

TAKE A PICTURE: COPYRIGHT AND STATE SOVEREIGN IMMUNITY

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DOI: <https://doi.org/10.15779/Z385717P8R>

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† J.D. 2024, University of California, Berkeley, School of Law. Sincere thanks to Professor Talha Syed, Shih-Wei Chao, my fellow students in the 2022 Law & Technology Writing Workshop, and the *Berkeley Technology Law Journal* editors.

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I. INTRODUCTION

Should individual states be allowed to use the intellectual property of their citizens without payment? Suppose that to boost its public treasury, the state of Texas downloaded copies of Billboard’s Top 100 and used these hit songs to create its own subscription-based music-sharing platform to rival Spotify. Do the songs become a “public good” if Texas’ use leads to more funding for local services? What if the use simply bolsters the marketability and reputation of local universities?

In *Jim Olive Photography v. University of Houston*, this was the question before the Texas Supreme Court.¹ Jim Olive is a Houston-based photographer, specializing in aerial photography.² Several of the photographs that Olive produces and licenses are of the downtown Houston skyline.³ These images require Olive to rent a helicopter at \$2,500 per hour, invest in specialized photography equipment, strap into a harness, and dangle below the helicopter while he is taking the photographs.⁴ After he is grounded, Olive painstakingly edits his images, including adding his watermark, and files the images with the Copyright Office. Protective over the work, Olive hired a copyright infringement scanner called Image Rights that alerted him to the unauthorized use of one of his skyline photographs, “The Cityscape,” by the University of

1. 624 S.W.3d 764, 768 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

2. *Id.*

3. *Id.*

4. Ryan Hughes, *University Sued for Image of Houston Skyline*, BYU COPYRIGHT LICENSING OFF. (Feb. 1, 2018), <https://copyright.byu.edu/university-sued-for-image-of-houston-skyline>, (listing some of Jim Olive’s expenses in creating and protecting his works).

Houston (UH)’s C.T. Bauer College of Business.⁵ UH replaced Olive’s watermark from the image with its own logo and stripped its metadata, making it untraceable back to Olive, and provided him neither compensation nor attribution.⁶ UH used the images repeatedly on its website and social media pages, and even provided the photo to *Forbes* magazine who published the photograph and credited the work to the Bauer College of Business.⁷ When Olive’s attorney reached out to the university to negotiate a license fee for the use, UH responded, “[y]ou can’t sue us; we have sovereign immunity.”⁸ The University’s dismissal of a federal copyright infringement suit inspired Olive to pursue Takings Clause claims at the state-level instead, testing the Court’s likelihood of extending the Takings⁹ doctrine to cover instances of state infringement.¹⁰

Under the doctrine of sovereign immunity, states may not be held liable for torts like copyright infringement.¹¹ In an attempt to hold states liable for the unauthorized taking of a citizen’s copyrighted material, Congress passed the Copyright Reform Clarification Act (CRCA) in 1990. Thirty years later, the Supreme Court declared the statute an unconstitutional abrogation of state sovereign immunity that encroached on states’ rights under federalism in *Allen v. Cooper*.¹² After the fall of the CRCA in 2020, copyright owners are left with little recourse against even repeated and intentional state infringers.

5. Alex Meyer, *Photographer’s Copyright Lawsuit Calls Bauer Ethics into Question*, DAILY COUGAR (Mar. 8, 2017), <http://thedailycougar.com/2017/03/08/photographers-copyright-lawsuit-calls-bauer-ethics-into-question/> (interviewing Jim Olive about his investment in monitoring techniques to prevent copyright infringement).

6. *Id.* (explaining that Olive discovered that UH infringed “The Cityscape” after hiring professional copyright monitoring services).

7. *Id.* (documenting Jim Olive’s discovery of altered versions of his image appearing on UH websites and on Forbes).

8. *Id.* (quoting Dana Andrew LeJune, attorney for Jim Olive on the response received from UH).

9. This Note uses “Takings” (with a capital T) to refer specifically to the legal process outlined by the Fifth Amendment and similar state provisions, involving the government’s formal acquisition of private property for public use with just compensation, and “takings” (lowercase) more broadly refers to any instance where a property right is deprived from an owner, regardless of the legal mechanism or justification.

10. *Jim Olive Photography*, 624 S.W.3d at 768.

11. See Michael Shaunessy & Ian M. Davis, *The Lion’s Share: Federal Law, State Sovereign Immunity, and Intellectual Property*, in *ADVANCED INTELLECTUAL PROPERTY LITIGATION 2021* 1, 6 (State Bar of Texas Course Book, 2021), https://www.mcginnislaw.com/media/publication/15313_15312_14_Shaunessy.pdf [hereinafter *Lion’s Share*] (explaining that direct relief against state entities is barred by sovereign immunity following *Allen v. Cooper*).

12. See Tom James, *Digital Blackbeards: Copyright Infringement by States and the “Congruence and Proportionality” Test in Allen v. Cooper*, 36 BERKELEY TECH. L.J. 1375, 1377–91 (2021) (explaining the Court’s decision to strike down the CRCA as an unconstitutional abrogation

One pathway for direct state liability and compensation for appropriation of the right to exclude under the Takings Clause may remain at the federal level.¹³ The Court's recent decision in *Cedar Point Nursery v. Hassid* extends the state's liability under the federal Takings Clause doctrine to encompass cases where the state has provided third parties access to a plaintiff's property; however, it is unclear if this case will apply to intellectual property, because intellectual property is nonrivalrous unlike real property and cannot be physically occupied.¹⁴ As such, this Note argues a more narrowly-tailored version of the CRCA is necessary to balance the interests of copyright owners with the important research, archival, and educational work of state universities and libraries in response to the growing record of copyright infringement by state actors.

This Note examines the interplay between copyright, state sovereign immunity, and the federal Takings Clause. In Part II, the Note surveys the history and purposes of state sovereign immunity and copyright in the United States. Part III questions the potential viability of Takings Clause claims as an alternative pathway to compensation for state appropriations of exclusive rights under the Copyright Act. Part IV addresses the threat that even if copyright Takings Clause claims may be viable, states may still claim sovereign immunity as a defense. Part V explores potentially viable alternative pathways to compensation that are less desirable than congressional abrogation. Finally, Part VI concludes by proposing a constitutional pathway for congressional abrogation in revising the Copyright Remedy Clarification Act.

II. STATE SOVEREIGN IMMUNITY AND COPYRIGHT

State sovereign immunity doctrines prevent copyright holders from pursuing copyright infringement cases against states.¹⁵ States are independent sovereigns within the United States and therefore generally cannot be sued in

both under Article I's Intellectual Property Clause powers and under § 5 of the Fourteenth Amendment which vests Congress with enforcement powers to ensure that no state "deprives any person of life, liberty, or *property without due process of law*" because the CRCA is too broad to meet the congruence and proportionality test established in *City of Boerne v. Flores* (emphasis added).

13. U.S. COPYRIGHT OFF., COPYRIGHT AND SOVEREIGN IMMUNITY 65–67 (2021) [hereinafter COPYRIGHT AND SOVEREIGN IMMUNITY] (explaining that copyright owners may still pursue federal and state Takings Clause claims and these claims are still considered viable, but that the chances of success are questionable).

14. 141 S. Ct. 2063, 2073–74 (2021); *see also* discussion *infra* Section III.E.

15. *See Lion's Share*, *supra* note 11 (surveying the origins and purpose of state sovereign immunity).

state or federal court without their consent.¹⁶ Congress possesses limited powers to pierce this immunity against the states' will.¹⁷

A. THE STATE OF STATE SOVEREIGN IMMUNITY

Under the doctrine of state sovereign immunity, a state cannot be sued in federal or state court without the state's consent.¹⁸ This doctrine emerges both from the text of the Eleventh Amendment and from the structure of the original Constitution itself, which the Supreme Court has interpreted to broaden the scope of the immunity to prevent suit from citizens within the state.¹⁹ States may choose to waive their immunity or Congress may abrogate the immunity under limited circumstances prescribed by the Court.²⁰ As a result, states enjoy immunity from liability under otherwise valid federal laws.²¹

1. *History and Purpose of State Sovereign Immunity*

Sovereign immunity descends from English common law and from the adage that “the King can do no wrong.”²² In the early United States, Anti-Federalists argued that the proposed constitution failed to adequately protect the doctrine. In particular, they feared that Article III of the proposed Constitution, which states that the power of the judiciary extends to controversies “between a state and citizens of another state” would allow private lawsuits against states.²³ On the other hand, Federalists claimed that Article III would not be interpreted to allow citizens to sue states without their consent.²⁴ However, other Federalists conceded that Article III allowed suit against states and reasoned instead that justice requires states to be held

16. KEVIN J. HICKEY, CONG. RES. SERV., COPYRIGHT AND STATE SOVEREIGN IMMUNITY: THE *ALLEN V. COOPER* DECISION 1 (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10465>.

17. *See id.* at 1–4 (explaining that Congress' ability to abrogate is limited only to cases where Congress can show “congruence and proportionality” between the constitutional harm and the proposed remedy).

18. *See* Bradford R. Clark & Vicki C. Jackson, *The Eleventh Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xi/interpretations/133> (last visited Apr. 30, 2023) (explaining that generally the states enjoy broad immunity from suit, although some circumstances allow suit against state officers).

19. *Alden v. Maine*, 527 U.S. 706, 728 (1999) (holding that the Eleventh Amendment bars suits from individuals and corporations within the state and from other states when looking beyond the text of the Amendment to the overall structure of the constitution).

20. *See* HICKEY, *supra* note 16, at 1–2.

21. *See id.* at 1.

22. Shaunessy & Davis, *supra* note 15.

23. U.S. CONST. art. III, § 2; *see also* Clark & Jackson, *supra* note 18 (recounting the debate between Anti-Federalists and Federalists over the scope of sovereign immunity afforded by the text of Article III).

