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## Copyright and Federalism: Why State Waiver of Sovereign Immunity is the Best Remedy for State Copyright Infringement

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N O R T H W E S T E R N  
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AND  
INTELLECTUAL PROPERTY

**COPYRIGHT AND FEDERALISM: WHY  
STATE WAIVER OF SOVEREIGN  
IMMUNITY IS THE BEST REMEDY  
FOR STATE COPYRIGHT  
INFRINGEMENT**

*Leroy Johnston Ellis V*



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## COPYRIGHT AND FEDERALISM: WHY STATE WAIVER OF SOVEREIGN IMMUNITY IS THE BEST REMEDY FOR STATE COPYRIGHT INFRINGEMENT

*Leroy Johnston Ellis V\**

**ABSTRACT**— When a photographer intentionally takes a picture of a subject, or a writer puts a story to paper, the resulting works are protected by copyright. That protection is bolstered after the authors register their works with the Copyright Office. All private parties, from individuals to corporations, can be sued for infringing on the work should they use it without pay or permission.

However, what happens when the infringer is not a private party? What happens when the state or a state entity is the infringer? What happens when a public university decides to use a copyright owner's work without pay or permission? Can the copyright owner seek damages from the university for infringement? If not, then how can a copyright owner recover damages for state infringement?

Until recently, the answer was that copyright owners could obtain damages from the university for copyright infringement under the Copyright Remedies Clarification Act, 17 U.S.C. §511, but in *Allen v. Cooper*, the United States Supreme Court held the Act unconstitutional in part because there was not enough evidence of state infringement to support waiving sovereign immunity. Now the question has no clear answer. While some state cases have copyright owners attempting to obtain damages through alternative means, there does not seem to be an easy way for copyright owners to obtain monetary relief for state copyright infringement. National legislation could be proposed once again, but how well would that fair against the Court's current precedent? Would it be better to ask the states to waive immunity themselves?

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\* I am a graduate of Cumberland School of Law, Class of 2022. I am a recent admittee to the Tennessee Bar and am currently practicing with my father at the Ellis Law Offices in Nashville. I would like to give thanks to God for this opportunity and give a special thanks to the editors of the Northwestern Journal of Technology and Intellectual Property for their hard work and input. Their aid helped make this piece stronger than its draft. Thanks also to my law professor, Tim McFarlin, who helped make this paper possible. I would like to dedicate this article to the loving memory of my cousin, Travis Allen Russell, whose love of music kindled my interest in copyright.

Monetary remedies for wrongs should be available, even when the wrong is committed by the state or its entities. The issue is finding a way around sovereign immunity. Sometimes the way around sovereign immunity is by using federalism.

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INTRODUCTION

Andreas Gursky is a German photographer whose work has been exhibited in roughly thirty-five countries.<sup>1</sup> Imagine that Gursky decided to take a picture of the New York City skyline. He charts a plane, readies his camera, and gets what he thinks is the perfect shot of downtown Manhattan. Gursky registers his photograph of New York with the United States Copyright Office and displays it to the public. Sometime later, the City University of New York acquires a copy of Gursky’s photograph and uses it to advertise their Graduate School of Journalism. What remedies could Andreas Gursky pursue?

While the situation above is only a hypothetical, it is a reality on the ground for other copyright owners. Recently, the U.S. Copyright Office issued a report to Congress regarding copyright and state sovereign immunity. The general findings of the report stated that there were 132 cases filed against states for copyright infringement between 1986 and 2020.<sup>2</sup> Of those cases, 128 were filed between 2000 and 2020, and 76 cases

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<sup>1</sup> See *Exhibitions*, ANDREAS GURSKY, <https://www.andreasgursky.com/en/exhibitions/solo-exhibitions> [<https://perma.cc/8MUL-8D9K>].

<sup>2</sup> U.S. COPYRIGHT OFF., *COPYRIGHT AND STATE SOVEREIGN IMMUNITY* 28 (2021).

were “brought against state-funded educational institutions.”<sup>3</sup> A total of 117 cases involved either literary works or “pictorial, graphic, or scriptural works,” with nearly the same number of cases involving actions for money damages.<sup>4</sup> The report included survey results from the Copyright Alliance,<sup>5</sup> which concluded that of 115 copyright owners reporting that a state or state entity had infringed on their copyrights, 52% of those owners described multiple instances of state infringement.<sup>6</sup> Nearly sixty-percent identified the infringers as “state universities or institutions of higher learning.”<sup>7</sup> The report concluded that there is evidence indicating that state infringement is a legitimate concern, but whether the evidence could establish patterns of unconstitutional conduct was inconclusive.<sup>8</sup> Additionally, the report noted that the claims a copyright owner can bring against the state are either untested, unlikely to succeed, or do not favor complete relief for the owner.<sup>9</sup> The conclusions are alarming for copyright owners because they demonstrate that infringement is occurring at the hands of the state or its entities at a seemingly increasing rate and copyright owners have no remedy against it.

Copyright infringement requires a remedy no matter who the infringing party may be. William Blackstone wrote that the general rule is “that where there is a legal right, there is also a legal remedy, by suit or action of law, whenever the right is invaded.”<sup>10</sup> Chief Justice John Marshall echoed this sentiment when he said that “[t]he very essence of civil liberty . . . consists in the right of every individual to claim protection of the laws, whenever he receives an injury,” and it is “one of the first duties of government . . . to afford that protection” to the individual.<sup>11</sup> The law currently allows copyright owners to pursue monetary remedies for copyright infringement;<sup>12</sup> however, when the state is the infringer, the Supreme Court has held that monetary remedies are unavailable for copyright owners because Congress has not abrogated sovereign

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The Copyright Alliance is an organization that advocates for policies “that promote and preserve the value of copyright” and seeks to protect “the rights of creators and innovators.” *About, COPYRIGHT ALLIANCE*, <https://copyrightalliance.org/about/> [<https://perma.cc/GL3Q-M885>].

<sup>6</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 32.

<sup>7</sup> *Id.* at 33.

<sup>8</sup> *Id.* at 72–73.

<sup>9</sup> *Id.* at 59–70.

<sup>10</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*23.

<sup>11</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>12</sup> 17 U.S.C. § 504.

immunity.<sup>13</sup> While the Court's ruling leaves copyright owners with an injunction as a remedial option, this will not satisfy those owners seeking monetary compensation for infringement of their copyrights.<sup>14</sup>

If copyright owners have a legal right to pursue monetary damages whenever their protected material is infringed upon,<sup>15</sup> but sovereign immunity bars those same remedies when the infringer is the state or a state entity, then the next question is whether the monetary remedies are available under a separate legal theory. If no theory exists, then the injunction may be the only defense copyright owners have against state infringement,<sup>16</sup> barring some waiver of sovereign immunity. The purpose of this paper is not to detail *all* the possible legal theories<sup>17</sup> copyright owners can use to obtain monetary remedies for state infringement. A remedy already exists by statute,<sup>18</sup> but sovereign immunity prevents copyright owners from obtaining that remedy in an action where the state or state entity is the infringer.<sup>19</sup> This is a problem requiring some kind of a solution. In this paper, I argue that the best solution for copyright owners seeking to enforce the monetary remedies already available to them under the Copyright Act<sup>20</sup> is state waiver of sovereign immunity.

This paper will present a survey of the current legal landscape. Part I will address the problem of copyright infringement and sovereign immunity as it currently exists. The Supreme Court's holding that states cannot be sued for copyright infringement is a relatively recent decision.<sup>21</sup> A look at state infringement cases from before and after the decision can help indicate what the current issue is and who the main culprits are in state

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<sup>13</sup> Allen v. Cooper, 140 S. Ct. 994, 1007 (2020).

<sup>14</sup> Jason Bloom, Annie Allison & Abbey Gauger, *Texas Ruling Shows Weight of State Immunity / In IP Claims*, LAW360 (July 7, 2021, 4:18 PM), <https://www.law360.com/articles/1400522/texas-ruling-shows-weight-of-state-immunity-in-ip-claims> [<https://perma.cc/973X-CRWM>].

<sup>15</sup> 17 U.S.C. § 504.

<sup>16</sup> Bloom, *supra* note 14.

<sup>17</sup> I acknowledge that copyright owners can use the Due Process Clause of the Fourteenth Amendment to justify a monetary remedy for state copyright infringement, but I will not address it in this paper. The argument was recently raised at the district level in *Canada Hockey LLC v. Texas A&M University Athletic Department* to no success. 484 F. Supp. 3d 448, 454–58 (S.D. Tex. 2020), *aff'd*, No. 20-20503, 2022 U.S. App. LEXIS 3976 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603). In that case, a copyright owner sued Texas A&M for allegedly using an unpublished manuscript of his book to enforce the university's trademark on the 12th Man. *Can. Hockey*, 2022 U.S. App. LEXIS 3976, at \*2–6. The Fifth Circuit held that the owner's procedural due process rights were not violated because the owner's claims could be brought in state court under the Texas Takings Clause. *Id.* at \*22.

<sup>18</sup> 17 U.S.C. § 504.

<sup>19</sup> Allen v. Cooper, 140 S. Ct. 994, 1007 (2020).

<sup>20</sup> 17 U.S.C. § 504.

<sup>21</sup> *Allen*, 140 S. Ct. at 1007.

infringement cases. Part II of this paper will consider the Takings Clause as a possible legal theory for monetary remedies when state copyright infringement occurs. The Takings Clause allows private property owners to seek a compensatory remedy when the state takes their property for public use,<sup>22</sup> and thus it can be used by copyright owners seeking to combat state infringement of their copyrights. The Copyright Office noted that a Takings claim was available to copyright owners,<sup>23</sup> but the theory has issues in application. Lastly, in Part III I will propose that using federalism is the best path for copyright owners seeking monetary remedies for state infringement and address concerns, such as the Dormant Commerce Clause, that may follow from the use of federalism. If copyright owners lobby for specific waivers of state immunity for copyright infringement, then copyright owners can easily seek the money damages afforded to them under the Copyright Act<sup>24</sup> against the state infringer.

#### I. COPYRIGHT INFRINGEMENT: THE REMEDY AND THE PROBLEM.

Generally, when a copyright owner deals with copyright infringement, she has a statutory remedy for monetary damages.<sup>25</sup> Whenever a protected work is used in a way that tramples on the owner's five exclusive rights,<sup>26</sup> the Copyright Act is there with an avenue to recover monetary damages.<sup>27</sup> All the owner has to do is prove infringement occurred and the money is hers.

In theory, lawsuits for copyright infringement are available to copyright owners no matter who the infringer might be. In practice, however, copyright owners lack the ability to sue the state for copyright infringement. The 2020 United States Supreme Court case, *Allen v. Cooper*, held that states could not be sued for copyright infringement because sovereign immunity had not been abrogated through any Congressional act.<sup>28</sup> *Allen* was cited in later copyright infringement cases dealing with state infringement of copyright, and has proven difficult for copyright owners confronting state infringement.<sup>29</sup>

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<sup>22</sup> U.S. CONST. amend. V.

<sup>23</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 65–67.

<sup>24</sup> 17 U.S.C. § 504.

<sup>25</sup> *Id.*

<sup>26</sup> 17 U.S.C. §§ 106(1)–(5) (reproduction of the work; preparing derivatives based on the work; distributing copies of the work; publicly performing the work; displaying the work).

<sup>27</sup> 17 U.S.C. § 102(a)(5).

