



Interview with Keith Kupferschmid & Rick Allen

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KENNEALLY: When the US Supreme Court ruled earlier this year in *Allen v. Cooper*, the outcome for an unusual copyright infringement case left many IP creators dismayed, though it may have pleased Blackbeard the pirate.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Beyond the Book. In March, a unanimous SCOTUS ruling held that Congress lacked authority to abrogate the state's sovereign immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990. Videographer Rick Allen had sued the State of North Carolina when he'd learned it was using his exclusive underwater footage showing the wreckage of Blackbeard's flagship vessel without his permission. Allen cited the CRCA, which was passed expressly to prevent such infringements. Nevertheless, the state argued that sovereign immunity shielded it from any such claims.

Twenty years ago, when Congress passed the Copyright Remedy Clarification Act, it was responding to pressure from filmmakers like Allen as well as movie studios, software companies, and many other IP stakeholders who said states were abusing sovereign immunity to avoid paying licensing fees. The Copyright Alliance filed a friend of the court brief in the SCOTUS case and is now urging IP owners to make their views known to an ongoing US Copyright Office study on the subject. Alliance president and CEO Keith Kupferschmid joins me now from his Washington office. Welcome back to Beyond the Book, Keith.

KUPFERSCHMID: I'm glad to be here. Thank you very much for inviting me.

KENNEALLY: This is an interesting and somewhat of a tangled story. We'll turn to you to help us unravel it all. I guess the way to start for those who care about copyright is what's at stake here? Why is this an important case for copyright holders as well as for patent holders?

KUPFERSCHMID: I think what's particularly interesting here, and also certainly in the patent context, is that states – under this holding in *Allen v. Cooper*, states cannot be liable for infringing the work of another copyright owner, but they can sue you if you were to infringe their copyrighted work. You can sense the imbalance there, right? They get rights, and they can enforce those rights, but you cannot enforce



your rights against the states. There's really an inequity. Even though the Supreme Court held what they did, they kind of acknowledged that there was inequity here and did almost encourage – took the unusual step of encouraging Congress to say, hey, you may want to look at this again and take another shot at this. Maybe you can pass a law that will allow states to be sued when they infringe somebody's work and it rises to the level of a constitutional violation.

KENNEALLY: Help us out with the legal concept here. It's known as sovereign immunity.

KUPFERSCHMID: Yeah, so it's in the 11th Amendment to the Constitution, and it says that states basically have sovereign immunity. They cannot be sued. In this particular instance, for someone who's a copyright owner, like Mr. Rick Allen, who's a videographer here, he tried suing the state, but they were held to be immune under the 11th Amendment.

KENNEALLY: How big a problem is this, Keith? Rick Allen is an individual. He has his own company, Nautilus Productions. But I understand those who are concerned about this represent some of the most important copyright holders in the US creative economy.

KUPFERSCHMID: Yeah, that's a wonderful question and a question that we truly don't have an answer for, because there was an earlier case – we're talking about the *Allen v. Cooper* case which was just decided earlier this year, but there was a much earlier case in the patent context called *Florida Prepaid* where the Supreme Court in essence said the same thing, that states could not be sued for patent infringement.

But no one really collected records as a general matter, because they knew or they thought that it was impossible to proceed against these states anyway. So there's no way to truly know without proactively trying to collect the data in terms of how big a problem this is.

KENNEALLY: Keith, on what legal point did the Supreme Court say there was a problem with the CRCA?

KUPFERSCHMID: Ultimately, what the court said was that the law, the CRCA, was out of proportion to the due process problem – that instead of providing a uniform remedy, which the CRCA does for statutory infringement, it needs to more specifically just address or prevent unconstitutional conduct.

I know that gets a little bit convoluted, but ultimately the Supreme Court said that there wasn't enough evidence to show that there was a 14th Amendment injury, at



least as broad as this statute was. If you narrow the statute to the actual problem, then you'd have a better chance, Congress, of getting it right and making it constitutional.

KENNEALLY: So that's the point here. On the one hand, the Supreme Court gave a sort of legal exam to the law that Congress had passed in 1990, but it also gave kind of a hint for the next case that may come as to what would pass muster.

KUPFERSCHMID: They have part of the decision where they encourage Congress to kind of go back to the drawing board knowing what they know now. They know what the test is and what test whatever statute they pass has to pass muster. And knowing the extent of the problem and the types of problems, they basically say, Congress, we acknowledge that this is a problem, so you may want to go back – and knowing what the scope and what limitations you have on what statute you draft, go back and take another shot at it. This time, direct your statute very focused on due process violations. That's what the Supreme Court did.

