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Congress Should Better Secure Copyrights From State Infringements

by

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On August 28, the District Court for the Eastern District of North Carolina issued an [order](#) in *Allen v. Cooper*, allowing the owner of photos and videos of Blackbeard’s sunken pirate ship to go forward with a claim that the state’s infringement of his copyrights also violated due process of law. The court recognized that the alleged due process violation abrogates the state’s sovereign immunity from damage claims in federal court. Yet the court’s order was a mixed bag. It dismissed Fifth Amendment Taking Clause claims related to the infringement. And the court deemed lost potential licensing revenue to be economically insignificant under the Supreme Court’s regulatory takings doctrine while also acknowledging that the doctrine is a conceptual mess.

As *Allen v. Cooper* reveals, copyright owners remain vulnerable to harmful infringements by state officials in most circumstances. One way to reduce that vulnerability is for Congress to declare that the loss of potential copyright licensing revenue resulting from intentional or reckless state infringements is economically significant property damage for which compensation is due. Congress also should consider the approach – suggested by the U.S. Copyright Office in a 2021 [report](#) – that it pass legislation that would remove a state’s trademark, patent, and copyright protections under federal law unless the state agrees to waive its immunity

from infringement claims in federal court. These approaches are in step with Congress's constitutional obligation to secure copyrights.

The plaintiff in *Allen v. Cooper* owns copyrights to video footage and photo images of the shipwreck of Blackbeard's *Queen Anne's Revenge*, located in North Carolina's coastal waters. A North Carolina agency apparently made and displayed copies of the copyrighted works online without permission and retained physical copies in its possessions. And in 2015 the North Carolina Assembly amended its public records law to declare all photos, videos, and other documentary materials about shipwrecks in the state's custody to be public domain. The law effectively denied any rights to compensation to copyright owners for state agency uses of videos and photos of shipwrecks.

In December 2015, the plaintiff filed a lawsuit against the State of North Carolina that included claims for infringement under the Copyright Remedy Clarification Act of 1990 (CRCA). Under the CRCA, states (including state officials) "shall not be immune" from infringement suits, and that they shall be subject to liability and remedies for infringements "in the same manner and to the same extent" as private parties. North Carolina argued that it was sovereignly immune from infringement claims for damages in federal court under the Eleventh Amendment. The case eventually reached the Supreme Court.

According to the Supreme Court's decision in *Allen v. Cooper* (2020), the CRCA was an invalid abrogation of state sovereign immunity under the Fourteenth Amendment's Section 5 Enforcement Clause. As a result, states are immune from infringement actions for damages in federal court. However, the decision recognized that states are still liable for infringing copyrights if the infringements also amount to actual constitutional violations under the Fourteenth Amendment. The Supreme Court held that infringements are violations of the Fourteenth Amendment if they are intentional or at least reckless and the state fails to offer an adequate remedy to satisfy due process requirements.

On remand from the Supreme Court, plaintiff Allen alleged that the state's infringement constituted violations of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause. (In Supreme Court jurisprudence, the Fifth Amendment's bar against the taking of private property for public use without just compensation is incorporated against the states via the Fourteenth Amendment.) North Carolina motioned to dismiss the case at the District Court.

The District Court's August 28 [order](#) partially denied the dismissal motion by determining that the plaintiff adequately alleged that the state's direct infringement of his copyrights under the CRCA also constituted a deprivation of property without due process of law. North Carolina argued that adequate *post-deprivation* remedies are available to the plaintiff in state court. But the District Court drew on Supreme Court decisions articulating due process standards for determining when post-deprivation remedies are constitutionally adequate. Under *Parrat v. Taylor* (1981), *Hudson v. Palmer* (1984), and *Zinermon v. Burch* (1990), post-deprivation remedies are adequate only where property losses result from random or unauthorized acts by a state employee, where post-deprivation remedies are the only practical options due to the necessity of prompt state action, or because a pre-deprivation process is impractical.

