Intellectual Property Alert: States Still Enjoy Sovereign Immunity in Federal Copyright Cases for Now

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CLIENT ALERT | 4.2.2020

As Vorys previewed in January, the United States Supreme Court was set to issue a ruling in the case of *Allen v. Cooper* regarding whether a copyright owner could sue a state for copyright infringement in federal court. The Court issued its ruling last week and upheld state sovereign immunity by striking down the 1990 Copyright Remedy Clarification Act (CRCA) as unconstitutional.

State Sovereign Immunity and the CRCA

In general terms, the concept of state sovereign immunity bars a federal court from hearing a suit brought by any person against a non-consenting state. Congress may abrogate state sovereign immunity through legislation, so long as that legislation contains unequivocal abrogation language and stems from a clear exercise of authority granted Congress by the Constitution.

No one disputed that the CRCA unequivocally sought to abrogate state sovereign immunity for copyright infringement. The CRCA stated, in relevant part, states were not "immune" from suit and were exposed to liability and remedies "in the same manner and to the same extent" as private defendants. The question posed to the Supreme Court in *Allen v. Cooper* was whether Congress had the authority under the Constitution to remove the states' immunity in this manner.

States Enjoy Sovereign Immunity from Copyright Suits in Federal Court

Around the same time it passed the CRCA, Congress enacted the Patent Remedy Act, a nearly identical statute that attempted to abrogate state sovereign immunity for patent infringement claims. In the 1999 case of *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, the Supreme Court struck down the Patent Remedy Act as an unconstitutional exercise of Congress' authority. The ruling in *Florida Prepaid* compelled a similar result in this case. In both the CRCA and the Patent Remedy Act, Congress' authority under the Intellectual Property Clause of Article I was insufficient because Article I

powers cannot be used to abrogate state sovereign immunity.

Is This the End of the Issue?

For now, states enjoy unfettered sovereign immunity with respect to copyright, trademark, and patent infringement claims in federal court. However, the Supreme Court's opinion in *Allen* expressly left the door open for Congress to abrogate the states' sovereign immunity for infringement of intellectual property rights through appropriate legislation in the future. Specifically, the 14th Amendment's Due Process Clause permits Congress to abrogate state sovereign immunity where there is no adequate remedy for the intentional, or at least reckless, infringement of copyrights, trademarks, or patents. Accordingly, the Court indicated that Congress should be able, if necessary, to enact a reasonably tailored statute, capable of passing constitutional muster, which "effectively stop[s] States from behaving as [intellectual property] pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice."

***Practice Tip*:** The ruling in *Allen* has no bearing on state laws and the ability of a state to be sued in certain state courts. States and qualifying state instrumentalities should not view the ruling in *Allen* as granting them *carte blanche* to infringe the intellectual property rights of citizens. Instead, *Allen* and the Supreme Court's prior rulings only protect states and qualifying state instrumentalities from being hauled into federal court to defend itself.