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States Should Not Take Intellectual Property Without Just Compensation: The Constitution's Fifth and Fourteenth Amendments Protect Copyrights

by

Seth L. Cooper *

I. Introduction and Summary

The Supreme Court's March 2020 decision in *Allen v. Cooper* dealt a blow to copyright owners by holding that the Eleventh Amendment largely immunizes states when they infringe copyrights. Yet a petition now before the Court in the case of *Jim Olive Photography v. University of Houston System* could provide the occasion for judicial enforcement of the Fifth and Fourteenth Amendments' prohibitions against state government takings of copyrighted property without just compensation.

Copyrights are a type of property that are expressly recognized in the Constitution. This understanding of copyrights as property provides a principled basis for Takings Clause claims when states intentionally or recklessly appropriate exclusive rights in copyrighted property. Such claims also appear consonant with Supreme Court decisions that prohibit states from appropriating personal property and an owner's "right to exclude." The Court should extend its Takings Clause jurisprudence to include takings of copyrighted property.

The Constitution's Article I, Section 8 Intellectual Property (IP) Clause grants Congress the power to secure copyrights. Section 106 of the Copyright Act generally protects a copyright owner's exclusive rights to control reproductions, create derivatives, distribute copies, and publicly display or perform the copyrighted property. But in *Allen v. Cooper* (2020), the Supreme Court determined that the Eleventh Amendment generally bars federal courts from hearing copyright infringement claims brought against state governments. Even so, the Eleventh Amendment does not bar federal courts from hearing claims against states for takings of private property without just compensation or for deprivations of due process.

The Fifth Amendment to the Constitution states: "nor shall private property be taken for public use, without just compensation." Supreme Court precedents, dating back to *Chicago, Burlington, & Quincy Railroad Company v. Chicago* (1897), hold that the terms of the Fifth Amendment's Takings Clause are incorporated against the states by the Fourteenth Amendment's Due Process Clause, which declares: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

If a state government, through one of its entities or its officials, makes copies of copyrighted property, such as a movie, TV show, music sound recording, photograph, or painting, then the state is appropriating to itself one of the exclusive rights of the owner. Such an action is analogous to a state government partially occupying a property owner's land or confiscating and using a portion of a property owner's personal goods. Regardless of the class of property involved, an intentional or even a reckless taking of a valuable interest in private property by a state should require the payment of adequate compensation to the owner.

The property rights basis for copyrights is key to recognizing takings claims when state entities or state officials intentionally or recklessly appropriate exclusive rights in creative works. The property rights character of copyrights is reflected in the IP Clause's reference to authors' "exclusive Right to their respective Writings." Conversely, there is no principled reason to exclude rights that expressly are recognized in the Constitution from the scope of property rights that are protected by the Takings Clause.

Although the Supreme Court has never squarely addressed a claim for takings of copyrighted property, decisions such as *Ruckelshaus v. Monsanto Company* (1984) recognize that intangible rights, including IP rights, are property for purposes of the Fifth Amendment's Takings Clause. Also, in decisions such as *James v. Campbell* (1882) and *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* (2018), the Court has recognized that patents are property for purposes of the Due Process and Takings Clause. On many occasions, the Court has applied its legal reasoning in patent cases to copyright cases. For example, in *Allen v. Cooper*, the Court stated that its 1999 patent decision in "*Florida Prepaid* all but prewrote our decision" and that it was "the critical precedent" regarding what constitutes an unconstitutional copyright infringement under the Fourteenth Amendment's Due Process Clause: "intentional conduct for which there is no adequate state remedy." (In *Allen*, the Court suggested that reckless conduct might also amount to an unconstitutional infringement.)

It is all but certain that a state's use of eminent domain to seize title to a copyright or a state's depriving an owner of all exclusive rights under Section 106 of the Copyright Act would be a taking for public use and require just compensation. But even less flagrant takings of copyrighted property appear to be within the scope of constitutional protection.

