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Congress Should Stop States From Infringing Copyrights

by

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I. Introduction and Summary

There is a glaring void in the law's protections for copyright owners. State agencies, institutions, and officials can exploit creative works, harming copyright owners who are left with no viable remedies. This copyright protection black hole is a result of the U.S. Supreme Court's March 2020 decision in *Allen v. Cooper* that ruled states are immune from copyright infringement claims in federal court. Congress needs to repair the void and secure copyrights from infringements by states and their officials.

Congress should craft a statute that will abrogate the sovereign immunity of states from being sued in federal court when they intentionally or recklessly infringe copyrights. State infringers should be subject to statutory damages and awards of attorney fees and costs just like other infringers. And Congress ought to consider more ways to provide access to justice for copyright owners, including recognition of state court jurisdiction to hear infringement claims. Harms to copyright owners from infringement are no less real when the infringers are states rather than private parties. Congress should act to hold states accountable for those harms.

In *Allen v. Cooper*, the Supreme Court struck down the Copyright Remedy Clarification Act of 1990 (CRCA) on Eleventh Amendment grounds. The CRCA provided that monetary awards, including statutory damages and attorneys' fees, are available to copyright owners whose copyrights were infringed by states, just as they are available in cases involving private parties.

According to Supreme Court jurisprudence, the Eleventh Amendment generally prevents states from being sued in federal court. And in *Allen*, the Court held that the CRCA's "all-out abrogation" of state immunity was not proportional or congruent to any demonstrable problem of infringements by states that were serious enough to be considered "unconstitutional injuries." The Court apparently only considered evidence of state infringements in the legislative record prior to the CRCA's passage in 1990 and not more recent evidence.

However, *Allen* left the door open for Congress to pass a new statute addressing state infringements as an exercise of its legislative powers to enforce the Fourteenth Amendment's Due Process Clause. According to *Allen*, Congress is free to pass a "tailored statute" that abrogates states' immunity for infringements that are intentional or reckless – and thereby satisfy the Court's jurisprudential threshold for "unconstitutional injuries." *Allen* indicated that monetary damage awards could constitute a valid exercise of Congress's powers to enforce the Fourteenth Amendment, provided that Congress compiles a record showing an existing problem of state infringements.

Congress should act to restore legal remedies in federal court for copyright infringements by states. Statutory damages relieve copyright owners of the difficulty and expense of having to establish actual damage amounts in litigation. And awards of attorney fees and costs of civil litigation are a crucial access to justice measure. Costs of hiring attorneys and bringing infringement lawsuits are high and sometimes staggering. In the absence of courts awarding statutory damages as well as recovery of those fees and costs from infringers, many copyright owners would be unable to seek enforcement of their rights. Injunctive relief is also necessary to prevent future infringements by states.

Accordingly, Congress should pursue the path suggested in *Allen*. It should build a record showing the extent of state copyright infringements. Then it should pass a tailored abrogation statute that provides statutory damages and attorney fees awards when states intentionally or recklessly infringe copyrights. There is evidence recent infringements or alleged infringements by states exists. For instance, plaintiff copyright owners in the U.S. District Court case *Canada Hockey v. Texas A&M University Athletic Department* (2019) cited over 170 copyright cases filed against states between 2000 and 2019. Other copyright owners and industries have pointed to alleged harmful infringements by state institutions, including public universities.

To its credit, the U.S. Copyright Office is now undertaking a study of state infringements and state sovereignty. The Office's proceeding likely will amass additional evidence supporting a new abrogation statute aimed at intentional and reckless infringements by states.

Beyond the path outlined in *Allen*, Congress ought to consider additional measures to provide copyright owners access to justice for infringements by states. One way is for Congress to recognize state court jurisdiction to hear copyright infringement claims, including ordinary

civil infringement claims that do not require intentional or reckless conduct. The Copyright Acts of 1790 and 1802 provided that civil copyright infringement claims could be brought "in any court of record in the United States" authorized to hear common law actions of debt. Reviving state court jurisdiction for federal copyright claims against states would preserve federal uniformity in defining basic protections and provide a fuller scope of relief. It also would further the end that Congress sought in the CRCA of ensuring that the same remedies are available for infringements in lawsuits against public or private parties. Given the limits that *Allen v. Cooper* places on federal court jurisdiction, state court jurisdiction over infringement claims against states may not be optimum policy. But it is likely preferable to leaving many copyright owners with no remedy at all.

Under the Article I, Section 8 Copyright Clause, Congress has a constitutional obligation to secure copyrights. By crafting a tailored abrogation statute – and also by pursuing other options – Congress can follow the path that *Allen* suggested would "effectively stop States from behaving as copyright pirates."

II. Background: The Copyright Remedy Clarification Act and Allen v. Cooper

At issue in Allen v. Cooper was the constitutionality of the Copyright Remedy Clarification Act of 1990. Congress passed the CRCA with the intention of holding state institutions and officials accountable for copyright infringements. The CRCA provided monetary awards, including statutory damages and attorneys' fees, to copyright owners whose copyrights were infringed by states, just as they are available in cases involving only private parties.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." According to Supreme Court jurisprudence, the Eleventh Amendment generally bars states from being sued in federal court without their consent.

