

**Blackbeard's Law**  
**NC Session Law 2015-218**  
**Law for Public Administration**  
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**July 25, 2022**

This paper will address the NC § 121-25 (b) statute also known as Blackbeard's law. Background on how the law came about, may be more than you are looking for but being part of the project that led to this law for a decade makes for a unique perspective. The law centers around a 2013 settlement agreement between the State of North Carolina (NC) and private companies, Intersal, Inc and Nautilus Productions. There are still ongoing challenges against the State who use sovereign immunity as their defense but we will look at the copyright claims that made it all the way to the Supreme Court.

## **Background**

In 1996, a private research firm, Intersal, Inc. discovered a shipwreck in Beaufort, Inlet, North Carolina believed to be *Queen Anne's Revenge (QAR)*, Blackbeard the Pirate's flagship that ran aground in 1718. In 1998, North Carolina Department of Cultural Resources (NCDCCR) entered into a Memorandum of Agreement (MOA) with Intersal, where Intersal "agreed to forego entitlement to their share of any coins and precious metals recovered from the *QAR* site in order that all *QAR* artifacts remain as one intact collection," and DCR to determine the ultimate disposition of the artifacts. As part of the agreement, Intersal retained media, documentary, and replica rights (Agreement Intersal-DCR 1998).

The Office of State Archaeology's (OSA) Underwater Archaeological Branch (UAB) began excavating the main features of the site in 1998. With Intersal's knowledge, UNC-TV was interested in making a documentary about the historical project and hired Nautilus Productions owned by videographer, Rick Allen, who specialized in underwater videography. The shipwreck is located in an inlet and sits in twenty-four to thirty feet of water where visibility averages three to five feet with currents rapidly changing with the tides. The diving is technical, often reaching pitch black conditions in a matter of minutes. Allen's professional media career, diving experience, and historical interest were a great match for this project and after working on the UNC documentary, he started volunteering his time to capture this project on film. The service Allen provided was invaluable as the UAB did not have the level of professional equipment Allen possessed and Allen was more than willing to share the footage with UAB for research and educational purposes

Allen realized in the MOA that Intersal retained the documentary rights and approached Intersal to discuss his role as he accumulated volunteer hours and footage of the site. In 1998, it was agreed between Allen and Intersal that Allen would own the copyright for all his material and Intersal would get 25% in royalties for any footage used in documentaries. Allen's passion for the project was steadfast even as he spent his own time and money obtaining footage. In 2000 and 2001, Bill Lovin of Marine Grafics and Nautilus Productions created the DiveLive educational programs. Live surface and underwater video of the project was streamed on the internet allowing thousands of school children around the world to learn about underwater archaeology in real time (Nautilus 2022).

The film series *Pirates of the Caribbean* generated an enormous public interest in pirates and this was helpful as DCR worked to fulfill their part of the MOA in the conservation and curations of artifacts. Raising money and awareness took time but through state appropriated funds, a conservation lab was created and by 2006, the UAB was systematically excavating and recovering artifacts from the site. Allen was with the project every step of the way documenting surface and underwater activities while handing over all his footage to UAB.

Allen was accumulating a lot of footage and an increase in public interest resulted in more requests for underwater video of the site. In October of 2006, Allen and the UAB entered into a formal agreement which stated,

“The NCUAB/QAR agrees to use this footage for research purposes only and to acknowledge the footage as specified by Nautilus Productions. NCUAB/QAR agrees not to provide this footage for public display, commercial, or broadcast use including but not limited to television, cable, DVD, internet use, or to other parties without written consent of Nautilus Productions and in accordance with the Memorandum of Agreement between the North Carolina Department of Cultural Resources and Intersal, Inc. regarding media and documentary rights of the *QAR* site. Requests for such footage will be referred to Nautilus Productions.” (Agreement UAB-Nautilus 2006)

This agreement in effect designating Rick Allen as the project videographer. In 2007, Allen sought to formally ratify all oral agreements with Intersal and it was understood that, “Nautilus and/or its assignees owns all rights, worldwide, to footage collected for the Project including, but not limited to all copyright, intellectual property rights, and licensing rights.” This agreement was to remain in effect until the termination or expiration of Intersal's MOA with the State of North Carolina.” Upon termination,

“Nautilus will retain all intellectual property rights and rights to sell, license and distribute, without restriction, all project footage” (Agreement Intersal-Nautilus 2007).