KENNEALLY: Indeed, Congress did hear what the Supreme Court had to say and has turned to the Copyright Office to gather information – some of that information you said we need to have when looking at this subject. The Copyright Office is now conducting a state sovereign immunity study. What have they asked for from copyright holders, and how can people respond?

KUPFERSCHMID: Yeah, so remember, earlier I said that there's a sort of dearth of information and data about state infringements because of the state of the law. So the Copyright Office has been asked by Congress to undertake a study to determine the extent of the problem, to basically answer the question you asked me earlier, and what they've done is put out a notice asking several questions to try to get at the heart of the matter and try to collect this data.

For instance, they asked for examples and information about specific instances of infringing conduct that is committed by a state government entity or officer or employee of the state. Then for those people who have that information, they ask very specific information about when the infringement occurred, was the infringement intentional or reckless, etc.

But they also ask other information about the relationship between states and copyrighted work. For instance, how do states go about licensing or purchasing copyrighted works? Do they get a better deal because of the Supreme Court decision granting them state sovereign immunity?



Other questions that are asked are, for instance, what other remedies might be available? For instance, if you don't have a copyright infringement claim to bring against a state, perhaps there's some other claim that could be brought. Maybe there's a state claim, like a contract claim that you could bring against a state where they wouldn't be able to claim immunity. The office also wants to get a feel for whether these type of state infringements has increased over recent years and ultimately how states handle infringement cases and copyright cases and whether that might differ from one state to the next.

So people have until September 2 to submit information to the Copyright Office. And for anyone who's listening who might be a copyright owner or even know of a state infringing the copyright of someone else, I encourage them to go to the Copyright Office website and look at these questions and try to answer the questions. Or, for that matter, come to the Copyright Alliance website, too, because we are doing our own survey and trying to collect our own information about the extent of the problem, and we can then turn around and report to the Copyright Office as well.

So after the September 2 deadline for submitting data and information to the Copyright Office, after that, they're going to have some roundtable discussions about the issue. And ultimately, what they're going to do is produce a study which is due back to Congress by April of next year. Congress will then look at that study – and I should mention Congress also asked for a similar study from the Patent and Trademark Office on the patent and trademark aspects of this. Once they get both reports, they will look at them, Congress will, and decide what the next step should be, which I would imagine would be introducing legislation to specifically address the issues at stake here.

KENNEALLY: Copyright Alliance President and CEO Keith Kupferschmid, thanks for speaking with me on Beyond the Book.

KUPFERSCHMID: Well, thank you. Thank you for having me.

KENNEALLY: Joining me now is Rick Allen, a broadcast video producer and videographer and co-founder of Nautilus Productions, based in Fayetteville, North Carolina. He is the Allen of *Allen v. Cooper*, who found himself on the losing side of his copyright infringement case when the US Supreme Court found for the defendants – in this case, the State of North Carolina, as represented by Governor Roy Cooper. Rick Allen, welcome to Beyond the Book.

ALLEN: Chris, it's a pleasure to be here. Thank you for having me.



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KENNEALLY: Thank you for joining us. Apart from decades of experience as a video producer, you're also an experienced diver and one especially accustomed to the company of sharks in the water. But the sharks you encountered here are the dry land variety. Explain what happened and take us back to those very first days when you were filming at the Blackbeard site.

ALLEN: OK. Well, yeah, I'm used to swimming with sharks, both literally and metaphorically now. This all began in – the *Queen Anne's Revenge* was found in 1996 by a company called Intersal. And in 1998, they reached an agreement with the State of North Carolina. They handed the wreck over to the state in exchange for media and replica rights. Then in mid-1998, North Carolina Public Television produced a documentary on the *Queen Anne's Revenge* in association with Intersal, and I was originally hired by UNC-TV to document the work on the wreck site and primarily do the underwater shooting for their crew.

While I was there, I looked at the agreement that Intersal had with the State of North Carolina and their media rights and realized that if I wanted to stay on the project and keep documenting the infamous pirate Blackbeard and the recovery of his shipwreck that I needed to have some sort of agreement with the people on the rights. So I went to Intersal and said, you know what? I'll make a deal with you. I'll shoot all of the recovery of artifacts and archaeological activities, and I'll give you a portion of the proceeds any time I license footage, and then we'll be able to document this, and everybody wins. There will be a record of the recovery by a professional videographer. Intersal will be able to take care of their media rights. And at the end of that, my agreement with Intersal was that I would keep the copyright and the intellectual property rights to any of the footage that I collected when it was all said and done.