The court further held that “post-deprivation remedies are constitutionally inadequate where it is foreseeable that individuals would be deprived of property because of state actors acting pursuant to established state procedure.” It thus determined that plaintiff Allen adequately alleged that the state committed direct infringements while operating under a 2015 statute designed to facilitate a deprivation of Allen’s protected interests in his copyrights, and that the state was positioned to foresee that deprivation. The North Carolina statute, Section 121-25(b), allowed state agencies to use copyrighted documentary materials in their custody without limit. Indeed, the court held that plaintiff Allen sufficiently alleged the statute was specifically passed to help the agency in its ongoing dispute over the use of documentary materials about *Queen Anne’s Revenge*. The court thereby concluded that, as applied in that case, the CRCA validly abrogated the state’s sovereign immunity from liability for copyright infringement.

It is surely welcome news that the court recognized that, under the Fourteenth Amendment’s Due Process Clause, a state cannot infringe a copyrighted owner’s exclusive rights in creative works under a state procedure intended to cause a deprivation of those rights. The North Carolina agency’s uncompensated use of Allen’s copyrighted property and the state government’s efforts to deprive the copyright owner of any remedy through legislation putting documentary materials about shipwrecks in the public domain seem particularly egregious.

Yet it is unlikely a state would pass legislation or a state agency would adopt a regulation establishing procedures expressly intended to deprive copyright owners of the value of their creative works. Most infringements by state officials are likely to be negligent or otherwise unauthorized by any established state procedures. Consequently, in many instances the Due Process Clause is not likely to serve as a source of protection against state infringements.

Unfortunately, neither does current Takings Clause jurisprudence appear to offer much hope of protections or remedies for infringements of copyrighted property by states. In *Allen v. Cooper*, the District Court actually dismissed the plaintiff’s Takings Claims under the Fifth Amendment. It acknowledged that Taking Clause protection extends to intellectual property under the trade secrets case of *Ruckelshaus v. Monsanto Co.* (1984), and the patent case of *James v. Campbell* (1882). And it proceeded under the assumption that copyrights are property protected by the guarantees of the Fifth Amendment’s Due Process Clause. Following *Ruckelshaus*, the District Court applied the multi-factor test for regulatory takings outlined by the Supreme Court in *Penn Central Transportation Company v. City of New York* (1978) that considers: (1) “the economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”

The District Court held that the first factor favored the state, writing that “even in the light most favorable to Allen, an assertion of potential lost licensing revenue does not lead to the plausible inference that the copyrights are so incapable of generating other licensing revenue that the decrease in their value is substantial.” The court found that the second factor only slightly favored the copyright owner in his expectancy interest of financial returns on his substantial investments of time and money to photograph and film the sunken ship. And it found that the third factor favored the state because “mere infringement of a copyright by a state actor is not

‘functionally equivalent’ to a government appropriation of the Copyright itself.” In other words, the court held that a state’s infringement on a copyright owner’s exclusive rights over the use of the work does not divest a copyright owner of the copyright and therefore does not amount to a classic taking.

However, a copyright owner’s exclusive right to license his or her creative works is of utmost importance to copyright ownership. Indeed, for many copyrighted works – including sound recordings, movies, TV shows, as well as photo images – the exclusive right to license them and generate revenues constitutes the prime source if not sole source of the economic value of those works. It is decidedly unreasonable for a court to deem an intentional deprivation of licensing revenue “economically insignificant” and therefore non-compensatory under the first *Penn Central* factor.

Regarding *Penn Central*’s third factor – whether “the character of the State’s action” is functionally equivalent to a classic taking whereby the government directly appropriates private property or ousts its owner – the District Court acknowledged that “conceptually, this factor is a mess.” It quoted the Fourth Circuit’s characterization of the *Penn Central* factors in *Clayland Farm Enterprises, LLC v. Talbot County* (2020): “combine an ad hoc balancing test with an open-ended factor and you’re left with a doctrine that is a veritable mess.” It is to be hoped that on a future occasion, the Supreme Court will refine its regulatory takings doctrine with clearer standards that recognize that just compensation of copyright owners is due when government misappropriations of copyrighted property diminish or effectively eliminate the owner’s opportunities to generate licensing revenues.

