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Samuel S. Johnson

SAMUEL S. JOHNSON

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ABSTRACT

Perhaps the only exception to the rule that every rule has its exceptions is the law of unintended consequences. An example may be found in the Supreme Court's 2020 ruling in Allen v. Cooper. Seeking to protect the rights of states against the federal judiciary, the Court ruled that states are immune from suit in federal court for copyright infringement. As a consequence, the only courts with jurisdiction over copyright infringement cases were summarily closed to copyright owners who found themselves the victims of state piracy of their works.

Copyright owners thus find themselves in a materially weakened position relative to state entities, and states find themselves with court-sanctioned impunity to violate copyrights. The robust right to a remedy at law for infringement of intellectual property rights has served to make intellectual property one of the most valuable components of United States commerce, enriching lives in the United States and around the world. If states can violate this right with impunity, the incentive to creativity envisioned by the Intellectual Property Clause will materially weaken, and "Science and useful Arts" will undoubtedly suffer.

Necessity is, as they say, the mother of invention, and this Comment argues that the consequences of Allen constitute a necessity which must lead to the invention of a new remedy for copyright owners whose work is infringed by state entities. This Comment focuses on the prudential and policy arguments for using the author's property interest in the tangible manifestations of a copyrighted work as a proxy for the copyrighted work itself in a new application of the Takings Clause of the Fifth Amendment to copyright. Prudentially, this proposal would remedy the problem by applying a legal theory sufficiently certain in its requirements and

consistent in its application to make it workable. As to policy, this Comment would bring the practical outcomes of intellectual property litigation against states back into line with the policy goals of the Intellectual Property Clause, the Takings Clause, and the Copyright Act. This Comment thereby seeks to solve the problem caused by the unintended consequences of Allen and return to the robust intellectual policy protections envisioned by the Constitution and laws of the United States.

AUTHOR

Senior Staff, *Liberty University Law Review*, Vol. 17. J.D. Candidate, Liberty University School of Law (2023). B.S., *summa cum laude*, Political Science, Liberty University (2020). I would like to thank my wife, Annette, and my children, Christopher, Sarah, and Michael, for being there for me, cheering and supporting me through the journey that is law school. I would like to thank Professor Tory Lucas for his helpful suggestions and input on takings law, Professor Andrew Connors for his feedback and teaching on intellectual property matters, and my colleague and friend, Jake Bryant, for his helpful suggestions in the composition of this Comment.

COMMENT

THE RIGHT TO THE COPY: A CASE FOR APPLYING PHYSICAL TAKINGS PROTECTION TO INTELLECTUAL PROPERTY

Samuel S. Johnson[†]

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Perhaps the only exception to the rule that every rule has its exceptions is the law of unintended consequences. An example may be found in the Supreme Court's 2020 ruling in Allen v. Cooper. *Seeking to protect the rights of states against the federal judiciary, the Court ruled that states are immune from suit in federal court for copyright infringement. As a consequence, the only courts with jurisdiction over copyright infringement cases were summarily closed to copyright owners who found themselves the victims of state piracy of their works.*

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for using the author's property interest in the tangible manifestations of a copyrighted work as a proxy for the copyrighted work itself in a new application of the Takings Clause of the Fifth Amendment to copyright. Prudentially, this proposal would remedy the problem by applying a legal theory sufficiently certain in its requirements and consistent in its application to make it workable. As to policy, this Comment would bring the practical outcomes of intellectual property litigation against states back into line with the policy goals of the Intellectual Property Clause, the Takings Clause, and the Copyright Act. This Comment thereby seeks to solve the problem caused by the unintended consequences of Allen *and return to the robust intellectual policy protections envisioned by the Constitution and laws of the United States.*

I. INTRODUCTION

In 2020, the Supreme Court of the United States rendered a decision in the case of *Allen v. Cooper*, effectively, though perhaps unintentionally, obliterating any remedy for private owners of copyrights when state agencies infringe their copyrighted works.[1] The Court, following a string of precedents dating back to 1996,[2] struck down the Copyright Remedy Clarification Act of 1990 (CRCA), which abrogated state sovereign immunity in copyright infringement suits in federal court against state agencies.[3] Because copyright falls under exclusive federal subject matter jurisdiction,[4] this decision effectively allows state agencies to claim sovereign immunity as an affirmative defense when sued for copyright

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[1] *See* Allen v. Cooper, 140 S. Ct. 994, 1002 (2020).

[2] *See* Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (holding that Congress's powers under Article I did not extend to the abrogation of state sovereign immunity); *see also* Fla. Prepaid Postsecondary Educ. Exp. Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 296, exceeded Congress's power to abrogate state sovereign immunity, and therefore states could claim sovereign immunity in suits against them for patent infringement); Allen v. Cooper, 140 S. Ct. 994, 998–99 (2020) (applying the holding in *Florida Prepaid* to the Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511, concluding that Congress could not abrogate the sovereign immunity of states to suits against them for copyright infringement).

[3] *Allen*, 140 S. Ct at 1002 (2020); *see also* 17 U.S.C. § 511.

[4] 28 U.S.C. § 1338(a).

infringement.[5] This strikes at the heart of the Framers' intent "[t]o promote the Progress of Science and useful Arts;"[6] if there is no remedy for infringement, there is less incentive to create and, thus, less progress.

One possible remedy for this problem is legislation abrogating state sovereign immunity that satisfies the specifications laid out by the Court in *Allen*.[7] However, this course of action would be an "uncertain . . . voyage," at best,[8] and is one upon which Congress has, to date, declined to venture. The other possibility is applying the Takings Clause of the Fifth Amendment, as incorporated to the states by the Fourteenth Amendment, to copyrights. Courts have been reluctant to apply takings law to intellectual property.[9] However, when faced with the application of sovereign immunity to state infringement of copyrighted works, takings law may be the last best hope for copyright owners.[10]

This Comment argues that a state entity infringement of a copyright constitutes a physical taking under the Fifth and Fourteenth Amendments.[11] It also argues for a specialized proxy of subject matter for purposes of a Takings Clause analysis applicable to copyright specifically, which leads to a more logical application of physical takings than the more widely proposed regulatory theory.[12] This theory would eliminate the requirement of multiple preliminary findings in the regulatory takings analysis,[13] allow courts to use a relatively simple analytical framework to determine the

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[5] *See* Univ. of Hous. Sys. v. Jim Olive Photography, 580 S.W.3d 360 (Tex. App. 2019), *aff'd*, 624 S.W.3d 764, 777 (Tex. 2021); *see also* Runhua Wang, *Modify State "Piracy" After* Allen*: Introducing Apology to the U.S. Copyright Regime*, 69 BUFF. L. REV. 485, 509 (2021).