With these agreements in place, Allen continued to be the project videographer on all field expeditions the UAB had through 2014. During this time, Allen provided well over 200 days of video production on site and at the *QAR* lab at no charge to the state, costing Nautilus Productions well over \$200,000. Allen supported film crews, provided footage to over a dozen international documentaries, new release footage for every major broadcast network, as well as footage and stills for public exhibition in NCDCCR facilities. In 2010, Allen sent a letter to the OSA citing concerns of the changing digital world and the ease at which anyone could of pirate content online. Allen advised the OSA to safeguard its own digital content as well as any content of his that was posted online (Letter 2010). Allen made sure to register all his work with the US Copyright Office.

The UAB went through a leadership change in 2012 and in 2013 the non-profit, Friends of *QAR*, desired to do a “web series to educate viewers about underwater archaeology and all aspects of the *QAR*” (Settlement Agreement 2013) and presumably underwater footage would be needed for this project. The president of the non-profit, Richard Lawrence (former head of the UAB), was under the impression that Allen would be heavily involved in this process (Lawrence 2013) but Friends of *QAR* awarded two “no bid” contracts to two out of state production crews \$70,000 for this service. Allen was never offered the opportunity to bid on this project and was excluded from all planning. Allen invoked his 2006 agreement with UAB and the hired crews approached Allen with a patronizing offer to employ his services for one day on a two-week on-site expedition. In June of 2013, the crews set out to film the series and with no underwater videographer or discussions of the use of Allen’s footage, it could only be assumed by Allen that the UAB was planning to give his footage to these production crews for their use in this web series (Allen, personal communication July 2022). To protect his fifteen years of investments with the project, Allen sent a revocation letter to the secretary of DCR “asserting his full intellectual property rights and revoked any and all rights, licenses, and sub licenses previously granted to DCR and others.” DCR was to “immediately return, destroy, or delete all video, images, files, stills and other related materials created by

Nautilus Productions” (Letter 2007). Both parties agreed the state could keep the material under lock and key until a solution was reached. Weeks later, the Friends of *QAR* launched their website and several of Allen’s images were used on their site without permission (Allen, personal communication July 2022).

### **OAH Settlement Agreements**

In July 2013, Intersal filed a petition of a contested case with the NC Office of Administrative Hearing (OAH) (*Intersal v NC Dept of Cultural Resources* 13DCR15732). OAH ordered parties to mediate disputes and in October 2013 DCR, Intersal, and Nautilus Productions signed a settlement agreement where no party admitted to any wrong doing. This agreement states that Intersal/Nautilus has “exclusive right to produce a documentary film about the *QAR* project for licensing and sale.” It also stated all non-commercial digital media shall bear a time code stamp and watermark of Nautilus and DCR agrees to display non-commercial media only on DCR’s website. Allen was also awarded \$15,000 for copyright violations. Breach of the agreement stated that parties ‘may avail themselves of all remedies provided by law or equity” (Settlement Agreement 2013).

In March of 2015, Intersal filed a second petition for a contested case with OAH (*Intersal v NC Dept of Cultural Resources* 13DCR16102), seeking remedy for violation of the 2013 agreement. Intersal claimed DCR continued to display over 2,000 digital image and over 200 minutes of digital video on websites other than DCR’s site without the required watermark or time code stamps. (*Intersal v Hamilton* 373 NC 89) Intersal also claimed DCR failed to inform them of opportunities under collaborative commercial narrative.

### **NC § 121-25 (b) Archives and History Statute Amendment**

In August of 2015, NC General Assembly passed HB 184 into State Law 2015-218. The timing and language of this law is subject to much scrutiny and is worth taking the time to lay out the timeline of amendments to NC § 121 Archives and History. March 10, 2015, NC HB 184 was introduced as an act

“to allow DCR to use the net proceeds of the sale of artifact for maintenance or conservation of other artifact; to clarify the process for transferring title of unclaimed or undocumented property loaned to museums and historical repositories; and to set a time limitation on confidentiality of records” (HB 184 Proposed Draft: DRH20061-LG-55).