Two recent decisions furnish a strong basis for the Supreme Court to extend its *per se* takings doctrine to a state's appropriation of a copyright owner's exclusive rights. In *Horne v. Department of Agriculture* (2015), the Court made clear that the government's duty under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property" applies to personal property just as it does to real property. This is significant because copyrighted original works and reproductions of those works are personal property. And in *Cedar Point Nursery v. Hassid* (2021), the Court recognized that regulations requiring government access to private property constitute *per se* physical takings similar to an easement in property because they appropriate the "right to exclude." A state's appropriation of a copyright owner's exclusive rights, whether by making unauthorized copies of the work or publicly displaying it, is analogous to a state's appropriation of a portion of an owner's land or crops.

There also is a strong basis for treating appropriations of exclusive rights in copyrighted property as regulatory takings. In *Ruckelshaus*, the Court determined that required public disclosure of trade secrets was a regulatory taking under the test set forth in *Penn Central Transportation Company v. City of New York* (1978). And in the copyright context, a state's appropriation of the copyrighted property does not abate a public nuisance or offer reciprocal benefit to the owner. Also, it has long been recognized in copyright law that unauthorized reproductions and public displays of copyrighted works result in economic losses to the owners and undermines their investments in creating and marketing their property.

Importantly, the petition pending at the Supreme Court in *Jim Olive Photography v. University of Houston System* provides an opportunity for the Court to develop its takings jurisprudence with respect to copyrighted property. In this case, a business school downloaded original aerial photos of the City of Houston, removed all copyright and attribution information, and displayed the photos on the school's website for over three years. The photos were viewed countless times, but no compensation was paid to the owner of the photos. The Court should grant the petition in *Jim Olive Photography* and send the case back to the lower courts to address state infringements of copyrights in light of its "right to exclude" decision in *Cedar Point Nursery*.

A state's taking of copyrighted property also is the subject of continuing litigation in *Allen v. Cooper*. Despite the Supreme Court ruling in March 2020 that Allen's copyright infringement claim for uncompensated use of photos by a North Carolina government agency was barred by the Eleventh Amendment, the case on remand involves Allen's remaining legal claims that the state agency's intentional infringements constituted an unconstitutional taking and deprivation of due process. Those claims ought to be taken seriously.

It is wrong for states intentionally to make unauthorized copies of copyrighted works, distribute them, or display them without paying for those uses. Such actions invade the rights of the owners and undermine their ability to generate returns. Also, when states appropriate exclusive rights in copyrighted property, they are subverting one of the primary purposes of government. As James Madison wrote in his 1792 essay *On Property*: "Government is instituted to protect property of every sort." To prevent capricious harm to property owners and hold states accountable to the rule of law, the Supreme Court – and lower courts – should

enforce constitutional protections against state takings of copyrighted property – just like any other property.

II. The Constitution Protects Copyrighted Property

The Constitution's Article I, Section 8 Intellectual Property (IP) Clause, or Copyrights Clause, grants Congress the power "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."[1] Ever since the First Congress passed and President George Washington signed the Copyright Act of 1790, federal law has secured protections to copyright owners when their works are infringed.

However, in *Allen v. Cooper* (2020), the Supreme Court determined that the Eleventh Amendment generally bars federal courts from hearing copyright infringement claims brought against state governments.[2] Even so, the Eleventh Amendment does not bar federal courts from hearing claims against states for takings of private property without just compensation. Thus, takings claims could help shore up a glaring gap in copyright protections and provide owners a way of recovering some of their financial losses when states appropriate their exclusive rights and refuse to provide them with adequate remedies.

Takings claims are based on the Fifth Amendment to the Constitution, which states: "nor shall private property be taken for public use, without just compensation."[3] Supreme Court precedents dating back to *Chicago, Burlington, & Quincy Railroad Company v. Chicago* (1897),[4] hold that the terms of the Fifth Amendment's Takings Clause are incorporated against the states by the Fourteenth Amendment's Due Process Clause, which declares: "nor shall any State deprive any person of life, liberty, or property, without due process of law."[5]

If a state government, through one of its entities or its officials, intentionally makes copies of a copyrighted property such as a movie, TV show, music sound recording, photograph, or painting, then the state is appropriating to itself one of the exclusive rights of the owner. The same goes if a state distributes or publicly displays copyrighted property without authorization and payment of royalties. Such actions are analogous to a state government partially occupying a property owner's land or confiscating and using a portion of a property owner's personal goods. Regardless of the class of property involved, an intentional or reckless taking of a valuable interest in private property by a state should require the payment of adequate compensation to the owner.

