

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 32 • NUMBER 2 • FEBRUARY 2020

Queen Anne's Revenge?

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In June 2019, the U.S. Supreme Court granted certiorari in *Allen v. Cooper*.¹ The case presents a question “whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act . . . in providing remedies for authors of original expression whose federal copyrights are infringed by States.” The petitioners filed their opening brief in August 2019, the respondents filed their brief in September 2019, and the petitioners filed their reply in October. Oral argument was held on November 5, 2019.

BACKGROUND

Since 1998, Frederick Allen and his production company Nautilus Productions (together “Allen”), have been the exclusive photographers of the shipwreck of Queen Anne’s Revenge, the flagship of Edward Teach, better known as Blackbeard the pirate. Coincidentally, the ship was named for Queen Anne, who gave royal consent to the Statute of Anne, the first British copyright act. Allen registered his photographic works with the U.S. Copyright Office.

In 2013, Allen alleged that the State of North Carolina (the “State”) posted online his copyrighted works without his consent. The parties entered into a

settlement agreement, requiring the State to compensate Allen for the prior infringement. Subsequently, Allen discovered the State continued to use his copyrighted works and accused it of breaching the settlement agreement. In response, the State passed a law making all photographs and video material of shipwrecks in custody of North Carolina public record and available for use without limitations.

Allen sued the State in district court for copyright infringement. 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.

The district court 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’ abuse of the copyright held by their citizens. The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the CRCA did not validly abrogate the State’s sovereign immunity.

ALLEN’S POSITION

Allen argued that Congress validly exercised its powers under the Intellectual Property Clause in enacting the CRCA. It asserted in its opening brief that the Intellectual Property Clause expressly empowers Congress to “secur[e] . . . to Authors and

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Inventors the exclusive Right to their respective Writings and Discoveries.”² Allen explained that Congress could not “secur[e]” authors and inventors’ “exclusive Right” to their works if Congress was powerless to hold States liable when and if they infringe. Allen relied on the clause by clause analysis outlined by the U.S. Supreme Court in *Central Virginia Community College v. Katz*³ and concluded that the Intellectual Property Clause supplies singular warrant for Congress to abrogate state sovereign immunity so that Congress may secure the uniform, nationwide copyright protection required to “promote Progress of Science and useful Arts.”

Allen contended that although immunity from suit is a fundamental aspect of the sovereignty, compelling evidence demonstrates that states surrendered their immunity from copyright liability as part of the plan of the Constitutional Convention.

First, Allen argued, the plain text of the Intellectual Property Clause evidences the waiver. Allen explained that the active verb “secure” means, “to protect, insure, save, [and] ascertain.” It follows, that to “secur[e]” authors’ copyrights, Congress must be able to “put [them] beyond hazard” and protect them from any intrusion.

Similarly, by referring to the property rights that exist in creative works as “exclusive Right[s],” the Intellectual Property Clause denotes that those rights are to belong solely to the copyright holder, who may “enjoy [them] to the exclusion of others.” Allen concluded that, accordingly, the Framers left no doubt that Congress was to grant and protect creators’ exclusive rights over their intellectual property and any notion that States would retain their own sovereign authority and immunity to infringe upon federally-conferred copyrights is incompatible with Congress’s express power to secure copyrights, as to which authors are to hold exclusive rights.

Allen also argued that, in addition to the text of the Intellectual Property Clause, Congress’s enactment of the Copyright Act of 1790 and the history of the Intellectual Property Clause evidence that the Framers viewed the Clause as effectuating a waiver. The Copyright Act of 1790 launched a uniform national system and such uniformity could have not been achieved unless the intellectual property rights

conferred by Congress were enforceable against all infringers, including States. Additionally, Allen contended, the history of the Intellectual Property Clause at the Constitutional Convention indicates that States agreed to waive sovereign immunity under the Plan of the Convention. Specifically, the Intellectual Property Clause was passed unanimously, indicating there was a general agreement on the importance of authorizing a uniform federal response, which obviated any question or concern about whether states should be yielding to federal control and authors’ exclusive rights within this realm.

Further, Allen pointed out, it is not plausible that the Framers were unconcerned about the threat that governmental overreach would pose to the exclusive intellectual property rights Congress had the responsibility to protect. The Framers were concerned about protecting the rights of private citizens against intrusion by the government, as evidenced by the Third Amendment (quartering), Fourth Amendment (search and seizure), and Fifth Amendment (takings).

Consequently, Allen argued, it is implausible that the Framers would let the government infringe upon citizens’ intellectual property rights without liability. Allen concluded that leaving States free to violate those federal rights while disabling Congress from protecting them would be antithetical to the constitutional structure and conception—allowing states to intrude upon and upset a unique federal scheme for securing exclusive rights to creators to encourage and reward their efforts.

Allen also argued the Supreme Court’s prior decisions do not foreclose congressional reliance on the Intellectual Property Clause to abrogate states’ sovereign immunity. Specifically, Allen relied on the *Katz* holding that the proper analysis of Congress’s abrogation authority under Article I proceeds clause by clause.⁴

In *Katz*, the Supreme Court rejected the notion that Article I is incapable of giving rise to the power to abrogate sovereign immunity and explained that the Court is “not bound to follow dicta in a prior case in which the point now at issue was not fully debated.” Therefore, Allen argued, *Katz* superseded *Seminole Tribe of Florida v. Florida*,⁵ and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.⁶

Allen further concluded that once the Intellectual Property Clause is understood as empowering Congress to abrogate sovereign immunity, there should be no doubt that the CRCA reflects a valid exercise of that power.

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Separately, Allen argued the Fourteenth Amendment also gave Congress the power to allow copyright owners to sue States. Section 5 of the Fourteenth Amendment imbues Congress with “power to enforce, by appropriate legislation, the provisions of this article,” including the clause prohibiting States from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁷ Allen explained that rights to intellectual property are no less cognizable and protected under the Fourteenth Amendment than rights to other property are—and unlawful deprivations by the government no less warrant remedy. Allen concluded that, therefore, it was well within the legislature’s prerogative to furnish legislative remedy, *i.e.*, the CRCA.

Allen noted that the House Report supporting the CRCA expressly noted that, through unchecked state copyright infringement, states are injuring the property rights of citizens. Allen contrasted that with the Patent Remedy Act at issue in *Florida Prepaid*, where the legislative record did not reveal

any pattern of patent infringement by the States. Conversely, CRCA is cut from a different legislative cloth and supported by a compelling record, including the Register’s Report, the testimony at the Hearing, and specific examples of growing copyright infringement by States. This record, Allen concluded, demonstrated that in enacting the CRCA, Congress sought to remedy a pattern of Fourteenth Amendment violations.

Finally, Allen argued that given the limited, discrete, and targeted nature of copyright liability, the remedy afforded by Congress in the CRCA represents a congruent and proportional response to the State’s copyright infringement.

CONCLUSION

Following the filing of Allen’s opening brief, 13 *amici* filed briefs, 12 supporting Allen and one supporting neither party. A decision is expected this spring.

Notes

1. *Allen v. Cooper*, No. 18-877.
2. U.S. Const. art. I, § 8, cl. 8.
3. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).
4. *Katz*, 546 U.S. at 363.
5. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995) (holding that Congress lacked power under the Indian Commerce Clause of the U.S. Constitution to subject States to suit in federal court for violations of federally created rights).
6. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (holding that that Congressional efforts to abrogate state sovereign immunity for patent infringement were unavailing).
7. U.S. Const. amend. XIV.

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