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Takings Clause Ruling on Required Book Deposits Implicates Property Rights in Copyrights

by

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On August 29, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Valancourt Books, LLC v. Garland*. The court held – correctly – that the book deposit requirement contained in Section 407 of the Copyright Act, as applied to a book publisher, was an unconstitutional taking of private property under the Fifth Amendment. The decision was a straightforward Takings Clause case because copies of copyrighted books are personal property, and the deposit requirement involved no form of just compensation or like kind exchange to justify it.

In *Valancourt*, the D.C. Circuit observed that the deposit requirement is not a precondition for copyright protections and it rightly concluded that Section 407 confers no benefit for compliance. But the court's analysis in *Valancourt* also deserves scrutiny for appearing to deviate from the Founding Fathers' understanding of the nature of copyrights as a type of public contract between creative artists and the government that is rooted in natural property rights. *Valancourt* also provides a window into the open question of the applicability of the Takings Clauses of the Fifth and Fourteenth Amendments to takings by state governments of exclusive rights in creative works.

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Copyrights are a form of property rights that are expressly secured in the Constitution's Article I, Section 8 Copyright Clause. Constitution Day is celebrated each year on September 17, and it provides occasion for continuing recognition of the importance of the nation's fundamental law in securing life, liberty and property – including copyrights. With that purpose in mind, this is the third in a three-part September series addressing various aspects of copyright protection.

In a *Perspectives from FSF Scholars* published on September 7 titled "Internet Archive to Face the Music for Mass Copyright Infringement," I analyzed the mass infringement claims brought by several music sound recording companies in the case of *UMG Recordings v. Internet Archive*. And a *Perspectives* published on September 20, "Supreme Court Should Clarify the Law on Direct Infringement of Copyrighted Works," focused on exclusive rights to authorize copying as well as the volitional conduct requirement that was at issue in *ABKCO Music, Inc. v. Sagan*. This third *Perspectives* analyzes Takings Clause issues addressed by the D.C. Circuit's August 2023 decision in *Valancourt Books, LLC v. Garland*. Each of these three *Perspectives* is part of the Free State Foundation's continuing scholarly work advocating for protecting the exclusive rights of authors and other creative artists that are secured by the Constitution's Copyright Clause.

Section 407 of the Copyright Act contains a deposit requirement for owners of recently published copyrighted works. Under Section 407(a) and –(b), within three months of the publication date, "two complete copies of the best edition" of the copyrighted work must be submitted by the copyright owner and "deposited in the Copyright Office for the use or disposition of the Library of Congress." The Copyright Office is authorized to issue demands and assess fines to enforce compliance. And the agency also possesses authority under Section 407(c) to issue regulations that exempt categories of material from the deposit requirement or require only one copy of the published work.

Valancourt is an independent press that publishes on-demand copies of rare and out-of-print fiction, many of which are in the public domain. In June 2018, Valancourt received a demand for 341 books published by Valancourt. The letter identified potential fines of up to $250 per work for failure to comply with the demand, plus additional fines of $2,500 for willful and repeated failure to comply. Valancourt estimated that the compliance costs totaled $2,500. After pushback, Office narrowed its demand to 240 works.

In August 2018, Valancourt filed an action against the Attorney General and the Register of Copyrights, claiming that Section 407, as applied to Valancourt, violated the Fifth Amendment because it was an uncompensated taking of private property. The Fifth Amendment's Takings Clause states "nor shall private property be taken for public use, without just compensation." But in July 2021, the D.C. District Court granted summary judgment in favor of the government. As to the takings claim, the lower court determined that Section 407 was a condition on the receipt of governmental benefit of copyright protection. The lower court also explained that Valcourt accepted that condition by putting copyright notices on its books. And it dubiously characterized Valancourt's legal position "disingenuous" because Valancourt refused to disavow copyright protections. According to the lower court, abandonment of copyright would have required the Copyright Office to withdraw its deposit demands.

