

Ahoy, matey! The Supreme Court to Decide Whether Copyright Owners Can Make States Walk the Plank for Infringement

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On June 3, 2019, the Supreme Court agreed to decide whether Congress validly abrogated State sovereign immunity for copyright infringement claims by passing the Copyright Remedy Clarification Act of 1990 (“CRCA”), 17 U.S.C. § 511.

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The facts of the case before the Court began in 1717 in the Caribbean Sea. There, infamous pirate Edward Teach (a.k.a. Blackbeard) captured the French merchant vessel that would become his flagship, *Queen Anne’s Revenge*. A year later, Blackbeard ran aground near Beaufort, North Carolina, and abandoned the ship.

Nearly 300 years later, in 1996, the private salvage firm, Intersal, Inc. rediscovered

Queen Anne's Revenge, which was now the property of North Carolina. Intersal began a fifteen-year salvage effort, under an agreement with North Carolina. Intersal retained videographer Fredrick Allen to document the salvage efforts. Allen took video footage and still photos, which he then registered with the U.S. Copyright Office. Allen, Intersal, and North Carolina first quarreled over the copyrighted material in 2013, when North Carolina posted several of Allen's photos on a state website. The parties ultimately entered into a settlement agreement that clarified each party's right to use the material.

Allen brought the instant suit in December 2015, alleging copyright infringement, state law unfair competition, and state law civil conspiracy claims. Finally, Allen challenged the validity of N.C. Gen. Stat. § 121-25(b), which states: "All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record." Allen argued that North Carolina passed the statute in 2015 in bad faith with the intention to invalidate his claim of copyright rights. In response, North Carolina raised various immunity defenses. Allen countered by arguing that Congress abrogated sovereign immunity for copyright claims in the CRCA.

The only issue before the Supreme Court involves the issue of the CRCA's validity. As a general rule, sovereign immunity means that states cannot be sued in federal court. The CRCA purports to provide a broad exception to state sovereign immunity. Essentially, the CRCA opens states to all of the same claims and remedies that copyright owners can bring against private parties. Allen lost on this issue in the Fourth Circuit. Writing for the Circuit Court, Judge Niemeyer based his decision on Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank. *Florida Prepaid* was a patent case, in which the Supreme Court struck down a similar law that abrogated sovereign immunity for patent infringement.

Without a statutory exception, copyright owners must fit their infringement claims within narrow exceptions that severely limit the available remedies. One such exception, established by the Supreme Court in Ex Parte Young, allows private citizens to sue to enjoin state officials to obtain prospective relief from *ongoing* violations of federal law. Based on this exception, Allen argued that North Carolina's posting of his copyrighted material online was an ongoing violation. However, North Carolina had since taken down the material, which sank any colorable argument Allen could float about North Carolina's *ongoing* infringement.

The real world problem posed by the facts in Allen's case, is that without a broad exception to sovereign immunity like the CRCA, copyright owners have very little protection against state governments or agencies infringing their works. Imagine your photos appear without your consent on the Minnesota Department of Natural Resources website. You can contact the Department and ask it to remove your copyrighted material, but the Department has relatively little monetary incentive to comply with your request. Against a private citizen, you could recover actual or statutory damages under the Copyright Act, even if the private citizen subsequently stopped infringing. The *Ex Parte Young* exemption only allows equitable relief. Even if you bring suit, the Department

could remove the photo, ending both the ongoing infringement and case itself. The Department, at most, could be forced to remove the photo, but only *after* you've brought suit and won. And by then, the damage has been done. Without the CRCA, copyright owners have little leverage against state infringers.

While the CRCA may seem obscure to most lawyers (copyright lawyers included), the Supreme Court's decision could tip the balance towards States, leaving copyright owners disproportionately vulnerable to State infringers.