III. The Property Rights Basis for Recognizing Takings of Copyrighted Property

The key to recognizing takings claims when state entities or state officials intentionally or recklessly appropriate exclusive rights in creative works is found in the property rights basis for copyrights. As Free State Foundation President Randolph May and I explained in our

[1] U.S. CONST. ART I, § 8, Cl. 8.
[2] 589 U.S. ___, Case No. 18-877, Slip Op., at 1 (Mar. 23, 2020).
[3] U.S. CONST. AMEND. V.
[4] 166 U.S. 226.
[5] U.S. CONST. AMEND. V., § 3.

book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015), the Founding Fathers and later generations of jurists and statesmen recognized that copyrights are a class of property rights that originate in individuals' labors. The property rights character of copyrights is reflected in the IP Clause's reference to authors' "exclusive Right to their respective Writings." Similarly, as George Ticknor Curtis wrote in *A Treatise on the Law of Copyrights* (1847), a copyright implies "the right of possession and use," and "[t]his right of possession and use is full and exclusive."[6] Thus, Section 106 of the Copyright Act federal law generally protects copyright owners' exclusive rights to control reproductions, create of derivatives, distribute copies, and publicly display or perform the copyrighted property.[7]

Conversely, there is no constitutionally principled reason to exclude copyrights from the scope of property rights that are protected by the Takings Clause. As James Madison wrote in his 1792 essay, *On Property*: "Government is instituted to protect property of every sort."[8] The Founding Fathers recognized that individuals may possess interests in physical property such as land or agricultural crops, as well as in intangible property such as commercial contracts. Accordingly, the Fifth Amendment's simple reference to "private property" should be read in its broad sense and it certainly ought to include the intellectual property rights that are expressly recognized in Article I, Section 8.

IV. Protections for Copyrighted Property is Consonant With Takings Clause Jurisprudence

Although the Supreme Court has never squarely addressed a claim for the taking of copyrighted property, its jurisprudence recognizes the plausibility of such claims. Under the Court's precedents, intangible rights, including IP rights, are property for purposes of the Fifth Amendment's Takings Clause. In *Ruckelshaus v. Monsanto Company* (1984), for example, the Court concluded that trade secrets under a state's law are property protected by the Takings Clause.[9] The conclusion in *Ruckelshaus* relied on prior decisions recognizing materialmen's liens, real estate liens, and valid contracts as intangible interests entitled to protection under the Takings Clause.[10]

Additionally, a handful of Supreme Court decisions have expressly recognized that patent rights are property within the scope of the Takings Clause. For instance, in *James v. Campbell* (1882), the Court stated that a patent "confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation."[11] And in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* (2018), the Court cited *James v. Campbell* in reiterating the point that patents are property for purposes of the Due Process and Takings Clause.[12] This is significant because, on many occasions, the Court has deemed its legal reasoning in patent right cases to be

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[6] *Id.* at 5.
[7] *See* 17 U.S.C. § 106.
[8] James Madison, "On Property," *National Gazette* (March 27, 1792).
[9] 467 U.S. 986, 1003-1004.
[10] 467 U.S. at 1003.
[11] 104 U.S. 356, 358.
[12] 584 U.S. ___, Case No. 16-712, Slip. Op. at 17 (Apr. 24, 2018) (citing 104 U.S. at 358)(additional cites omitted).

applicable in copyright cases and vice versa, as both of those rights are expressly provided for in the IP Clause. For example, in *Allen v. Cooper*, the Court stated that its patent decision in "*Florida Prepaid* but prewrote our decision" and that it was "the critical precedent" regarding what constitutes an unconstitutional copyright infringement under the Fourteenth Amendment's Due Process Clause: "intentional conduct for which there is no adequate state remedy."[13] (In *Allen*, the Court suggested that reckless conduct might also constitute an unconstitutional patent or copyright infringement.[14])