The District Court’s decision in *Allen v. Cooper* provides a reminder that copyright holders remain vulnerable to economically damaging infringement of their creative works by state government officials. As the U.S. Copyright Office concluded in its August 2021 study report, “Copyright and State Sovereign Immunity”: “The evidence indicates that state infringement constitutes a legitimate concern for copyright owners” and that “it seems clear that there are instances in which some state entities infringe copyrights—whether intentionally, recklessly, or negligently—and that those infringements can cause harm to the value of the copyrighted works.” In its report, the Office acknowledged that the public provided it with allegations of state infringements “substantially greater than the number cited in the Oman Report” that informed and prompted Congress’s passage of the CRCA, and it identified over 130 copyright infringement suits against 36 states filed between 2000 and 2020. But the Office conceded that “in the copyright context, conclusive evidence of intentional or reckless state infringement may be elusive.” Also, “[s]overeign immunity itself may dissuade copyright owners from bringing suit” and often prevents adjudication of the merits of plaintiffs’ claims, making it inherently difficult to develop any record of unconstitutional conduct.”

In its report, the Copyright Office indicated that the factual record of state infringements that the agency compiled may not be enough to satisfy Eleventh Amendment jurisprudential standards for showing a pattern of unconstitutional conduct that would justify abrogation of state sovereign immunity for instances of *negligence* – including state officials’ “honest mistakes” and “innocent” misunderstandings that nonetheless are economically damaging. Nonetheless,

Congress and the Copyright Office should be open to refreshing the record and revisiting the problem of state infringements in the years ahead.

Moreover, Congress should pursue other options in the near term to better secure copyrights from state infringements. One modest approach would be for Congress to identify loss of licensing revenue from intentional or reckless state infringements as economically significant property damages for which compensation is due. Statutory recognition of property damages from loss of potential licensing revenue may help bolster copyright owners' claims to relief from infringements that double as Takings Clause violations. Recognizing such relief under the statute would serve "to redress or prevent unconstitutional conduct" consistent with the Supreme Court's 2020 *Allen v. Cooper* decision.

Congress also ought to consider passing a statute that would abrogate state sovereign immunity by establishing a "waiver-based framework" for infringement lawsuits against states. According to the Copyright Office's 2021 report: "Under that model, a state's ability to recover damages for infringement of its intellectual property rights would be conditioned on its waiving sovereign immunity from infringement suits." In other words, under the statute, a state would forfeit its trademark, patent, and copyright protections under federal law unless the state agrees to waive its immunity from infringement claims in federal court.

Notably, the Copyright Office took the position that "[i]f Congress decides not to proceed with new abrogation legislation, the Office would support further consideration of a waiver approach, as well as other options to ensure that copyright owners have meaningful remedies when states infringe their rights." The Intellectual Property Restoration Act of 2003 (S.1191), which was introduced in the 108th Congress, embodied the waiver-based framework discussed in the Office's report. That bill provides the 118th Congress with a helpful starting point for reforms.

The District Court in *Allen v. Cooper* rightly vindicated the due process rights of the owners of copyrighted property. And perhaps future developments in the Supreme Court's Takings Clause jurisprudence will provide a stronger source of protection against state misappropriations of the economic value of copyrights. Yet copyright owners remain vulnerable to steep economic losses from infringements by sovereignly immune states and their officials. The Constitution's Article I, Section 8 Copyright Clause places on Congress primary responsibility for securing Americans' copyrights. Congress should do its constitutional duty by better protecting copyright owners from state infringements.

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Further Readings

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