24. *Id.*

accountable when they violate valid laws.²⁵ Shortly after the Constitution's ratification, the Supreme Court addressed the power of the doctrine under Article III in the landmark case *Chisholm v. Georgia*.²⁶

In that case, a citizen from North Carolina sought damages from Georgia for unpaid goods sold to the state during the Revolutionary War.²⁷ The Court held that under Article III, a state can be held liable for harms caused to private citizens.²⁸ In its analysis, the Court explained that the sovereign immunity guaranteed by the Constitution differs from that in Great Britain, because citizens of the United States are not subjects. Rather, all citizens are equal, and thus state governments, as representatives of those citizens are not immune from private suit brought by citizens from another state.²⁹

Concerned by the precedent set by *Chisholm v. Georgia*, Congress rapidly ratified the Eleventh Amendment to protect sovereign immunity.³⁰ The text of the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³¹ Following its ratification, pending suits against states were "generally dropped"³² and private citizens were left without recourse for past wrongs committed by the states.³³

While the text of the Amendment only protects states from litigation against out-of-state or foreign plaintiffs, the Supreme Court has expanded the doctrine to include suits originating from a state's own citizens.³⁴ The Court continued this expansion in *Alden v. Maine*, enshrining state sovereign immunity even for cases brought within the state's own court system.³⁵

25. *Id.*

26. *See generally* *Chisholm v. Georgia*, 2 U.S. 419, 430–38 (1793).

27. *See id.* at 419.

28. *See id.* at 452.

29. *See id.* at 472.

30. *See id.* (explaining that Congress passed the Eleventh Amendment to overturn *Chisholm v. Georgia* and enshrine state sovereign immunity).

31. U.S. CONST. amend. XI.

32. Clark & Jackson, *supra* note 18.

33. *See* CONG. RES. SERV., INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS AND STATE SOVEREIGN IMMUNITY 1, 4 (2010), https://www.everycrsreport.com/files/20100730_RL34593_d9260ec5494a86ce9adcd94ce633330d05b268f.pdf (explaining that IP holders generally have no recourse against state infringers due to the Supreme Court's precedent regarding the Eleventh Amendment).

34. *See id.* at 4; *see generally* *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (holding that a state cannot be sued in federal court by one of its own citizens, even if the conflict arose under federal law).

35. 527 U.S. 706, 730–32 (1999) (holding that the Constitution, "by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated

Generally, courts recognize two purposes behind sovereign immunity.³⁶ The first reason is to promote faith in governmental decisions by barring lawsuits challenging their discretionary decisions and actions, such as allocating resources or specific political decisions.³⁷ The second reason is to protect the public treasury from the costs and consequences of governmental infringement, as allowing citizens to sue state actors could cause states to allocate money from public goods to defend the lawsuit and pay damages.³⁸

Today, states are immune from suits originating from out-of-state or foreign citizens, or its own citizens, in federal or state court, and may define their own state laws surrounding sovereign immunity.³⁹ In effect, state sovereign immunity doctrine generally protects states from suit by any private citizen, unless the state specifically consents to waive this immunity or unless Congress has specifically abrogated the immunity.⁴⁰

2. *The Application of Sovereign Immunity to the State's Instrumentalities*

Under the Eleventh Amendment, state sovereign immunity also extends to a state's "lesser entities" serving as "arms" or "instrumentalities" as defined by that state.⁴¹ While the Supreme Court did not offer a universal test, whether an entity is immune as "arms" or "instrumentalities" depends on the "relationship between the sovereign and the entity in question" and the "essential nature and effect of the proceeding."⁴² For example, the Fifth Circuit utilizes a six-part test originating in *Clark v. Tarrant County* to determine whether or not a state entity also has immunity where the most important factor is the extent that the entity is funded by the state.⁴³

3. *The Scope of and Exceptions to State Sovereign Immunity*

In general, a state's sovereign immunity protection supersedes an individual's copyright protection unless the state waives their immunity. The

powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power").

36. Miles McCann, *State Sovereign Immunity*, NAT'L ASS'N ATT'YS GEN., (Nov. 11, 2017) <https://www.naag.org/attorney-general-journal/state-sovereign-immunity/> (explaining the history, purposes, and exceptions to the state sovereign immunity doctrine).

37. *See id.* (explaining that the Eleventh Amendment serves, in part, to shield states from legal challenges to their political decisions promoting faith in state governments).

38. *See id.* (positing that abrogating or further diminishing state sovereign immunity may threaten a state's treasury).

39. *See id.* (concluding that "only in limited instances can the state itself be sued against its will and even the doctrine's many wrinkles tend to favor of the state as sovereign").

40. *See Hans*, 134 U.S. at 13; *Alden*, 527 U.S. at 728.

41. *Alden*, 527 U.S. at 756.

42. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

43. 798 F.2d 736 (5th Cir. 1986).

Copyright Act vests exclusive jurisdiction over copyright infringement cases in federal court.⁴⁴ However, federal courts are precluded by the Eleventh Amendment from exercising jurisdiction over state defendants.⁴⁵ In the absence of state consent or Congressional abrogation, states are effectively “immune from any monetary liability for infringing federal copyrights.”⁴⁶

There are limited exceptions to state sovereign immunity, including: the *Ex parte Young* exception, waiver by the state, and congressional abrogation. Under the *Ex parte Young* exception, private litigants may sue a state actor for prospective injunctive relief to end a “continuing violation of federal law” such as on-going copyright infringement.⁴⁷ Additionally, states may voluntarily waive their sovereign immunity; however, they are unlikely to do so without an incentive.⁴⁸ A state may waive its sovereign immunity by issuing a state statute, proclaiming waiver in its state Constitution, or by accepting federal funds contingent on waiving state sovereign immunity as part of a federal program.⁴⁹ Finally, Congress may abrogate sovereign immunity under strict guidelines.

a) Congressional Abrogation

The Supreme Court places two stringent requirements on Congress’ ability to abrogate state sovereign immunity. Congress must first have “unequivocally expresse[d] its intent to abrogate [sovereign] immunity” within the specific legislation.⁵⁰ Second, Congress must have acted “pursuant to a valid exercise of power.”⁵¹ Determining whether Congress has genuinely acted within its powers has proven complicated, even more so after the rise of the Congruence and Proportionality test in *City of Boerne v. Flores*. In that case, the Court held that for sovereign laws passed under the Fourteenth Amendment, abrogating legislation is valid only if “there is congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵²

The Copyright Office discussed the ambiguity of the Congruence and Proportionality test in its 2020 Copyright and State Sovereign Immunity

44. See 17 U.S.C. § 301(a) (declaring that all claims arising from the violation of an exclusive right under the Copyright Act are governed exclusively by the Act).

45. *Hans*, 134 U.S. at 10–11.

46. John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 339 (2000).

47. McCann, *supra* note 36.

48. See *id.* (listing reasons why a state may waive sovereign immunity, such as by accepting funds through a federal program).

49. *Id.*

50. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

51. *Id.*

52. *City of Boerne v. Flores*, 521 U.S. 507, 521 (1997).

Report.⁵³ In more than two decades since *City of Boerne*, the Court had only upheld congressional abrogation on two occasions: abrogation involving either disability- or sex-based discrimination.⁵⁴ The Copyright Office noted that while the Court had encouraged Congress to consider revising the CRCA to align with the *City of Boerne* test, the Court had “provided less guidance as to the nature and volume of evidence” that would support a finding that state infringement is a widespread and persistent problem, that states are acting intentionally or at least recklessly, and that the bill is narrowly tailored to address those injustices as necessary for Congressional abrogation.⁵⁵

B. HISTORY AND PURPOSES OF COPYRIGHT

The copyright system secures the legal rights of a creator’s investment into their innovative practice.⁵⁶ This system serves as a vehicle of free expression and provides economic incentive to create and spread new and innovative ideas.⁵⁷ This system grants copyright owners a bundle of exclusive rights, similar to the rights granted to other property owners.⁵⁸ Artists, authors, musicians, photographers, actors, programmers, and other creatives rely on these rights to protect and monetize their otherwise nonexcludable works.⁵⁹

These exclusive rights are almost as old as the nation itself. The “IP Clause” of the United States Constitution empowers 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.”⁶⁰ Prior to the ratification of the Bill of Rights in 1791, the only direct mention of the word “right” in the Constitution laid in the IP Clause.⁶¹

53. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 72.

54. *Id.*

55. *Id.* at 72–73.

56. ALDEN ABBOTT, KEVIN MADIGAN, ADAM MOSSOFF, KRISTEN OSENGA & ZVI ROSEN, FEDERALIST SOC., HOLDING STATES ACCOUNTABLE FOR COPYRIGHT PIRACY 1 (2021), <https://regproject.org/wp-content/uploads/Paper-Holding-States-Accountable-for-Copyright-Piracy.pdf> [hereinafter *Holding States Accountable*].

57. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (finding “copyright itself to be the engine of free expression” and that “copyright supplies the economic incentive to create and disseminate ideas”).

58. *Jim Olive Photography*, 580 S.W.3d at 376 n.26 (Tex. 2021) (citing *Harper & Row*, 471 U.S. at 546) (“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright.”).

59. *Id.*

60. U.S. CONST. art. I, § 8, cl. 8; *see* ADAM MOSSOFF, HERITAGE FOUND., THE CONSTITUTIONAL PROTECTION OF INTELLECTUAL PROPERTY 2–3 (2022), <https://www.heritage.org/sites/default/files/2021-03/LM282.pdf> (explaining Congress’ authority under the Constitution to pass the Copyright Act).

61. *See* MOSSOFF, *supra* note 60, at 3.

Heeding the call from the Constitution, the First Congress immediately enacted the original Copyright Act in 1790.⁶² Early courts interpreted and enforced the evolving copyright statutes to ensure creatives “were provided reliable and effective property rights in the fruits of their productive labors.”⁶³ Having secured these rights, creatives and inventors invested their time and wealth into their arts, sparking many of the technological and cultural advances of the 19th century.⁶⁴ Inspired by the industry of this period, the American system of awarding property rights to creators became the “gold standard” across the globe.⁶⁵

A copyright is a bundle of federal statutory rights over an expressive work or “original work of authorship.”⁶⁶ Copyright protects the abstracted creative work, not simply the individual mediums displaying the work.⁶⁷ The principal rights granted by the Copyright Act include the exclusive right to reproduce and display the work.⁶⁸ These rights initially vest in the creator,⁶⁹ but like property rights, they may be sold, licensed, left in a will,⁷⁰ or used as collateral.⁷¹ Copyright is “defined by the right to exclude,” which the Supreme Court has recognized as one of the most important “sticks” in the “property bundle.”⁷²

There is a tension between the public’s desire to access the work to spread ideas and culture, and the artist’s desire for economic compensation and recognition to create future works.⁷³ To ease these competing desires, the copyright system provides for a time-limited right for the artist to exclude the public from accessing and altering the work that extends beyond the duration of the creator’s lifetime.⁷⁴ After the copyright protection lifts, the work enters

62. *See id.* at 1–2.