So that continued for 15 years until 2013, when a new administration came into the North Carolina government. The department of North Carolina cultural resources decided that they didn't like the agreement they had with Intersal, and we ended up – Intersal and Nautilus Productions ended up in a legal disagreement with the state. We entered into a settlement agreement in October of 2015 that redefined some of the contract between the state, Intersal, and Nautilus. The state paid me \$15,000 for some copyright violations, some misuse of images. And then we agreed to all move forward.

Unfortunately, that didn't last. In the summer of 2015, the State of North Carolina passed what we call Blackbeard's law, which essentially converted all of my images and video of the shipwreck into a public record. So it took my intellectual property and made it the property of the people of North Carolina without my consent and without any compensation. That was in August of 2015. Soon after



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that, in December, I filed a lawsuit in federal court for copyright violations against the State of North Carolina. That went to federal district court. The judge there agreed with us, and the state appealed. We went to the Fourth Circuit. The Fourth Circuit disagreed with our lawsuit and shot us down. And then we appealed our case over copyright to the United States Supreme Court, and ultimately we failed there, because states have sovereign immunity and are immune from lawsuit in copyright lawsuits.

KENNEALLY: Well, we had heard from Keith Kupferschmid earlier that the so-called Copyright Remedy Clarification Act was supposed to help to remedy this particular imbalance in the law, but the Supreme Court found that it didn't do it properly enough.

ALLEN: I would agree. (laughter) When we started the lawsuit, we certainly looked at the CRCA and thought that was pretty clear that states simply had to follow the same copyright laws as the rest of us. As we know from the outcome of *Allen v. Cooper*, that is not so.

So I think what was frustrating for me is that as an intellectual property holder, I followed every statute and law that was required of me. I registered my copyright. I created the work. And I've defended my copyright over the years to my work. So there's nothing else legally or by statute that I could have done to protect my intellectual property, and yet I'm still left here with no remedy and no way to deal with copyright infringement by the State of North Carolina.

KENNEALLY: What's your reaction today to the SCOTUS ruling? It must have been a source of dismay for you at the time in March, but today, as we record this the beginning of July, the Copyright Office is undertaking a survey around the issue. So perhaps you're beginning to feel a bit more optimistic than you might have only a few months ago.

ALLEN: It was certainly a challenging day, week, month, and it still is to a certain extent, though by that afternoon, the Senate committee that deals with intellectual property was already contacting people and in the process of discussing updating the CRCA or writing a new law. So it is heartening to see that Congress is working on this, that they hope to address a better copyright law as it applies to sovereign immunity, and I am hopeful that they'll be able to do that and be able to get to a place where the same rules apply to all of us, whether it's Disney or Nautilus Productions or the State of North Carolina. It's pretty clear that intellectual property is, to quote a colleague of mine, the gold of the digital age. Intellectual property rights are really what run commerce in the world right now. And if you



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can't protect your intellectual property and your copyright from infringement by a state, you're in a very difficult place.

KENNEALLY: The Copyright Office is asking some specific questions of copyright holders, one of which is the extent to which state sovereign immunity affects licensing or sales of copies of copyrighted works to state entities. What's your sense? How big a problem is this?

ALLEN: It's really hard to quantify, because you don't know the case that was never filed. As we were discussing before we actually started recording, your average copyright case costs in excess of \$350,000 to prosecute, so most people when faced with having to go to court and spend that kind of money with an uncertain outcome are just not willing to lay that out. Especially if you're going to fight a state over copyright, it's daunting.

So it's hard to say. There are hundreds and thousands of copyright violations by states. That was documented in some of the amicus briefs that were filed on our behalf. So it is a very real problem, and I think it's a much bigger problem than we may know, because it's going to be hard to reach people who had an infringement – maybe it was just a picture posted on a website or whatever – and just chose not to do anything about it and then chose not to follow up with this survey, which is unfortunate. But as you well know, 100 people may be affected by something, and only one will actually feel the need to write a letter or send an email.

KENNEALLY: And the other area that the Copyright Office is asking for input on is for remedies. The Supreme Court did, in fact, suggest there may be a path to a remedy. Do you have anything specific in mind yourself?

ALLEN: I think copyright law and copyright statute is really pretty clear. That's one of the things in my case. I've never been asking the court for special treatment or to have a special set of rules for me. I just simply would like the states to follow the same copyright law that I have to follow. I don't need any special treatment, nor do I want it. If infringement is willful, then you should have to pay damages. And there are plenty of established copyright cases and uses of copyrighted material that are well thought out and there's case law to support, whether it's fair use or willful infringement. That record is there. So I would simply just like states to have to follow the same law that I do.

KENNEALLY: Rick Allen, co-founder of Nautilus Productions, thanks for joining me today on Beyond the Book.

ALLEN: It has been a great pleasure, Chris. Thank you so much for having me.



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