The case of *Allen v. Cooper* was previewed in my *Perspectives from FSF Scholars* paper, "States Have No Rights to Infringe Copyrights: The Supreme Court Should Enforce the Copyright Remedy Clarification Act." In that paper, I offered reasons why constitutional grounds exist for abrogating state sovereign immunity for copyright infringement claims against states. However, the Court viewed matters quite differently.

In *Allen*, the Supreme Court struck down the CRCA on Eleventh Amendment grounds. Applying its precedents, particularly *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), the Court held that the Article I, Section 8, Copyright Clause did not provide a valid basis for abrogating state sovereign immunity under the Eleventh Amendment. It also held that the CRCA's provision for awards of statutory damages and attorney fees when states infringe copyrights was invalid as an exercise of Congress's Section 5 powers to enforce the Fourteenth Amendment's Due Process Clause.

According to the Court, the CRCA's uniform remedy for infringements by both state and private actors was not proportional or congruent to any sufficiently demonstrated problem of infringements by states, and therefore impermissible under its Fourteenth Amendment jurisprudence. Apparently, the Court considered only pre-CRCA examples of state

infringements. It therefore directed criticism toward a 1988 Copyright Office report submitted to Congress by Register of Copyrights Ralph Oman because it "came up with only a dozen possible examples of state infringement."

Now that the CRCA has been struck down, state governments, their agencies, and their officials are immune from copyright infringement claims in federal court. But the harm to copyright owners' exclusive rights in their creative works and opportunities to seek financial returns for their creative labors is the same, regardless of the fact that the infringers are states rather than private citizens.

III. Congress Should Restore Remedies in Federal Court for State Copyright Infringements

Following the Court's decision in *Allen v. Cooper*, there is now a significant void in the law's protections for copyright owners. Fortunately, *Allen* outlined a path for Congress to restore remedies for copyright owners whose creative works have been infringed by states. Congress should pursue that path and thereby restore remedies such as statutory damages and attorney fees awards when states intentionally or recklessly infringe copyrights.

The Court's decision in *Allen* left the door open for Congress to pass a "tailored statute" that addresses state infringements of copyrights rather than a statute that includes "all-out abrogation of immunity." According to *Allen*, Congress can pass legislation that tracks with the Court's "congruence and proportionality" test by "linking the scope of its abrogation to the redress or prevention of unconstitutional injuries" and "creating a legislative record to back up that connection."

Significantly, the Court set forth the threshold for "unconstitutional injuries" under the Fourteenth Amendment's Due Process Clause. According to its existing precedent, "an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause." And if Congress "detects violations of due process, then it may enact a proportionate response."

By this understanding, a new copyright abrogation statute could constitutionally impose statutory damages and attorney fees awards in cases where states have intentionally or recklessly infringed copyrights. But Congress could not impose those same remedies in instances where states commit mere infringement or even acted negligently. (As a general matter, civil liability for copyright infringement does not require that an infringer acted with intent or with any other mental state, but proving intentional or reckless conduct provides a basis for enhanced statutory damage awards.)

Beginning with the Copyright Act of 1790, federal copyright law has included statutory damage awards as a remedy for copyright owners. As Free State Foundation President Randolph May and I explained in our book *Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform*, statutory damage provisions relieve copyright owners of the difficulty and expense of having to establish actual damage amounts in litigation. Current copyright law permits copyright owners to elect statutory damages, thereby making the pursuit of justice worthwhile.

At the same time, the law requires copyright owners to shoulder the burden of proving that defendants made infringing use of their works. Importantly, statutory damage awards are increased in cases where infringement is the result of intentional or reckless conduct, reflecting the seriousness of the wrongs and harms involved. And awards of attorney fees and costs of civil litigation are a crucial access to justice measure. Costs of hiring attorneys and bringing infringement lawsuits are high and can be staggering, and in the absence of courts awarding statutory damages as well as recovery of those fees and costs from infringers, many copyright owners would be unable to seek enforcement of their rights.

Congress should take up the Court's offer in *Allen* by building a record of state infringements of copyrights and by passing a new abrogation statute that is targeted to intentional and reckless infringements by states. Such a statute would include remedies such as statutory damages, awards of attorney fees and costs, as well as injunctive relief to prohibit future infringements. Indeed, evidence exists to support a new abrogation statute. For example, a September 2001 report by the Government Accountability Office identified about two dozen copyright lawsuits against states between 1985 and 2001. Additionally, plaintiff copyright owners in the U.S. District Court case of *Canada Hockey v. Texas A&M University Athletic Department* (2019) cited over 170 copyright cases filed against states between 2000 and 2019. Other copyright owners and industries have alleged harmful infringements by state institutions, including public universities.