There was no mention of photography or video recordings of shipwrecks in custody of NC agencies in the first draft of the bill. In the fourth edition of the bill, on July 23, 2015, the Senate Judiciary I Committee submitted and adopted a substitution in NC § 121-25(b) that read, “

“All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy” (HB CS: PCS10423-RN-38).

Analysis of the bill states that this substitute clarifies that “all photographs, video recording, or other documentary materials of a derelict vessel or shipwreck or its contents in the custody of any agency of NC government or is subdivision are public record” (Krehely and Patterson 2015). A July 29, 2015 newspaper article states that Sen. Norman Sanderson said the department (DCR) asked him and Sen. Jim Davis, to add language to a substitute bill proposed in a Senate Judiciary Committee. Senator Sanderson added, “I’m sure that it was brought forth because of the lawsuit” but department officials said the new legislation would have no effect on current contracts (Moritz 2015). This bill was signed into law August 15, 2015 by Governor Pat McCrory.

December 1, 2015 Allen sued the state in US District Court for the Eastern District of NC seeking to hold the state liable for copyright infringement through amendments made to NC § 121-25(b) by violating the Copyright Remedy Clarification Act (CRCA), 17 USC 501(a) and 511(a) and the Takings and Due Process Clause of the Fifth and Fourteenth Amendments. The language in the law appears to be an attempt to convert each copyrighted works in the state’s possession into public record, with no limitations on the use. The State moved to dismiss the copyright claim on the ground that the Eleventh Amendment’s provision of state sovereign immunity shields the state from suit in federal court (*Allen v Cooper*, 244 F. Supp.3d 525).

May 3 2016, legislators introduced the Current Operations and Capital Improvements Appropriations Act of 2016. In the third version of the bill, committee submitted and adopted a substitution to change the language in 121-25(b) to read:

“All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes” (HB CS: PCS30501-LUX-6 p. 99)

What is interesting here is that legislators used an appropriations bill to amend NC § 121-25(b) to remove language that in essence infringes current copyrights claims. If legislators thought the original 2015 amendment was just and constitutional, why covertly remove the language in a bill that is for allocating funds to state entities? It seems suits against the state prompted the change. HB 1030 was passed into State Law 2016-94 July 14, 2016. Even though the change in language, a decision in March 2017 by Justice Boyle on *Allen v Cooper* held that Allen pled sufficient to allow the court to draw reasonable inference that NC § 121-25(b) is invalid as it purports to regulate a matter in the domain of federal law and defendants infringed on his registered copyright works after the 2013 settlement agreement (*Allen v Cooper*, 244 F. Supp.3d 525).

### **Copyright Law, Fifth, Fourteenth, and Eleventh Amendments**

NC state law NC § 121-25(b) and Constitutional federal law are at issue in this case. Under the NC Constitution, ‘no person shall be deprived of life, liberty, or property but by the law of the land’ (N.C. Const. Art. I, §19), Title 17 in the US Code deals with copyright law and Allen’s arguments are centered around the Copyright Remedy Clarification Act (CRCA), 17 USC 501(a) and 511(a). 17 USC 501(a) states that anyone who violates any of the exclusive rights of the copyright owner as provided in sections 106-122, is an infringer of the copyright. The term anyone includes any State, any instrument of a State, and any official acting in her/her official capacity of that State and shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernment entity. 17 USC 511(a) makes clear these entities shall not be immune, under the Eleventh Amendment of the Constitution or under any other doctrine of sovereign immunity from suit in Federal court for violation of any of the exclusive rights of a copyright owner and the section (b) describe remedies are available (at law and in equity) for the violation to the same extent remedies are available against any public or private entity (17 USC 511).

The Eleventh Amendment makes clear that a state cannot be sued in federal court by a citizen of another state or country but does not say anything about citizens suing their own state (US Const. Amend. XI). The courts held that Congress has the power to override the state's sovereign immunity when necessary to protect rights under the fourteenth amendment (Szypszak 2011). The takings clause in the Fifth Amendment refers to the statement that private property shall not be taken for public use, without just compensation (US Const. Amend. V). The Fourteenth Amendment reaffirms this stating "nor shall any State deprive any person of life, liberty, or property, without due process of law" nor deny any person equal protection of the laws (US Const. Amend. XIV). The Intellectual Property Clause of the Constitution specifically authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (US Const. Art. I § 8. cl.8).