<sup>28</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

<sup>29</sup> *See* *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep't*, No. 20-20503, 2022 U.S. App. LEXIS 3976, at \*17 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603); *Fowler v. T-Mobile USA Inc.*, No. CV-20-01516-PHX-DJH, 2021 U.S. Dist. LEXIS 112961, at \*13–15

*A. Allen v. Cooper: What Happened?*

In 1996, the marine salvage company, Intersal Inc., discovered the wreckage of Blackbeard's ship, the Queen Anne's Revenge, off the coast of North Carolina.<sup>30</sup> The state of North Carolina contracted with Intersal to recover the shipwreck, and Intersal charged videographer Frederick Allen with documenting the operation.<sup>31</sup> Allen documented the recovery for over a decade, creating videos and photos of the diver's salvaging efforts and obtaining registered copyrights in all his recordings of the operation; however, after Allen finished documenting the recovery, North Carolina began publishing some of the photos and videos to the state's website.<sup>32</sup> The first time the infringement occurred, Allen and North Carolina worked out a settlement agreement laying out what rights each party had to the copyrighted material; nevertheless, the state infringed on Allen's copyrights a second time without admitting any wrongdoing, leading Allen to sue the state for copyright infringement.<sup>33</sup>

At the time, Allen was able to bring his action under the Copyright Remedies Clarification Act (CRCA) because the Act abrogated sovereign immunity in favor of authors so they could sue the state for copyright infringement.<sup>34</sup> Allen argued CRCA was justifiable because Congress had the power to abrogate sovereign immunity under the Intellectual Property Clause and Due Process Clause.<sup>35</sup> A similar argument was raised in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.<sup>36</sup> In that case, College Savings Bank, a New Jersey savings bank, held a patent for a financing methodology designed to help cover the cost for college tuition.<sup>37</sup> They alleged that Florida Prepaid Postsecondary Education Expenses Board, a state-created entity located in Florida that provided similar services to Florida residents, infringed upon their patent.<sup>38</sup> College Savings brought action against Florida Prepaid under the Patent Remedy Act, arguing that the Act properly abrogated sovereign immunity under the Due Process Clause; however, the Court was unconvinced by this

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(D. Ariz. June 16, 2021); *High Sch. Serviços Educacionais v. Curators of the Univ. of Mo.*, No. 2:19-CV-04083-BCW, 2020 U.S. Dist. LEXIS 241164, at \*7 (W.D. Mo. Oct. 27, 2020).

<sup>30</sup> *Allen*, 140 S. Ct. at 999.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 999–1000.

<sup>35</sup> *Id.* at 1001, 1003.

<sup>36</sup> *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 633–34 (1999).

<sup>37</sup> *Id.* at 630–31.

<sup>38</sup> *Id.* at 631.



argument, and held that the Act was not a proper waiver of sovereign immunity.<sup>39</sup>

In *Allen*, the Court relied heavily on *Florida Prepaid* and quickly disposed of both the Intellectual Property Clause argument and the Due Process argument.<sup>40</sup> In the same breath, the Court held that CRCA was inapplicable because it could not be justified under any Congressional power.<sup>41</sup> Thus, the Court barred *Allen* from suing North Carolina for copyright infringement, and with it, all subsequent copyright owners lost the ability to seek monetary remedies for state infringement.

*B. The Past and the Present: State Infringement Before and After Allen.*

Before CRCA, there were some copyright infringement cases brought against the states or their entities, but the results varied. In *Wihtol v. Crow*, the Clarinda School District in Iowa was accused of infringing on a copyright owner's song after one of their employees copied the song and incorporated it into a new arrangement, after which it was performed by a high school choir the employee directed.<sup>42</sup> The Eighth Circuit held the district court could not exercise jurisdiction over the Clarinda School District because of the Eleventh Amendment prevented lawsuits from being brought against non-consenting states.<sup>43</sup>

Similar facts were present in other cases, but with different results. In *Mills Music Inc. v. Arizona*, a copyright owner alleged that the state of Arizona was party to copyright infringement after a musical compensation was played by the Coliseum Board, an agency hired by the state to operate a state fair.<sup>44</sup> Although the Ninth Circuit acknowledged state waiver and consent to lawsuits, they held that both the Copyright Clause and the Copyright Act of 1909 properly abrogated sovereign immunity, noting that "the Eleventh Amendment's sovereign immunity does not permit a state to nullify the rights reserved and protected by Congress, acting pursuant to the [Copyright Clause]."<sup>45</sup>

Finally, in *Johnson v. University of Virginia*, a copyright owner alleged that the University of Virginia and two of its employees infringed on photographs the owner took at a sporting event.<sup>46</sup> The District Court

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<sup>39</sup> *Id.* at 640–48.

<sup>40</sup> *Allen*, 140 S. Ct. at 1001–07.

<sup>41</sup> *Id.* at 1007 ("Florida Prepaid all but prewrote our decision today.").

<sup>42</sup> *Wihtol v. Crow*, 309 F.2d 777, 778–80 (8th Cir. 1962).

<sup>43</sup> *Id.* at 781–82.

<sup>44</sup> *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1280–81 (9th Cir. 1979).

<sup>45</sup> *Id.* at 1282–86.

<sup>46</sup> *Johnson v. Univ. of Va.*, 606 F. Supp. 321, 322 (W.D. Va. 1985).

noted the split on copyright infringement and sovereign immunity but ultimately concluded that the Copyright Act of 1976 waived the state's sovereign immunity "from liability for damages and equitable relief for copyright infringement."<sup>47</sup> While these cases illustrated an issue of state infringement and sovereign immunity before CRCA, the case law appears to demonstrate isolated incidences of state copyright infringement.

State copyright infringement remained after Congress passed CRCA, but compared to the prior cases, the state infringement appeared more concentrated. Instead of the infringers being the school employees<sup>48</sup> or the state itself,<sup>49</sup> the state infringers were primarily public universities and university systems.<sup>50</sup> However, unlike *Mills Music* and *Johnson*, where the courts found an abrogation of sovereign immunity through the Copyright Act,<sup>51</sup> the circuit courts did not see CRCA as a waiver of sovereign immunity.<sup>52</sup> Thus, rather than having a circuit split on Congressional waiver of sovereign immunity, the state was allowed to infringe upon the copyrights held by copyright owners before *Allen* because the rulings amongst the circuit courts agreed that CRCA did not waive sovereign immunity for copyright infringement.

Nothing has changed since *Allen* struck down CRCA. Public schools are still infringing on copyrighted material.<sup>53</sup> As previously noted, the U.S. Copyright Office reported that nearly sixty-percent of infringers were state or public universities;<sup>54</sup> however, whether Congress can take action and waive sovereign immunity is questionable because the small number of state infringement cases renders the evidence remains inconclusive.<sup>55</sup> The

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<sup>47</sup> *Id.* at 322–24.

<sup>48</sup> *Wihlton*, 309 F.2d at 778.

<sup>49</sup> *Mills Music*, 591 F.2d at 1280.

<sup>50</sup> See *Dermansky v. Univ. of Colo.*, 445 F. Supp. 3d 1218, 1220 (D. Colo. 2020) (the University of Colorado); *Nettleman v. Fla. Atlantic Univ. Bd. of Trs.*, 228 F. Supp. 3d 1303, 1305–07 (S.D. Fla. 2017) (Florida Atlantic University); *Coyle v. Univ. of Ky.*, 2 F. Supp. 3d 1014, 1016 (E.D. Ky. 2014) (the University of Kentucky); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1301–06 (11th Cir. 2011) (the University System of Georgia); *InfoMath, Inc. v. Univ. of Ark.*, 633 F. Supp. 2d 674, 676–77 (E.D. Ark. 2007) (the University of Arkansas); *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (the University of Houston).

<sup>51</sup> *Mills Music*, 591 F.2d at 1285; *Johnson*, 606 F. Supp. at 323.

<sup>52</sup> See *Nat'l Ass'n of Bds. of Pharm.*, 633 F.3d at 1301–06; see also *Chavez*, 204 F.3d at 603.

<sup>53</sup> See *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 777 (Tex. 2021), *cert. denied*, 142 S. Ct. 1362 (2022) (the University of Houston); *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep't*, 484 F. Supp. 3d 448, 451–53 (S.D. Tex. 2020), *aff'd*, No. 20-20503, 2022 U.S. App. LEXIS 3976 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603) (Texas A&M University Athletic Department); *High Sch. Serviços Educacionais v. Curators of the Univ. of Mo.*, 2020 U.S. Dist. LEXIS 241164 at \*1–3 (W.D. Mo. 2020) (the University of Missouri).

<sup>54</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 33.

<sup>55</sup> *Id.* at 72–73.

scanty evidence was the primary reason why the Court held that CRCA could not be justified as a waiver of sovereign immunity under Section 5 of the Fourteenth Amendment.<sup>56</sup> While the decision is a good compass for drafting future legislation, it is also a hazard for Congress, should they wish to draft a new bill with the same effect as CRCA.

The *Allen* decision is still relatively fresh, and the full consequences of the case are yet to be determined, but *Allen* leaves copyright owners with useful dicta that can be used for future litigation. In the decision, the Court stated that “copyrights are a form of property.”<sup>57</sup> Property owners can raise claims against the state for harm done to their property by the state under either the Due Process Clause of the Fourteenth Amendment,<sup>58</sup> or the Takings Clause of the Fifth Amendment.<sup>59</sup> While arguments for Due Process claims exist,<sup>60</sup> the Takings claims seem to be the easier candidate for the copyright owner, if he desires to seek monetary damages for state copyright infringement. The Copyright Office listed a Takings claim as a possible remedy for copyright owners in state court.<sup>61</sup> The question is how successful the claim will be.

## II. TAKINGS CLAIMS: IS STATE INFRINGEMENT A TAKING?

As acknowledged by the Copyright Office, a copyright owner may bring a Takings claim against the state for copyright infringement.<sup>62</sup> A Takings claim was asserted in *Allen* at the district level,<sup>63</sup> and Takings has been addressed in at least one other federal case.<sup>64</sup> While it is considered a

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<sup>56</sup> *Allen v. Cooper*, 140 S. Ct. 949, 1007 (2020).

<sup>57</sup> *Id.* at 1004.

<sup>58</sup> U.S. CONST. amend. XIV, § 1. (“[N]or shall any State deprive any person of . . . property without due process of law. . .”).

<sup>59</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation. . .”).

<sup>60</sup> See *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep’t*, 484 F. Supp. 3d 448, 454–58 (S.D. Tex. 2020), *aff’d*, No. 20-20503, 2022 U.S. App. LEXIS 3976 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603); see also Brief for Adam Mossoff as Amicus Curiae Supporting Appellants, *Can. Hockey, LLC v. Tex. A&M Univ. Ath. Dep’t*, No. 20-20503, 2021 U.S. App. LEXIS 27012 (5th Cir. Feb. 14, 2021); John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 399–410 (2000); Davida H. Isaacs, *Shifting Constitutional Sands: Can and Should Patentholders Rely on the Due Process Clause to Thwart Government Action?*, 35 FLA. ST. U. L. REV. 627, 648–54 (2008).

<sup>61</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 65–67.

<sup>62</sup> *Id.*

<sup>63</sup> *Allen v. Cooper*, 244 F. Supp. 3d 525, 531 (E.D.N.C. 2017). The claim was barred by precedent. See *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 551–53 (4th Cir. 2014) (holding that because a Takings claim could be brought in state court, the Eleventh Amendment barred a Takings claim in federal court).

<sup>64</sup> *Can. Hockey*, 2022 U.S. App. LEXIS 3976, at \*24–25. This claim was also barred by precedent. See *Bay Point Props. v. Miss. Transp. Comm’n*, 937 F.3d 454, 456–57 (5th Cir. 2019) (holding that

viable option to remedy state infringement, successfully using the Takings Clause against the state in copyright infringement cases is questionable.

The Takings Clause is designed to compensate private property owners when the state takes their property for public use.<sup>65</sup> The practice itself is as old as Rome.<sup>66</sup> American jurisprudence, having inherited and relied upon English law since the colonial era,<sup>67</sup> can trace a framework of Takings as far back as the *Magna Carta*, which provided that personal property could not be taken by the King without first compensating the owner.<sup>68</sup> However, the genesis of Takings involves *tangible* property, not intellectual property. Copyright is of the latter.<sup>69</sup>

If copyright owners use the Takings Clause against the state in copyright infringement cases, the first question is the applicability of the Takings Clause to intangible property in general. Copyright owners can establish that intangible property can be subjected to a Taking by relying on Supreme Court cases that hold intangible property can be subjected to the eminent domain powers of the Fifth Amendment.<sup>70</sup> Thus, the question of intangibles being subjected to eminent domain poses no issue.