63. *Id.*

64. *See id.* at 2 (explaining how “[t]hese intellectual property rights spurred the explosive growth in the U.S. innovation economy from the 19th century through today”).

65. *See id.*; Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 SO. CAL. L. REV. 921, 936–37 (2019).

66. 17 U.S.C. § 102.

67. *See id.* § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

68. *See id.* § 106 (listing the exclusive rights granted by the Copyright Act).

69. *Id.* § 201(a).

70. *Id.* § 201(d)(1).

71. *See Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 978 (2015).

72. *Id.* at 980.

73. *See* Alexander Cuntz, *Copyright and the Currency of Creativity: Beyond Income*, WIPO MAG. (June 2019), https://www.wipo.int/wipo_magazine/en/2019/03/article_0003.html (criticizing solely income-based rationales for copyright that fail to consider the artist’s need for attribution and that some artists are intrinsically motivated).

74. DILAN J. THAMPAPILLAI, CORNELL LAW SCHOOL GRADUATE STUDENT PAPERS, THE BALANCING ACT OF COPYRIGHT: THE COPYRIGHT LAWS OF AUSTRALIA AND THE

into the public domain, where the public can access it generally and incorporate it into their own expressive works or use it to promote their business.

C. COPYRIGHT AND STATE SOVEREIGN IMMUNITY

For the majority of American history, copyright law did not directly address the liability of state actors.⁷⁵ The law instead stated that “anyone” or “any person” infringing a copyright was subject to liability.⁷⁶ In the absence of clear guidelines, courts turned to the Supreme Court’s abrogation jurisprudence to determine whether states should be held liable for infringement and came to “inconsistent conclusions.”⁷⁷

For example, in 1962, the Eighth Circuit in *Wibtol v. Crow* dismissed a copyright claim brought against a school district, because the district was found to be an instrumentality of a state’s educational system, and because the Eleventh Amendment provided that “a state cannot be sued without its consent.”⁷⁸ The court did not determine whether Congress had “made its intent to abrogate sufficiently clear” or on what basis Congress could abrogate this immunity.⁷⁹

However, in 1979, the Ninth Circuit in *Mills Music, Inc. v. Arizona* affirmed an award for copyright damages against a state infringer.⁸⁰ In its analysis, the court found that the Copyright Act of 1909’s language was “sweeping and without apparent limitation,” meaning that the words “any person” in “any person [who] shall infringe” should be interpreted broadly and encompass state infringers.⁸¹ The court further held that Congress had “inherent” authority over legislating copyrights and abrogating sovereign immunity under the IP Clause, and concluded that a state may not “in any way diminish the federally granted and protected rights of a copyright holder.”⁸²

In an attempt to directly abrogate sovereign immunity and clarify the ambiguity throughout the circuits, Congress asked the Copyright Office to study the extent of the problem in the 1980s, which resulted in the Oman

UNITED STATES IN THE DIGITAL ERA 1, 3–4 (2003), http://scholarship.law.cornell.edu/lps_papers/7.

75. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 14.

76. *Id.*

77. *Id.* at 15.

78. *Id.* at 15 (citing *Wibtol*, 309 F.2d 777, 781 (8th Cir. 1962)).

79. *Id.*

80. 591 F.2d 1278, 1284–85 (9th Cir. 1979).

81. *Id.*; see also COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 15.

82. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 15 (citing *Mills Music*, 591 F.2d at 1285).

Report,⁸³ after which Congress passed the Copyright Remedy Clarification Act (CRCA).⁸⁴ Between 1990 and 2020, this Act specifically held states liable for copyright infringement; however, the CRCA was consistently weakened by court rulings on a patent act.⁸⁵ Ultimately, in 2020, the Supreme Court found that Congress' attempt at abrogation through the CRCA was unconstitutional, restoring states' immunity from copyright infringement suits in federal court.⁸⁶

1. *Congress' Attempt to Abrogate and the Rise of the CRCA*

In 1976, Congress reconstructed the nation's copyright laws but did not expressly address the issue of state sovereign immunity.⁸⁷ The 1976 Copyright Act instead held "anyone" violating the exclusive rights of the copyright owner liable for infringement. The statute's ambiguity led to inconsistent application of sovereign immunity across the lower courts.⁸⁸ Further, the ambiguous language of the statute failed to provide a "clear statement" of Congress' intent to abrogate and could not be used to hold states liable for infringement.⁸⁹

By 1987, Congress grew wary of states' unchecked ability to freely infringe copyrighted material and the House Judiciary Committee asked the Copyright Office to conduct a report on the "interplay between copyright infringement and the Eleventh Amendment."⁹⁰ In its final report (the "Oman Report"), the Copyright Office published the results of its study after conducting a thorough review of public comments, analyzing the Eleventh Amendment case law, and examining state waiver of sovereign immunity.⁹¹ Its investigation yielded only five instances of copyright infringement by a state actor where the copyright

83. U.S. COPYRIGHT OFF., COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT 1 (1988), <https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf> [hereinafter Oman Report].

84. *See id.* at 14.

85. *See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (finding that the Court's precedent in *Seminole Tribe* determines that Congress may not abrogate sovereign immunity under its Article I powers, including the Commerce Clause and the IP Clause).

86. *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) (concluding that *Florida Prepaid* "all but prewrote" the decision to overturn the CRCA because that case held that "Article I's Intellectual Property Clause could not provide the basis for an abrogation of sovereign immunity" and that the current record of state infringement under the Oman report does not provide evidence of a widespread deprivation of due process of property rights to support abrogation under § 5 of the Fourteenth Amendment).

87. 17 U.S.C. §§ 101–801 (1976).

88. *See* COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 15.

89. *See id.* at 16 (expressing the House Judiciary Committee's concern that the 1976 Act's "anyone" language was insufficiently clear).

90. Oman Report, *supra* note 83, at 7.

91. *Id.*

owner documented actual problems enforcing their claims.⁹² The report further found in its analysis of the relevant Eleventh Amendment case law that the text of the Copyright Act was not “sufficiently clear” in expressing its intent to abrogate state sovereign immunity.⁹³ In its conclusion, the Oman Report recommended that Congress amend the Copyright Act to clearly state its intention to subject states to liability for copyright damages.⁹⁴

Congress followed the recommendation and proposed the Copyright Remedy Clarification Act (CRCA) under its Article I abrogation power in 1989.⁹⁵ It modeled the language of the final bill on a previous law that the Supreme Court had “twice cited as an example of Congress’ ability to abrogate the Eleventh Amendment when it wanted to do so.”⁹⁶ The final bill had two provisions. The first amended § 501(a) of the Copyright Act to clarify that the term “anyone” included both states and their instrumentalities.⁹⁷ The second amended § 511 to specifically mandate that states “shall not be immune under the Eleventh Amendment” and would be liable “to the same extent” as private actors.⁹⁸ The CRCA was signed into law on November 15, 1990.⁹⁹

2. Seminole Tribe, Florida Prepaid Cases, and the Fall of the CRCA

Over the course of three decades, the Supreme Court repeatedly challenged Congress’ authority to abrogate sovereign immunity in intellectual property infringement cases under Article I. In 2019, the Court ultimately declared the CRCA to be unconstitutional in *Allen v. Cooper*.¹⁰⁰

The Court first cast doubt on the CRCA with its ruling in *Seminole Tribe of Florida v. Florida*. In that case, the Court explained that Article I of the Constitution could not be interpreted to abrogate sovereign immunity and that intended abrogation would require Congress to use its § 5 powers under the Fourteenth Amendment instead.¹⁰¹ Following this revelation, the Court further considered whether Congress had appropriately abrogated state

92. *Id.* at 104.

93. *Id.*

94. *Id.*

95. *Id.* at 19 (citing Copyright Remedies Clarification Act, H.R. 3045, 101st Cong. § 2(a)(2), 101 Stat. 2749, 2749 (1990)).

96. *Id.*

97. Copyright Remedies Clarification Act, H.R. 3045, 101st Cong. § 2(a)(1), 101 Stat. 2749, 2749 (1990).

98. *Id.* § 2(a)(1).

99. *Id.* §§ 1–3.

100. 140 S. Ct. at 1000.

101. *Florida Prepaid*, 527 U.S. at 635–36 (“Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the [Intellectual Property] Clause.”).

sovereign immunity under its § 5 powers in a pair of cases referred to as the *Florida Prepaid* cases. In those cases, the Court concluded that the language of the Patent and Plant Variety Protection Remedy Clarification Act (which functioned like the CRCA) was sufficiently clear as to Congress' intent to abrogate.¹⁰² However, the Court found that the statute failed the “congruence and proportionality” test from *City of Boerne*, as the few constitutional violations sought to be remedied were incongruent with the requirement of abrogation.¹⁰³ In particular, the Court held that Congress had not identified a pattern of unconstitutional infringement and narrowly tailored its abrogation to that finding.

The majority opinion in *Florida Prepaid* detailed a pathway for congressional abrogation. First, Congress had to establish sufficient evidence of the state actors' infringement.¹⁰⁴ Second, Congress had to consider the adequacy of state-law remedies for state infringement.¹⁰⁵ Third, Congress must find more than “a handful of instances” of infringement and must establish a record of intentional or reckless infringement.¹⁰⁶ Fourth, legislation must “not be limited to ‘cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy.’”¹⁰⁷ Under this framework, Congress' efforts to abrogate under the CRCA were insufficiently congruent and proportional to amount to a constitutional harm sufficient for Congress' abrogation of sovereign immunity under the Fourteenth Amendment.¹⁰⁸

a) *Allen v. Cooper*: The Death Knell of the CRCA

The CRCA was officially declared unconstitutional in *Allen v. Cooper*.¹⁰⁹ The petitioners, videographer Frederick Allen and his production company Nautilus Productions, LLC, entered into an exclusive contract with the state of North Carolina to film the historic restoration of the *Queen Anne's Revenge*, the ship captained by the pirate Blackbeard.¹¹⁰ Allen retained the copyright in these videos.¹¹¹ Despite previously agreeing to a settlement compensating Allen for the use of the work, the state further posted the copyrighted material

102. *Id.* at 635.

103. *Id.* at 639.

