States Cannot be Sued for Copyright Infringement Says the Supreme Court

Article By
Monique Curry
Proskauer Rose LLP
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On March 23, 2020, the United States Supreme Court ruled that States cannot be sued for copyright infringement under principles of sovereign immunity. This ruling arose from a filmmaker’s suit against the state of North Carolina for unauthorized use of his copyrighted works—footage of a ship wreckage.

In 1996, a marine salvage company discovered a pirated slave-ship, which ran aground off the coast of North Carolina in 1718. Upon discovery, North Carolina, the owner of the shipwreck, commissioned the marine salvage company to reconstruct the ship. The recovery and reconstruction was to be documented and recorded by the Plaintiff-filmmaker. He took videos and photos of the recovery for over a decade, registering all of his works. When North Carolina began to publish videos of the recovery operations online and photos in newsletters, Plaintiff filed suit alleging copyright infringement.

North Carolina moved to dismiss the action citing principles of sovereign immunity, whereby a state cannot be sued without its consent. The only exception to that rule is where clear statutory language abrogates sovereign immunity. The Copyright Remedy Clarification Act ("CRCA"), upon which Plaintiff relied, explicitly provides that States “shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court” for copyright infringement. 17 U. S. C. §511(a). However, the Supreme Court unanimously decided that Congress lacked authority to abrogate State’s immunity for copyright infringement in the CRCA.
Plaintiff argued Congress’s authority to abrogate sovereign immunity in the CRCA derived from Article I, §8, cl. 8 of the U.S. Constitution, often referred to as the Intellectual Property Clause, and Section 5 of the Fourteenth Amendment.

In delivering the opinion, Justice Kagan dismissed Plaintiff’s contention under both sources of authority, relying on a 1999 Supreme Court patent infringement case, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999), which “all but prewrote our decision today.”

First, Article I, §8, clause 8 of the Constitution extends Congress the power to grant copyrights and patents. Plaintiff argued that by extension this power allows Congress to abrogate sovereign immunity as “abrogation is the only way to secure copyright holder’s exclusive rights against State intrusion.” The Supreme Court rejected this argument in *Florida Prepaid*, which evaluated sovereign immunity under the Patent Remedy Act, a “basically identical” statute to the CRCA. In *Florida Prepaid*, the Supreme Court relied on earlier authority which determined Article I could not be used to circumvent sovereign immunity. Accordingly, Justice Kagan reasoned that because the Intellectual Property clause, which applies to copyrights and patents, could not be used to abrogate sovereign immunity in a patent infringement case, *Florida Prepaid* necessitates the prohibition of Article I as statutory authority in a copyright infringement case.

Although Plaintiff argued a clause-by-clause approach, whereby the Court is to examine each constitutional clause independent and apart from the general rule against Article I abrogation, *stare decisis* compelled no such analysis here.

Second, Section 5 of the Fourteenth Amendment gives Congress the power to enforce the commands of due process. Abrogation under this section must be congruent and proportional to the Fourteenth Amendment injury. Courts look to the legislative record of unconstitutional infringement Congress had before it when enacting the law to determine if abrogation is proportional. In doing so, Justice Kagan asked, “When does the Fourteenth Amendment care about copyright infringement?” and responded “by no means always.” Using *Florida Prepaid* as “critical precedent,” the scope of unconstitutional infringement is defined “as intentional conduct for which there is no adequate state remedy.” The record of harm for copyright infringement was minimal and when present, it was neither intentional nor reckless. As *Florida Prepaid* ruled, abrogation of sovereign immunity without materially stronger evidence of infringement is not proportional. Therefore, Congress had no authority under Section 5 of the Fourteenth Amendment to abrogate sovereign immunity for copyright infringement.

While this decision seemingly eviscerates avenues of protection for authors and the like to sue States for pirating their works, it should not discourage future copyright abrogation laws. Justice Kagan advises Congress—to which Justice Thomas disapproves in his concurring opinion—to tailor future statutes to comport with the rule that Article I could not be used to circumvent sovereign immunity and the congruent and proportional test for abrogation under Section 5 of the Fourteenth Amendment. As Justices Breyer and Ginsberg put in their joint concurrence, “States must pay for what they plundered.” Future copyright abrogation legislation under these prescriptions just might achieve that result.