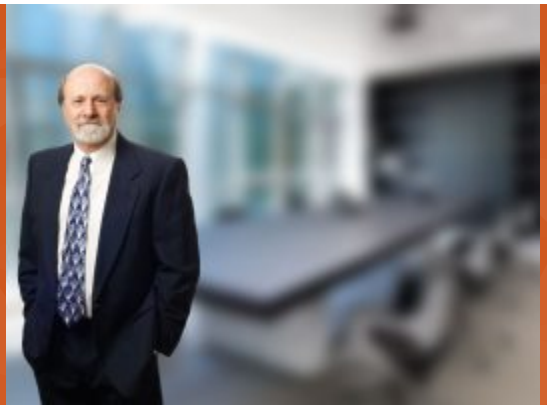
Contours of Copyright

The States Win One and Lose One

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6/4/20 Update: See Supplementary Note to *"The States Win One and Lose One."*

Two recent U.S. Supreme Court cases affect the rights of states under copyright law, one pro-state, one anti-state (really more pro-public).

Georgia v. PRO

The state loss was *Georgia v. Public.Resource.Org. Inc.* (decided April 27, 2020). The issue was whether the State of Georgia could copyright annotations to the Georgia Code, consisting of case summaries and other explanatory materials created by LexisNexis in a work-for-hire arrangement with Georgia's Code Revision Commission.

Georgia argued yes, that no rule prohibited a state from claiming copyright protection in such *non-binding* legislative materials. The Public.Resource.Org. Inc. said no, that logic and precedent required a denial of copyright protection for these important official writings. (Prior cases had denied copyright for non-binding *judicial* explanations; this was an attempt to extend that principle to *legislative* materials.)

The Supreme Court, in a 5-4 decision (with two dissenting opinions), found for the PRO. Their basis for denying Georgia copyright was largely their interpretation of the "government edicts" doctrine, as espoused in three historic cases, to mean that all materials produced by the judicial or legislative branch in the course of its official duties must be free to copy.

The key rationale offered is that for a work to be protected, it must have an "author," and that, under the government edits doctrine, officials who speak with the force of law can't be authors of their official pronouncements. (The explanation of this mystical assertion is that, when performing their official roles, members of the judiciary and legislature are effectively employees of … well, *We, the People*. Thus, in essence the entire public is the author, so there's no traditional author and we're all free to use these writings as we wish.)

A secondary rationale is to avoid a pay-per-law model whereby only people who can afford it can have access to materials that may be crucial to understand the law. The court gives as an example that several laws remain on Georgia's books that have been held unconstitutional: If Georgians who can't afford a subscription are denied access to such important explanations, they would not know that these laws are unenforceable and should be treated as non-existent.

Although this seems a clear win for open government and the public domain, dissenters and commentators have expressed several concerns.

- First, this may discourage or make it unaffordable for states to create annotations, which

would be an overall loss for the public, not a victory.

- Second, maybe not: nothing appears to prohibit states using restrictive licenses (rather than copyright law) to control and charge for use, so (again) the public's victory may be illusory.
- Third, the Court's holding depends on *legislators* creating these works (directly or indirectly). But states can have explanatory materials commissioned and overseen by *non-lawmaking* employees, or simply cooperating with (and possibly paying for) the creation of such works by private companies, who own the copyright then assign or license it to the state (nothing suggests that private citizens cannot create and copyright legal content).

Net result: This may not be as big a loss to the states, or as big a gain to the public, as at first appears. Nevertheless, we now know that any materials created by or on behalf of members of the judiciary or legislature in the course of their official duties cannot be subject to a state-owned copyright.

Allen v. Cooper, Governor of North Carolina

The pro-state case, *Allen v. Cooper* (decided March 23, 2020), concerned how and when Congress may properly abrogate states' rights under the 11th Amendment to the US Constitution, which 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.*"

This Amendment, in brief, has been interpreted to prevent private suits against non-consenting states. In *Allen v. Cooper* the Supreme Court considered whether the Copyright Remedy Clarification Act of 1990 (the "CRCA"), which authorized private copyright infringement suits against states, violated the 11th Amendment. The Court ruled it did. Here's why:

In 1996, the remains of the *Queen Anne's Revenge* (an 18th Century flagship of the pirate Blackbeard) were found off the North Carolina Coast. The salvage company hired videographer Frederick Allen to record the recovery, which he did for a decade, registering the copyright in his photos and videos. When North Carolina published some of his work online (after prior unlicensed publication and settlement), Allen sued for infringement.

The state claimed sovereign immunity. Allen argued that the CRCA removed that immunity, and the district court agreed. The Fourth Circuit, however, reversed and held that the 11th Amendment prevented Congress from waiving that immunity; the Supreme Court agreed.

Allen had argued that abrogation could be justified under the 14th Amendment, which gives Congress the power to enforce the Amendment's due process protections against the states. According to Allen and the District Court, North Carolina's "pattern of abus[ive]" copyright infringement constituted an unconstitutional deprivation of his property without due process.

Citing precedent, Justice Kagan explained that to constitute a 14th Amendment deprivation, an infringement of copyright "must be intentional, or at least reckless." In addition, a state does not violate due process "unless it fails to offer an adequate remedy for an infringement." In short, what Congress can legislate against, over a state's objection, is "intentional conduct for which there is no adequate state remedy," not just run-of-the-mill copyright infringement.

Unfortunately, the CRCA had been enacted with no proof of unconstitutional or even widespread infringement by states. Indeed, the legislative history suggested that the CRCA's main concern was states' "honest mistakes" and innocent misunderstandings, rather than intentional or unconstitutional behavior. In addition, there was no evidence that states offered no remedies for infringements they might commit – for example, under contract or unjust enrichment principles – and such remedies might satisfy due process. In short, the

CRCA's "indiscriminate scope" – allowing suits for any and all infringements without regard to actual harm or available remedies – far exceeded any authority provided by the 14th Amendment.

The Court acknowledged that an appropriate statute – directed to unconstitutional copyright conduct, rather than all copyright infringement – was possible. But the CRCA was not it.

Net result: If Congress wants to empower citizens to sue states for copyright infringement, it will need to craft a narrow statute aimed at more eggregious conduct. But the CRCA itself is unconstitutional and unenforceable, and Allen's claim for infringement against North Carolina must be dismissed.

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