104. *Id.* at 640.

105. *Id.* at 643–44.

106. *Id.* at 646–47.

107. *Id.*

108. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 21.

109. 140 S. Ct. at 1006–07.

110. *Id.* at 999.

111. *Id.*

to its website without Allen's knowledge and in violation of the parties' agreement.¹¹²

After discovering the infringement, Allen sued the state for copyright infringement in 2013.¹¹³ As the CRCA amended the Copyright Act to eliminate states' sovereign immunity, Allen was able to bring the case directly in federal district court.¹¹⁴ The case settled, and North Carolina agreed not to further infringe the copyrighted material.¹¹⁵ Yet, to circumvent this settlement, the state passed Blackbeard's Law, which declared all video footage of the historic restoration part of the public domain, and impacted only the petitioners due to their exclusive contract.¹¹⁶

Seeking relief from the state's intentional infringement, Allen again sued the state in federal district court in 2015. The state argued that the suit was barred due to the Eleventh Amendment's promise of state sovereign immunity and that the CRCA was beyond the scope of Congress' constitutional authority to abrogate and render the state liable for copyright infringement.¹¹⁷ The district court rejected this argument and denied the state's motion to dismiss.¹¹⁸ The Fourth Circuit reversed this decision and held Congress' attempt to abrogate state sovereign immunity with the CRCA unconstitutional.¹¹⁹ With a constitutional question raised, the case headed to the Supreme Court.

Even though Justice Kagan's majority opinion recognizes that North Carolina has committed a "modern form of piracy,"¹²⁰ the Court offered Allen no relief. The Court found that Congress, in passing the CRCA, failed to establish a record of intentional and unconstitutional state infringement required by the congruence and proportionality test established in *Flores*. Without satisfying the *Flores* test, the CRCA fell outside of the scope of congressional authority and was struck down by the Court in 2020.¹²¹ The Court concluded by suggesting that Congress pass more tailored legislation in

112. *Id.*

113. *Id.*

114. *Allen v. Cooper*, CONST. ACCOUNTABILITY CTR., <https://www.theusconstitution.org/litigation/allen-v-cooper/> (last visited May 9, 2023).

115. *Id.*

116. *Id.*; see also Hudson Institute, *IP Infringement and State Sovereign Immunity*, YOUTUBE (Oct. 25, 2021), <https://www.youtube.com/watch?v=NyVJW0T6ejM&t=3060s> (starting at 23:30) (Frederick Allen discussing the sole impact of "Blackbeard's Law" (N.C. § 121-25(b)) which eliminated Allen's ability to enforce his copyright).

117. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 22.

118. *Id.*

119. *Id.*

120. *Allen*, 140 S. Ct. at 999.

121. *Id.* at 1007.

the future to accomplish its goal of properly abrogating state sovereign immunity.¹²²

3. *Availability of Suit Against State Infringers After the CRCA*

The Supreme Court's decision leaves Allen and other creators with little to no recourse for "blatant and intentional theft" of their copyrighted works.¹²³ After the decision, Allen reported to the Copyright Office that "because of current law and Supreme Court precedent, [he was] powerless to enforce [his] constitutionally granted intellectual property rights against infringement by States."¹²⁴ Beyond the lost licensing opportunities Allen had suffered from the state's piracy, Allen had incurred "hundreds of thousands of dollars in legal expenses" attempting to secure his investment, and had spent countless hours engaging in monitoring and enforcement rather than creating new works.¹²⁵

Congress appeared interested in remedying the issue. Just weeks after the CRCA was struck down, Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT) wrote to both the U.S. Copyright Office and the U.S. Patent and Trademark Office, requesting a study on the impact of infringement by states.¹²⁶ The pair of Senators formed a bipartisan team committed to combatting intellectual property theft.¹²⁷ The report sought to lay out a path for congressional abrogation consistent with the decision in *Allen v. Cooper*.¹²⁸

In August 2021, the Copyright Office released a report entitled *Copyright and State Sovereign Immunity* exploring the interplay between the doctrines and the extent of state actors' copyright infringement.¹²⁹ In large part, the report focused on the lack of adequate remedies from states' infringement. Overall, the report found that the number of infringement allegations substantially

122. *Id.*

123. *Holding States Accountable*, *supra* note 56, at 4.

124. *Id.*

125. *Id.*

126. Thom Tillis & Patrick Leahy, Letter to Maria Strong, Acting Register of Copyrights and Director, U.S. Copyright Office (Apr. 28, 2020), <https://www.copyright.gov/policy/state-sovereign-immunity/letter.pdf>.

127. *See, e.g.*, Tillis and Leahy Introduce Bipartisan Legislation to Combat Copyright Theft, Enhance Content Sharing, and Hold Tech Accountable, THOM TILLIS: U.S. SEN. N.C. (Mar. 18, 2022), <https://www.tillis.senate.gov/2022/3/tillis-and-leahy-introduce-bipartisan-legislation-to-combat-copyright-piracy-enhance-content-sharing-and-hold-tech-accountable>; Tillis and Leahy Introduce Bipartisan Legislation to Improve Patent Quality, THOM TILLIS: U.S. SEN. N.C. (Aug. 2, 2022), <https://www.tillis.senate.gov/2022/8/tillis-and-leahy-introduce-bipartisan-legislation-to-improve-patent-quality>.

128. *See* COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 1 (responding to Congressional requests to undertake a study to determine whether Congress could legislatively abrogate sovereign immunity consistent with the Court's analysis in *Allen v. Cooper*).

129. *See id.* at 1–3.

grew since Congress passed the CRCA and that “evidence indicates that state infringement represents a legitimate concern for copyright owners.”¹³⁰

However, because of the high standard set by *Allen v. Cooper* and because of the ambiguity of the doctrine, the report admitted that it cannot conclude that even the more robust record of states’ piracy it established would meet constitutional muster.¹³¹ Nonetheless, the Copyright Office still “believes that infringement by state entities is an issue worthy of congressional action” and asked Congress to consider renewed abrogation attempts or alternative approaches to establishing liability for state infringement.¹³² One approach is through takings claims.

III. TAKINGS CLAUSE AND COPYRIGHT

The government has the authority to dispossesses private citizens of personal property to allocate it for the “public good” through its power of eminent domain.¹³³ In granting the state this power, the Takings Clause signals that “individual property rights are subordinate to the good of the polity.”¹³⁴ However, the state must provide just compensation for property that it takes, and it can only take property when it is justified by an expected social benefit.¹³⁵ Similar frameworks for compensation have been in place since Ancient Roman times, such as the *Magna Carta* which provided that the King must compensate private citizens before taking any property for the common good.¹³⁶ However, this doctrine originally applied only to tangible or physical property, not intellectual property such as copyright.¹³⁷

After the fall of the CRCA, copyright owners began pursuing copyright-takings claims to seek damages resulting from state infringement. So far, these claims have been unsuccessful in both state and federal circuit courts because no court has been willing to both acknowledge (1) copyright as a protectable property interest under the Fifth Amendment and (2) that state infringement impermissibly interferes with a property owner’s ability to concurrently

130. *Id.* at 2.

131. *Id.*

132. *Id.*

133. Micah Elazar, “Public Use” and the Justification of Takings, 7 U. PA. J. CONST. L. 249, 249 (2004).

134. *Id.*

135. *Id.*

136. MAGNA CARTA cl. 28 (“No constable or other bailiff of ours is to take the corn or other chattels of anyone, unless he immediately gives money for this, or is able to have a delay with the consent of the seller.”).

137. Leroy J. Ellis V, *Copyright and Federalism: Why State Waiver of Sovereign Immunity is the Best Remedy for State Copyright Infringement*, 20 NW. J. TECH. & INTELL. PROP. 1 (2022).

exercise a fundamental property right. However, the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid* may enable copyright infringement to be viewed as a temporary appropriation of one's right to exclude third parties, which would be compensable under the Takings Clause. Nonetheless, after *Jim Olive Photography*, the viability of the copyright-takings claim is unreliable, as the Supreme Court denied Jim Olive's Petition for Writ of Certiorari that asked the Court to consider whether the *Cedar Point Nursery* holding extends to nonrivalrous property like copyright.¹³⁸

This Part proceeds in three Sections. The first Section explains the state of Takings Clause jurisprudence in three contexts: physical or "per se" takings, regulatory or constructive takings, and appropriation of access rights under *Cedar Point Nursery*. The second Section argues that intangible property such as copyright are protected by the Takings Clause. The final Section explores the Court's decision in *Cedar Point Nursery* which interprets the Takings Clause to include appropriations of the right to exclude third parties from access under a "per se" rule and its application to *Jim Olive Photography*.

A. TAKINGS CLAUSE JURISPRUDENCE

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."¹³⁹ This amendment is applied to the states through the Fourteenth Amendment.¹⁴⁰ The Constitution does not define the term "takes" in the context of the Takings Clause, but courts have interpreted it to include government actions that seize or occupy private property for a public purpose or that otherwise substantially diminish its value or use.¹⁴¹ The Supreme Court has gradually expanded the definition of "takings" under the Fifth Amendment to include not only physical takings, where the government physically seizes or occupies a property, but also regulatory takings, where the government's actions restrict a property owner's use of their property to a similar degree as a physical seizure. Most recently in *Cedar Point Nursery*, the Supreme Court further expanded the definition of "physical takings" to include state actions that temporarily take away or appropriate a property owner's right to exclude third parties from accessing their property.¹⁴²

138. 624 S.W.3d 764 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

139. U.S. CONST. amend. V.

140. U.S. CONST. amend. IV.

141. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515 (1998).

142. *Allen*, 140 S. Ct. at 999.

