

Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
208.350.6426 (Direct Dial)
208.724.9780 (Cell)
Clay.Smith@cwagweb.org

FEDERALISM

Allen v. Cooper—The Supreme Court holds unconstitutional the abrogation of state immunity from suit under the Copyright Remedy Clarification Act

In the Copyright Remedy Clarification Act of 1990, Congress provided that a State “shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court” but, instead, shall be liable for all remedies “in the same manner and to the same extent as” as private parties. 17 U.S.C. § 511(b). A video producer and his company sued North Carolina in 2015 seeking prospective and retroactive relief for unauthorized on-line posting of his work and use of photographs in a newsletter. The State, citing *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), moved to dismiss on the basis of its immunity from unconsented federal court suit as reaffirmed in the Eleventh Amendment. The district court agreed that Congress could not abrogate North Carolina’s immunity under its Article I power but could do so via Section 5 of the Fourteenth Amendment. The Fourth Circuit affirmed as to Article I but reversed the Section 5 holding on interlocutory appeal. *Allen v. Cooper*, 244 F. Supp. 3d 525 (E.D.N.C. 2017), *aff’d in part & rev’d in part*, 895 F.3d 337 (2018). The Supreme Court granted certiorari and affirmed the Fourth Circuit’s judgment. *Allen v. Cooper*, ___ S. Ct. ___, 2020 WL 1325815 (U.S. Mar. 23, 2020). Justice Kagan authored the principal opinion in which five other Justices joined in its entirety.

Florida Prepaid controlled both grounds for Congress’ asserted power to abrogate North Carolina’s immunity from suit. As to Article I, “[t]he Intellectual Property Clause ... covers copyrights and patents alike. So it was the first place the *Florida Prepaid* Court looked when deciding whether the Patent Remedy Act validly stripped the States of immunity from infringement suits[;]” i.e., “if not the Patent Remedy Act, not its copyright equivalent either, and for the same reason.” Nor did *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), support a different conclusion. There, the Court “decided that no congressional abrogation was needed because the States had already ‘agreed in the plan of the Convention not to assert any sovereign immunity defense’ in bankruptcy proceedings. ... We therefore discarded our usual rule ... that Congress must speak, and indeed speak unequivocally, to abrogate sovereign immunity.” Thus, because “there is no difference between copyrights and patents under the Clause, nor any material difference between the two statutes’ provisions[,]” under the *stare decisis* doctrine “a ‘special justification,’ over and above the belief ‘that the precedent was wrongly decided’” was necessary. However, “Allen offers us nothing special at all; he contends only that if the Court were to use a clause-by-clause approach, it would discover that *Florida Prepaid* was wrong (because, he says again, the decision misjudged Congress’s authority under the Intellectual Property Clause).”

As to Congress’ power under Section 5 of the Fourteenth Amendment, the Court applied the congruence and proportionality test announced in *Florida Prepaid*. It identified the question as

“[w]hen does the Fourteenth Amendment care about copyright infringement?” and partially answered it as “[s]ometimes, no doubt. Copyrights are a form of property.” It then summarized the factual record that had left the *Florida Prepaid* Court unable to “identify a pattern of unconstitutional patent infringement.” This case could “come out differently[] [g]iven the identical scope of the CRCA and Patent Remedy Act … only if the former law responded to materially stronger evidence of infringement, especially of the unconstitutional kind.” However, “the evidence of Fourteenth Amendment injury supporting the CRCA and the Patent Remedy Act is equivalent—for both, that is, exceedingly slight. And the scope of the two statutes is identical—extending to every infringement case against a State. It follows that the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew.” Observing that the CRCA was enacted prior to *Florida Prepaid*, the Court held out the possibility for Congress, “if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates.”

Justice Thomas concurred in part and concurred in the judgment. He agreed that *Florida Prepaid* was binding precedent but stated his position that if the decision “was demonstrably erroneous, the Court would be obligated to ‘correct the error, regardless of whether other factors support overruling the precedent.’” Justice Thomas further declined to “join the Court’s discussion regarding future copyright legislation. In my view, we should opine on ‘only the case before us in light of the record before us.’” Last, he “believe[d] the question whether copyrights are property within the original meaning of the Fourteenth Amendment’s Due Process Clause remains open.”

Justice Breyer, joined by Justice Ginsburg, concurred separately. In his view, “[t]hat our sovereign-immunity precedents can be said to call for so uncertain a voyage suggests that something is amiss. Indeed, we went astray in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, (1996), as I have consistently maintained”—a view he maintained in *Florida Prepaid* through joinder in Justice Stevens’ dissent. “But recognizing that my longstanding view has not carried the day, and that the Court’s decision in *Florida Prepaid* controls this case, I concur in the judgment.”

Decision link: https://www.supremecourt.gov/opinions/19pdf/18-877_dc8f.pdf