If intangible property in general can be taken under the power of eminent domain, then the next question should focus on the applicability of eminent domain to intellectual property specifically. The first Supreme Court case tackling that issue was *Ruckelshaus v. Monsanto Company*. In

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sovereign immunity barred Takings claims in federal court, and thus a Takings claim must be pursued in state court).

<sup>65</sup> U.S. CONST. amend. V.

<sup>66</sup> See generally SUSAN REYNOLDS, BEFORE EMINENT DOMAIN: TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD 15–84 (2010). While Reynolds references 2 Samuel as a place where an example of a Taking is found, *id.* at 10, her historical tracking of Takings begins with Roman law and proceeds through Western Europe, both before and after 1100, *id.* at 15–76. Her research found evidence of, what she calls, expropriation in various European countries, including France, Italy, and Germany. *Id.* at 54–76.

<sup>67</sup> E.g. *Clayland's Lessee v. Pearce*, 1 H. & McH. 29 (Md. 1714) (relying on the parliamentary statute relating to frauds, 29 Car. II, to conclude a case in favor of the plaintiff); see also *Lloyd's Lessee v. Hemsley*, 1 H. & McH. 28 (Md. 1712) (holding that if a statute of limitations from England, 1623, 21 Jac. 1 c. 16 §§ 3, 4, 7, neither extended to Maryland nor was applicable to the case, then the contested land went to the plaintiff).

<sup>68</sup> 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.”).

<sup>69</sup> 1 MELVILLE NIMMER, NIMMER ON COPYRIGHT § A.05(D) (“[C]opyright forms one species of [intellectual property].”).

<sup>70</sup> See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14–16 (1949) (holding that the trade routes used by a business were taken when the place of business was temporarily taken for the use and benefit of the United States Army); see also *West River Bridge Co. v. Dix*, 47 U.S. 507, 533–34 (1848) (holding that the state of Vermont could take a franchise through the power of eminent domain, even though a franchise is an intangible and incorporeal property right).

that case, a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was challenged as unconstitutional because it authorized the Environmental Protection Agency (EPA) “to use data submitted by an applicant for registration of a pesticide” and to disclose some of the submitted data to the public.<sup>71</sup> The Monsanto Company made pesticides and applied for registration with the EPA; however, they wanted to protect the trade secrets in their products, and so they challenged the FIFRA provision under the Takings Clause.<sup>72</sup> Although the Court did not hold that the provision was unconstitutional, it held that intangible property rights protected under state law deserved protection under the Takings Clause.<sup>73</sup> With trade secret being the intangible property interest in *Monsanto*<sup>74</sup> and a kind of intellectual property right,<sup>75</sup> the Court opened the door for subjecting intellectual property to Takings claims.

More specifically, if one form of intellectual property can be subjected to a Fifth Amendment Taking, does that mean that other forms of intellectual property can be subjected to the same? The current answer appears to be “Yes.” In *James v. Campbell*, the Supreme Court expressed certainty that patents for inventions are protected from appropriation or use by the government without compensation, just as land patents are protected under the same principles.<sup>76</sup> Although the case is old, the Court recently quoted the same section from *James* to support their position that personal property is protected under the Takings Clause.<sup>77</sup> With copyrights and patents sharing the same clause of the Constitution,<sup>78</sup> suggestions can be made that copyrights may enjoy the same protection as patents under the Takings Clause.

The suggestions that the Takings Clause applies to copyright are not limited to the Supreme Court. Some federal courts have indicated in dicta

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<sup>71</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984).

<sup>72</sup> *Id.* at 999–1000.

<sup>73</sup> *Id.* at 1003.

<sup>74</sup> *Id.* at 999–1000.

<sup>75</sup> See 1 ROGER M. MILGRAM, *Milgrim ON TRADE SECRETS* § 2.01 (2021) (“One’s rights in a trade secret are intangible intellectual property.”).

<sup>76</sup> *James v. Campbell*, 104 U.S. 356, 357–58 (1882) (“That the government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt.”).

<sup>77</sup> See *Horne v. Dep’t of Agric.*, 576 U.S. 350, 359–60 (2015) (conducting, prior to the Court’s quotation, a detailed history of Takings dating back to the *Magna Carta*, with the court concluding that “[n]othing in this history suggests that personal property was any less protected against physical appropriation than real property”).

<sup>78</sup> U.S. CONST. art. I, § 8, cl. 8.

that they are warm to the idea of granting such protection to copyrights.<sup>79</sup> The Second Circuit has expressly stated that copyright interests are property rights “protected by the due process and [Takings] clauses of the Constitution.”<sup>80</sup> However, the Fifth Circuit refused to decide whether the Takings Clause protected copyright partially because the Supreme Court has not ventured to answer the question of Takings and copyright.<sup>81</sup> Regardless of the differences between the circuits, Professor Roberta Kwall writes that states have eminent domain power over copyright and can therefore subject copyright to a Taking.<sup>82</sup> Thus, although the Supreme Court has yet to consider the matter, there is authority, both legal and scholastic, suggesting copyright can be subjected to a Fifth Amendment Taking.

The final question is whether copyright infringement constitutes a Taking. Kwall, after thoroughly analyzing the concepts of fair use and just compensation, concluded that because of the government’s ability to exercise eminent domain power over copyright, “any unauthorized use not falling within the fair use or other statutory exception constitutes a Taking.”<sup>83</sup> Recently, however, the Texas Supreme Court held that infringement is not a Taking in their case *Jim Olive Photography v. University of Houston*.<sup>84</sup> With scholarship now meeting the application of law, it is worth breaking down the facts and rationale of the Texas decision.

#### A. *Jim Olive Photography: The Facts and the Decision.*

In 2005, Jim Olive took aerial photographs of the City of Houston “and displayed them on his website for purchase.”<sup>85</sup> He registered the photographs with the United States Copyright Office before displaying them, and made notice to others that unauthorized use of the images was “strictly prohibited.”<sup>86</sup> However, Olive alleged that the University of

<sup>79</sup> See *Lane v. First Nat’l Bank of Bos.*, 871 F.2d 166, 174 (1st Cir. 1989) (listing the Takings Clause as an available avenue for remedies that a copyright owner could bring against the state for copyright infringement).

<sup>80</sup> *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983).

<sup>81</sup> *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep’t*, No. 20-20503, 2022 U.S. App. LEXIS 3976, at \*23 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603).

<sup>82</sup> Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign’s Prerogative*, 67 TEX. L. REV. 685, 703–11 (1989); see also Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 981–86 (2015) (arguing that because of *Monsanto* and the characteristics of copyrights, the Takings Clause has a limited application to copyrights).

<sup>83</sup> *Id.* at 752.

<sup>84</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 777 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

<sup>85</sup> *Id.* at 768.

<sup>86</sup> *Id.*

Houston downloaded a copy of his picture, The Cityscape, “removed all identifying copyright and attribution material,” and displayed the image “on several webpages to promote [their] C.T. Bauer College of Business.”<sup>87</sup> While the University removed the photograph from its website after Olive demanded they cease and desist their use of The Cityscape, Olive sued the University for compensation, alleging that the University engaged in an unlawful Taking of his copyright.<sup>88</sup>

Jim Olive argued that the Takings Clause protected copyright from appropriation by the state and that the University of Houston took his property when the institution published the photograph on their webpage.<sup>89</sup> The University countered that infringement merely violated Olive’s copyrights but did not “confiscate or appropriate those rights.”<sup>90</sup> The Court recognized that property “is the bundle of rights that describes one’s relationship to a thing and not the thing itself,” while also acknowledging that the property at issue was Olive’s copyright, not the photograph.<sup>91</sup> Because the property at issue was copyright, the Court said property rights are governed by the Copyright Act; however, under the same statute, those rights are not destroyed when violated by the government.<sup>92</sup> Infringement violates the rights reserved to copyright owners, but the infringer does not assume any physical control over the copyrights through his infringement.<sup>93</sup> The nature of copyright makes it non-rivalrous, and thus others can use copyrighted material without depriving anyone else of its use.<sup>94</sup> Because of this non-rivalrous nature and the nature of infringement, the Court held that there was no Taking of Olive’s copyright. Olive retained his five exclusive rights, even if infringement trespassed on his “exclusive domain.”<sup>95</sup> Thus, the Court concluded that state copyright infringement did not amount to a Taking.<sup>96</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 769–70.

<sup>90</sup> *Id.* at 771.

<sup>91</sup> *Id.* at 773–74.

<sup>92</sup> *Id.* at 774.

<sup>93</sup> *Id.* at 775.

<sup>94</sup> *Id.* at 776.

<sup>95</sup> *Id.* at 776–77.

<sup>96</sup> *Id.* at 777 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)). The concurrence noted that Olive’s Takings claim would have been stronger had the infringement occurred in a more public forum where money damages became an issue, such as passing copyrighted books out to students for free; however, because damages for copyright infringement were not claimed, the Takings claim was weakened. *Id.* at 782 (Busby, J., Concurring).

### B. *What Matters When Taking a Copyright?*

The Texas Court's decision raises an interesting question that will be important for any future claim alleging that copyright infringement is a Taking of copyright: Does the state need to take any one of the five exclusive copyrights<sup>97</sup> in order for a copyright to be taken through the power of eminent domain? If Kwall is correct and "any unauthorized use not falling within the fair use or other statutory exception constitutes a Taking,"<sup>98</sup> then the state does not need to take any of the five exclusive rights to execute a Taking of copyright. Instead, if the state committed copyright infringement, then the act of infringing on the copyright would constitute a Taking.<sup>99</sup> If, however, one or more of the five exclusive rights must be taken in order for a Taking of copyright to occur, then the Texas Supreme Court is correct and infringement is not a Taking.<sup>100</sup>

#### 1. *Mossoff and Madison: A Contemporary Argument.*

While the Takings Clause states that private property shall not be taken by the state for public use without just compensation,<sup>101</sup> determining the applicability of the Clause to copyright seems an open question. Professor Adam Mossoff wrote an amicus brief to the Fifth Circuit Court of Appeals where he argued that copyrights and patents were both recognized as property in American law as far back as the Framers, and the history thus makes copyrights a protected property under the Takings Clause.<sup>102</sup> Mossoff's argument in part relies on James Madison, who defended the Copyright Clause by stating that "[t]he copyright of authors has been solemnly adjudged in Great Britain to be a right of common law."<sup>103</sup> Mossoff also relied on an article Madison wrote on property, where he claimed that if property is the dominion that man claimed and exercised over things in the world to the exclusion of all others, then in a broad sense "a man has property in his opinions" and "may be equally said to have a property in his rights."<sup>104</sup> In Madison's view, the duty of government was to preserve and protect the property of its citizens, and if property includes the

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<sup>97</sup> 17 U.S.C. § 106(1)–(5).

<sup>98</sup> Kwall, *supra* note 82, at 751.

<sup>99</sup> *Id.*

<sup>100</sup> *Jim Olive*, 624 S.W.3d at 776–77.

<sup>101</sup> U.S. CONST. amend. V.

<sup>102</sup> Brief for Adam Mossoff as Amicus Curiae Supporting Appellants, *Can. Hockey, LLC v. Tex. A&M Univ. Ath. Dep't*, No. 20-20503, 2021 U.S. App. LEXIS 27012 (5th Cir. Feb. 14, 2021).