1. *Physical Takings and Per Se Takings Claims*

Generally, the Court has recognized two varieties of physical takings: occupations and appropriations.¹⁴³ An occupation is a physical invasion of a private property (usually land) by either a state actor or a third-party acting with governmental authority, or a physical placement of objects on private personal property by those actors. Whereas, an appropriation refers to “a government order or other action that either explicitly or effectively divests an owner of her interest in property and transfers ownership to the government” or a third-party.¹⁴⁴ Sometimes courts expressly distinguish between the two types of physical takings within a particular case; however, courts also often conflate these categories and refer to them by either term, or generically as a “physical” taking.¹⁴⁵ The Supreme Court has repeatedly stated that a “per se” (or “categorical”) rule governs most physical takings.¹⁴⁶ This means that in most cases, the government must compensate a private citizen for the use of their property if it physically takes or occupies that property, or if it appropriates property rights onto itself or a third party.¹⁴⁷

In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁴⁸ the Court held that any permanent physical occupation authorized by the government would be a per se taking that requires just compensation regardless of the public interest it furthers or the economic interest of the property owner.¹⁴⁹ The Court also noted it is immaterial that the appropriation takes over only a small area, so long as the government action caused the permanent occupation of a space.¹⁵⁰

In 2015, the Court in *Horne v. Department of Agriculture* extended the per se rule from land to personal property. The Court considered whether a mandate requiring property owners to set aside personal property, in this case raisins, for governmental use could be compensable under the per se analysis.¹⁵¹

143. John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 747 (2020).

144. *Id.* at 747–48.

145. *Id.* at 748.

146. *Id.* at 745.

147. *Id.* at 745.

148. 458 U.S. 419, 441 (1982). In that case, New York law required landlord companies to allow the installation of cable equipment in rented properties. Seeing this permanent occupation as an appropriation of their right to do as they please with their property, a landlord brought a per se Takings Clause claim. The court agreed with the landlord that a permanent physical occupation appropriates three of their basic property rights: (1) the right to fully possess the property or exclude others from possessing it; (2) the ability to exclude others from using the property and an inability to make personal use of the property; and (3) the ability to sell or dispose of the property due to its decreased economic value.

149. *Id.* at 441.

150. *Id.* at 421.

151. *Horne*, 576 U.S. at 354–55.

Finding the reserve requirement to be akin to a physical taking, the Court interpreted the Fifth Amendment to prevent the government from appropriating any part of a person's private property without compensation.¹⁵² The case further clarified that "nothing in text or history of the Takings Clause" prevents considering appropriations of personal property under the per se analysis, and that personal property is no less protectable than real property such as land.¹⁵³

2. *Regulatory Takings Claims*

Courts may also find that the government must compensate a property owner for a regulatory taking (also known as a constructive taking) if the government's action goes "too far" and restricts the property owner's rights to the point where they are functionally equivalent to a physical seizure or occupation.¹⁵⁴ Although it is more inherently difficult to determine whether a government action has exceeded its ability to regulate public property than whether a property has been physically occupied or seized, the Court has developed several tests to guide this inquiry over the past century.

The Court began developing the regulatory takings doctrine in 1922, in *Pennsylvania Coal v. Mahon*, where Court first interpreted the Takings Clause to encompass particularly oppressive regulatory takings of private property generally.¹⁵⁵ In that case, the Court found that regulation had "very nearly the same effect for constitutional purposes as appropriating or destroying [the estate]" and that a regulation should be considered a taking when it "goes too far" in depriving the property owner of the enjoyment of any of the property rights.¹⁵⁶

Modern jurisprudence utilizes the balancing test expressed in *Penn Central Transportation Co. v. New York City* to determine whether a regulatory taking has occurred and is compensable.¹⁵⁷ In that case, Justice Holmes clarified the holding in *Mahon* by first reminding of its warning that governing could hardly "go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹⁵⁸ Rather, to prevail on regulatory takings claims, plaintiffs must show that "government regulations work a significant deprivation of property right."¹⁵⁹ The decision

152. *Id.*

153. *Id.* at 358.

154. Echeverria, *supra* note 143, at 747.

155. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

156. *Id.* at 414–15.

157. 438 U.S. 104, 124–25 (1978).

158. *Id.* at 124.

159. *Id.*

recognizes that states are not financially responsible for every economic effect of their legislative actions, but that citizens should be compensated when a regulation goes “too far” so as to prevent governmental abuse of its ability to regulate private property.

Ultimately, the Court articulated and applied a three-factor ad-hoc balancing approach to determine whether the government action required compensation.¹⁶⁰ These factors include: (1) the economic impact of the regulation, (2) the extent the regulation interferes with “distinct investment-backed expectations,” and (3) “the character of the governmental action.”¹⁶¹ Under this approach, no factor is definitive, and significant diminutions in property value are generally permissible without compensation.¹⁶² In the absence of a physical conversion of the property, takings are compensable when they go “too far” and amount to a “significant deprivation of a property right.”¹⁶³

Plaintiffs often struggle to meet the high standard for relief demanded by the *Penn Central* test, which has been described as “maddeningly unpredictable” and “favoring the government in most cases.”¹⁶⁴ In 2017, the Court made the *Penn Central* test even more difficult to satisfy with its decision in *Murr v. Wisconsin* that established a new threshold for property owners to meet before reaching the *Penn Central* test.¹⁶⁵ As such, regulatory takings claims are more difficult for plaintiffs to succeed on than per se takings claims.

3. Expansion of “Physical” Takings: Cedar Point Nursery

Recently, the Court issued a unanimous opinion in *Cedar Point Nursery v. Hassid*, further expanding the scope of physical takings and potentially providing an alternative pathway for compensation for copyright holders under the Takings Clause.¹⁶⁶ The case surrounded an access regulation in California that required agricultural employers to allow labor organizers temporary access to and use of the employers’ land to meet with employees

160. *Id.* at 123–24 (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.”).

161. *Id.* at 124.

162. *Id.* at 124–25.

163. *Id.* at 125.

164. Timothy M. Harris, *No Murr Tests: Penn Central is Enough Already!*, 48 GEO. ENVTL. L. REV. 605, 609 (2018).

165. *Id.* at 607 (citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017) which requires courts to also consider (1) the property’s treatment under state and federal law, (2) the property’s physical properties, and (3) the property’s value).

166. *Cedar Point Nursery*, 141 S. Ct. 2063, 2066.

and promote their union.¹⁶⁷ Cedar Point Nursery, a strawberry farm, argued that California's access regulation violated the Takings Clause of the Fifth Amendment, which provides that private property shall not "be taken for public use, without just compensation."¹⁶⁸

The question before the Court was whether the temporary access regulation amounted to a per se physical taking.¹⁶⁹ Answering affirmatively, the Court expanded the definition of per se takings to include actions by governmental actors that appropriates a right to exclude third parties from accessing physical, private property.¹⁷⁰ The Court explained that rather than restricting the owners' use, the government instead appropriated the property for the enjoyment of a third party, which deprived the owners of their right to exclude—a fundamental property right.¹⁷¹ Even though the access was temporary, the Court found this to be inconsequential because of its ruling in *United States v. Dow*, which found that "physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due."¹⁷² Further, the Court refused to adopt the theory that the access regulation merely regulates without appropriating the growers' right to exclude and that "the right to exclude is not an empty formality that can be modified at the government's pleasure."¹⁷³

Further, the case answered the question raised by the Supreme Court of Texas in *Jim Olive Photography* as to whether governmental appropriations of property rights, such as the right to exclude third parties, are best analyzed under a per se rule or the regulatory framework proposed in *Penn Central*.¹⁷⁴ Definitively ruling that "when the government physically appropriates property, *Penn Central* has no place—regardless whether the government action takes the form of a regulation, statute, ordinance, or decree."¹⁷⁵ Less definitely is whether or not courts will apply a per se rule to protect non-physical properties such as those protected by the Copyright Act.

B. COPYRIGHT & TAKINGS CLAIMS

Courts award compensation to owners of intangible and nonrivalrous property under the Takings Clause, just like they do for owners of traditional,

167. *Id.*

168. U.S. CONST. amend. V.

169. *Cedar Point Nursery*, 141 S. Ct. at 2066.

170. *Id.* at 2072.

171. *Id.* at 2076.

172. *Id.* (citing *United States v. Dow*, 357 U.S. 17, 26 (1956)).

173. *Id.* at 2077.

174. *Id.* at 2072.

175. *Id.*

physical property. However, courts might award a narrower scope of protection for copyright than for physical property. This is because the Court grants greater deference to physical property rights, and because copyright rights can be segmented. In other words, a state's violation of one of the exclusive rights granted by the Copyright Act does not destroy the copyright owner's enjoyment of other rights.

1. *Copyright is Likely Protectable Under the Takings Clause*

Courts have found that both intangible and nonrivalrous properties are compensable in the case of state occupation.¹⁷⁶ For example, the Supreme Court in *Ruckelshaus v. Monsanto Co.* recognized trade secrets as a property interest protected by the federal Takings Clause.¹⁷⁷ Despite trade secrets' intangible and nonrivalrous nature, which allows them to be used by another party without simultaneously depriving anyone else of their use,¹⁷⁸ the Court found that the intellectual property taking was compensable because the property holder had a reasonable investment-backed expectation in the exclusive use of the property.¹⁷⁹ After the Court determined that trade secrets were a form of property protected under Takings Clause jurisprudence, it extended property status to copyright in dicta, as it is a more "durable" form of intellectual property protection than trade secrets.¹⁸⁰ However, not all courts have accepted this dicta as law, refusing to protect copyright under the federal Takings Clause.¹⁸¹ Ultimately, the Supreme Court after *Monsanto* has accepted that patents, which are legislatively similarly to copyrights, may be considered property in the context of the Fifth Amendment.¹⁸² As such, courts after *Monsanto* usually assume copyright to be a protectable form of property under the federal Takings Clause.¹⁸³

2. *But There is Uncertainty in the Scope of Protection*

Not all property rights are held equal in the eyes of courts. As physical property historically forms the core of Takings Clause jurisprudence, physical

176. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–02 (1984).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1003.

181. *See, e.g.*, *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 363 (Tex. App. 2019).

182. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999).

183. *See, e.g.*, *Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764, 770 (Tex. 2021).

property is held in higher regard than personal and intangible properties.¹⁸⁴ However, physical and intangible property share many of the same fundamental property rights.¹⁸⁵ For example, the Supreme Court in *Monsanto* explained that trade secrets share many characteristics with real property such as their transferability and ability to be used as collateral.¹⁸⁶ Like any other form of property, copyright is a bundle of rights, including the fundamental right to exclude.¹⁸⁷ However, the Court has recognized that intellectual property enjoys weaker Takings Clause protection than physical property because it is intangible and nonrivalrous, which means that it can be easily appropriated and used by a government actor without wholly depriving the owner of its value.¹⁸⁸

All property can be best thought of as a bundle of rights protected by the Courts, although this makes it susceptible to segmentation.¹⁸⁹ However, the Court requires that Takings claims consider the proportion of the size of the damages over the total property's value.¹⁹⁰ While this analysis requires consideration of the whole property, the Court has sometimes divided property for the Takings Clause purposes.¹⁹¹ One of the factors it uses to divide property rights is by the property interest impacted.¹⁹² In regulatory claims, the Court has found that interference with a single key right, such as the right to exclude, amounts to a compensable taking.¹⁹³ However, in other cases the Court has insisted in viewing property as a bundle of rights, in which the loss of a single stick does not amount to a taking.