[6] U.S. CONST. art. I, § 8, cl. 8.

[7] *Allen*, 140 S. Ct. at 1007.

[8] *Id.* at 1009 (Breyer, J., concurring).

[9] *See* Zoltek Corp. v. United States, 442 F.3d 1345, 1353 (Fed. Cir. 2006) (per curiam), *cert. denied*, 551 U.S. 1113 (2007). *See generally* Davida H. Isaacs, *Not All Property is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1 (2007).

[10] *See* 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, 638 (2000).

[11] *See* discussion *infra* Section III.A.

[12] *See* discussion *infra* Section III.C.

[13] *See* discussion *infra* Section III.C.3.

existence of a governmental taking of private property,[14] and apply an equally simple remedy.[15] Applying this theory would present no difficulty beyond that of a typical infringement suit.[16] State entities could not claim sovereign immunity because the cause of action would arise under the Takings Clause, as incorporated to the states by the Fourteenth Amendment.[17] In the Information Age, when intellectual property comprises a large and growing share of American GDP, it is high time to consider innovative techniques to avoid weakening intellectual property protections and to serve the purpose of the Intellectual Property Clause.

II. BACKGROUND

Creativity is the fuel for the engines of any thriving economy or culture. Everything in society is facilitated by its products. Recognizing this, the Framers of the Constitution of the United States conceived, as one of the essential roles of government, the promotion of creativity by providing incentives to its exercise.[18] The mechanism they chose as their primary incentive for creativity was the protection of a property interest in the products of individual creativity.[19] The result was the Intellectual Property Clause of the Constitution.[20]

A. The History, Policy, and Nature of American Copyright

In order to understand how copyright protection relates to the Takings Clause, it is necessary to understand where copyright came from, why it was first created, and, most importantly, what it is. Of course, the deeper into these questions the inquiry proceeds, the more enmeshed the inquirer becomes in a veritable spider's web of complexities, and, therefore, it is neither necessary nor advisable to include a comprehensive inquiry into these questions here. A reasonably broad overview is, however, in order.

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[14] *See* discussion *infra* Section III.C.4.

[15] *See* discussion *infra* Section III.C.4.

[16] *See* discussion *infra* Section III.C.4.

[17] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 343 (1816).

[18] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[19] *See id.*; U.S. CONST. art. I, § 8, cl. 8.

[20] *See* U.S. CONST. art. I, § 8, cl. 8.

1. History: Whence Copyright?

The Framers of the Constitution expressly included their purpose for granting intellectual property protection in the words of the Intellectual Property Clause, granting to the new Congress the power "*[t]o promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[21] The first Congress responded to this purpose in 1790 by enacting the first copyright act in American history.[22] "Since [that enactment], Congress has overhauled . . . copyright [protection] several times."[23] The Copyright Act of 1976, as amended, contained in Title 17 of the United States Code, is the current statutory authority for American copyright law.[24]

2. Policy: Why Copyright?

The policy of copyright protection in the United States is simple. The Framers wished "[t]o promote the Progress of Science and useful Arts."[25] The way in which protecting property rights in the products of human creativity promotes such progress is obvious: human nature is primarily motivated by self-interest, and human beings are more likely to innovate when they have a prospect of gaining personally through their work and innovation.[26] Copyright thus seeks to advance two policy goals: (1) to promote scientific and literary progress *generally*, and (2) to provide *individual* incentives to produce such progress.[27]

Perhaps this is why Congress's revisions of copyright law have generally strengthened its protections. For example, the original term of a copyright

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[21] *Id.* (emphasis added).

[22] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § A.01(A) (Matthew Bender & Co., Inc. rev. ed. 2023).

[23] *Id.*

[24] *Id.*

[25] U.S. CONST. art. I, § 8, cl. 8.

[26] *See Proverbs* 16:26 (King James).

[27] *See id.*; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("Rather, the limited grant is . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . .").

was fourteen years, renewable for an additional fourteen-year term.[28] This term has gradually been lengthened and now extends seventy years beyond the life of the author.[29] This consistent enhancement of copyright protection shows that strong copyright protection is, in Congress's judgment, the policy that "best effectuates the constitutional aim" of promoting the progress of science and useful arts.[30]

The *Allen* decision is arguably inconsistent with the policy goals of the Intellectual Property Clause. Indeed, in passing the CRCA, Congress made it clear that, in its judgment, the policy goals of the Intellectual Property Clause were best served by abrogating state sovereign immunity in copyright infringement cases.[31] Granting governmental entities legal carte blanche to infringe the products of an individual's creativity without compensation arguably weakens the individual incentive policy goal, and thus the general progress goal by implication.[32] Although the overarching purpose of copyright is primarily utilitarian, there is something fundamentally unjust about providing a state with impunity to pirate copyrighted materials without paying.[33] This licensed piracy may impact the decisions of prospective authors going forward, especially in situations like those that led to *Allen*, where an author worked as a subcontractor for a state government contractor.[34]

3. Nature: What is Copyright?

The nature of copyright is complicated, and a thorough analysis of its properties is outside the scope of this Comment. It is enough to say that, in general, the Supreme Court treats copyright protection as a personal property interest.[35] Personal property interests, like real property interests, are generally subject to constitutional protection under the Takings

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[28] *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.01 (Matthew Bender & Co., Inc. rev. ed. 2023).

[29] *See id.*

[30] *See* Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)).

[31] *See* Allen v. Cooper, 140 S. Ct. 994, 1000 (2020).

[32] *See* Ghosh, *supra* note 10, at 648.

[33] *Allen*, 140 S. Ct. at 1009 (Breyer, J., concurring).

[34] *See id.* at 999 (majority opinion).

[35] *See* Stewart v. Abend, 495 U.S. 207, 219 (1990).

Clause.[36] The central question, then, is: what, exactly, is the property interest to which a Takings Clause analysis may attach in a copyrighted work?