<sup>103</sup> THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

<sup>104</sup> JAMES MADISON, PROPERTY (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 101 (Gaillard Hunt ed., 1906).



interest the people have to enjoy their opinions and rights, then it follows government must protect the opinions and rights of the people.<sup>105</sup> Thus, Madison argued, at no point are the people to be deprived of these rights without just compensation.<sup>106</sup>

Mossoff's reliance on Madison appears applicable to cases involving state infringement of copyrights, but two problems arise for this type of justification that copyrights are property protected by the Takings Clause. First, Madison relies on a labor theory of property to conclude that the people's property, including their opinions and rights, cannot be taken without just compensation.<sup>107</sup> Even though this view was likely informed by Blackstone,<sup>108</sup> the United States Supreme Court explicitly rejected a labor theory for copyright in *Feist Publications, Inc. v. Rural Telephone Service Company*, preferring instead the idea/expression dichotomy for works of authorship because "[i]t is the means by which copyright advances the progress of science and art."<sup>109</sup> Thus, the Court held, the idea/expression dichotomy has greater compatibility with the Copyright Clause itself than does the labor theory of property.<sup>110</sup> The Clause had the same verbiage when Madison defended it.<sup>111</sup> Those favoring Mossoff's argument must contend with the idea/expression dichotomy of copyright where Takings claims are concerned. They may also have to answer why Madison at first defends a constitutional provision favoring the dichotomy<sup>112</sup> but also embraces a labor theory of property that broadly extends to many intangibles.<sup>113</sup>

A second issue is with Madison's assertion that people have a property interest in their opinions and rights.<sup>114</sup> The notion that people have a property interest in their "opinions and communications," as Madison put it,<sup>115</sup> implies that people have a property interest in their freedom of speech because speech is a way in which opinions are expressed and communication is conducted. In the same article, Madison claims people

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<sup>105</sup> *Id.* at 102.

<sup>106</sup> *Id.* at 103.

<sup>107</sup> *See id.*

<sup>108</sup> *See* 2 WILLIAM BLACKSTONE, COMMENTARIES \*405–06 ("When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.")

<sup>109</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 350 (1991).

<sup>110</sup> *Id.* at 349–50.

<sup>111</sup> MADISON, *supra* note 104.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 101–03.

<sup>114</sup> *Id.* at 101.

<sup>115</sup> *Id.*

have a property interest in their religious beliefs,<sup>116</sup> thus inferring that people have a property interest in their First Amendment rights because opinions, communications, and religious beliefs are protected by the text.<sup>117</sup> While a property interest in First Amendment rights can be an interest in intangible items because rights such as opinions and communications do not necessarily require a fixed tangible medium to be expressed, the idea itself seems both questionable and difficult to apply under our current jurisprudence. The idea is questionable because under *Board of Regents v. Roth*, a property interest is “not created by the Constitution,” but is instead created and defined “by existing rules or understandings that stem from an independent source such as state law.”<sup>118</sup> Madison’s idea that people have property interest in their rights appears novel and without reference to any independent sources, thus leaving an argument relying on his essay questionable.

Secondly, the current Takings law views a person’s relation to property under a bundle of rights theory, where the denial or destruction of one right does not amount to a Taking when the owner retains possession of the full bundle.<sup>119</sup> If a person’s relation to property is a bundle of rights theory, and people have a property interest in their rights, then viewing rights themselves as property becomes a question of “What rights from the bundle of rights were acquired or destroyed by the state when they took the person’s rights?” The question is metaphysical and seems difficult to apply to a Takings analysis in a copyright case because it amounts to nonsense. Thus, Mossoff’s argument, so far as it relies on Madison’s views of property, seems difficult to defend.

## 2. *Epstein and Locke: A Theoretical Argument.*

Madison is not without use for those searching for an answer to copyright and Takings. If Madison was informed by Blackstone, then tracing the line backwards reveals Blackstone based his theory of copyright on John Locke’s labor theory.<sup>120</sup> Locke’s views on property<sup>121</sup> and the legislature’s power to take it<sup>122</sup> remain relevant in the current Takings

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<sup>116</sup> *Id.* at 103.

<sup>117</sup> U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridge the freedom of speech, or of the press. . . .”).

<sup>118</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>119</sup> *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

<sup>120</sup> WILLIAM BLACKSTONE, *supra* note 108.

<sup>121</sup> See JOHN LOCKE, TWO TREATIES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, 110–120 (Digireads.com Pub. 2015) (1690).

<sup>122</sup> See *id.* at 158.

discussion because they inform the views of Professor Richard Epstein.<sup>123</sup> According to Epstein, a taking of private property must be justified to avoid the compensation requirement, and the taking must be limited by the public use requirement so that the people may fully enjoy their life, liberty, and estates.<sup>124</sup> Epstein claims a *prima facie* Taking occurs whenever the rights of the property owner are diminished, and a partial Taking occurs whenever any one of three rights of the private property owner – possession, use, or disposition – are taken.<sup>125</sup> Importantly, his main concern is not what is retained by the property owner, but what is taken by the state.<sup>126</sup> Thus, the focus should be on what the state or its entities came into possession, use, or disposition of that once belong to a private property owner.

If the Takings Clause is read with Epstein’s commitment to the Lockean interpretation of property, then it seems a different question needs consideration in *Jim Olive*. The Texas Supreme Court emphasized Olive’s retention of his exclusive copyrights but did not focus on the taking of the picture because Olive did not allege his *photo* was taken but that his *copyright* was taken.<sup>127</sup> If the photo was taken, then it appears compensation is required because the taking is unjustified, and the use by a public university arguably satisfies the public use requirement.<sup>128</sup> However, while the taking of the photograph would satisfy the first question of Epstein’s analysis of the Takings Clause,<sup>129</sup> it does not appear that the taking of the photograph implies a Taking of the copyright under Epstein’s view. To be a Taking, the taking of the photograph must result in either a deprivation of possession, use, or disposition, or the diminishment of rights in the property owner.<sup>130</sup> It is not clear that taking the photograph results in

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<sup>123</sup> See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 31 (1985).

<sup>124</sup> See *id.* at 162–63.

<sup>125</sup> See *id.* at 57.

<sup>126</sup> See *id.*

<sup>127</sup> *Jim Olive Photography v. Univ. of Hou. Sys.*, 624 S.W.3d 764, 774–76 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

<sup>128</sup> See Epstein, *supra* note 123, at 162–70 (defining public use by reference to the elements of public goods—exclusivity and zero marginal costs). If the university physically took Olive’s photograph, then it would take anywhere between a single unit from the surplus of copies of the photograph to all possible copies. Once the photograph is used by the university, it would provide the public access to that specific photograph for little to no cost. The university thus deprives Olive of exclusive possession of however many copies were taken, and it can produce more copies of the photograph for public consumption at almost no additional cost. The use could be granting public access to the photograph, such as displaying it in a hallway, or actions that mirror private use, such as advertising the Business school. Both types of use would require compensation under Epstein’s theory.

<sup>129</sup> *Id.* at 31 (“Is there a taking of private property?”).

<sup>130</sup> See *id.* at 57.

either for the copyright. Thus, while Epstein can help narrow the necessary question in a Takings claim, the narrow question seems to best fit tangible property rather than intangible rights.

### 3. *Uniting the Views: A Third Argument?*

Mossoff and Epstein are not without merit to formulate a Takings argument. Mossoff's argument demonstrates that people can have an intangible property interest in tangible items because things such as communications and opinions<sup>131</sup> can be put onto a fixed tangible medium, which could potentially grant them copyright protection.<sup>132</sup> Epstein's consideration of what is taken<sup>133</sup> appears to have its best application to tangible property, and tangible property can carry with it an intangible interest, such as copyright protection.<sup>134</sup> If the question is what was taken and not what was retained, and a tangible item can possess an intangible property interest, then viewing the issue as a Taking of tangible property carrying intangible rights might provide some use for copyright owners.

For example, if a book is printed, then it is a tangible form of personal property with intangible rights attached to it because copyright protection applies to the work.<sup>135</sup> Normally, if there are intangible rights attached to tangible property, then just compensation may be required when the tangible property is taken.<sup>136</sup> While the transfer of the object protected by copyright is not itself a transfer of copyright from the author to the person receiving the object,<sup>137</sup> that does not negate the fact that the tangible object still has the five exclusive rights attached to its use.<sup>138</sup> Because these intangible rights are attached to a tangible object, it could be argued that when the state or its entities takes personal property protected by copyright, and then uses the property in an infringing manner without paying the copyright owner, there exists a Taking of the owner's intangible rights in the tangible property without just compensation.<sup>139</sup> Thus, even in situations where the five copyrights themselves are retained by the owner, using

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<sup>131</sup> See MADISON, *supra* note 104, at 102.

<sup>132</sup> 17 U.S.C. § 102.

<sup>133</sup> Epstein, *supra* note 123, at 57.

<sup>134</sup> 17 U.S.C. § 102.

<sup>135</sup> 17 U.S.C. § 102(a)(1).

<sup>136</sup> See 2 PHILIP NICHOLS ET AL., NICHOLS ON EMINENT DOMAIN § 5.03(6)(a) (2021) (noting that intangible interests and property may be acquired through eminent domain, thus requiring compensation, and providing a list of intangible interests in real property that are later addressed).

<sup>137</sup> 17 U.S.C. § 202.

<sup>138</sup> 17 U.S.C. § 106(1)–(5).

<sup>139</sup> Epstein, *supra* note 123, at 57.

Epstein's approach to focus on what was taken instead of retained<sup>140</sup> can offer the copyright owner an avenue for Takings claims.

However, issues abound with viewing the taking of copyright as a taking of an intangible interest on tangible property. Firstly, while copyrights are intangible rights attached to tangible property, arguing that those rights require just compensation when the state takes the tangible property the rights attach to is evidently flawed. For example, compare copyrights to a lien, an intangible interest that attaches to tangible personal property. Like copyright,<sup>141</sup> a lien is subject to the powers of eminent domain.<sup>142</sup> The difference between copyrights and liens on personal property is that liens do not necessarily apply universally to all reproductions of the personal property subject to the lien, while copyrights apply to all reproductions of the copyrighted material.<sup>143</sup> Suppose Nissan produced five Altimas of the same make and model. Depending on what contracts are active at the time of production, a lien could apply to all or none of the five Altimas produced. But if Stephen King publishes the same five copies of *The Shining*, then copyright protection applies to all five copies at the same time, even if there is a contract granting or licensing the copyright to a third-party.<sup>144</sup> A property interest through a lien is limited to what is named in the contract for the lien. Copyright protection has no such limitation.

The second issue is that, even if copyright owners successfully analogize copyrights to intangible interests on personal property that are worthy of just compensation, not everyone agrees with Epstein's views on property. For example, Professor Ghosh has considered how the views of Epstein and other property theorists might apply to intellectual property in the context of the Takings Clause.<sup>145</sup> A court may not adopt Epstein's views, and instead adopt a differing view, such as those that favor balancing efficiency and fairness<sup>146</sup> over what was taken.<sup>147</sup> There is no guarantee such a view will work in the favor of copyright owners.

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<sup>140</sup> *Id.*

<sup>141</sup> Kwall, *supra* note 82, at 703–11.

<sup>142</sup> Nichols, *supra* note 136, § 5.03(6)(c).

<sup>143</sup> 17 U.S.C. § 102.

<sup>144</sup> 17 U.S.C. § 203.

<sup>145</sup> Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637, 665–87 (2000) (analyzing various views on Takings, such as Epstein's theory and a theory of balancing efficiency and fairness, before considering how they function under the Takings Clause).

<sup>146</sup> *Id.* at 675–79. According to Professor Ghosh, under an efficiency/fairness balance, judges determine whether a Taking has occurred by addressing “the state regulation and loss of value to the property owner directly on a case-by-case basis,” but they do not start with “the presumption that private property itself is in special need of protection.”