A copyright itself is likewise a “bundle of exclusive rights” established and governed by the Copyright Act.¹⁹⁴ Under the Act, the government's violation of those rights does not destroy them. Copyright in a digital good differs from rights in real property in that digital goods are intangible and nonrivalrous. Despite these differences, the Supreme Court of Texas in *Jim Olive Photography* found that because of its transferability and other property attributes, the “copyright owner thus retains the key legal rights that constitute property for

184. *Copyright Reform and the Takings Clause*, *supra* note 71, at 975.

185. *Id.*

186. *Id.*

187. *Id.*

188. See generally Davida H. Isaacs, *Not All Property is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1, 16–28 (2007) (explaining how intangible and nonrivalrous property such as patent receives limited protection compared to traditional forms of property).

189. *Copyright Reform and the Takings Clause*, *supra* note 71, at 978.

190. *Id.* at 978–79.

191. *Id.*

192. *Id.*

193. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

194. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546–47 (1985).

purposes of a per se takings analysis.”¹⁹⁵ Although a copyright is a bundle of rights and not actually the thing itself,¹⁹⁶ the distinction between things and property is often of little consequence in the typical takings case. If the State seizes one’s automobile, it has also by definition interfered with one’s “property”: one’s right to possess, use that automobile, and exclude other from using the automobile. In Takings Clause claims involving intellectual property, however, the distinction between things and property rights becomes more important. Because the “thing” is intangible, an unauthorized user of that thing need not physically seize or take the property to appropriate one or more of the owner’s rights to the “thing” under the Copyright Act.¹⁹⁷

Prior to *Cedar Point Nursery*, Courts applied both regulatory and physical tests to determine whether copyrighted material has been “taken” by a state’s action because of the difficulty of distinguishing between the seizure of an intangible thing like a digital photography or a rather an interference of the exclusive rights to the underlying work protected by the copyright. After *Cedar Point Nursery*, plaintiffs in cases such as *Allen v. Cooper* and *Jim Olive Photography* have emulated the Supreme Court’s reasoning in *Cedar Point Nursery* and relied on its holding to bring copyright-takings claims where a state agent has appropriated any of their exclusive rights under the Copyright Act and enabled unauthorized third-party access to the copyrighted material.

C. THE VIABILITY OF THE COPYRIGHT TAKINGS CLAIMS IN *JIM OLIVE PHOTOGRAPHY* BEFORE AND AFTER *CEDAR POINT NURSERY*

A copyright owner whose work has been infringed by a state actor may potentially bring a suit alleging that “the infringement constitutes a taking of property without just compensation, in violation of the Fifth Amendment of the U.S. Constitution or a state constitution.”¹⁹⁸ The Court in *Florida Prepaid* first proposed a Takings Clause claim as a possible remedy for state intellectual property infringement. The Supreme Court has only ruled once on whether intellectual property, specifically trade secrets, can be “taken” by a governmental actor and are thus eligible for just compensation under the Takings Clause in *Ruckelshaus v. Monsanto Co.*¹⁹⁹

This theory has rarely been tested.²⁰⁰ When it has been, federal and state courts have ruled inconsistently, and scholars have debated whether copyrights

195. *Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764, 771 (Tex. 2021).

196. *See Lightning Oil Co. v. Anadarko E&P Onshore, L.L.C.*, 520 S.W.3d 39, 48 (Tex. 2017) (describing property “as a bundle of rights, or a bundle of sticks”).

197. *Id.*

198. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 65.

199. *Monsanto*, 467 U.S. at 986.

200. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 66.

are property protectable under the Fifth and Fourteenth Amendments and whether or not temporary appropriation of non-physical property (such as a copyright) amounts to a taking by that state actor.²⁰¹ Neither of these questions are explicitly addressed in *Cedar Point Nursery*, which leaves them open for litigation and on-going debate. In the meantime, “the viability of such a claim remains uncertain.”²⁰²

For example, attorneys for Jim Olive Photography tested two variations of this legal theory under both federal and state Takings Clauses twice against UH. Olive’s original takings claims made their way to the Supreme Court of Texas, where the court ultimately found that Olive was not entitled to compensation because he retained some of his property rights despite the infringement—mainly the right to exclude further private parties from using the photographs, and because the infringement was temporary in that UH took down the infringing copies. Just days after the Texas court issued its opinion, the Supreme Court decided *Cedar Point Nursery v. Hassid*, which found that a property owner may bring a per se Takings Clause claim when the state appropriates only some of the owner’s right and for only a limited amount of time. Despite the ambiguity as to whether this holding is only meant to apply to physical takings, the Supreme Court denied Jim Olive Photography’s petition for writ of certiorari.²⁰³ As such, it remains unclear if the holding in *Cedar Point Nursery* would change the outcome in *Jim Olive Photography*.

1. Before Cedar Point Nursery

Olive’s case was much weaker before *Cedar Point Nursery*. On first appeal from district court, the Court of Appeals of Texas acknowledged that as of 2008, the question whether “copyright is property under the takings clause is ‘as of yet unlitigated.’”²⁰⁴ The court further relied on a student law review article arguing that the Supreme Court’s “definition of ‘property’ does not appear to shelter copyright” and that “copyrights exist only by the grace of the Constitution.”²⁰⁵ While Olive proposed that *Horne* extends protection to other

201. See, e.g., *Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764, 774–77 (Tex. 2021) (assuming without deciding that copyright qualifies as property for the purposes of takings law); but see Tom W. Bell, *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523, 539–40 (2008) (arguing copyrights exist only by the grace of the Constitution and are not property for Takings Clause purposes).

202. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 66.

203. *Jim Olive Photography*, 624 S.W.3d at 764.

204. *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 361 (Tex. App. 2019).

205. *Id.* at 368 (citing *Copyright Reform and the Takings Clause*, *supra* note 71, despite acknowledging that the author ultimately argued in favor of Takings Clause protection for copyrighted material).

forms of property including personal property, the court refused to apply the Takings Clause to intangible intellectual property.²⁰⁶

Principally, Olive originally relied on reasoning from *Pruneyard Shopping Center v. Robins*, which defined “property” under the Takings Clause as “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it” and clarified that “[t]he constitutional provision is addressed to every sort of interest the citizen may possess.”²⁰⁷ This language was also relied upon in *Ruckelshaus* to equate intellectual property rights with the property rights protected by the Takings Clause.²⁰⁸ The district court found this citation unpersuasive because neither *Pruneyard* nor *Ruckelshaus* addressed the question of copyright infringement by a state actor.²⁰⁹

Olive also cited to *James v. Campbell*, which provides Supreme Court precedent for an IP-takings claim because it “purports to protect patents from a government-taking without just compensation.”²¹⁰ The Texas appellate court rejected this argument because it found that the Supreme Court has “never definitively held that a patent holder’s recourse against the government for infringement is a *constitutional* takings claim.”²¹¹

Finally, the Texas Appeals Court found that even if copyright were a form of protectable property, a Takings claim would still not succeed because what the university committed was copyright infringement, not a taking. As Olive did not lose his right to use or otherwise license his photograph, the court found that Olive had only lost a licensing fee, rather than the use or possession of his property.²¹² The court ultimately found this to be a case of “transitory common law trespass—a government interference with real property that may not amount to a taking at all.”²¹³

Appealing the case to the Texas Supreme Court yielded no better result for Olive. The Supreme Court of Texas acknowledged the ambiguity of copyright as property, and decided to assume for its analysis that a copyright is property and entitled to protection under the Fifth Amendment.²¹⁴ UH argued that even

206. *Id.* at 369.

207. *Id.* at 371 (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980)).

208. *Id.* at 369–70.

209. *Id.*

210. *Id.* at 372–73.

211. *Id.* at 373.

212. *Id.* at 376.

213. *Id.*

214. *Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764, 770 (Tex. 2021).

if copyright is property and is entitled to protection, the act of copyright infringement does not rise to a taking.²¹⁵

UH distinguished its infringement from a taking because the university did not “confiscate or appropriate those rights” in the photograph as necessary for a physical taking under *Loretto* and *Horne*.²¹⁶ Olive contended that UH’s infringement deprived Olive of the exclusive right to control his work, not just use of the photo itself.²¹⁷ Further, Olive argued that just as each raisin in *Horne* was Horne’s personal property, each reproduction and display of The Cityscape photograph is Olive’s.²¹⁸ The Supreme Court of Texas affirmed the lower court’s analysis that *Horne* does not apply because the case is silent on the question as to whether “state action may be asserted as a per se taking of an intellectual property right.”

Further, the court assumed that the reasoning in *Horne* only protects forms of tangible property, such as grapes, from state appropriation; however, this conflicts with the Supreme Court’s decision in *Monsanto*, which extends Takings Clause protection to intangible property such as trade secrets.²¹⁹ Finally, the court rejected Olive’s argument that UH’s infringement appropriated any strands within his property rights bundle. While Olive argued that “exclusivity” is the core component of each specific right granted under the Copyright Act, the court found that UH’s infringement does not “indicate the existence of a per se taking” because it does not necessarily destroy any of the rights to possess and use the work. Because Olive may still exclude third parties from using or displaying The Cityscape, the court found that the State had not appropriated these rights in Olive’s bundle of exclusive rights.²²⁰ Ultimately, Olive found no remedy for UH’s infringement within the Texas court system. However, the Supreme Court’s later decision in *Cedar Point Nursery* would extend the scope of the per se takings analysis to include state actions, like the University’s, which appropriate a property owner’s right to exclude third parties.

2. *After Cedar Point Nursery*

The majority opinion in *Cedar Point Nursery* opened up the potential that a state’s temporary use of copyrighted material for a “public good” may constitute a per se taking because it temporarily encroaches on the creator’s right to exclude third parties from accessing the work. Although courts may

215. *Id.* at 771.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 773.