V. Precedents Favor Recognition of *Per Se* Takings of Copyrighted Property

It is all but certain that a state's exercise of eminent domain power to seize legal title to a copyrighted work or a state's depriving a copyright owner of all of his or her exclusive rights under Section 106 of the Copyright Act would constitute takings for public use requiring payment of just compensation. But even less flagrant takings of copyrighted property appear to be within the scope of constitutional protection. Two recent takings cases decided by the Supreme Court appear to furnish a strong basis for the Supreme Court to extend its *per se* takings doctrine to a state's appropriation of an owner's exclusive rights under Section 106.

First, in *Horne v. Department of Agriculture* (2015), the Court made clear that "the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property'" applies to personal property just as it does to real property."[15] The text and history of the Takings Clause indicate a strong concern about government appropriations of personal property, and thus the government's taking of personal property is a *per se* taking requiring just compensation. Reflecting on the Takings Clause, the Court observed that "[i]t protects 'private property' without any distinction between different types."[16] This is significant because copies of copyrighted works are types of personal property. Also, in making the point that personal property is no less protected than real property under the Takings Clause, the Court in *Horne* quoted its statement in *James v. Campbell* (1882) that the government cannot appropriate or use "exclusive property" in a patented invention – that is, it cannot appropriate exclusive rights in intellectual property – without paying just compensation, just as it cannot do the same in the case of privately owned land.[17]

In *Horne*, the Court concluded that a California regulation requiring raisin growers to set aside a percentage their raisin harvest for the government to collect, free of charge, was a *per se* physical taking. A state's appropriation of an owner's exclusive rights in copyrighted property, whether by making unauthorized copies of the work or publicly displaying it, is analogous to state's appropriation of a portion of a land owner's crops.

Secondly, in *Cedar Point Nursery v. Hassid* (2021), the Court recognized that regulations requiring government access to private property constitute physical takings because they appropriate the "right to exclude."[18] The Court described the right to exclude as "a

[13] Case No. 18-877, Slip. Op. at 16 (citing 527 U.S. 627).
[14] Case No. 18-877, Slip Op., at 11.
[15] 576 U.S. 350, 357 (internal cite omitted).
[16] 576 U.S. at 358.
[17] 576 U.S. at 359-360 (quoting 104 U.S. at 358).
[18] Case No. 20-107, Slip. Op., at 10 (June 23, 2021).

fundamental element of the property right" and it characterized the property interest taken by government-authorized physical invasions as a servitude or an easement.[19] And "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."[20]

In *Cedar Point Nursery*, the Court concluded that a California regulation granting labor organizers a right of access to agricultural employer properties to solicit support for unionization for up to three hours per day, 120 days per year was a *per se* taking because it appropriated the owner's "right to exclude." The right to exclude is of central importance to copyrights. And thus, the Court's decision appears congenial toward claims based on appropriations of owners' exclusive rights based on Section 106 of the Copyright Act.

VI. Precedents Favor Recognition of Regulatory Takings of Copyrighted Property

But even if the Supreme Court declined to regard state appropriations of exclusive rights in copyrighted property as *per se* takings, there is a strong basis for the Court to treat such appropriations as regulatory takings. In *Ruckelshaus*, the Court determined that a required public disclosure of certain trade secrets amounted to a regulatory taking.[21] Under the test set forth by the Court in *Penn Central Transportation Company v. City of New York* (1978), the existence of a partial taking of property requiring payment of just compensation depends on three factors: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property, and (3) the property owner's distinct investment backed expectations with respect to that property.[22] In the copyrighted property context, the character of a state's appropriation of an owner's exclusive rights would appear to warrant payment of just compensation. This is because a state's use of the copyrighted property would involve no abatement of a public nuisance and the appropriation would offer no reciprocal benefit to the owner. And it has long been recognized in copyright law that unauthorized reproductions and public displays of copyrighted works result in economic losses to the owners and undermines their investments in creating and marketing their property.