The D.C. Circuit reversed the lower court and concluded that "Section 407's demand for physical copies of works, as applied by the Copyright Office here, represents an uncompensated taking of private property under the Takings Clause." Relying on Supreme Court precedents, the D.C.

Circuit explained that physical appropriations of private property present the "clearest sort of taking," which is assessed under the simple rule that the government must pay for what it takes. As the court recognized that "[a]lthough the Takings Clause often arises in the context of real property, its requirements apply to personal property as well." And "[b]y requiring copyright owners to provide physical copies of books, the mandatory deposit provision" effect[s] a 'classic taking in which the government directly appropriates private property for its own use.'"

In reversing the lower court, the D.C. Circuit concluded that "copyright owners receive no additional benefit for the works they forfeit pursuant to Section 407's deposit requirement. Mandatory deposit is not required to secure the benefits of copyright." The court bolstered this conclusion with a succinct historical review of the deposit requirement. Although the Copyright Act of 1790 required authors to "deposit a printed copy" of their work to gain the benefit of copyright, "[t]he Copyright Act of 1976 made copyright automatic upon fixation of a work in a tangible medium, and that regime persists today, meaning mandatory deposit remains unnecessary to gain copyright." The 1976 Act also removed loss of copyright as a sanction for failure to deposit. Additionally, the court observed that the Berne Convention Implementation Act of 1988 eliminated the author's obligation to include a copyright notice when publishing his or her works as a condition for retaining copyright.

Additionally, the D.C. Circuit determined that there is no indication that abandonment of copyright is even a legally available option for copyright owners to avoid the deposit requirement. The lower court's disparagement of Valancourt's position on abandonment didn't age well. In any event, the D.C. Circuit did not address the constitutional implications of such abandonment in its analysis of Section 407. And the court rejected the government's contention that the constitutional problem posed by the demanded deposit was alleviated by the option of paying a government-imposed fine instead of the copyright owner forfeiting personal property. Quoting the Supreme Court's decision in *Koontz v. St. Johns River Water Management District* (2013), the court wrote that "a 'demand for money' that 'operate[s] upon . . . an identified property interest' can violate the Takings Clause because a 'monetary obligation burden[s]' ownership of property."

The result in *Valancourt Books, LLC v. Garland* appears correct as a matter of constitutional law and the court's reasoning is satisfying overall. But a few additional observations about the decision are in order.

First, in *Valancourt Books, LLC v. Garland*, the court made a partial overstatement when it wrote that "the changes to copyright law untethered the deposit requirement from the benefits of copyright protection, erasing copyright's status as the product of a voluntary exchange." It is true that the deposit requirement was delinked from the benefits of copyright protection. But at constitutional bedrock level, copyright *is* the result of a voluntary exchange – a public contract – according to which a creative artist agrees to publish an original creative work in a tangible public medium and in return the government secures exclusive rights in the work. Free State Foundation President Randolph May and I explored the public contract basis of copyrights in chapter two of our book, *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* (Carolina Academic Press, 2020). The public contract basis for copyrights was recognized by American legal scholars and jurists going back to the early nineteenth century. A modern description of this concept was summarized by the Eleventh Circuit in *CNN, Inc. v. Video Monitoring Services of America, Inc.* (1991):

> The Copyright Clause itself describes the concept of copyright intended by its framers; that is, the grant of an exclusive right to authors to reproduce their writings for sale during a limited period of time in exchange for the author's making the work available to the public in order to promote learning. This quid pro quo reflects a fundamental fairness to both the public, the "owner" of the public domain, and the author who takes from the public domain the ideas which are the substance of such author's protected original expression.

As we wrote in our book regarding copyright registration reforms enacted by Congress in the late twentieth century, "the removal or reduction of those particular formalities did not undo the underlying logic of the public contract basis for copyright protections."