### ***Allen v Cooper Saga Continues...***

While the first ruling in US District court was held in part and denied in part, the state appealed the decision however Justice Boyle affirmed that Congress appropriately exercised its powers under the Fourteenth Amendment in passing the CRCA to abrogate the state's sovereign immunity from copyright claims and Allen's copyright claim could not be dismissed on state immunity grounds. The test for determining whether a state waived its immunity is stringent as the state must explicitly express such or by such overwhelming implications from the text to leave no room for any other interpretation. Allen claimed the state waived sovereign immunity by entering the 2013 settlement agreement but the court held that the state did not waive its Eleventh Amendment immunity although the State's consent to suit was broad, there was not clear declaration of its intent to submit to suit in federal court (*Allen v Cooper*, 244 F. Supp.3d 525). Defendants argued Allen did not have standing to contest the validity of NC § 121-25(b) because they are not harmed by the statute and no imminent threat of harm. Allen alleged defendants stated the 2013 settlement was not longer valid or binding due to NC § 121-25(b). The court held there is an ongoing harm and Allen had sufficient injuries to contest the validity of the statute (*Allen v Cooper*, 244 F. Supp.3d 525).



After the district court rejected NC's claim of immunity, NC filed an appeal in the 4<sup>th</sup> Circuit and Allen filed a cross-appeal. In July 2018, the 4<sup>th</sup> Circuit reversed and remanded the District court to dismiss all claims against the state officials and remaining claims against the State. NC claims Congress cannot rely on Article I to abrogate Eleventh Amendment immunity due to cases *Seminole Tribe*, 517 U.S. at 72-73, *Alden v Maine*, 527 U.S. 706, and *Fla Prepaid Postsecondary Educ Expense Bd. V. Coll. Sav. Bank*, 527 U.S. 627. Allen argued the Supreme Court overruled those case in *Central Virginia Community College v Katz*, 546 U.S. 356 but the court ruled that even after *Katz*, Congress cannot rely on Article I over copyright to compel a State to litigate copyright cases in federal court. NC also argued that Congress did not validly exercise its power in enacting the CRCA because it did not purport to rely on the authority and it did not tailor the Act to an identified, widespread pattern of conduct made unconstitutional by the Fourteenth Amendment. The 4<sup>th</sup> Circuit held that Congress did not limit the scope of the CRCA to enforce the rights protected under the Fourteenth Amendment (*Allen v Cooper*, 895 F.3d 337).

In January of 2019, Allen petitioned SCOTUS for a Writ of Certiorari to appeal the Fourth Circuit decision and was granted this writ in June of 2019 (*Allen v Cooper*, 139 S. Ct.2664). This case was brought before the Supreme Court in Nov 2019 and an opinion was released in March of 2020. The court opinion upheld the Fourth Circuit ruling. Justice Kagan delivered the opinion of the court and quotes *Florida Prepaid* as precedent that Congress did intend to remove State's immunity in the Patent Remedy Act. but then questions that authority and says *Florida Prepaid* forecloses each of Allen's arguments and decisions in *Seminole Tribe v Florida State* stating Congress cannot abrogate sovereign immunity under Article I. Allen's argument under the *Katz* decision are also invalid because the court views the Bankruptcy Clause did the abrogating, not Article I and bankruptcy is a different jurisdiction than Intellectual Property (*Allen v Cooper*, 140 S. Ct. 994).

Justice Kagan went on to say that under *Florida Prepaid*, the CRCA would fail the 'congruence and proportionality' test and therefore the evidence the Fourteenth Amendment injury supporting the CRCA is exceedingly slight. Kagan claimed the court needed special justification to overrule precedent

because error alone cannot overcome *stare decisis*. Kagan concluded that Article I and the Fourteenth amendment could not support an abrogation on legislative record. Justice Thomas concurred with the court but disagreed on *stare decisis* citing if the court ruled erroneously then they would be obliged to correct the error. Thomas also believed the question of whether copyrights are property within the original meaning to the Fourteenth Amendment's Due Process Clause remains open (*Allen v Cooper*, 140 S. Ct. 994).