To answer that question, it is helpful to look at the general principles of copyright law. Under the copyright statutes, copyright protection applies to "original works of authorship fixed in any tangible medium of expression . . . from which they [may] be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[37] For a copyright to vest in an author, the author must first create (1) an original creative work that is both (2) "fixed in [a] tangible medium of expression" and (3) "perce[ptible], reproduc[ible], or otherwise communica[ble]."[38] Without any one of these elements, no copyright vests in the would-be owner.[39] The exclusive rights granted by copyright protection include (1) the right "to reproduce the . . . work;" (2) the right "to prepare derivative works based [on] the [original] work;" (3) the right to distribute, sell, lease, or license the work; and (4) the right to display the work publicly.[40] All of these rights are limited in several ways, including limited duration[41] and the fair use doctrine.[42]

These rights imply the existence of a contemporaneous and exclusive possessory right to individual copies of the work. If authors do not have the exclusive right to possess the tangible copies of their works, how can they have the exclusive right to sell or lease them? And if the right to possess the tangible copies of their work is not exclusive, then how is it possible for authors to have the exclusive right to license others to possess, sell, or reproduce their works?[43] Since a work can be copyrighted only when it is fixed in a tangible, perceptible medium of expression,[44] also known as a

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[36] *See* Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) ("[The Takings Clause] protects 'private property' without any distinction between different types [of property].").

[37] 17 U.S.C. § 102.

[38] *Id.*

[39] *See* 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03 (Matthew Bender, rev. ed. 2023).

[40] 17 U.S.C. § 106.

[41] *Id.* § 302.

[42] *See id.* § 107.

[43] *See id.* § 106.

[44] *Id.* § 102.

"copy," the property interest in copyright is so intimately connected with a right to possess, use, convey, and exclude others from all tangible copies of the work that copyright protection cannot even apply to the work without this right to *the* copy.[45] Copyright protection is therefore in its very essence dependent on the existence of a tangible item of property to which the author has the original possessory interest by right of creation and first possession.[46]

This understanding of the connection of copyright with the possessory right to all tangible copies of the work is consistent with both copyright and property law.[47] Copyright law protects not the *idea* inherent in the copyrighted work but the *expression* of the work as embodied in tangible copies.[48] In fact, the exclusive right to create copies implies an exclusive right to possess those copies since creation constitutes first-in-time possession that confers the exclusive right to continue in possession.[49] Furthermore, transfers of copies of copyrighted works are, in essence, transfers of tangible personal property.[50] Purchasers of copies acquire the possessory right to the specific copies purchased that they may then transfer to whomever they please.[51] The sale, lease, or license of any rights to use or exploit copyrighted works therefore include by implication the transfer of this exclusive possessory right to the purchaser, lessee, or licensee.[52] The right to copy is logically and statutorily distinct from the "right to *the* copy,"[53] but given that the former is dependent for its very existence upon the latter and that the two are often intertwined in practice,[54] they are

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[45] *See id.*

[46] 17 U.S.C. § 102.

[47] *See id.*; *see also* Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 413 (2017).

[48] *See* 17 U.S.C. § 102.

[49] *See generally* JEFFREY J. SHAMPO, AMERICAN JURISPRUDENCE §§ 27, 34 (West Group 2d ed. 2023).

[50] *See* 17 U.S.C. § 109(a); *see also* Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 200 (2016) ("[T]he 'first-sale doctrine' . . . . enables the lawful owner of a book (or other work) to resell or otherwise dispose of it as he wishes.").

[51] *See Kirtsaeng*, 579 U.S. at 200.

[52] *See* 17 U.S.C. § 106; *Kirtsaeng*, 579 U.S. at 200; Shampo, *supra* note 49, at § 27.

[53] *See* 17 U.S.C. § 202.

[54] For instance, when the possessory rights to a copy of a work are transferred to a purchaser, the purchaser acquires not only the possessory rights to the copy but also certain rights in the copyright itself, embracing the rights to display and distribute the copy. *See* 2

arguably connected with sufficient intimacy to make their nexus a valid point of focus for a Takings Clause analysis.[55]

B. Legal Rights and Remedies Under the Takings Clause

If copyright law is one road at the intersection under scrutiny here, takings law is the other. As with copyright, therefore, a brief overview of takings law is required to make clear the entire map of the intersection itself. The policy and nature of takings are particularly relevant as it is the jurisprudence of takings that will be affected by the adoption of this Comment's proposal more than anything else.[56]

1. Policy: Why Takings?

As the Framers conceived it, government is instituted to protect the inalienable rights of individuals, especially rights to property.[57] This being the case, the Framers thought it was essential to protect individuals from any possible depredations by the government upon the rights it was instituted to protect.[58] Therefore, the founding generation included an express clause in the Fifth Amendment to the Constitution, providing that the federal government could not violate the property rights of individuals without paying them just compensation.[59] This clause provides individuals constitutional protection of their inherent property interests as against the government, as well as against other individuals, following the old English common law recognition of property rights as an "absolute right, inherent in every [person], . . . which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[60] Copyright, as both a property interest and as a

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MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 8.12, 8.20 (Matthew Bender & Co., Inc. rev. ed. 2023).

[55] *See* discussion *infra* Section III.B.1.

[56] *See* discussion *infra* Section III.E.1.

[57] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* James Madison, *The Papers of James Madison, in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (William T. Hutchinson et al. eds., Univ. of Chi. Press 1962–1977) (1792) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses.").

[58] *See* Madison, *supra* note 57, at 598.

[59] U.S. CONST. amend. V.

[60] *See* 1 WILLIAM BLACKSTONE, Commentaries *121, *138.

constitutionally-created right, is well within this conception of property and therefore would have been within the sphere of the Framers' intent in shaping the Takings Clause.[61]

The Takings Clause serves two policy purposes: deterrence of government from infringing private property rights without payment, and compensation of private property owners when their rights are thus infringed.[62] As to copyright, even if the *Allen* decision is consistent with the policy goals of the Intellectual Property Clause, it is inconsistent with the policy goals of the Takings Clause. Until *Allen*, the statutory remedy at law as against a state governmental entity adequately served the policy goals of the Takings Clause as to copyright.[63] Because that remedy is no longer operative against the states, *Allen* eliminates any deterrence to states from violating intellectual property rights and any incentive for the payment of compensation in case of such violation.[64] There is, thus, a discord between the present state of the policy goals of sovereign immunity and those of takings law in the area of copyright that would be harmonized by applying the Takings Clause to copyright.