Second, the court's description of copyrights as merely a government benefit and not a natural right is at odds with the historic constitutional understanding of copyrights. As the court wrote in *Valancourt*, "We agree that copyright is not a natural right. Rather, it is a uniquely governmental benefit whose conferral the Copyright Office can validly condition on meeting various requirements." The court's stated agreement was with the Department of Justice and the Copyright Office. It's unfortunate that the federal agencies charged with enforcing and registering copyrights apparently hold to a shallow view of the nature of copyrights, and the court's agreement with that view was unnecessary to the holding in *Valancourt*.

As FSF President Randolph May and I detail in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015), the Founding Era's political philosophy of natural rights informed the drafting of the Constitution, including the Copyrights Clause. Several state laws that preceded the Constitution applied natural rights philosophy to copyrights, defining them as property rights that justly deserve to be protected and promoted for the good of individual creators and for the public. And later generations of jurists and statesmen recognized that copyrights are a class of property rights that originate in individuals' labors. The natural property rights character of copyrights is reflected in the Copyright Clause's reference to secure authors' "exclusive Right to their respective Writings."

The fact that the Founders recognized that laws passed by Congress were necessary to secure copyrights did not mean that the Founders denied the natural rights basis for copyrights. Federal laws were intended to protect exclusive rights that originated in a person's intellectual labors. When it comes to copyrights, courts and federal agencies should not assert a disjunction between natural rights and positive laws of Congress or Copyright Office regulations where none exists. Moreover, copyright is no mere government benefit in the sense of a handout or unilateral gift. As previously observed, the public contractual foundation of copyright is key. Copyright is part of a quid pro quo and it constitutes a pledge of good faith by the U.S. government to ensure that exclusive rights in creative works are protected.

Third, the court's takings analysis in *Valancourt Books, LLC v. Garland* provides occasion to ponder a constitutional question not directly at issue in the case: whether a creative artist's intangible, exclusive rights under Section 106 of the Copyright Act "to do and to authorize" reproductions, preparations of derivatives, distributions, displays, and public performances of copyrighted works are property protected by the Takings Clauses of the Fifth and Fourteenth Amendments. Although the Supreme Court has yet to squarely address the question, the property

rights basis for copyrights under the Constitution supports the conclusion that copyrights should be subject to takings claims when state entities or state officials intentionally or recklessly appropriate exclusive rights in creative works.

In my December 2021 *Perspectives from FSF Scholars*, "States Should Not Take Intellectual Property Without Just Compensation: The Constitution's Fifth and Fourteenth Amendments Protect Copyrights," I wrote that "there is no constitutionally principled reason to exclude copyrights from the scope of property rights that are protected by the Takings Clause."

The applicability of takings claims to copyrights has become an issue as the result of several incidents involving the appropriation of copyrighted works by government officials in several states. 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. But the Eleventh Amendment does not appear to bar federal courts from hearing claims against states for intentional or reckless takings of private property without just compensation. The court's decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* (2018) cited *James v. Campbell* (1882) in reiterating that patents are property for purposes of the Due Process and Takings Clauses. *Allen v. Cooper* left open the question about the applicability of those clauses to copyrights.

Takings claims could fill a gap in copyright protections and provide recompense to owners of creative works who have suffered financial losses as a result of states appropriating their exclusive rights and refusing to provide them with adequate remedies. The Supreme Court and lower courts ought to enforce Takings Clause protections against state takings of exclusive rights in copyrighted property – just like any other property.

In sum, the D.C. Circuit's decision in *Valancourt* correctly recognized that the Fifth Amendment's Takings Clause applies to copyrighted personal property. The court's application of takings precedents in the case is commendable. But the court's views about the nature of copyright were not necessary to the result in the case, and those come up short when measured against the Founding Fathers' views of copyrights based on public contract and natural property rights. And both court precedents and the views of the Founding Fathers are consonant with a future judicial recognition that exclusive rights in copyrighted works are property protected by the Takings Clauses of the Fifth and Fourteenth Amendments.

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Further Readings

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