220. *Id.*

find this to be a transitory appropriation and award just compensation, some scholars including Professor Michael McConnell interpret the case to dramatically reduce or permanently curtail the regulatory takings framework.²²¹ Dean Erwin Chemerinsky believes that this case will lead to much more litigation because it leaves many of these questions unanswered, but that it ultimately reflects a Supreme Court that is more protective of copyrights.²²²

Just days after the Texas court system failed to remedy the harm caused by the University's infringement, Olive revised his taking claims in light of the Supreme Court's holding in *Cedar Point Nursery* and petitioned for writ of certiorari. Because the Supreme Court did not grant the petition, it is unclear how it would have ruled. The Court's reluctance to accept the case may suggest unwillingness to overturn the Supreme Court of Texas' opinion.²²³

In the petition and accompanying support briefs, Olive argues that the "right to exclude" is the core property interest created by the Copyright Act and violated by acts of copyright infringement.²²⁴ Olive points to language from *Cedar Point* explaining that the right to exclude is one of the most treasured rights and "that sole and despotic dominion which one man claims and exercises over the external things of the world, in *total exclusion of the right of any other individual in the universe.*"²²⁵ Specifically, Olive claims that the Supreme Court of Texas ignored his right to exclude in light of *Cedar Point Nursery* because a taking under *Cedar Point* does not require the University to acquire legal title, and also does not require the complete destruction of the bundle of property rights, only the appropriation of the right to exclude.²²⁶ In support of this argument, Olive again cites *Cedar Point* for the rule that "even if the Government physically invades only an easement in property, it must

221. United States Courts, *Term Talk (2020-2021): Cedar Point Nursery v. Hassid*, YOUTUBE (Oct. 28, 2021), <https://www.youtube.com/watch?v=L6uIHgrKorw&t=577s>. (discussing at timestamp 9:25 how, after *Cedar Point Nursery*, "regulation-goes-too-far-type claims are . . . on the road to oblivion").

222. *Id.* (explaining at timestamp 9:47 that *Cedar Point Nursery* reflects that a "conservative majority [in the Supreme Court] wants much more protection of intellectual property" and leaves open the question of what comprises just compensation for temporary appropriations, which will lead to increased litigation).

223. See Mark Brodt, *What the Constitution Giveth, Texas May Taketh Away*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (May 10, 2022), <http://www.fordhamiplj.org/2022/05/10/what-the-constitution-giveth-texas-may-taketh-away/> (arguing while it is unclear whether Jim Olive would prevail on a per se taking claim, "with the Supreme Court denying certiorari at what, presumably, was the most opportune time for such a case to be heard, states remain free and protected for the foreseeable future").

224. Petition for Writ of Certiorari at 18–21, *Jim Olive Photography v. Univ. of Hous. Sys.*, 142 S. Ct. 1361 (2022) (No. 21-735).

225. *Id.* at 20.

226. *Id.*

nonetheless pay just compensation.”²²⁷ In sum, Olive contends that copyright infringement constitutes a compensable easement onto its property because the state has interfered with his right to exclude.

The University in response contends that infringement is more like a trespass which is a tort, not a taking. The University alleges that *Cedar Point Nursery* actually bolsters the Supreme Court of Texas’ analysis because it reaffirms the trespass-takings distinction.²²⁸ Further, it argues that because Olive retains the right to exclude third parties, he retains all of his rights under the Copyright Act as they apply to third parties.

As the Supreme Court chose not to take the appeal, it is uncertain whether it would have ruled in favor of creators like Jim Olive, or state actors like the University of Houston. In part, the Court’s decision would likely turn on whether *Cedar Point* extends to digital appropriations of nonrivalrous goods. Even if its holding extends to intellectual property, creators will still need to overcome state sovereign immunity before they can recover on Takings Clause claims. Ultimately, although the Supreme Court will not shed light on the murky questions raised by *Jim Olive Photography*, Olive’s plight at least adds to the growing record of state actors’ intentional infringement that could allow Congress to abrogate sovereign immunity for copyright infringement directly rather than shape Takings Clause jurisprudence to address what it is still, at its heart, the tort of copyright infringement.

IV. SOVEREIGN IMMUNITY AND COPYRIGHT TAKINGS

If state sovereign immunity can preclude a Takings Clause claim, then how can any Takings Claim be brought against a state actor? So far, the Supreme Court has never granted sovereign immunity in a Takings Clause case against a state actor.²²⁹ Further, the Court has questioned whether “sovereign immunity retains its vitality” against the basic policy rationale of the Takings Clause.²³⁰ However, private citizens have historically been limited in their ability to sue their own state governments for Takings Clause claims because states rarely consent to suit arising from their citizens, and Congress has not abrogated state sovereign immunity for state Takings Clause claims.²³¹ Some argue that the federal Takings Clause, in absence of other adequate remedies,

227. *Id.* at 26.

228. *Id.* at 15.

229. J.P. Burleigh, *Can State Governments Claim Sovereign Immunity in Takings Cases?*, U. CINCINNATI L. REV. (Jan. 15, 2020), <https://uclawreview.org/2020/01/15/can-state-governments-claim-sovereign-immunity-in-takings-cases/>.

230. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999).

231. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 551–52 (4th Cir. 2014).

exists to force non-consenting states into their state courts to hold them accountable for violations of private property rights.²³² However, according to the Court's interpretation in *Alden v. Maine*, the Eleventh Amendment protects states from suit by private parties in its own courts without its consent even when the suit derives from federal law—such as an infringement of the Federal Copyright Act or a violation of the federal Takings Clause.²³³

However, there is ample academic support for holding the states accountable. Eric Berger explains that the Takings Clause should be interpreted as self-executing because of its unique nature and intent to hold states accountable which “naturally supersedes” the Eleventh Amendment removing the state's grant of immunity.²³⁴ However, Berger speculates that in temporary takings claims the Court may allow the state to retain its immunity to retain the health of federalism.²³⁵ Professor Richard H. Seamon further clarifies that although states can claim sovereign immunity against copyright infringement cases brought in federal court, due process concerns may force non-consenting states into just compensation suits in state courts.²³⁶ This means that if a state fails to create an adequate remedy, the Due Process Clause of the Fourteenth Amendment requires that states hear just compensation cases within their courts regardless of any claims of sovereign immunity.²³⁷

In another copyright-takings case involving a Texas university, the Fifth Circuit Court of Appeals held that states are entitled to sovereign immunity from federal takings claims in federal court, and from state takings claims in both federal and state courts if not waived.²³⁸ In *Canada Hockey L.L.C. v. Texas A&M University Athletic Department*, Michael Bynum, a sportswriter and editor, sued Texas A&M University (TAMU) after it published a key part of Bynum's forthcoming book without permission and retyping the byline of the portion to indicate university sponsorship.²³⁹ The Fifth Circuit upheld the lower court's ruling that TAMU's federal sovereign immunity cannot be abrogated from either the federal or state takings claims, which were pleaded in the alternative to the copyright infringement claims.²⁴⁰

232. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067–69 (2001).

233. *Alden v. Maine*, 527 U.S. 706, 712 (1999).

234. *Id.*

235. *Id.* at 601.

236. *See* Seamon, *supra* note 232, at 1069.

237. *Id.*

238. *Can. Hockey, L.L.C. v. Tex. A&M Univ. Ath. Dep't*, U.S. App. LEXIS 3976, at *25–*26 (5th Cir. Feb. 14, 2022).

239. *Id.* at *2–*6.

240. *Id.* at *25–*26.

From a policy perspective, the juxtaposition of these two competing doctrines is about balancing the desire to protect the public treasury from the cost of countless lawsuits and violations, and the desire to protect private citizens from their own states' theft. If the Supreme Court continues to not provide guidance on how to balance these interests, then courts may adopt the Fifth Circuit's rationale and prevent copyright owners from recovering on any copyright-takings claims. As such, the Takings Clause does not currently provide copyright owners with just compensation when states violate private citizen's rights under the Copyright Act.

V. ADEQUATE ALTERNATIVES AND PATHWAY TO CONGRESSIONAL ABROGATION

After *Jim Olive Photography*, few pathways remain for just compensation for creators whose copyright have been infringed by states, even intentionally and repeatedly. While attorneys for Frederick Allen, Jim Olive, and Michael Bynum have argued that the Takings Clause may provide a pathway for just compensation, this is unlikely even after the expansion of the doctrine in *Cedar Point Nursery* as the Supreme Court declined to overturn both the Texas Supreme Court's decision in *Jim Olive Photography* and the Fifth Circuit's decision in *Canada Hockey L.L.C.* Other alternative pathways for compensation are largely inadequate. If all alternative pathways for compensation including takings claims are found to be inadequate to remedy creators for widespread and persistent, intentional, or at least reckless infringement by the states, the Court should uphold the constitutionality of a revised Copyright Remedy Clarification Act that is narrowly tailored to curb the worsening pattern of state infringement sparked after the *Florida Prepaid* cases.

A. ADEQUACY OF ALTERNATIVES

This Section lists alternative pathways for just compensation and assesses their adequacy in remedying the constitutional harms state infringement has inflicted. Beyond takings claims, which Part III has discussed, alternative pathways include: breach of contract, injunctive relief under *Ex parte Young*, personal-capacity suits against state officials, and waiver.

1. Breach of Contract Claims

Breach of contract claims may arise where the creator and infringer have an existing contract or an implied-in-fact contract.²⁴¹ However, some courts "will reject contract claims that are at their core about copyright violation[s]"

241. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 64.

and find instead that they should be preempted by the Copyright Act's express preemption provision.²⁴² Because breach of contract claims add an extra element, the existence of a contract, to the copyright infringement analysis, these claims are less likely to be preempted.²⁴³ The state cannot claim its sovereign immunity when entering into contracts because it "bind[s] itself like any other party to the terms of the agreement."²⁴⁴

Breach of contract claims are largely inadequate because they are not available for the creators who have not entered into a contract with the state infringer. This is particularly pertinent as the "vast majority" of infringements do not involve a contractual relationship as the state entity "may obtain copies from sources such as Google [I]mages, social media, websites," and exploit those copies "without the creators' knowledge."²⁴⁵ Additionally, these claims are disfavored because they add an additional element that a plaintiff must prove in order to properly allege copyright infringement.²⁴⁶ Finally, even if a copyright owner prevails on a breach of contract claim, they are not eligible for the statutory remedies under the Copyright Act.²⁴⁷

2. Ex parte Young Claims

Under the doctrine of *Ex parte Young*, creators may seek injunctive relief that prevents the state's further use of the copyrighted work.²⁴⁸ States have long argued that this protection is enough to justify state sovereign immunity. In support of their argument, states cite to a survey conducted by the Copyright Alliance which indicates that fifty percent of respondents would be willing to accept injunctive relief alone.²⁴⁹ Further, they argue that injunctive relief proceedings allow creators to prove infringement on the merits and obtain an injunction.²⁵⁰ Lastly, they allege that the high monetary cost of defending against injunctive claims and the negative publicity that such suits may spark is a powerful enough deterrent to keep states from committing particularly egregious forms of infringement.²⁵¹

242. *Id.*

243. *See id.* (noting that the Ninth Circuit, in *Ryan v. Editions Ltd.*, 786 F.3d 754, 761 (9th Cir. 2015), recognized that a contractual-based claim contains the extra element necessary to distance the claim from the express preemption provision of the Copyright Act).

244. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

245. *Id.*

246. *Id.*

247. *Id.* at 81.

248. *See Ex parte Young*, 209 U.S. 123, 166 (1908).

249. COPYRIGHT AND SOVEREIGN IMMUNITY, *supra* note 13, at 67.

250. *Id.*

251. *See id.* (finding many commenters citing the monetary cost of defending against these suits and the adverse publicity that could result from these claims to be "powerful deterrents").

Nonetheless, injunctive relief is inadequate because it only prevents future infringement and does nothing to remedy damage done from past infringement.²⁵² This is particularly inadequate when the infringement depletes the expressive work of all its economic value, like in the case of *Allen v. Cooper*.

3. *Personal-Capacity Suits Against State Officials*

Another alternative remedy is the ability to bring a copyright infringement suit against a state official in their personal capacity in federal court. The Ohio Attorney General's Office described these suits as a "pretty easy workaround" that enables recovery against the state, and that the state can indemnify the named defendant for any resulting damages if it chooses to.²⁵³

This pathway is also inadequate for three reasons: (1) if the state does not indemnify, "the copyright owner's ability to recover damages may be limited by the individual official's ability to satisfy a judgment";²⁵⁴ (2) often it will be difficult or impossible for the copyright owner to uncover the identity of the individual that committed the infringement as required by the suit;²⁵⁵ (3) the individual state official, if identified, may be protected from liability by qualified immunity which shields state actors if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."²⁵⁶ In many cases, copyright owners have been unable to prove that the infringing individuals should have known they were committing copyright infringement due to the fair use defense.²⁵⁷

4. *Waiver*

Finally, states may choose to waive their sovereign immunity for copyright infringement suits.²⁵⁸ Most states have waived their sovereign immunity to state-law claims such as tort actions or contractual violations; however, the procedural and substantive requirements for bringing these actions vary. For example, three states have state constitutional protection from becoming a defendant in its courts.²⁵⁹ Currently, thirty-seven states waive sovereign immunity for torts like copyright infringement, and fifteen allow plaintiffs to

252. *Id.* at 67.

253. *See id.* at 69.

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.* at 69–70 (determining that several copyright owners have been unable to approve that a state actor should have known that their actions infringed a valid copyright because of the "unsettled nature of the legal issue involved").

258. *Id.* at 60.

259. *See id.* (referencing the Constitutions of Alaska, Arkansas, and West Virginia).

bring contract claims.²⁶⁰ When states choose to do so, waiver is adequate because it allows the consensual abrogation of sovereign immunity and provides a pathway for creators to be made whole following a copyright infringement suit. However, this pathway remains inaccessible for many copyright holders across the country living and creating in states that have not waived immunity.

B. PATHWAY TO CONGRESSIONAL ABROGATION: RECOMMENDATIONS FROM THE COPYRIGHT OFFICE REPORT

After *Allen v. Cooper*, congressional leaders requested that the Copyright Office conduct a study to “determine whether there is sufficient basis for federal legislation abrogating State sovereign immunity when States infringe copyrights.”²⁶¹ Specifically, the Office studied (1) “the extent to which copyright owners are experiencing infringements by state entities without adequate remedies under state law” and (2) “the extent to which such infringements appear to be based on intentional or reckless conduct.”²⁶²

In response to these inquiries, the Office reported that the number of allegations of state infringement has substantially increased since the release of the Oman Report, which the CRCA was passed on.²⁶³ Infringement has increased since the *Florida Prepaid* cases began casting doubt on the validity of the CRCA.²⁶⁴ Additionally, the majority of respondents indicated that their works have been infringed repeatedly by state actors, which establishes a pattern of infringement.²⁶⁵

The Office contended that “state infringement constitutes a legitimate concern for copyright owners.”²⁶⁶ Largely, copyright owners are left with no adequate remedies. The Office illustrated how recent cases “cast doubt on the viability of claims seeking to recover under a takings theory.”²⁶⁷ While some creators may be able to bring a breach of contract claim, these claims may be preempted by the Federal Copyright Act, and even if successful, they do not

260. *See id.* (finding that thirty-seven states waive immunity for tort actions against state officials and that fifteen permit contract claims).

261. *Id.* at 70.

262. *Id.*

263. *See id.* at 71–72 (determining that over 130 copyright infringement suits against state entities were brought between 2000 and 2020, compared with the “no more than ‘half a dozen’ examples” that Congress had gathered to support passing the CRCA).

264. *See id.* (finding the instances of documented infringement increased “substantially” between 2000 when the Court decided the *Florida Prepaid* cases and 2020 when the Report was released).

265. *Id.* at 71.

266. *Id.*

267. *Id.*

provide the same remedies as copyright infringement.²⁶⁸ Injunctive relief only prevents future harm, and does not remedy previous harm even if state action depletes the copyrighted work of all economic value.²⁶⁹ Lastly, suits against individuals are inadequate where qualified immunity or a lack of funding prevents economic relief.²⁷⁰

Additionally, the Office contemplated that evidence of intentional or reckless state infringement may be “elusive.”²⁷¹ The state sovereign immunity defense may deter copyright owners from suing, which makes it difficult to establish a conclusive record of unconstitutional conduct.²⁷²

The Office explained that the evidentiary standard that the Court is seeking to allow abrogation is unclear.²⁷³ Since the Court articulated its “congruence and proportionality test” in *City of Boerne* over two decades ago, only two cases based on discrimination claims have upheld Congress’ ability to abrogate immunity.²⁷⁴ While the Court had articulated that the record established in the Oman Report was insufficient, it has not issued guidance on the “nature and volume of evidence that would be sufficient in this area”—although it appears that the standard is quite high.²⁷⁵ As such, the Office was ultimately “unable to conclude with certainty that the evidence provided in this study would be held sufficient to establish a pattern of unconstitutional conduct.”²⁷⁶ Nonetheless, the Office believed that, equipped with the heightened record and the growing number of plaintiffs pursuing copyright-takings claims, Congress may still proceed with proposing new abrogation legislation.²⁷⁷ The Copyright Office and numerous amicus organizations continue to “believe that infringement by state entities is an issue worthy of congressional action.”²⁷⁸

State universities and libraries, which currently benefit from immunity, contend that they adopt rigorous policies and educational programs to alert

268. *Id.* at 64.

269. *Id.* at 67–68.

270. *See id.*

271. *Id.*

272. *See id.* at 71–72 (discussing the difficulty of compiling conclusive evidence of intentional or reckless infringement because the presence of sovereign immunity claims either dissuades potential plaintiffs from bringing suit or may cause the suit to not be adjudicated).

273. *See id.* at 72 (explaining that the standard to which the evidence is to be weighed after *City of Boerne* is unclear but appears to be “set quite high.”).

274. *See id.* (discussing that the only two cases to uphold congressional abrogation in response to either disability- or sex-based discrimination).

275. *See id.*

276. *See id.* at 73.

277. *See id.*

278. *Id.*

their staff about potential copyright infringements.²⁷⁹ Predominantly, these states entities are concerned about the impact on their finances if they must defend themselves in infringement suits.²⁸⁰ However, these entities may generally be about to invoke protection under existing protections and limitations of the Copyright Act, such as “fair use, exceptions for reproduction by libraries and archives, and limitations on remedies” and do not require sovereign immunity to protect against non-meritorious copyright infringement claims.²⁸¹

Congress should choose to pass legislation to ensure that creators have adequate remedies to protect their work against other state entities such as athletic departments and radio stations which may currently make use of copyrighted works to commercial purposes that affect the works’ marketability. If Congress chooses to abrogate, it must narrowly tailor its legislation to the extent that copyright owners are experiencing widespread, persistent, and intentional—or at least reckless—infringement by state actors that would subject private parties to liability. However, even if Congress passes legislation that seeks to abrogate state sovereign immunity, the Court may still find that the record established by the Copyright Office is insufficient to support abrogation.²⁸²

If Congress chooses not to pursue full abrogation because of the lack of clarity from the Court, it should consider a waiver-based framework proposed by previous Congresses.²⁸³ Under this framework, “a state’s ability to recover damages for infringement of its own intellectual property rights would be conditioned on its waiving sovereign immunity from infringement suits.”²⁸⁴

VI. CONCLUSION

Because the Copyright Office’s report on Copyright and State Sovereign Immunity greatly expanded the record of state infringement and established a pattern of increased infringement following the fall of the CRCA, Congress should pass a revised, narrowly tailored version of the CRCA that holds state actors liable from intentionally or recklessly engaging in the same conduct that

279. *See id.* at 2 (recognizing that many state entities have taken “significant steps to ensure respect for copyright including implementing policies, procedures, and social norms).

280. *Id.* at 67.

281. *Id.* at 74.

282. *See id.* at 73 (concluding that the Copyright Office is unable to conclude with any certainty that the Court would uphold any legislation abrogating sovereign immunity under the current record).

283. *See id.* at 74.

284. *Id.*

would subject private parties to liability under the Copyright Act. This bill should create an explicit safe harbor for public schools, libraries, and museums that implement strenuous copyright trainings and policies to prevent infringement. This approach is narrowly tailored to prevent further harm to creators that generate art and culture without placing an undue burden on state institutions that curate and disseminate culture and knowledge. Although it is untested whether the present record would be sufficient enough to support abrogation, at the very least, passing this legislation would likely prompt the Supreme Court to provide clearer guidance on Copyright Takings Claims following *Cedar Point Nursery* and *Jim Olive Photography*.