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## **The United States Supreme Court Rules that State Governments are Immune from Copyright Infringement Suits**

The United States Supreme Court held on March 23, 2020, that state governments cannot be sued for copyright infringement without the state's consent. The opinion, filed by Justice Elena Kagan, settled a long-standing question whether an Act by Congress, the Copyright Remedy Clarification Act of 1999 ("CRCA"), could authorize a person to file suit against a state for copyright infringement, even without the state's consent. The High Court unanimously held that Congress lacked the authority to revoke the state's immunity from a copyright infringement suit.

The case involved North Carolina's unauthorized use of copyrighted photographs and video footage. A videographer named Frederick Allen documented a salvage operation off the North Carolina coast of a shipwreck belonging to the famous pirate, Blackbeard. Allen duly registered his photographs and videos with the United States Copyright Office. Nevertheless, the state of North Carolina published reproductions of the photographs and videos without permission. Allen tried to negotiate a settlement with the state; however, when negotiations failed, Allen filed a copyright infringement suit in Federal District Court. North Carolina moved to dismiss the case on the ground of sovereign immunity, arguing that state governments cannot be sued without their consent.

The Supreme Court found that Allen could not sue for copyright infringement, even though North Carolina freely admitted having published reproductions of the photographs and videos without permission. The Court borrowed its reasoning from a similar case from 1999 in which it was decided that states are immune from patent infringement suits. With this ruling, nonconsenting state governments may not be sued by private individuals for either copyright or patent infringement.

### **Who is Affected by the Supreme Court Ruling?**

Under federal copyright law, copyright protection exists for a wide variety of original works of authorship, e.g., musical works, pictures, sculptures, graphics, audiovisual works, and literary works (including computer programs). 17 U.S.C. § 102. With the Supreme Court's decision that sovereign immunity permits state governments to reproduce, modify, distribute, publish, and display copyrighted works and patented items without remunerating the holders of the affected patents and copyrights, holders of intellectual property rights will need to embrace new or different measures to avoid having their property purloined.

For example, software developers that license products to state governments or a state university, authors and publishers of books destined for academic use, web developers that design for state entities, or advertising agencies who produce work for government entities, may all be affected by the Supreme Court's ruling.

### **How to Protect Copyrighted Material from Unauthorized Use by State Governments**

Now, it is more important than ever for copyright holders to understand how to protect their proprietary material from unauthorized use by state governments. The Supreme Court's decision does **not** mean that

holders of IP rights should not negotiate with state governments and entities for copyright licenses and other permissions. Some states have consented to suit or waived sovereign immunity. A licensor with enough leverage may condition its license upon such a consent or waiver. Software publishers that have used a client/server model may have to cease offering products in that way, insisting, instead, on a cloud-based licensing model where the state cannot get its hands on the code, and the licensor can turn off access if payment isn't forthcoming.

For patent and copyright holders dealing with state governments, the new order is "licensor beware." Ironically, the strategies to be used with states within the United States will resemble the strategies IP rights holders have used for years in dealing with licensees, manufacturers, distributors, and suppliers in China and other foreign countries that have not respected intellectual property rights. Lawyers in Kutak Rock's intellectual property group have extensive experience in implementing such strategies and other measures to protect IP rights holders. If you would like assistance evaluating and handling these and other related matters, please contact one of the authors listed below or any member of our [Intellectual Property Practice Group](#).

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