It is possible these Takings issues could be adverted by making analogies to patents instead of intangible interests. Just as some court holdings imply that patents are personal property that can be subjected to a Taking, the same view can be extended to argue that copyrights are personal property that can be subjected to a Taking.<sup>148</sup> Because American jurisprudence is descended from English law, which includes the provision in *Magna Carta* that demands compensation for the taking of personal property,<sup>149</sup> it is possible viewing copyrights as personal property would change the analysis.

Moreover, the history of American patent law lends the analogy more weight. According to Professor Mossoff, past patent cases included damages being awarded to patentees “for an unauthorized governmental use of his patented invention.”<sup>150</sup> This view on patents prevailed even against sovereign immunity, and placed patent rights within the security of the Takings Clause.<sup>151</sup> It is only with the “bundle of rights” theory of property that this belief began to change.<sup>152</sup> The bundle of rights theory was embraced by the Texas Supreme Court,<sup>153</sup> but in so embracing the theory, they neglected the views of the past that could have better informed their decision. Both patent and copyright are given a special place within the same constitutional clause.<sup>154</sup> It is not unreasonable to analogize the two property interests to determine the protection of copyright under the Takings Clause, nor is the highest court in a single state barred from using older federal decisions to inform its rational on a Takings issue. Thus, the Texas Supreme Court could have relied on prior decisions on patents and Takings when ruling on copyright and Takings.<sup>155</sup> Had the court done so,

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<sup>147</sup> Epstein, *supra* note 123, at 57.

<sup>148</sup> Matthew Zorn & Shane Pennington, *Questions Raised By Laws That Use Copyrighted Standards*, LAW360, <https://www.law360.com/articles/1069389/questions-raised-by-laws-that-use-copyrighted-standards> [<https://perma.cc/E582-AH22>]; see also Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 983 (2015) (stating that “copyrights are usually classified as personal property”).

<sup>149</sup> MAGNA CARTA cl. 28.

<sup>150</sup> Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 703 (2007).

<sup>151</sup> *Id.* at 704–5.

<sup>152</sup> *Id.* at 715–16.

<sup>153</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 775–76 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

<sup>154</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>155</sup> *But see* 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, 18–36 (2007) (arguing that patents are not property that are subject to protection under the Takings Clause, and that the historical record is inconclusive as to whether patents were ever considered property in the nineteenth century).

they may have concluded that copyright infringement was a Taking, just as the old patent cases held patent infringement was a Taking.<sup>156</sup>

Although this analogy has some help from the Supreme Court through their decision in *Allen*,<sup>157</sup> the question of Takings itself remains a mess. Professor Davida Isaacs noted that some commentators have called the Court's decisions on regulator Takings "muddled" and inconsistent in how it describes the requirements necessary for a Taking.<sup>158</sup> Worse still is analyzing a Takings claim against a fair use defense because the jurisprudence on fair use is equally difficult with its elements.<sup>159</sup> Because of the messy nature of the Takings jurisprudence and the additional issue of determining fair use,<sup>160</sup> a decision from the Supreme Court may be of little to no help for state and federal courts. A Takings case involving obvious infringement would be straight forward, but one involving a fair use defense may result in a complicated decision.

The final issue involves the courts themselves and sovereign immunity. If a Takings claim can be raised against the state, then the action is most likely limited to state court, even though copyright is protected by federal law.<sup>161</sup> The reason is that a swath of cases in the United States courts of appeals hold that sovereign immunity bars Takings claims against the state in federal court because the same claims can be brought in state court.<sup>162</sup> Copyright owners may find comfort in knowing that not every circuit has addressed the issue, but some of those same circuits have district courts that are warm to the decisions already rendered in the sister

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<sup>156</sup> Mossoff, *supra* note 150, at 703.

<sup>157</sup> See *Allen v. Cooper*, 140 S. Ct. 994, 1000–07 (using a patent infringement case to decide a copyright infringement case).

<sup>158</sup> Isaacs, *supra* note 155, at 17.

<sup>159</sup> Kwall, *supra* note 82, at 716–17.

<sup>160</sup> 17 U.S.C. § 107.

<sup>161</sup> 17 U.S.C. § 101.

<sup>162</sup> See *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212–14 (10th Cir. 2019) (holding that the Eleventh Amendment barred a Takings claim in federal court because the claim was not first brought in state court, even though the Supreme Court held Takings claims could be brought in federal court without having first been brought in state court); *Jachetta v. United States*, 653 F.3d 898, 909–10 (9th Cir. 2011) (holding that a Takings claim under inverse condemnation must be litigated in state court because the claim was barred from federal court under the Eleventh Amendment); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526–28 (6th Cir. 2004) (holding that although the Fifth Amendment forces states to provide judicial remedies for Takings claims in *state* courts, the Eleventh Amendment bars a Takings claim in *federal* court); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980) (holding the Fifth Amendment may support causes of action against the United States for damages, but the Eleventh Amendment bars similar actions against the state unless the state consents to actions for damage or when Congress abrogates the state's immunity under section five of the Fourteenth Amendment).

circuits.<sup>163</sup> While the Takings Clause may be invoked in federal courts to permit damages against a state employee in her individual capacity,<sup>164</sup> a preliminary injunction is currently the only guaranteed remedy in federal court for copyright infringement actions against the state.<sup>165</sup> An injunction will not help any copyright owner seeking money damages against the state for copyright infringement. If copyright owners cannot utilize the federal courts for a Takings claim, then the best they can hope for is to win in state court on the same argument.<sup>166</sup> However, as *Jim Olive Photography* has demonstrated,<sup>167</sup> copyright owners may fare no better bringing Takings claims in state court than they would in federal court. Thus, the entire exercise becomes blind shooting.

At the current moment, at least four federal circuits have yet to definitively rule on whether sovereign immunity bars a Takings claim against the state in federal court.<sup>168</sup> Regardless, the problems a Takings claim will face with the muddled Takings jurisprudence<sup>169</sup> and fair use considerations<sup>170</sup> shows there is no guarantee a decision on state Takings of copyright in the event of infringement will make sense, let alone be decided. It is likely that if the owners cannot establish that infringement is a Taking, then they will never get the claim through court, assuming the courts will allow the Takings claim to be brought. The uncertainty of the state courts

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<sup>163</sup> See *Cnty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 40–41 (E.D.N.Y. 2020) (noting that while the Second Circuit has not ruled on whether the Eleventh Amendment bars a Fifth Amendment Takings claim, the authority from the sister circuits is overwhelmingly in favor of the bar).

<sup>164</sup> *Id.* at 42–43.

<sup>165</sup> See *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 479–80 (1st Cir. 2009) (finding that the Eleventh Amendment argument raised against the Takings claim was unpersuasive because the cases relied upon for the argument included monetary damages, whereas the case at bar involved a preliminary injunction).

<sup>166</sup> If the Takings claim is initially brought in federal court and dismissed on grounds of sovereign immunity, the copyright owner is not barred from bringing the Takings claim in state court. Sovereign immunity prevents the federal courts from having jurisdiction over the Takings claims, and lack of jurisdiction is grounds for dismissal under FED. R. CIV. P. 12(b)(1)–(2). The RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a) states that when a court’s ruling on a claim is a judgment of dismissal for lack of jurisdiction, a plaintiff is not barred from another action on the same claim. Thus, a federal court dismissing a Takings claim for lack of jurisdiction under sovereign immunity will not prevent the copyright owner from bringing the same claim in state court.

<sup>167</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 776–77 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

<sup>168</sup> Those Circuits are the First, the Second, the Third, and the Eighth. See J. P. Burleigh, *Can State Governments Claim Sovereign Immunity in Takings Cases?*, U. CIN. L. REV. (Jan. 15, 2020), <https://uclawreview.org/2020/01/15/can-state-governments-claim-sovereign-immunity-in-takings-cases/> [<https://perma.cc/R5QM-B7RR>].

<sup>169</sup> See Isaacs, *supra* note 155, at 17.

<sup>170</sup> See Kwall, *supra* note 82, at 721–53.



first allowing and then ruling favorable on a Takings claim for copyright owners seeking a monetary remedy for state infringement does not seem like the best gamble for the owners; and yet, it is the state level where copyright owners should focus their time to pursue a remedy.

### III. COPYRIGHT AND FEDERALISM: THE SOLUTION TO THE ISSUE.

There is some pessimism regarding monetary remedies for state copyright infringement. Professor Runhua Wang writes that *Allen* creates an imbalance in bargaining power because copyright owners are now barred from suing the state for infringement.<sup>171</sup> Thus, copyright owners are left to sue in state courts, where the laws are inconsistent and the cases may be unsuccessful.<sup>172</sup> Furthermore, while *Allen* permits private parties to litigate in state court, sovereign immunity can still protect state entities from litigation after they have engaged in copyright infringement.<sup>173</sup> This problem was illustrated by *Jim Olive*, leaving at best injunctive relief as the sole remedy available in state court.<sup>174</sup> However, none of this means copyright owners cannot convince the legislature to pass laws in their favor. Rather, the rulings of *Allen* and *Jim Olive* show that if copyright owners want to hold states and state entities liable for infringement, they need a better legal theory and strategy to get around sovereign immunity.

#### A. Congress: Where the National Power Resides.

The legal strategy starts with location, and the most obvious place to look is to the federal government. Although the Supreme Court struck down CRCA because Congress had no basis on which to justify an abdication of state sovereign immunity,<sup>175</sup> that does not mean that other laws allowing private citizens to bring action against states for copyright infringement cannot be made. Copyright owners can lobby Congress to pass another statute similar to the CRCA, and Congress could again attempt to justify it through the Due Process Clause of the Fourteenth Amendment. However, whether a Due Process justification is successful is an open question because if the states bring the case to the Supreme Court again, *Allen* may return as the guiding precedent and strike the law down.<sup>176</sup> Congress will need proof that copyrights are under threat by states or state

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<sup>171</sup> Runhua Wang, *Modify State "Piracy" After Allen: Introducing Apology to the U.S. Copyright Regime*, 69 BUFF. L. REV. 485, 494 (2021).

<sup>172</sup> *Id.* at 500–01.

<sup>173</sup> *Id.* at 508–09, 516.

<sup>174</sup> Bloom, *supra* note 14.

<sup>175</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

<sup>176</sup> *Id.* at 1003–07.

entities because it was that lack of adequate proof that led the Court to strike down CRCA.<sup>177</sup> Absent sufficient evidence of states infringing on copyrights, any new federal legislation would likely require a different justification. While the U.S. Copyright Office has provided their report on state infringement to Congress, their inconclusive findings leave future legislation with questionable odds of survival.<sup>178</sup>

If the evidence of state copyright infringement is wanting, then a new legal theory is required to justify further Congressional legislation. With the right legal minds and maneuvering, Congress could claim that new legislation abrogating sovereign immunity for copyright infringement is justified through the Takings Clause as incorporated by the Due Process Clause. Kwall states that appealing to sovereign immunity “to preclude [copyright owners] from suing states for damages in federal court violate[s] the fifth amendment’s [Takings Clause], which binds the states through the fourteenth amendment.”<sup>179</sup> The Takings Clause, if not by name, has in principle applied to the states through the Due Process Clause for over a hundred years,<sup>180</sup> and the applicability of the Clause to copyright has some support from the courts of appeals.<sup>181</sup> If copyright falls under the power of eminent domain at both the state and federal level,<sup>182</sup> and the Fourteenth Amendment makes the Takings Clause applicable to the states, then it appears Congress has fertile grounds for drafting new legislation that allows copyright owners to sue states for copyright infringement on a theory suggesting state infringement amounts to a Taking without just compensation.

Ideally, the theory that the Takings Clause could justify abrogating sovereign immunity in copyright infringement cases would work; however, there remains no guarantee that the legislation would survive scrutiny from the Supreme Court. If new legislation cannot survive before the Court, then the legal strategy for copyright owners is to abandon the pursuit of new legislation and instead lobby for an amendment to existing legislation. Professor Michael Landau, for example, proposes an addition to 28 U.S.C.

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<sup>177</sup> *Id.* at 1004–07.