In September 2020 Allen filed a motion for reconsideration in the US District court to reconsider its 2017 order dismissing the claim of unconstitutional taking claiming that although court relied on prevailing law at the time, precedent has been changed by the Supreme Court's decision in *Knick v Township of Scott*, 139 S. Ct. 2162 in June 2019. Allen claims that, now the Supreme Court has rejected the CRCA as abrogation statute, it is appropriate to consider his claim on a case-by-case abrogation based on an actual violation of his constitution right under *United States v Georgia*, 546 U.S. 151. In August 2021, Allen's motion for reconsideration was granted (*Allen v Cooper*, 555 F. Supp 3d 226).

#### **Other Cases Affected by NC § 121-25(b)**

As this paper has mostly been focused on copyright law and sovereign immunity, the other cases that has been affected by this law are cases associated with Intersal. While Intersal has interest in how *Allen v Cooper* plays out, Intersal's claim against the state mostly centers around the State's breach of the 2013 agreement and renewal of the *El Salvador* search permit. After many state motions to dismiss Intersal's complaints and Intersal's appeal of trial court decisions, this case's most recent opinion lies with the NC Supreme Court in a November 2019 ruling. Justice Hudson has affirmed in part, reversed in part, and remanded this case to trial court to review two of Intersal's claim; trial courts erred in granting the State's motion to dismiss the claims that defendants breached the 2013 Agreement by (1) violating Intersal's media and promotional rights and (2) failing to renew Intersal's search permit for *El Salvador* (*Intersal v Hamilton* 373 NC 89). The issue of media rights is still alive in NC courts and will be interesting to see how this plays out.

To mention a recent citing of *Allen v Cooper*, June 29, 2022, the US Supreme Court took up another case on sovereign immunity in *Torres v Texas DPS*. Justice Kagan states, “In my view, our sovereign immunity decisions have not followed a straight line” (*Torres v Texas*, p.21) Kagan cites *Allen v Cooper* and her justification in using *Katz*’s decision of Article I as ‘good for one clause only’, the Bankruptcy Clause. Kagan thought that precedent shut the door on further Article I exceptions to state sovereign immunity but she was proved wrong by *PennEast Pipeline Co v New Jersey* (*Torres v Texas*, Docket 20-603). Maybe Allen will get another opportunity to be an exception to Article I.

## Discussion

Archaeology is more a noble pursuit than a lucrative one and archaeologists crave recognition which comes in the form of publications and media appearances. The *QAR* project is a high-profile archaeological project because of its association with the infamous Pirate Blackbeard and the lore of his association with the NC coast. Having been part of this project for ten years and participated in the majority of fieldwork that has taken place on that site, I am familiar with the politics at play when it comes to media attention. Rick Allen provided more than just photographs and underwater video of the site, he was part of navigating the unknowns and helped figure out solutions in everyday operations. When new leadership came onboard, there were ‘stars in people’s eyes’ and everyone could see the ambition to be the ‘on-film personality’ of the project. This led to the state ostracizing Allen, taking his intellectual property, and plastering it on YouTube and the state’s website without attributing any of the work to Nautilus Productions. Watermarking someone’s work is a simple concession considering what it would actually cost the state to produce the amount of film given to UAB and the quality of that video. The state knows how valuable that footage is and they desire to have full control of it which is why they conspired to legally take it by helping draft the amendment.

In my opinion, NC § 121-25(b) was absolutely written to commandeer Allen’s underwater video and to do away with media rights for Intersal. State archaeologists do not like being associated with a private search firm and do not want to re-issue Intersal’s search permit for *El Salvador*. NC § 121-25(b) is clear and consistent with the expectation of those affected by it and while it is law, its merits are being

contested in NC Supreme Court. Intersal is contesting the breach of the 2013 Agreement and the state is using the statute to claim all media rights belong to the state. Allen is not currently arguing the merits of the law but he is still fighting whether or not he can actually sue the state. The granted reconsideration may give Allen some grounds to proceed fighting the merits of NC § 121-25(b). The facts of this case couldn't be more fitting than to be part of Blackbeard's shipwreck. Although in this instance, state archaeologists are pirating intellectual property from Allen.

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