Additional fact-finding likely will yield significantly more instances of state infringements or alleged state infringements and thereby bolster the case for a new statute that will restore remedies for copyright owners who have been harmed. The record-building process is now underway. Following the *Allen* decision, Senators Thom Tills and Patrick Leahy sent letters to the U.S. Copyright Office requesting it undertake a study of state copyright infringement and sovereign immunity. In response, the Copyright Office has opened a proceeding to study those issues and it has requested public comments. The Copyright Office's proceeding offers an opportune venue for both litigants and non-litigants who have allegedly suffered harm from infringements of their creative works by state institutions to come forward. Indeed, there are likely large numbers of copyright owners who have had their creative works infringed by states but who never filed lawsuits because they did not have the economic resources to pursue litigation. Likely many other copyright owners have been deterred from pursuing infringement claims against states because they considered such litigation futile on account of lower court decisions pre-dating *Allen* that declared the CRCA unconstitutional.

IV. Residual Bases for Infringement Claims, Including *Ex Parte Young* Actions, Are Inadequate

Following *Allen*, copyright owners may still file copyright infringement actions against individual state officials for prospective relief only. Such actions are permissible under the Eleventh Amendment according to the *Ex Parte Young* doctrine, a narrow exception to state sovereign immunity recognized by the Supreme Court. However, *Ex Parte Young* actions are inadequate to protect copyrights. The *Ex Parte Young* doctrine forbids judgments for past violations of federal law. Also, identifying specific officials responsible for infringing activity can be difficult. Litigation targeting a single official may be insufficient to stop the infringing activity. And the *Ex Parte Young* doctrine does not permit damage awards for future infringements to come from state treasuries. Individual state officials who are infringers may

have limited personal financial resources, thereby making recovery of damage awards uncertain, costly, and procedurally burdensome – if not futile.

Additionally, exceptions to Eleventh Amendment immunity likely exist for infringements by county and city governments when they are not acting as "arms of the state" to implement state law as well as for government enterprises that are acting in a proprietary capacity rather than a regulatory capacity. However, such exceptions would provide relief only in narrow sets of circumstances. Those limited exceptions do not undermine the need for a new abrogation statute but prove the need for making relief available in broader sets of circumstances, where the harms are equally real. However, a new statute could offer some clarity to the law by delineating some of those circumstances in which states' immunity is abrogated.

V. Congress Should Consider Reviving State Jurisdiction Over Federal Copyright Claims

In addition to restoring statutory damages and attorney fee awards as remedies in cases where states intentionally or recklessly infringe copyrights, Congress also should consider additional measures to provide copyright owners access to justice for infringements by states and to clarify the scope of the law's protections. One way is for Congress to recognize state court jurisdiction to hear copyright infringement claims.

The Copyright Acts of 1790 and 1802 provided that civil copyright infringement claims could be brought "in any court of record in the United States" authorized to hear common law actions of debt. Thus, beginning with the 1790 Act, copyright owners could file infringement claims in federal or state courts. The Copyright Jurisdiction Act of 1819 established that federal courts have exclusive jurisdiction over infringement claims that are based on federal copyright law. Since the 1819 Act, exclusive federal jurisdiction over copyright infringement claims has remained the basic rule. However, Congress could establish a narrow exception by authorizing copyright owners to bring copyright infringement claims or substantially related claims in state courts – including in cases where there is no allegation of intentional or reckless conduct – against states.

Reviving state court jurisdiction for federal copyright claims against states would preserve federal uniformity for basic copyright protections, and it also would further the end that Congress sought in the CRCA of ensuring that remedies are available for infringements to the same extent in lawsuits against public or private entities. Additionally, it is desirable that a court of law be capable of addressing ordinary copyright infringement claims as well as those involving intentional or reckless conduct. A court with jurisdiction over both types of claims could retain authority to provide relief to copyright owners who have proven their works have been infringed by a party defendant but who have not succeeded in proving that such infringement was caused by intentional or reckless conduct. Establishing intentionality or recklessness is sometimes difficult – even when proving that defendants actually engaged in infringing uses is straightforward.

Admittedly, state court jurisdiction over copyright claims against states is not likely the optimum policy. State courts may lack procedural uniformity in their enforcement of federal copyright law and some state courts might prove less receptive to infringement suits against their state governments than others. Yet the Court's decision in *Allen v. Cooper* appears to

leave little options for providing relief to copyright owners. State court jurisdiction over infringement claims against states is likely preferable to leaving copyright owners with no remedy at all.

VI. Conclusion

Following the Court's decision in *Allen v. Cooper*, there is now a significant void in the law's protections for copyright owners when states infringe their copyrights. Congress should pursue the path outlined in *Allen* for restoring remedies to copyright owners whose creative works have been intentionally or recklessly infringed by states.

The U.S. Copyright Office is now undertaking a study of state infringements and state sovereignty. Once the factual record has been refreshed, Congress should craft a tailored statute that will abrogate state immunity when states have intentionally or recklessly infringed copyrights. Such a statute also should provide for injunctive relief to prohibit future infringements.

Beyond the path provided in *Allen*, Congress ought to consider additional measures to provide copyright owners access to justice for infringements by states and to clarify the scope of the law's protections. One way is for Congress to recognize state court jurisdiction to hear copyright infringement claims. According to *Allen*, by taking these steps to pass a valid statute, Congress can "effectively stop States from behaving as copyright pirates."

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Further Reading

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