<sup>178</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 72–73.

<sup>179</sup> Kwall, *supra* note 82, at 755.

<sup>180</sup> *See Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (“In our opinion, a judgment of a state court, even if it be authorized by statute, *whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner*, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.”) (emphasis added).

<sup>181</sup> *See Lane v. First Nat’l Bank of Bos.*, 871 F.2d 166, 174 (1st Cir. 1989); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983).

<sup>182</sup> *See Kwall, supra* note 82, at 703–11.

§ 1338 that would grant the federal courts jurisdiction over cases where states or arms of the state may be sued by private persons when intellectual property rights are violated or taken.<sup>183</sup> His proposal invokes just compensation language found in the Takings Clause and would prevent sovereign immunity from barring the suit.<sup>184</sup> All Congress would have to do is specify the violations of intellectual property rights and then expressly use the Fourteenth Amendment while drafting the proposed provision.<sup>185</sup>

Landau's idea could work because it would make the legislation distinguishable from CRCA, since his proposal expands the jurisdiction of the federal courts rather than the protections of copyright. Expanding jurisdiction would making it harder to strike down the law under the current precedent governing state copyright infringement,<sup>186</sup> but amendments to existing laws face the same challenges as the creation of new ones. Landau admits that under a constitutional immunity theory of the Eleventh Amendment, Congress "lacks . . . the power to change the scope of suits permissible in federal court."<sup>187</sup> While sovereign immunity may be waived,<sup>188</sup> there is nothing in the Constitution that allows Congress to waive sovereign immunity on behalf of the states, and it seems that under a constitutional immunity theory, the case for waiver would need to be strong. If the Court took to this theory of the Eleventh Amendment, Landau's proposed addition to Section 1338 would need strong teeth or else it would likely fall because it attempts to expand the scope of permissible suits and simultaneously waive immunity on behalf of the states.<sup>189</sup>

Another issue with relying on Congress is their current record on addressing state infringement issues. Congress has remained silent on legislation concerning patent infringement since *Florida Prepaid* struck down regulations against states for patent infringement.<sup>190</sup> It seems unlikely they will become vocal now that *Allen* has done the same for copyright infringement.<sup>191</sup> If Congress has not moved to make or amend legislation to protect patents since the turn of the century, it is unlikely they will move to

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<sup>183</sup> Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 513, 563–64 (2012).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 563.

<sup>186</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1004–07 (2020).

<sup>187</sup> Landau, *supra* note 183, at 526.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 563–564 (“To stop . . . violations of federal patent, copyright, and trademark laws, and to prevent the taking of a license in patent, copyright, and trademark without paying just compensation, the jurisdiction of the federal court shall include States, state instrumentalities, state employees, and persons acting under color of state law.”).

<sup>190</sup> Wang, *supra* note 171, at 488.

<sup>191</sup> *Allen*, 140 S. Ct. at 1007.

protect copyrights within the decade. Lobbying Congress may spur legislatures, but it may not move enough of them for decisive Congressional action.

From appearances, copyright owners cannot successfully lobby for Congressional legislation of any kind. If they lobby Congress at all, it may have to be aimed at a different Article I power. Landau suggests an additional target for lobbying, stating that, “Congress should flex its muscle through its spending power,” and place a waiver of sovereign immunity condition on federal funding.<sup>192</sup> Professor Ghosh is sympathetic to this approach.<sup>193</sup> While I think Landau is correct that money will perk the ears of the state, I do not think that using the Congressional purse is necessarily the best road to travel. Congressional use of the spending power against the states in the manner Landau suggests is nothing more than a bully tactic that does not present a positive appeal to the interests of the states. There is an additional issue of determining *what* type of funding should be withheld to provoke the states to waive immunity. Congress conditioned a state’s reception of federal highway funding on the state’s minimum age for drinking,<sup>194</sup> but there is a connection between the law and interstate travel.<sup>195</sup> Landau neither suggests what funding should be withheld nor which funding relates to state copyright infringement.

It is true that legislation seems the best path available for copyright owners, and that the waiver of sovereign immunity is the way forward; however, the waiver should not come from the undue influence of the Congressional purse. Instead, the waiver should come from the people of the states.

*B. State Legislation: Where the People Speak the Loudest.*

The alternative to federal action is state action. At the smallest levels, the people speak loudest; at the largest, they are easily spoken over. Copyright owners can take advantage of this political paradox and seek legislation on the state level that waives state sovereign immunity. Even the U.S. Copyright Office listed state waiver of immunity in state court as a possible remedy that remains available to solve the issue of state copyright infringement.<sup>196</sup> A list of all 50 states and the District of Columbia was attached to the report, complete with the power to waive sovereign

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<sup>192</sup> Landau, *supra* note 183, at 561.

<sup>193</sup> Ghosh, *supra* note 145, at 665.

<sup>194</sup> 23 U.S.C. § 158(a).

<sup>195</sup> The Supreme Court drew this connection in the case upholding the statute. *See South Dakota v. Dole*, 483 U.S. 203, 207–09 (1987).

<sup>196</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 60.

immunity, the available claims, and the type of forum considered for each individual location.<sup>197</sup>

The waiver of sovereign immunity could be legislated for specific entities, if not for the whole state. There is some state legislation that includes an implied acknowledgement that the state has the power to allow copyright infringement claims to be brought against state universities<sup>198</sup> and to waive Eleventh Amendment protections for public universities.<sup>199</sup> If states have the power to waive sovereign immunity for copyright claims, but such power has yet to be exercised through state legislation, it seems there remains a legislative avenue available to copyright owners that allows them to avoid running afoul of the Eleventh Amendment. The owners can lobby the local state governments to pass laws subjecting the state to copyright infringement claims when the states or their entities intentionally engage in copyright infringement.

If state laws are passed that allow for copyright infringement claims to be brought against the state or its entities, then there would not be an issue for copyright owners like Fredrick Allen or Jim Olive. The Eleventh Amendment only says that suits between states and citizens of other states will not come under the jurisdiction of the United States.<sup>200</sup> It does not say a state cannot consent to being subjected to some kind of lawsuit, nor that a state cannot revoke sovereign immunity for itself or its agents under certain circumstances. Because infringement in the current cases is at the hands of state universities,<sup>201</sup> I propose that copyright owners lobby for legislation that reads as follows:

No public college or university shall be immune from monetary damages arising out of claims for copyright infringement, should the infringing act be done for the purposes of benefitting the college or university monetarily,

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<sup>197</sup> *Id.* at E-1–E-11.

<sup>198</sup> *E.g.* TENN. CODE ANN. § 49-7-142(b)(4) (“Nothing in this section shall . . . [s]ubject public institutions of higher education to any suit, whether for monetary damages, injunctive relief or any cause of action whatsoever. . . .”).

<sup>199</sup> *E.g.* TENN. CODE ANN. § 49-7-142(b)(5) (“Nothing in this section shall . . . [b]e deemed or construed to waive or abrogate in any way the sovereign immunity of the state, the public institutions of higher education, or any officer or employee of the state or the public institutions of higher education or waive or abrogate in any way the immunity of the state, the public institutions of higher education, or any officer or employee of the state or the public institution of higher education from suit under the eleventh amendment to the United States constitution.”).

<sup>200</sup> U.S. CONST. amend. XI.

<sup>201</sup> *E.g.* *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 777 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022) (the University of Houston); *Can. Hockey LLC v. Tex. A&M Univ. Athletic Dep’t*, 484 F. Supp. 3d 448, 452 (S.D. Tex. 2020), *aff’d*, No. 20-20503, 2022 U.S. App. LEXIS 3976 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603) (Texas A&M University Athletic Department).

administratively, or in any other fashion that might bring benefits to the school as if it were a private business.

The legislation does not need to be worded as I have presented it, nor does it need to be limited to copyright infringement because patent owners can join the lobby effort. The two intellectual property owners share the same Constitutional clause,<sup>202</sup> and both suffered defeat at the hands of the state before the Supreme Court.<sup>203</sup> Those facts alone give both groups reason to lobby together, but even if copyright owners lobby alone, the legislation they aim for must be limited to two things: It must be aimed at state colleges and universities, and it must be aimed at the business-like behavior the colleges and universities engage in when they infringe upon copyrights.

The reasons for a specific and narrow aim in the legislation are strategic because the lobby efforts require a legal strategy as well as a legal theory if copyright owners are to protect their copyrights from state infringement. First, the copyright owners must remember who they are dealing with when they lobby the state.<sup>204</sup> The target audience in the lobbying effort are the members of the state legislature (henceforth the “assembly members”). Every state legislature consists of multiple people with multiple interests, and many of them may not want to waive immunity for the entire state. However, the same people may be warmer to a specific waiver aimed at specific state entities, and such a lobbying effort will allow the copyright owners to concentrate their efforts when they lobby the legislature.<sup>205</sup> If the copyright owners aim too broadly, then the lobby efforts will likely be scattered and poorly organized. Concentrated aim will allow them to sharpen their arguments before the state legislatures and will present the assembly members with an idea that does not threaten the state as a whole but only certain state entities.

Second, specific legislation is important because the copyright owners must remember that to lobby is to engage in some type of adverse action. On the other side is an opponent who does not want the legislation to get through. For waiver of sovereign immunity, the opponent is the state and its entities, and having knowledge of what both will or will not do is

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<sup>202</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>203</sup> Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999) (patent); Allen v. Cooper, 140 S. Ct. 944, 1007 (2020) (copyright).

<sup>204</sup> See ROBERT GREENE, THE 48 LAWS OF POWER 137–44 (1998) (failure to know who it is you are dealing with consistently results in blunders, from the mundane to the catastrophic).

<sup>205</sup> See *id.* at 171–177 (concentration on a single point is generally a good principle for achieving a desired outcome because lacking concentration can lead to ruin).

vital.<sup>206</sup> The likelihood that assembly members will favor a total waiver is highly unlikely because copyright owners are likely to face off against both the state and those entities who might be interested in retaining immunity for copyright infringement, such as the state Department of Education.<sup>207</sup> If a total waiver were granted, then more copyright owners could dip their hands into the state wallet for money damages whenever they sue the state or state entity for monetary damages. Thus, a total waiver is likely a battle copyright owners will lose because the assembly members are unlikely to risk what money the state possesses to so many potential copyright infringement lawsuits.

However, waiving immunity for public colleges and universities limits the copyright owners' opponents to public universities and their employees, both of whom appear to be the most predacious state infringers. As part of their work with the U.S. Copyright Office,<sup>208</sup> the Copyright Alliance issued a survey to copyright owners, and the respondents named at least twenty-six different state universities as the state entity that infringed on their copyright.<sup>209</sup> The evidence points almost exclusively to state colleges and universities as the principal copyright infringers, making them the ideal targets for waiver. This evidence is a useful lobbying tool and makes a specific waiver an easier battle for copyright owners, and thus the one they should fight.<sup>210</sup> "Easier" does not mean copyright owners are certain to win; however, if the specific evidence is presented to every assembly member, copyright owners can force the issue of state infringement upon the members by demanding they address the issue.<sup>211</sup> A general waiver does not appear to enjoy the same luxury of such forceful evidence.<sup>212</sup>

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<sup>206</sup> See ROBERT GREENE, *THE 33 STRATEGIES OF WAR* 165–178 (2006) (victory over an opponent requires knowledge of who he is, including his interests, movements, and habits); see also SUN-TZU, *THE ART OF WAR* 22 (John Minford trans., Penguin Classics 2014) (5th-Century BC) ("Know your enemy . . . and victory is never in doubt.").

<sup>207</sup> *E.g.* *Escholar LLC v. Neb. Dep't of Educ.*, 497 F. Supp. 3d 414, 419–21 (D. Neb. 2020) (Nebraska Department of Education).

<sup>208</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 31 n.175.