2. Nature: What are Takings?

The Supreme Court of the United States has held the Takings Clause to require the government to provide just compensation in two types of scenarios: (1) where the government or its agents physically "occupy, use, or in any manner take . . . possession" of private property;[65] and (2) where the government takes a regulatory action which "denies [the owner] all economically beneficial or productive use of [the property]."[66] The two categories are commonly known as "physical takings" and "regulatory

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[61] *See id.*; *see also* Madison, *supra* note 57, at 598. *See generally* THE FEDERALIST NO. 43 (James Madison) ("The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law[, and therefore t]he utility of [the Intellectual Property Clause] will scarcely be questioned.").

[62] *See* Ghosh, *supra* note 10, at 688 ("[D]eterrence and compensation [are the goals] required by the Takings Clause.").

[63] *See id.*

[64] *See* discussion *infra* Section II.C.1.

[65] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 431–32 (1982) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 165–66 (1958)).

[66] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

takings," respectively. Both categories of takings apply to both real and personal property.[67]

Establishing the existence of a physical taking requires only that the plaintiff show that the government, or an agent of the government, has "occup[ied], use[d], or [taken possession of the property] in any manner."[68] The extent to which the government has done so is immaterial.[69] Whether such a taking has occurred is usually determined by whether the governmental action has violated or nullified the owner's right to exclude, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[70]

The doctrine of physical takings is limited in several respects. Generally, neither federal action pursuant to the Commerce or Tax Clauses of the U.S. Constitution nor state action pursuant to its legitimate police powers constitute a compensable taking.[71] Property destroyed by war has not been "taken" under the Takings Clause.[72] "Transitory trespasses"—non-permanent, non-severe government intrusions like mere trespass—are not takings.[73] These limits serve to allow the government to fulfill its essential functions without being liable for just compensation for everything it does that curbs an individual right in some way.[74] Governmental occupation of private property interests outside the essential functions of the government nearly always subjects the government to takings liability.[75]

Regulatory takings generally occur when a non-possessory action by the government effectively deprives the owner of "all economically beneficial . . . use[s] of [the property]."[76] The rationale for this rule is that

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[67] Horne v. Dep't of Agric., 576 U.S. 351, 358–59 (2015).

[68] *Loretto*, 458 U.S. at 431–32 (quoting *Cent. Eureka Mining Co.*, 357 U.S. at 165–66).

[69] *See id.*

[70] *See id.* at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[71] *See generally* JULIUS L. SACKMAN, 2A NICHOLS ON EMINENT DOMAIN § 6.01 (Matthew Bender & Co. Inc. 3d ed. 2023).

[72] *Id.*

[73] Univ. of Hous. Sys. v. Jim Olive Photography, 580 S.W.3d 360, 376 (Tex. App. 2019), *aff'd*, 624 S.W.3d 764, 777 (Tex. 2021).

[74] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[75] John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 739 (2020).

[76] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16 (1992).

"total deprivation of beneficial use is, from the [owner's] point of view, the equivalent of a physical appropriation."[77] These takings are more difficult to establish since it is often possible to at least imagine some kind of retained use that will give the owner economic benefit, however slight.[78] Arguments for applying the Takings Clause to intellectual property generally propose these types of takings.[79]

Originally, the Takings Clause, like the rest of the Bill of Rights, only applied to the federal government, but in the wake of the Civil War, the Fourteenth Amendment expanded the operation of much of the Bill of Rights to the individual states as well.[80] The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies the Takings Clause to the individual states and therefore makes it enforceable against them.[81] Any application of the Takings Clause, which may apply to copyright, therefore, may apply against the individual states.

C. Where the Copy Meets the Right: The Intersection of Copyright and Takings Law

Because copyright is a property interest[82] and the Takings Clause protects private property interests against takings by the government,[83] copyright and takings law would seem to cross paths when state agencies violate the rights of copyright owners. However, courts have objected to applying takings law to copyright in the past.[84] Their objections have included (1) the existence of a statutory remedy for infringement, which makes a constitutional remedy unnecessary,[85] and (2) the intangibility of copyright,

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[77] *Id.* at 1017.

[78] *See id.* at 1043–44 (Blackmun, J., dissenting).

[79] *See generally* Ghosh, *supra* note 10.

[80] *See* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 316, 325–26 (2017).

[81] *See* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897). *See generally* U.S. CONST. amend. XIV, § 1, cl. 3.

[82] Stewart v. Abend, 495 U.S. 207, 219 (1990).

[83] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015). *See generally* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

[84] *See* Isaacs, *supra* note 9, at 1, 4–5.

[85] *See id.* at 2.

which seemingly places it outside the scope of the Takings Clause as traditionally applied only to tangible property.[86]

1. The Statutory Objection: Sovereign Immunity and the Road to *Allen*

The problem with the first objection is that the statutory remedy for state and state agency infringement of copyright is effectively eliminated by the Supreme Court's sovereign immunity jurisprudence.[87] The 2020 decision in *Allen v. Cooper* appears to close the door even to injunctive relief against state agencies that violate copyrights by forbidding federal courts to even *entertain* a suit against a nonconsenting state absent a clear abrogation of sovereign immunity.[88] But *Allen* did not happen in isolation. The Supreme Court laid the groundwork it relied on in *Allen* more than two decades prior in *Seminole Tribe v. Florida*, decided in 1996, and in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, decided in 1999.[89] In these decisions, the Court imposed new limitations on congressional power to abrogate state sovereign immunity under its Article I powers[90] and applied a "congruence and proportionality" test for determining whether abrogation of sovereign immunity under Section Five of the Fourteenth Amendment was proper.[91] These precedents make it quite unlikely that *Allen* will be overturned, at least in the near future; the majority opinion in *Allen*, itself, promulgated a strong view of stare decisis that bodes ill for any attempt to overturn *Allen* or the precedents that make up its legal foundation.[92]

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[86] *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773 (Tex. 2021).

[87] *See* Allen v. Cooper, 140 S. Ct. 994, 1000 (2020).

[88] *See id.*

[89] *Id.* at 1007.

[90] Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996).

[91] *See* Fla. Prepaid Postsecondary Educ. Exp. Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999).

