Allen v. Cooper: Supreme Court affirms state sovereign immunity in copyright case

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Congress may be taking an interest in certain online publishing activities in which popular books are republished online, becoming available for free to the public. Should Congress decide to take up this issue, it should also simultaneously deal with the major exception recently created in the copyright law by the Supreme Court: its decision regarding the sovereign immunity of the 50 states over actions for copyright infringement.

In Frederick L. Allen v. Roy A. Cooper, III, Governor of North Carolina, 589 US (2020), the Supreme Court decided that states cannot be liable for copyright infringement under the doctrine of sovereign immunity. In so doing, the court held that the state’s immunity was not abrogated by the Copyright Remedy Clarification Act of 1990 (CRCA), which purported specifically to abrogate such immunity. The Court reached its conclusion based almost entirely on its holding in Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U. S. 627 (1999), in which it held that states were not liable for patent infringement notwithstanding the Patent and Plant Variety Protection Remedy Clarification Act (PPVPRCA), the analogue to the CRCA for patents.
In each of *Allen* and *Florida Prepaid*, the Court analyzed the test that must be met for state’s sovereign immunity to be abrogated. Among other things, that test requires a clear Congressional intent to abrogate, coupled with some constitutional underpinning for the abrogation. In both cases, the Court found Section I of the Constitution (the Intellectual Property Clause and, in *Florida Prepaid*, the Commerce Clause) an insufficient basis, but said that the Fourteenth Amendment might be a sufficient basis: specifically if abrogation was necessary to remedy a state not having provided due process before depriving a citizen of property. A finding of a Fourteenth Amendment basis was dependent on there being “congruousness and proportionality” between the injury to be prevented or remedied and the means used to do so. Finding that the record did not indicate any pervasive pattern of patent or copyright infringement by states, and that the abrogation statute was not limited to states that acted willfully or that did not provide some alternate remedy, the Court held that the CRCA abrogation, as it had with PPVPRCA abrogation, was not so congruous and proportional. But, said the Court in *Allen*, now that Congress knew what it had to do to create such congruousness and proportionality, it might act within the bounds of its Constitutional authority.

In the more than two decades since the decision in *Florida Prepaid*, Congress has not chosen to enact any new legislation to protect patent holders from state infringement. Presumably, Congress chose not to act because state infringement of patents is not that big of a deal. However, this inaction regarding patents should not inform next steps on copyright. The differences between patent and copyright may not have found their way into the Court’s consideration of *Allen*, but these differences are substantial and relevant.

First, the degree to which states might otherwise provide some remedy for their copyright infringement is much more circumscribed than for patent infringement. States may arguably even offer a mirror remedy to that offered by federal patent law, while that is not possible as to copyrights, at least under current copyright law. Quite simply, because of the way the copyright law is currently structured, any purported effort by a state to provide alternate remedies for copyright infringement would be nullified by copyright preemption.¹

The Copyright Act (17 U.S.C. Section 301(a)) provides that:

> ...all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...are governed exclusively by this title...[emphasis supplied]

Thus, to the extent a state purports to provide a remedy for copying a work within the scope of copyrightable subject matter, that remedy would be nullified by the Copyright Act.² A particularly cynical state legislature could purport to create a remedy for copyright infringement, knowing it to be futile, while infringing at will.

In the greater scheme of things, in contrast, this is a more important consideration: the technological ability of anyone with a laptop and an Internet connection to engage in wholesale copyright infringement is close to limitless. It is tempting to assume that a state would have to engage some private outside contractor to do whatever business could be done through its infringement, as might be expected in the patent context. For example, to infringe a pharmaceutical patent, a state would almost certainly have to engage a private manufacturer, which would itself be vulnerable to infringement liability. As to copyrights, however, it is not ridiculous to posit a state, strapped for cash due to reduced tax revenues, launching a subscription (unlike the free Internet Archive) website with pirated content.³ Also unlike the Internet Archive, it would not need to assert “fair use” or any other substantive defense: it would simply be immune.

There is no indication within the *Allen* opinion that the Court took the foregoing into account when it concluded that the situation in *Allen* was essentially the same as that in *Florida Prepaid*. Because the Court did not, Congress should. Senator Tillis’s interest in the activities of the Archive suggests that, even while the country is preoccupied with public health issues, there is still room for other worthy activities. Congress should take up a successor to the CRCA. If that successor statute excludes from abrogation a state that purports to provide an infringement-like remedy to copyright holders, it must simultaneously revise the copyright preemption provisions to allow such a remedy to actually be enjoyed.

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¹ Preemption of state law by federal patent law only prevents states from providing patent-like protection for works that themselves would not be entitled to patent protection. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) & *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).
Copyright preemption was intended generally for the same purpose as patent protection – to deny state protection to works not generally worthy of federal copyright protection. For example, a work consisting of nothing more than an alphabetized list of names would not be original enough to warrant copyright protection, and therefore a state could not give it protection. See Feist Publ’ns, Inc. v Rural Tel. Serv. Co., 499 U.S. 340 (1991). The text of Section 301(a) is clear, however, that a fully copyrightable work cannot receive protection under state law equivalent to that provided by copyright (eg, protection against copying).

Of course, to store large amounts of material, a state would have to have its own server capacity. Relying for storage, as many do now on third-party private-actor cloud providers, would leave those parties vulnerable to contributor or vicarious infringement claims.