress's authority to

abrogate sovereign immunity from copyright suits naturally follows. The Court explained that it concluded in *Florida Prepaid* that the Patent Remedy Act did not lawfully strip the states of immunity from infringement suits because Article I cannot be used to circumvent sovereign immunity. The same is true here, the Court held. The Court also noted that while this is a copyright case and *Florida Prepaid* was a patent infringement case, the constitutional basis for copyright protection arises from the same provision of Article I and, thus, the Court's reasoning in *Florida Prepaid* applies.

The Court also rejected Allen's argument that *Central Va. Community College v. Katz*, 546 U. S. 356, 359 (2006) offers "an exit ramp" from *Florida Prepaid*. The Court explained that *Katz* involved Article I's Bankruptcy Clause, which the Court held allowed suit against a State in federal court. The Court explained that sovereign immunity has no place in bankruptcy and *Katz* reflects "bankruptcy exceptionalism." Further, the Court noted that even if *Katz's* confines were not clear, *Florida Prepaid*, together with *stare decisis*, would still doom Allen's argument. Indeed, the Court reasoned, if the Intellectual Property Clause permitted the CRCA's abrogation of sovereign immunity, the Patent Remedy Act also resulted in similar abrogation, which would be contrary to *Florida Prepaid's* holding. In that circumstance, *Florida Prepaid* would have to be overruled. The Court found no "special justification" to do so.

With respect to § 5 of the Fourteenth Amendment, the Court recognized that § 5 imposes prohibitions on the states, including (as relevant here) that none may "deprive any person of life, liberty, or property, without due process of law" and that it gives Congress the "power to enforce, by appropriate legislation" limitations on the states' authority. The Court confirmed that it has long held that that power may enable Congress to abrogate the states' immunity and, thus, subject them to suit in federal court. However, the Court acknowledged, that power

is not unlimited. The Court explained that for an abrogation statute to be “appropriate” under § 5, it must be tailored to “remedy or prevent” conduct infringing the Fourteenth Amendment’s substantive prohibitions. To make that determination, the Court applies a type of means-end test, *i.e.*, there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. As a result, courts are to consider the constitutional problem Congress faced and to examine the scope of the response Congress chose to address that injury.

The Court, then, explained that for abrogation of sovereign immunity for copyright infringement to flow from the Due Process Clause, two conditions must be met: (1) copyright infringement must be intentional, or at least reckless, and (2) a state cannot violate that Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of “due process.” In resolving this issue, the Court again turned to *Florida Prepaid*, which defined the scope of unconstitutional infringement as intentional conduct for which there is no adequate state remedy. *Florida Prepaid* did not find any evidence of that sort of infringement in the legislative record of the Patent Remedy Act and, thus, determined that the statute’s abrogation of immunity – again, the equivalent of the CRCA’s abrogation of immunity – was excessive. While the Court acknowledged that there was more evidence of willful infringement in this case than in *Florida Prepaid*, it determined that it still was not enough to meet the standard. Thus, the Court held that under *Florida Prepaid*, the CRCA failed the “congruence and proportionality” test.

The Court then explained that its conclusion should not prevent Congress from passing a valid copyright abrogation law in the future while approaching the issue differently and taking into consideration the Court’s “congruence and proportionality” test and other precedent. According to the Court, such a new, tailored statute may be able to effectively stop states

from behaving as copyright pirates and, while respecting constitutional limits, it can bring digital Blackbeards to justice. For the foregoing reasons, the Court affirmed the Fourth Circuit's judgment.

Justice Thomas wrote separately in concurrence, joining all but two sections of the Court's opinion and raising two disagreements. First, Justice Thomas did not join the Court's discussion of *stare decisis*. He criticized the Court's approach — that it needs “special justifications” to overrule precedent because error alone “cannot overcome *stare decisis*” — as not comporting with the Court's judicial duty under Article III. Indeed, Justice Thomas stated that if the Court's decision in *Florida Prepaid* was demonstrably erroneous, the Court would be obligated to correct the error. Second, Justice Thomas did not join the Court's discussion regarding future copyright legislation, which he thought goes beyond the Court's role.

Justice Breyer also wrote a concurring opinion, joined by Justice Ginsburg. He wrote that since the Constitution gives Congress certain enumerated powers, including the Intellectual Property Clause, one might therefore expect that someone injured by a state's violation of that duty could “resort to the laws of his country for a remedy.” Or more concretely, Justice Breyer added, “one might think that Walt Disney Pictures could sue a state (or anyone else) for hosting an unlicensed screening of the studio's 2003 blockbuster film, *Pirates of the Caribbean* (or any one of its many sequels).” However, he concluded, the Court previously held otherwise in *Florida Prepaid*. He further concluded that, under that view, Congress' power under the Intellectual Property Clause cannot support a federal law providing that, when proven to have pirated intellectual property, states must pay for what they plundered. He also expressed hope that Congress will venture into the “great constitutional unknown” and pass appropriate legislation to remedy the risk of unfairness to authors and inventors.

This is big win for state infringers. It is very hard for Congress to act to remedy such wrongs. It should not be, but it is.

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