[92] *See* Vikram David Amar, *How* Allen v. Cooper *Breaks Important New (If Dubious) Ground on Stare Decisis*, JUSTIA (April 10, 2020), https://verdict.justia.com/2020/04/10/how-allen-v-cooper-breaks-important-new-if-dubious-ground-on-stare-decisis (arguing that this line of decisions is questionable on originalist and textualist grounds). This state of affairs is likely to be permanent, or at least of long duration. While Justices Breyer, Ginsburg, and Thomas criticized various aspects of the Court's rationale in *Allen*, they concurred in the judgment; *Allen* was a unanimous decision. *Allen*, 140 S. Ct. at 1009 (Breyer & Ginsburg, JJ.,

2. The Intangible Objection

The other major reason commonly given for the reluctance of courts to apply takings to copyright—and probably the more significant objection, given that the statutory remedy objection no longer has a basis—is the intangible nature of copyright and the consequent difficulty of applying a theory of physical takings that can only attach to tangible property.[93] This is a pertinent objection; after all, the typical feature of a physical taking is a physical invasion or possession,[94] and how can one physically possess or invade a merely intangible property interest?

Perhaps this is why the physical theory of takings, as applicable to copyrights, has thus far been roundly rejected by courts.[95] In *Jim Olive Photography v. University of Houston System*, one of the most recent decisions involving this issue, the Supreme Court of Texas ruled that copyrights could not be "taken" in the physical sense because physical takings apply only to "tangible personal property, not intangible intellectual property."[96] The court quoted Professor John Cross as saying,

> Things themselves are not property. Although we typically refer to land, chattels, accounts, and various other things as our "property," what we are actually referring to is the bundle of rights that we have in those things. At some point, a person's rights in a thing will reach a level where the law concludes that his interest in that thing is a property interest. . . .
>
> This distinction between things and property is often of little consequence in the typical takings case. If the State

concurring); *id.* at 1007 (Thomas, J., concurring). Additionally, any congressional attempt to abrogate state sovereign immunity in this area would be a constitutional minefield. *Id.* at 1009 (Breyer & Ginsburg, JJ., concurring). In the absence of any dissent on the Supreme Court and the apparent absence of any congressional desire to wade into the constitutional quicksand of sovereign immunity abrogation, it is unlikely that the statutory remedy for copyright infringement committed by state entities will be effectively resurrected.

[93] *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773 (Tex. 2021).

[94] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 431–32 (1982). *See generally* Echeverria, *supra* note 75.

[95] *See generally* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764 (Tex. 2021).

[96] *Id.* at 773.

> seizes my automobile, it has also by definition interfered with my "property": my right to possess and use that automobile. In a takings claim involving intellectual property, however, the distinction between things and property becomes more important. Because the "thing" is intangible, use of or damage to that thing need not have any significant impact on the owner's legal rights in the thing.[97]

The court's logic is not isolated. Other legal scholars have made this same objection to explain why—despite the clear import of the Takings Clause—governmental entities may take private intellectual property for public use without just compensation.[98] It cannot help matters that most proposals for applying the Takings Clause to intellectual property suggest applying regulatory takings. The Supreme Court's regulatory takings jurisprudence is generally described as "a muddle."[99] Added to the nature of copyright protection as intangible property, this system that may be "charitably . . . described as ad hoc jurisprudence"[100] certainly seems dangerous, like shooting in the dark while blindfolded for good measure.

D. Of Pics and Pirates: Allen v. Cooper and The Problem Defined

In 1990, Congress passed the Copyright Remedies Clarification Act (CRCA) to abrogate state sovereign immunity for copyright infringement.[101] The CRCA clearly stated Congress's intent to abrogate state sovereign immunity in these cases.[102] In 1996, Intersal, Inc., a Florida-based shipwreck research, discovery, and salvage company, discovered the wreck of the *Queen Anne's Revenge*, the former flagship of the famous pirate known as Blackbeard. By law, the wreck belonged to North Carolina,[103] which contracted with Intersal to salvage the historic wreck.[104] Intersal, in

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[97] *Id.* at 773–74 (quoting John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 395 (2001)).

[98] Isaacs, *supra* note 9, at 16.

[99] Ghosh, *supra* note 10, at 679.

[100] *Id.*

[101] 17 U.S.C. § 511; Allen v. Cooper, 140 S. Ct. 994, 1000–01 (2020).

[102] *Allen*, 140 S. Ct. at 1000.

[103] *Id.* at 999 (citing 43 U.S.C. § 2105(c); N.C. GEN. STAT. ANN. § 121–22).

[104] *Id.*

turn, contracted with Fredrick Allen and his company, Nautilus Productions, to document the salvage operations through videos and photographs.[105] Allen did so, registering copyrights in each of his created works.[106]

In 2013, the state of North Carolina uploaded some of Allen's pictures and videos to a website without permission or compensation.[107] Allen sued for infringement, but the parties settled.[108] Shortly thereafter, in 2015, North Carolina's legislature quickly passed "Blackbeard's Law," placing "all photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck . . ." into the public domain.[109] The state then proceeded to re-appropriate Allen's work.[110] Allen again sued in federal court for copyright infringement.[111] On appeal, the United States Supreme Court held that Congress could not abrogate state sovereign immunity pursuant to its Article I powers[112] and that the CRCA also failed the Court's "congruence and proportionality test" under Section 5 of the Fourteenth Amendment.[113] Thus, the Court held the CRCA was unconstitutional, and state entities could claim sovereign immunity in federal court in suits for copyright infringement.[114] Because state sovereign immunity had not been constitutionally abrogated, the Court reasoned that it still applied, and Allen was therefore barred by sovereign immunity from a remedy at law, even though North Carolina had openly and apparently pirated (pun intended) his work.[115]

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105 *Id.*

106 *Id.*

107 *Id.*

108 Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

109 *See* N.C. GEN. STAT. ANN. § 121–25(b).

110 *Allen*, 140 S. Ct. at 999. Given that "appropriation" is a term of art sounding in both takings law and intellectual property law, the term is used in this Comment consistently with its correct usage as a term of art in Takings law. *See* discussion *infra* note 184 and accompanying text.

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

112 *Id.* at 1000.