<sup>209</sup> *Copyright Alliance Survey Results*, COPYRIGHT ALLIANCE 1, 13–14 (Jan. 15, 2021) <https://www.copyright.gov/policy/state-sovereign-immunity/additional-record-materials/copyright-alliance-response-jan-15-2021.pdf> [<https://perma.cc/TK5Q-A8S7>].

<sup>210</sup> See ROBERT GREENE, *THE 33 STRATEGIES OF WAR* 97–122 (2006) (failure to economically pick battles and effectively use strengths and weaknesses will cause more harm than good for long term goals); see also SUN-TZU, *THE ART OF WAR* 11 (John Minford trans., Penguin Classics 2014) (5th-Century BC) ("In war, victory should be swift. If victory is slow, men tire, morale sags.").

<sup>211</sup> See ROBERT GREENE, *THE 48 LAWS OF POWER* 62–68 (1998) (although it is better to make others come to you, at times a sudden strike that forces the issue is the better move against an opponent).

<sup>212</sup> The waiver will still pose a threat to state monetary reserves. The Eleventh Amendment exists because the Supreme Court held a state could be sued in federal court for money damages. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793) (opinion of Jay, C.J.). While the state can benefit

Furthermore, it is within the best interests of the copyright owners to lobby for legislation that is more likely to pass because it advocates for reform to the legal system without demanding too much all at once. The assembly members are human beings. While human beings may recognize the need to change how a system operates, they are simultaneously resistant when too much change is demanded all at once because change is accompanied by the unknown, and human beings prefer the familiar over the unknown.<sup>213</sup> A demand for total waiver demands immediate change without the comforts of what is familiar and would likely meet resistance because of the multitude of uncertainties a total waiver of immunity would bring. For example, there would exist concerns over what happens when states use copyright material in accordance with fair use.<sup>214</sup> If copyrighted material is used for education, research, or criticism, fair use is meant to protect the user.<sup>215</sup> A total waiver may change the system so much that it floods the courts with litigation in cases where the state engages in fair use.

A specific waiver focused on universities and their business-like use of copyright has no such challenge. Commercial use and the economic effects use has on copyrighted material are factors in a fair use analysis.<sup>216</sup> The specific waiver will focus on those two factors in relation to the university's infringing behavior. Thus, the familiar fair use protections<sup>217</sup> remains while gradual change occurs. The uncertain venture can be painted in familiar terms because copyright owners can take a page from Jim Olive's playbook while lobbying the legislature and claim infringement is much like a Taking.<sup>218</sup> While the same could be done in advocating for a total waiver, the evidence suggests that state schools and universities are the main culprits for copyright infringement,<sup>219</sup> and without more evidence of infringement from the states themselves or other state entities, a total waiver of state sovereign immunity would remain a radical change that

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from waiving immunity for public universities, the benefits from the waiver are largely rhetorical due to a lack of evidence.

<sup>213</sup> See ROBERT GREENE, *THE 48 LAWS OF POWER* 392–99 (1998) (when attempting to instigate change, it is better to appeal to the familiar and change things gradually rather than executing reform immediately); see also NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 182 (The Modern Library 1940) (1531-1532) (“He who desires or attempts to reform the government of a state, and wishes to have it accepted and capable of maintaining itself to the satisfaction of everybody, must at least retain the semblance of the old forms. . . .”).

<sup>214</sup> 17 U.S.C. § 107.

<sup>215</sup> *Id.*

<sup>216</sup> 17 U.S.C. § 107(1), (4).

<sup>217</sup> *Id.*

<sup>218</sup> *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 770 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022).

<sup>219</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 33; Copyright Alliance, *supra* note 208, at 13–14.



seems unnecessary. Thus, a specific waiver presented in familiar terms is the safer road because it allows for reform in some areas without reforming the state into completely unknown territory.

The final reason why copyright owners should aim only at the state colleges and universities is because it allows them to stand on the moral high ground when they lobby.<sup>220</sup> The arguments that copyright owners present against state universities will be much more effective than any broad argument against the state because of how the universities have behaved. In *Jim Olive*, the University of Houston used Olive's photograph to advertise the business school;<sup>221</sup> in *Canada Hockey LLC v. Texas A&M University Athletic Department*, Texas A&M used an unpublished chapter of a writer's book to help enforce their 12th Man trademark.<sup>222</sup> These are the actions of businesses, not institutions of learning. If a business engages in copyright infringement, it would face damages for violating one of the five exclusive rights.<sup>223</sup> Colleges and universities should be treated as private businesses when they deliberately infringe on copyrights in a business-like fashion; however, sovereign immunity allows state colleges and universities to get away with such predacious behavior<sup>224</sup> while private universities are left open.

To illustrate, suppose Vanderbilt University and the University of Tennessee infringe on the same copyrighted material. In that situation, Vanderbilt will be targeted, even if the University of Tennessee caused more monetary damage, simply because Vanderbilt is a private university unprotected by sovereign immunity. Copyright owners can present these disparities to the assembly members to show a lack of equity in the legal system for copyright infringement. Presenting the disparity will publicly present copyright owners as victims of unfair practices permitted by the state, which will allow copyright owners to garner public support and bolster the lobby effort. If done effectively, the assembly members will be left with two options: Allow the predacious behavior of state colleges and universities to go without access to a monetary remedy, or do the right

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<sup>220</sup> See ROBERT GREENE, *THE 33 STRATEGIES OF WAR* 331–41 (occupying the moral high ground can garner support from the public against one's antagonist, when the issue is framed correctly around virtue against viciousness); see also THOMAS HOBBS, *LEVIATHAN* 90 (Edwin Curley trans., Hackett Publishing 1994) (1651) (“[S]uccessful wickedness hath obtained the name virtue, and some . . . have allowed it when it is for the getting of a kingdom.”).

<sup>221</sup> *Jim Olive*, 624 S.W.3d at 768.

<sup>222</sup> *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep't*, No. 20-20503, 2021 U.S. App. LEXIS 27012, at \*2–5 (5th Cir. Sept. 8, 2021), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603).

<sup>223</sup> 17 U.S.C. § 504.

<sup>224</sup> See *Can. Hockey*, 2022 U.S. App. LEXIS 3976, at \*17–20.

thing and waive sovereign immunity for those state colleges and universities that engage in such behavior.

There might be a concern that failing to go for a total waiver is refusing to deal a final blow to those states and state entities engaged in copyright infringement. While it is better to defeat an opponent totally,<sup>225</sup> the plan of attack depends on the opponent and the location. It may be that some assembly members are warmer to a broader waiver than what I propose because of how important copyright is to their state and local economies,<sup>226</sup> while other assembly members might not see a total waiver as a necessary move because of how little copyright contributes to the state economy.<sup>227</sup> In states where there is a greater interest in protecting copyrights and copyright owners, a broader waiver may be called for, while states with less of an interest may not find a broad waiver appealing. However, the evidence of infringement by state colleges and universities appears to be sufficient enough to have a broader appeal in most, if not all, of the states because infringement by state colleges and universities is prevalent.<sup>228</sup> Location may allow for a broader waiver, but specific waivers are more likely to be effective in each state. Regardless, the specific waiver is only a suggestion to begin an effective lobby effort in each state to secure ways to check the predations of public universities, and is thus a suggestion that would defeat the nationwide opponent totally.<sup>229</sup> However, if copyright owners perceive that the assembly members would be willing to waive immunity for other state entities, then copyright owners can attempt to lobby for those waivers.

### *C. The Road Ahead: What Challenges Exist for Copyright and Federalism?*

While the arguments and approach to state waiver are not exhaustive, one question remains: Can waiver of sovereign immunity by the states survive scrutiny? Even if state legislatures are somehow convinced by the

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<sup>225</sup> See ROBERT GREENE, *THE 48 LAWS OF POWER* 107–14 (2006) (when combating an opponent, it is better to crush them totally rather than show them mercy); see also NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 9 (E. R. P. Vincent, ed., Luigi Ricci, trans., The Modern Library 1940) (1531-1532) (“For it must be noted, that men must either be caressed or else annihilated; they will revenge themselves for small injuries, but cannot do so for great ones. . .”).

<sup>226</sup> E.g. *New York*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/resources/states/new-york/> [<https://perma.cc/U9QC-K27J>]. In the state of New York, the entertainment industry contributes \$9 billion and creates 130,000 full-time jobs for the local state economy. *Id.*

<sup>227</sup> E.g. *Wyoming*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/resources/states/wyoming/> [<https://perma.cc/YD7F-5WPD>]. The largest demographic of copyright owners in the state of Wyoming is graphic designers at 300 people, and the state has nearly 11,000 jobs involving copyright. *Id.*

<sup>228</sup> U.S. COPYRIGHT OFFICE, *supra* note 2, at 33; Copyright Alliance, *supra* note 209, at 13–14.

<sup>229</sup> *Supra* note 225.

lobbying attempts of copyright owners, will the laws they pass survive long enough to make a difference? Here, I address some, but by no means all of those concerns.

### 1. *Is it Constitutional?*

The initial issue that arises is the constitutionality of state waiver for copyright infringement. If the states do not have the constitutional power to waive their own immunity, then lobbying for waiver at the state level is a lost cause. The answer will likely turn on the Constitutional text and the case law on the issue.

The Eleventh Amendment is silent on state waiver of sovereign immunity;<sup>230</sup> however, the Tenth Amendment, by reserving power for the state provided that those powers were not first “delegated to the United States by the Constitution, nor prohibited by it to the States,”<sup>231</sup> helps establish the bounds within which states can work regarding sovereign immunity. The Constitution does not delegate the power to waiving state sovereign immunity to the United States, nor does it forbid states from doing it themselves. Additionally, the dissent in *Florida Prepaid* concluded that the Supreme Court granted the states the power to waive their own immunity for patent infringement cases.<sup>232</sup> Thus, the power exists, both by the Constitutional text and case law. Because the Court heavily relied on *Florida Prepaid* when deciding *Allen*,<sup>233</sup> it is no stretch to suggest the principle that applied to patent infringement also applies to copyright infringement. Therefore, state waiver of sovereign immunity for copyright infringement is unlikely to conflict with the United States Constitution.

### 2. *What About the Dormant Commerce Clause?*

The next issue will be Dormant Commerce Clause concerns. Suppose Pennsylvania waives immunity for copyright infringement, but New York does not. Pennsylvania State then infringes on a New Yorker’s copyrighted work, and the New Yorker sues Pennsylvania State. The survival of the waiver hinges on whether the statute violates the Dormant Commerce Clause.

Under the current Dormant Commerce Clause jurisprudence, the party contesting the waiver will have to prove that the statute in question

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<sup>230</sup> U.S. CONST. amend. XI.

<sup>231</sup> U.S. Const. amend. X.

<sup>232</sup> See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. at 664–65 (Stevens, J., dissenting) (“[T]oday, this Court once again demonstrates itself to be the champion of States’ rights. In this case, it seeks to guarantee rights the States themselves did not express any particular desire in possessing: during Congress’ hearings on the Patent Remedy Act, although invited to do so, the States chose not to testify in opposition to the abrogation of their immunity.”).

<sup>233</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

“discriminates against out-of-state goods or nonresident economic actors.”<sup>234</sup> Copyrighted materials are goods because copyright attaches to things such as literary and musical works,<sup>235</sup> all of which can be sold within and across state lines. The economic actors involved with the copyrighted material would be the buyers and sellers of the goods as well as the copyright owner. Because profits can be recovered as part of the damages for copyright infringement,<sup>236</sup> and the impact on the potential market is a factor that is considered in a fair use analysis,<sup>237</sup> there is a strong case that copyright and copyright infringement can play a part in interstate commerce.

