Supreme Court Gives a Pass to State-Sanctioned Piracy of Media Copyrights

By: Brian D. Wassom

Media companies and other content creators no longer have a federal remedy against State governmental entities that infringe their copyrights under a unanimous decision issued on Monday, March 23, 2020.

In *Allen v. Cooper*, the US Supreme Court unanimously affirmed the Fourth Circuit’s decision to strike the Copyright Remedy Clarification Act of 1990 as unconstitutional. The CRCA had completely abrogated the States’ sovereign immunity with respect to copyright infringement. This allowed plaintiffs to sue States for infringement and to hold them liable to the same extent as any other defendant. In 1999, however, the Supreme Court held unconstitutional a nearly identical statute that had abrogated State sovereign immunity with respect to patent infringement. Twenty-one years later, the *Allen* Court applied that precedent to invalidate the CRCA.

The rationale of both decisions was identical. Under the doctrine of sovereign immunity as the Court has constructed it in the years since the CRCA was passed, the Copyright and Patent Clause of Article I in the Constitution does not provide Congress the power to abrogate States’ immunity. The 14th Amendment does—but only if the remedy adopted is “congruent and proportional” to well-documented violations of due process by the States. In the context of copyright infringement, according to the *Allen* Court, this required Congress to make specific findings that States had been engaged in widespread, intentional infringement for which they were not otherwise providing compensation to copyright owners. The CRCA’s legislative record included a 158-page report supporting the Act by the then-Register of Copyrights, which had been informed by a year-long examination and public comments from 40 copyright holders and industry groups. Nevertheless, the Court dissected the substance of this report and the remaining legislative history and found it insufficient to justify the CRCA’s wholesale abrogation of sovereign immunity.

The majority opinion held the door open to a future attempt by Congress to adopt a more evidence-based narrowly tailored abrogation—in part by being remarkably frank about the negative consequences of the Court’s decision for content creators. Writing for the majority, Justice Kagan wrote that, by adapting the intent of the CRCA to the Court’s evolving jurisprudence on sovereign immunity, Congress could “effectively stop States from behaving as copyright pirates.” Concurring, Justice Breyer was even more pointed: “one might think that Walt Disney Pictures could sue a State ... for hosting an unlicensed screening of the studio’s 2003 blockbuster film, *Pirates of the Caribbean* (or any one of its many sequels). Yet the Court holds otherwise.” Indeed, the underlying
facts that gave rise to the *Allen* case in the first place involved the State of North Carolina posting unauthorized copies of an independent documentarian’s copyrighted videos to its State-owned website.

Unless and until Congress takes up the majority’s invitation to try again, therefore, media companies and other copyright owners will have few options to curtail infringement of their copyrights by State governments and entities. And even if a new statute could pass constitutional muster, the rationale of *Allen v. Cooper* may limit Congress’ ability to restrain State-sponsored copyright piracy.

Author

**Brian D. Wassom**
Partner | Warner Norcross + Judd, LLP

Brian litigates disputes and counsels clients in a wide range of commercial and intellectual property matters. He has developed a particular focus in matters of creative expression, commercial identity and privacy, which spans the legal doctrines of copyright, trademark, privacy, publicity rights, advertising, journalism and related fields. A futurist at heart, Brian has become a globally recognized thought leader in the brand-new legal issues raised by augmented reality and other cutting-edge emerging media. He regularly publishes blogs and speaks on these topics to industry groups, legal education seminars and conferences across the country. An accomplished litigator, Brian has achieved victories for his clients in federal and state trial and appeal courts across the country. He was also instrumental in helping launch Michigan’s first “business court,” and remains active in statewide efforts to nurture this new approach to resolving business disputes.

Additional Information: [https://www.wnj.com/Professionals/Attorneys/Wassom-Brian-D](https://www.wnj.com/Professionals/Attorneys/Wassom-Brian-D)