113 *Id.*

114 *Id.*

115 Although this Comment deplores the legal effects of *Allen* on governmental accountability and property rights, the Court's reasoning on the sovereign immunity issue was admittedly in line with multiple long-established precedents. *Id.* at 1007; *see also id.* at

Justice Breyer, joined by Justice Ginsburg, concurred in the judgment but criticized the majority opinion, noting that the decision leaves copyright owners whose rights are violated without the ability to "'resort to the laws of [their] country for a remedy,' especially where, as here, Congress has sought to provide one."[116] He criticized the majority for requiring Congress to venture into a "great constitutional unknown" to implement its judgment on state sovereign immunity to copyright infringement lawsuits by passing legislation that may or may not pass constitutional muster, depending on the factual record Congress built to support it.[117] He concluded that the Court's sovereign immunity jurisprudence denies citizens a remedy for such a violation of their rights, and Congress has no clear path to providing one.[118]

Justice Breyer's powerful observation that the Court's sovereign immunity jurisprudence denies a remedy to copyright owners who suffer the violation of their rights at the hands of states underscores the inconsistency of this decision with the policy goals of the Intellectual Property and Takings Clauses.[119] If takings law was applied to copyright, the "laws of [our] country" would once again apply a remedy for such a situation, and the states could not claim sovereign immunity to it.[120] In light of other court decisions, the lack of a remedy under current law is painfully clear.[121] As Justice Breyer aptly put it, "something is amiss."[122]

The intersection of copyright and takings law is at an impasse. Courts persist in their reluctance to take the leap into applying constitutional protection to copyright, leaving copyright owners without a remedy for uncompensated state violation of their private property interests.[123] The

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1009 (Breyer, J., concurring). Justice Breyer criticized some of these precedents, but not all of them; and he criticized them based on their prudential effects, not on their legal bases. *Id.* Thus, the issue is not whether the Court's application of sovereign immunity to copyright infringements was correct; the issue, as Justice Breyer noted, is what to do about it. *Id.*

116 *Id.*

117 Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

118 *Id.*

119 *See* discussion *supra* Sections II.A.2., II.B.1.

120 *See* Martin v. Hunter's Lessee, 14 U.S. 304, 381 (1816) (Johnsons, J., concurring).

121 *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773 (Tex. 2021).

122 *Allen*, 140 S. Ct. at 1009 (Breyer, J., concurring).

123 *See generally Jim Olive Photography*, 624 S.W.3d at 773.

Takings Clause was designed to prevent just such government violations of private property interests.[124] Allowing state entities to violate private property interests under the protection of sovereign immunity runs counter to this policy.[125] It is time for the creation of a new remedy, contoured to the exigencies of this particular situation, to hold government accountable to its constitutional purpose of protecting private property, rather than pirating it.[126]

III. PROPOSAL

A. The Three Arguments

The proposed solution for this problem embraces three arguments that are based upon the elements of the Takings Clause: (1) private property, (2) taken for public use, and (3) just compensation.[127]

1. Argument 1: The "Private Property"

For the sole purpose of a Takings Clause analysis applicable to copyright, the author's personal property interest in all tangible copies of his copyrighted work should "stand in" as a proxy for the intangible interest in copyright protection itself. This understanding should not be used for any other purpose, but for prudential and policy reasons[128] it should be used as a proxy for the intangible property interest in a Takings Clause analysis for copyright. For all other purposes, the statutory definition of copyright as intangible property should continue to control. But for purposes of a takings claim, this theory may provide a remedy which would otherwise, despite the intent of the U.S. Constitution and Congress, be nonexistent.[129]

2. Argument 2: "Taken for Public Use"

The said tangible property interest (and, by proxy, the copyright at issue) is "taken for public use" when an entity that may claim sovereign immunity

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[124] *See* discussion *supra* Section II.B.1.

[125] *See* discussion *supra* Section II.B.1.

[126] *See* discussion *supra* Section II.B.1.

[127] U.S. CONST. amend. V.

[128] *See* discussion *supra* Sections II.A.2., II.B.1; *see also* discussion *infra* Sections III.C.3., III.C.4.

[129] *See* Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

in federal court appropriates possession of any copy of a copyrighted work that is fixed in a tangible medium of expression or perception, as defined in the copyright statutes.[130] This entity-based test would be similar to the law of takings surrounding other types of property, where physical appropriation of tangible property directly by a governmental entity is a per se "taking for public use."[131] For a copyright takings claim, the appropriating entity must be either a state government or another entity to which Eleventh Amendment sovereign immunity applies.[132]

3. Argument 3: "Just Compensation"

In determining "just compensation" for a copyright taking, a court may be guided by the judgment of Congress as to what constitutes just compensation for a copyright infringement, as expressed in the statutory damages provisions of the copyright statutes.[133] For a takings claim, courts may entertain several measures of just compensation. However, the best measure of "just compensation" is the measure defined in the copyright statutes.[134] In 17 U.S.C. § 504(b), Congress has defined what, in its judgment, constitutes just compensation for a copyright infringement by providing for statutory damages in cases where actual damages cannot be ascertained.[135] The courts, in determining "just compensation" for a takings claim, may follow the judgment of Congress, contained in this statutory provision.[136]

B. The Property Proxy: Copyright as "Tangible" Property

At the heart of the argument is the legal substitution, for a specialized purpose, of a tangible property interest as a proxy for intangible copyright in a physical takings claim. Courts have implied that they cannot apply physical takings to any but tangible property, and have therefore excluded

130 *See, e.g.*, 17 U.S.C. § 102.

131 Echeverria, *supra* note 75, at 745.

132 *See* Ghosh, *supra* note 10, at 685, 687.

133 *See* 17 U.S.C. § 504(b); *see also* Ghosh, *supra* note 10, at 691.

134 *See generally* 17 U.S.C. § 504.

135 17 U.S.C. § 504(b).

136 Ghosh, *supra* note 10, at 691.

copyright from physical takings protection.[137] Legal scholars have ruled out applying physical takings to copyright on the same basis, favoring regulatory takings in their takings proposals for copyright.[138] However, the Supreme Court has never been averse to adopting ad hoc rules as part of its enforcement of the Takings Clause, regulatory takings being a prime example.[139] The Court has utilized a problem-based approach to physical takings on more than one occasion as well, going beyond physical seizure of tangible property to include any governmental violation of an owner's right to exclude within the umbrella of physical takings.[140] The Supreme Court has undercut the constitutional and statutory protections for copyrights against state infringement,[141] but it has the ability to adopt just such another carveout in this case by substituting the tangible property interest with which copyright is so intimately associated, and to which physical takings undeniably apply, as a proxy for the intangible interest of copyright in its formation of a new Takings Clause jurisprudence tailored specifically to the exigencies of copyright.

1. Policy Considerations: How The Tangible Proxy Fits IP Law

The copyright statutes and the courts differentiate between the property interests in copyright and the property interests in individual copies of the work.[142] The copyright statute provides that ownership of a copyright or any of the enumerated rights under a copyright is distinct from ownership of any material object in which a copyrighted work is embodied.[143] This is why the substitution by proxy of tangible property interests to which physical takings already apply, in the narrow context of copyright infringement by a

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[137] *See, e.g.*, Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773, 775 (Tex. 2021).