However, challenging state waiver for copyright infringement through a Dormant Commerce Clause argument is problematic, primarily because a state waiver of sovereign immunity for copyright infringement discriminates against no one, as is required under a Dormant Commerce Clause analysis.<sup>238</sup> Even though the Eleventh Amendment bars diversity actions where the state is a party,<sup>239</sup> the waiver of immunity should allow a New Yorker to sue Pennsylvania State for copyright infringement as easily as it would allow a Pennsylvanian to do the same. State waiver would not know a resident from a nonresident, or differentiate between the copyrighted material coming from one state and the copyrighted material coming from another state. All copyrights and copyrighted material for every copyright owner is protected at all times with a state waiver of sovereign immunity. Thus, the Dormant Commerce Clause would not be violated with a waiver of sovereign immunity because discrimination between state residents and state goods does not exist.<sup>240</sup>

### 3. *Will Waiver Limit Educational Use for Public Universities?*

Waiving immunity for public universities in copyright infringement cases will cause concern about how it will affect the use of copyright material in education. While this concern is warranted because educational institutions use copyrighted material, using copyright material for educational purposes is already covered by the fair use section of the Copyright Act.<sup>241</sup> If a state law attempts to waive immunity for state

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<sup>234</sup> *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (citations omitted).

<sup>235</sup> 17 U.S.C. § 102(a)(1)–(2).

<sup>236</sup> 17 U.S.C. § 504(b).

<sup>237</sup> 17 U.S.C. § 107(4).

<sup>238</sup> *See Tenn. Wine & Spirits*, 139 S. Ct. at 2461.

<sup>239</sup> U.S. CONST. amend. XI.

<sup>240</sup> *See Tenn. Wine & Spirits*, 139 S. Ct. at 2461.

<sup>241</sup> *See* 17 U.S.C. § 107.

universities in cases where copyrighted material is used for educational purposes, the state law would likely be preempted by the federal statute.<sup>242</sup>

Supposing, however, that the federal law will not preempt the state waiver, the state law can explicitly assure that universities are safe to use copyright material for educational purposes, so long as the fair use factors are satisfied.<sup>243</sup> Tennessee, for example, provided that assurance when it passed a law concerning the use of copyrighted material by students at universities that have student residential computer networks.<sup>244</sup> In fact, copyright owners should advocate for an explicit provision in the waiver that protects universities from lawsuits where copyrighted material is used for educational purposes. Not only will copyright owners address the concerns over educational use, but they will also retain the moral high ground.<sup>245</sup> They will present themselves as supports of education, not opponents to it. Thus, including an explicit provision that protects educational use will both address concerns about limiting use of copyrighted material in education and bolster the lobby effort.

#### 4. *Will State Waiver of Immunity Survive State Level Scrutiny?*

The final hurdle is the survival of state waiver at the state level. Assuming the state decides to waive sovereign immunity for state copyright infringement, and said waiver survives federal scrutiny, the state or state entities being sued could still challenge the waiver in state court. There are some states that have waived sovereign immunity for certain cases by way of their constitution.<sup>246</sup> Others states have waived immunity by statute for a limited time.<sup>247</sup> However, there are states with constitutional provisions specifying no waiver of immunity,<sup>248</sup> with such provisions being recognized by both state courts<sup>249</sup> and federal courts.<sup>250</sup> Thus, while some

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<sup>242</sup> See U.S. CONST. art. VI, cl. 2 (supremacy clause).

<sup>243</sup> See 17 U.S.C. § 107(1)–(4).

<sup>244</sup> TENN. CODE ANN. § 49-7-142(b)(2) (“Nothing in this section shall . . . [r]estrict an educational institution’s use of copyrighted material under 17 U.S.C. § 107. . .”).

<sup>245</sup> *Supra* note 220.

<sup>246</sup> See, e.g., TEX. CONST. art. I, § 17(a)(1)(A) (“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . . and only if the taking, damage, or destruction is for the ownership, use, and enjoyment of the property . . . by the State, a political subdivision of the State, or the public at large. . .”). The Texas Supreme Court has ruled this is a waiver of state sovereign immunity in state court for Takings claims. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

<sup>247</sup> See Fla. Stat. § 11.065(1) (2021) (“No claims against the state shall be presented to the Legislature more than 4 years after the cause for relief accrued.”).

<sup>248</sup> See ALA. CONST. art. I, § 14 (“[T]he State of Alabama shall never be made a defendant in any court of law or equity.”).

<sup>249</sup> See *Aland v. Graham*, 250 So. 2d 677, 681 (Ala. 1971) (holding that the plaintiff had no legal right to bring a suit against the state under the Alabama Constitution).

states will have an easier time waiving immunity by statute, others may have to waive immunity by state constitutional amendment.

Constitutional amendment will be difficult, but the price of federalism is that each state retains the power to choose how to govern their own people. Copyright owners will have to contend with the respective jurisdictions and choose their attacks wisely. If all else fails, copyright owners can flee the states that will not protect their copyrights against state universities and deprive those states of any monetary or material benefit that may result from the copyrighted material. A survey of the cases involving state schools infringing on copyrights suggests the various copyright owners can impact state economies through flight. Of the published cases involving universities and educational institutions over the past twenty years, at least three involved photographers,<sup>251</sup> one involved a writer,<sup>252</sup> four involved businesses and organizations,<sup>253</sup> and two involved school employees.<sup>254</sup> In each case, the plaintiffs held copyrighted material and alleged copyright infringement from the universities and educational institutions. Broken down, each group individually contributes to the economies of the states where they work, and in some cases provide direct benefit to the schools as employees.

If copyright owners leave or avoid the states that do not protect their copyrights from the predations of universities, the state economies would be negatively affected. It would be hitting the states in the pocketbook as Landau suggested,<sup>255</sup> but the attack will come from potential revenue generated by state taxes and the state economy, not federal withholding of funds. It would also appeal to the state's self-interest because a state is interested in keeping and increasing its tax base so as to accumulate more

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<sup>250</sup> See *Melton v. Abston*, 841 F.3d 1207, 1233–34 (11th Cir. 2016) (holding that the defendants, a sheriff and a deputy, were immune from suit under the Eleventh Amendment because they benefited from immunity under Alabama law).

<sup>251</sup> *Dermansky v. Univ. of Colo.*, 445 F. Supp. 3d 1218, 1220 (D. Colo. 2020); *Reiner v. Canale*, 301 F. Supp. 3d 727, 730 (E.D. Mich. 2018); *Coyle v. Univ. of Ky.*, 2 F. Supp. 3d 1014, 1016 (E.D. Ky. 2014).

<sup>252</sup> *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000).

<sup>253</sup> *Smith v. Hous. Indep. Sch. Dist.*, 229 F. Supp. 3d 571, 574–75 (S.D. Tex. 2017) (clothing business); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents*, 633 F.3d 1297, 1301–06 (11th Cir. 2011) (nonprofit corporation licensing pharmaceuticals); *Mktg. Info. Masters, Inc. v. Bd. of Trs.*, 552 F. Supp. 2d 1088, 1091 (S.D. Cal. 2008) (corporation performing marketing research studies); *InfoMath, Inc. v. Univ. of Ark.*, 633 F. Supp. 2d 674, 676–77 (E.D. Ark. 2007) (education course creators).

<sup>254</sup> *Nettleman v. Fla. Atlantic Univ. Bd. of Trs.*, 288 F. Supp. 3d 1303, 1305–07 (S.D. Fla. 2017) (Surveying engineer and Professor of Geomatics); *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 985 (D. Minn. 2014) (cancer research scientist).

<sup>255</sup> Landau, *supra* note 183, at 561.

tax revenue.<sup>256</sup> The threat of the state's finances being negatively impacted by the exodus of copyright owners without a state waiver is great leverage. Alternatively, a waiver could positively impact state revenue because it would be a signal and invitation to other copyright owners to move to the state for the favorable copyright protections. This type of appeal to state financial interests is better than the use of the Congressional purse.

It is true that state abrogation of sovereign immunity for copyright infringement is uncertain. On the one hand, the states may see the need for such reform because state universities are infringing copyrights in business-like fashion while simultaneously hiding behind sovereign immunity.<sup>257</sup> On the other hand, the state may want to avoid such reform because there are times where they may be the infringer.<sup>258</sup> While this makes the likelihood of state legislation a tossup, it demonstrates a need for specific waiver over total waiver, rather than an insurmountable challenge to passing any waiver. The states may be less inclined to waive immunity for each and every portion of the state; however, they may be warm to waiving immunity in those circumstances where state entities abuse the privilege of sovereign immunity while infringing on copyrights. If copyright owners tailor their arguments accordingly, the odds of passing legislation may not only lean in their favor, but it may even survive judicial scrutiny at the state level.<sup>259</sup>

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<sup>256</sup> See ROBERT GREENE, *THE 48 LAWS OF POWER* 95–100 (1998) (although you can appeal to the charity and goodwill of people in power when asking for their help, obtaining their aid generally requires an appeal to their self-interest). While I acknowledge Greene's law could work well with a strategy demanding a total waiver of sovereign immunity, I believe that the demand for total waiver inevitably cuts against the state's self-interest because a total waiver allows the state and any of its entities to be sued for copyright infringement, be it from citizens or non-citizens, and that does more to threaten the state's revenue than does the loss of the state's possible copyright industry; however, I will admit that appealing to the state's economic self-interest could work when lobbying for total waiver in some states.

<sup>257</sup> See *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 768 (Tex. 2021) *cert. denied*, 142 S. Ct. 1361 (2022); *Can. Hockey LLC v. Tex. A&M Univ. Ath. Dep't*, 484 F. Supp. 3d 448, 452 (S.D. Tex. 2020), *aff'd*, No. 20-20503, 2022 U.S. App. LEXIS 3976 (5th Cir. Feb. 14, 2022), *cert. denied*, 91 U.S.L.W. 3066 (Oct. 3, 2022) (No. 21-1603).

<sup>258</sup> *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020).

<sup>259</sup> The three issues above are by no means the only ones that could arise with the waiver of sovereign immunity. Other issues include the effectiveness of the waivers themselves because waiver of immunity in one state does not mean immunity is waived for entities in another state. For example, suppose the copyright owner is a photographer from North Carolina and her photos are infringed upon by the University of South Carolina. The copyright owner's recovery is likely dependent on whether South Carolina has waived sovereign immunity because the University of South Carolina is an entity of a sovereign state other than North Carolina. Even if South Carolina waives immunity, there is a chance the law waiving immunity is less favorable to copyright owners than the waiver in North Carolina. Thus, if state waivers are relied upon as the best approach, recovery and favorable treatment for copyright infringement may vary from state to state. While this is a weakness of relying on state waivers for copyright infringement, it could potentially work in the favor of copyright owners seeking federal legislation on the issue. If the waivers create an unequal balance amongst the states for diversity cases

## CONCLUSION

The rights of copyright owners following infringement by the state or its entities is limited in scope. The owners still have some remedies available, such as injunctive relief, but such a remedy does not solve any damages problems that might arise from state copyright infringement.<sup>260</sup> While there is still a chance that copyright owners may get to test Takings claims for copyright infringement in the Supreme Court, such claims will face their own respective difficulties. Attorneys have room to maneuver with these claims in most state courts and federal courts because there is no binding precedent from the highest court in the land, but it is a gamble copyright owners might not want to make.

If copyright owners want to take control of the matter themselves, it is best for them to concentrate their efforts on the smallest scale possible and lobby the state legislatures for a waiver of sovereign immunity. By aiming at state universities specifically, they are more likely to get legislation passed than they would going for total waiver. This tactic may seem like weak tea to some, but it is the best foundation for further legislation. Once a state or an entity other than a state university engages in copyright infringement, the legislation waiving immunity against universities will become the basis to lobby for more waivers. The chances for copyright infringement claims being brought against the state are not lost. The basis for the claims only needs to be tempered so that it can get where copyright owners want it to be.

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involving state copyright infringement, the unequal balance will be a great foundation for lobbying Congress to pass laws resolving the matter. Thus, what starts as a weakness for state waivers of sovereign immunity ends as a strength for Congressional lobbying.

<sup>260</sup> See Bloom, *supra* note 14.