VII. Two Active Cases Raise Claims for Takings of Copyrighted Property

Importantly, the petition pending at the Supreme Court in the case of *Jim Olive Photography v. University of Houston System* provides an opportunity for the Court to develop its takings jurisprudence with respect to copyrighted property.[23] In *Jim Olive Photography*, a business school downloaded the copyright owner's original aerial photos of the City of Houston, removed all copyright and attribution information, and displayed the photos on promotional webpages for the school. The photos were posted on the school's website for more than three years and viewed countless times, but no compensation ever was paid to the copyright owner. The owner of the photos filed a lawsuit that raised takings claims against the university system. But in June of this year, the Texas Supreme Court decided against the owner's *per se*

[19] 594 U.S. ___, Case No. 20-107, Slip. Op., at 7 (internal quote omitted).
Kaiser Aetna v. *United States*, 444 U. S. 164, 176 (1979)); *Id.* at 11.
[20] 594 U.S. ___, Case No. 20-107, Slip. Op., at 9.
[21] 467 U.S. at 1004 *et seq*.
[22] 438 U.S. 104.
[23] *See* Petition for Writ of Certiorari, Jim Olive Photography v. University of Houston System, Case No. 21-735 (filed Nov. 15, 2021).

takings claim because it involved intangible property as opposed to physical property and because the state entity's use of that property did not deprive the owner of his possession or ability to continue using the photos.[24]

The soundness of the Texas Supreme Court's unwillingness to consider intangible property as a *per se* takings is far from certain. Additionally, just five days after the Texas Supreme Court's decision was released in *Jim Olive Photography*, the U.S. Supreme Court released its decision in *Cedar Point Nursery*. As described earlier, that decision emphasized the centrality of the "right to exclude" to property ownership and found that an appropriation of that right provides the basis for *per se* takings requiring just compensation. Accordingly, the Court should grant the petition in *Jim Olive Photography* and send the case back to the lower courts to address state infringements of copyrights in light of its decision in *Cedar Point Nursery*.

A claim for takings of copyrighted property by a state for public use without just compensation also is the subject of litigation in the continuing case of *Allen v. Cooper*. The Supreme Court ruled in March 2020 that Allen's copyright infringement claim for uncompensated use of photos by a North Carolina government agency was barred by the Eleventh Amendment.[25] But on remand to the Eastern District of North Carolina, the District Court issued an order allowing Allen to amend his legal complaint for purposes of clarifying and bolstering his remaining legal claims that North Carolina's intentional use of his copyrighted property without payment of royalties constituted an unconstitutional taking and deprivation of due process.[26] The District Court's order from August 2021 is now on appeal to the U.S. Court of Appeals for the Fourth Circuit. The copyright owner deserves the protections of the Fifth and Fourteenth Amendments.

VIII. Conclusion

It is wrong for state entities and state officials intentionally or even recklessly to make unauthorized copies of copyrighted works, distribute them, or display them without paying for those uses. Such actions invade the exclusive rights of the owners and undermine their ability to generate returns. Copyright law recognizes the harms to copyright owners when they are caused by private parties and it provides financial remedies for those harms. Similarly, the Supreme Court's Takings Clause jurisprudence should provide at least some financial remedies when identical types of harms are caused by state actors.

Like James Madison and the other Founding Fathers, Supreme Court Justice Joseph Story understood that one of the key purposes of government is to protect property under a system of equal laws. And in his *Commentaries on the Constitution of the United States* (1833), Story referred to the Takings Clause and wrote: "One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers."[27] To prevent the kind of caprice that Story warned against, the Supreme Court

[24] *See Jim Olive Photography v. University of Houston System*, Case No. 19-0605, Slip Op. (Tex. Supreme Court, June 18, 2021).
[25] 589 U.S. ___, Case No. 18-877, Slip Op., at 1.
[26] *Allen v. Cooper*, Case No. 15-627, Order (E.D.N.C, August 18, 2021).
[27] *Id.* at § 1784.

– and lower courts – should enforce Takings Clause protections against state takings of exclusive rights in copyrighted property – just like any other property.

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

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