[138] Ghosh, *supra* note 10, at 661.

[139] *See id.* at 679; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[140] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982).

[141] *See* discussion *supra* Section II.C.1.

[142] 17 U.S.C. § 202; *see* 1 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 2.03(C) (Matthew Bender, rev. ed. 2023).

[143] 17 U.S.C. § 202.

state, would meet the need created by the newfound impunity states currently have under *Allen*.

This suggestion is consistent with the statutory distinction and dovetails quite neatly with the theory known as the "first sale doctrine" as well as the doctrines surrounding the transfer of copies.[144] The "first sale" doctrine dictates that the first purchaser of a tangible copy of a work may convey their exclusive possessory rights to that copy as they please, without further accounting to the author.[145] Because state entities definitionally can only infringe a copyright by appropriating a copy of the work prior to the first sale,[146] it follows that, in the appropriation, the state violates *both* the tangible and intangible property interests of the author simultaneously. Courts could therefore allow the tangible interest to be the primary interest utilized for purposes of the Takings Clause, both in its own right and as a proxy for the intangible interests that were violated by means of violating the tangible interest in the first place.

Logical Considerations: How Copyright Relates to Personal Property

Copyright is distinctive among property interests in several ways. First, while most property interests are primarily defined and protected by state law,[147] copyright is a creature of the U.S. Constitution and acts passed by Congress.[148] In addition, the property interest of copyright is subject to exceptions, such as the fair use doctrine,[149] compulsory licensing for certain works,[150] and a set time limitation.[151] These differences may be significant for some purposes, but they are not significant for purposes of this proposal.

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144 *See id.* § 109; Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 200 (2016); *see also* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* §§ 8.12, 8.20 (Matthew Bender, rev. ed. 2023).

145 17 U.S.C. § 109.

146 *See* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* §§ 8.12, 8.20 (Matthew Bender, rev. ed. 2023).

147 2 JULIUS L. SACKMAN, *Nichols on Eminent Domain* § 5.01 (Matthew Bender, 3d. 2023).

148 *See* U.S. CONST. art. I, § 8, cl. 8; 28 U.S.C. § 1338(a).

149 *See* 4 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 13.05 (Matthew Bender, rev. ed. 2023).

150 *See* 17 U.S.C. § 115; *see generally* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.04 (Matthew Bender, rev. ed. 2023).

151 *See* 17 U.S.C. § 302.

a. Constitutional conundra: how copyright's creation counts as a constitutional property interest

Copyright, unlike most property interests, is a creature of exclusive federal creation and jurisdiction.[152] According to some legal scholars, the status of intellectual property interests (including copyright) as creatures of federal regulation is sufficient to disqualify such interests from protection under the Takings Clause.[153] However, the status of copyright as a creature of regulation would be logically inconsistent with regulatory takings, not with physical takings.[154] If courts focused on the tangible property interest with which copyright is intimately associated for purposes of the Takings Clause, they could apply the physical takings analysis instead of the regulatory analysis, eliminating the inconsistency between copyright and the Takings Clause.[155]

The fact that copyright is created by federal law is significant for purposes of such an analysis only to the extent that it will restrict state entities from infringing a federally created property interest without paying "just compensation."[156] The federal government has waived sovereign immunity from copyright infringement lawsuits, and therefore the statutory remedy still exists as against the federal government.[157] Therefore, any application of takings law to copyright will operate against state agencies, at least those in states that do not waive sovereign immunity to copyright infringement.

b. Horne, personal property, and physical possessory takings

Horne v. Department of Agriculture provides a blueprint for applying the Takings Clause to copyright through the proxy of its associated tangible property interest. In *Horne*, California required raisin growers to give a percentage of their raisin crop to the state government, free of charge.[158]

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152 U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 301.

153 *See, e.g.*, Isaacs, *supra* note 9, at 28–29, 35.

154 *Id.* at 25–26.

155 *See* discussion *supra* Section II.B.1.

156 U.S. CONST. amend. V.

157 28 U.S.C. § 1498(b).

158 Horne v. Dep't of Agric., 576 U.S. 351, 355 (2015).

The government, through an entity called the "Raisin Administrative Committee," took title to the government's share of the raisin crop,[159] which it then sold or disposed of to "maintain[] an orderly market."[160] From 2002–2003, the Raisin Administrative Committee required raisin growers to turn 47% of their raisin crop over to the government.[161] In 2002, the Horne family refused to set aside the required quota of raisins for the government and was fined the market value of the raisins, plus an additional $200,000 for its disobedience of the government's order.[162] The Hornes challenged the fine in federal court, arguing that the government's requirement of 47% of their raisins was an unconstitutional physical taking of their private property.[163]

The Ninth Circuit Court of Appeals ruled that, if there was any takings claim involved, it was not a physical takings claim, which, the court held, could only apply to real property; rather, the court ruled that the only claim possible under the Takings Clause was a regulatory takings claim.[164] Because the Hornes were not "completely divested of their property rights" in their entire raisin crop and because they could avoid the government's exactions by planting crops other than raisins, the court held that the Raisin Administrative Committee's exaction did not rise to the level of a regulatory taking and was instead "a proportional response to the Government's interest in ensuring an orderly raisin market."[165]

On appeal, the Supreme Court of the United States overruled the Ninth Circuit, holding that physical appropriation of personal property by a government agency constituted a physical taking.[166] The Court reasoned that the Takings Clause applies to all private property, "without any distinction between [real and personal] types."[167] The Court relied on *Loretto v. Teleprompter Manhattan Catv Corporation* where it had held that

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159 *Id.*

160 *Id.* at 354.

161 *Id.* at 355.

162 *Id.* at 356.

163 *Id.*

164 Horne v. Dep't of Agric., 576 U.S. 351, 356–57 (2015).

165 *Id.* at 357.

166 *Id.* at 358.

167 *Id.*

"a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors."[168] Applying this reasoning to personal property, the Court concluded that "[t]he Government has a categorical duty to pay just compensation when it takes [personal property], just as when it takes [real property]."[169]

c. Bringing it all together: the intersection of *Horne* and copyright

The Supreme Court's application of physical takings to personal property provides a blueprint for the application of physical takings to copyright. The relevant property interest must be classified as personal property because it is not composed of real estate. Therefore, the application of physical takings to personal property must also apply to copyright. The act that constitutes the "taking," therefore, is an "appropriation" not limited to actual physical possession.[170] In *Loretto*, the Court held that a government order requiring the owner of an apartment building to allow installation of a cable box on the roof of the building was a physical taking of private property.[171] The order did not divest the owner of possession; it merely commandeered her rights to exclude others from her property. The *Horne* Court strongly implied that similar action by governmental entities with regard to personal property would also amount to physical takings of private property for public use.[172]

The suggested proxy of the tangible "right to *the* copy" intimately associated with copyright fits well with the Supreme Court's physical takings jurisprudence. In *Horne*, the governmental entity violated the exclusive possessory and exclusory rights of the raisin growers to the raisins they grew;[173] if raisins were replaced in the fact pattern by song recordings, books, or photographs, the entity would have violated the same rights to these items of tangible property and thus, by proxy, the copyright in the

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[168] *Id.* at 360; *see* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 434–35 (1982).

[169] *Horne*, 576 U.S. at 358.

[170] *Loretto*, 458 U.S. at 435.

[171] *Id.* at 421.

[172] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015).

[173] *See id.* at 361–62.

works therein embodied. In either case, the ultimate finding should be that of an unconstitutional taking.

3. Prudential Implementation: How Physical Takings by Tangible Proxy Will Work

The suggested proxy of the tangible "right to *the* copy" raises some interesting issues due to the intangible aspect of copyright protection. Properly speaking, copyright protection enjoins *copying* and protects only *copies* of a work.[174] Thus, an original work that is substantially similar to a copyrighted work but is created without reference to the other work is not a *copy* and therefore does not infringe the original copyright.[175] This consideration raises pertinent procedural and substantive issues for determining the "private property" and "taken for public use" elements of a copyright takings claim. The third issue is how a court should ascertain the "just compensation" requirement of the Takings Clause. Under this proposal, the Court should be guided by the judgment of Congress as to what constitutes just compensation for an unlawful appropriation of a copyrighted work, as contained in the copyright statutes.[176]

a. "Private property:" burdens and objects of proof at trial

The "private property" element of a copyright takings claim will require two factual findings at any trial under this proposal, without which the claimant cannot recover.[177] The trial court must determine, by the preponderance of the evidence, (1) that the claimant owns the copyright and tangible rights in question, and (2) that the governmental entity in question in fact appropriated the tangible property interest.[178] These factual

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[174] 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.01 (Matthew Bender, rev. ed. 2023).

[175] *Id.*

[176] *See* 17 U.S.C. § 504(b).

[177] 4 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 13.04 (Matthew Bender, rev. ed. 2023).

[178] *Id.* This second requirement is analogous to the "copying" element of proof necessary in a statutory infringement claim. *See id.*

findings are analogous to those necessary in a statutory infringement suit,[179] rendering this element of a physical copyright takings claim no more difficult for the court to make than that of a statutory infringement claim. The judgment of Congress in the copyright statutes should control the criteria of proof for copyright takings claims, just as for civil infringement actions.[180]

b. Proof of ownership

As in statutory infringement cases, authors must prove their ownership of the copyright in question by producing their certificate of registration.[181] Because Congress has preempted the field of copyright, producing a certificate of registration is the only admissible method of establishing copyright ownership in court proceedings on the subject.[182] In accordance with the judgment of Congress in the statutes, the production of a certificate of registration should be the standard method of proof to establish ownership of the copyright in question,[183] subject to the typical statutory limitations for certain types of works.[184]

c. Proof of appropriation

It is essential to a copyright takings claim that the claimant prove that a tangible copy of their work was in fact "appropriated" by the governmental entity. Because the proposed cause of action sounds in takings law, rather than intellectual property law, "appropriate" is used consistently with its use as a term of art in the law of physical takings.[185] For this element, it is not enough to prove similarity; the claimant must prove that the appropriated material is, in fact, a tangible embodiment of *their* copyrighted work and no other.[186] This is the same burden of proof the claimant must carry in a

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[179] *See* 17 U.S.C. § 410; 3 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 12.11 (Matthew Bender, rev. ed. 2023).

[180] *See* 17 U.S.C. § 411.

[181] *See id.*

[182] *See id.* § 301(a).

[183] *Id.* § 411(a).

[184] *Id.* § 411(c).

[185] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982).

[186] *See* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.01 (Matthew Bender, rev. ed. 2023).

statutory infringement suit.[187] The case is made far easier when it is obvious that the content appropriated is the author's entire actual work, as was the case in *Allen*.[188] However, in cases where the governmental entity merely appropriates a copy of part of the work, it may still be a compensable taking under the physical takings theory.[189]

C. The "Taken" Element: Why Physical Takings?

Applying the Takings Clause to copyright is necessary due primarily to policy considerations.[190] Physical takings are the best form of takings to apply due primarily to prudential considerations. First, regulatory takings—although they would be applicable to intangible property interests[191]—would, if applied to intangible intellectual property interests, present the courts with too many logistical and prudential difficulties to be practicable.[192] To date, the most comprehensive proposals for applying regulatory takings to intellectual property focus on "licensing value" as the measure of property for purposes of a takings analysis; this would require multiple preliminary findings of fact by the trial court, several of which would be highly speculative.[193] The practical difficulty involved in administering a regulatory takings regime for copyrights weighs against a court's decision to take the plunge, and explains why, despite the Supreme Court having already applied regulatory takings to one variety of

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[187] *See* Mazer v. Stein, 347 U.S. 201, 218 (1954) ("Absent copying there can be no infringement of copyright.").

[188] Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

[189] *See generally* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419 (1982).

[190] *See* discussion *supra* Sections II.A.2 and II.B.1.

[191] Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773 (Tex. 2021) (citing Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1005–16 (1984)).

[192] Isaacs, *supra* note 9, at 4 ("A review of the current state of regulatory takings law, as well as of the confusion that would occur if one were to add patents' complexities to the mix, reveals why a court might hesitate to recognize that such claims are proper.").

[193] *See generally* Ghosh, *supra* note 10, at 686–88. (focusing on "licensing value" as the measure of property for a Takings Clause analysis and discussing what would need to be shown for such an analysis).

intellectual property,[194] courts continue to be reluctant to attempt the development of a full-fledged intellectual property takings jurisprudence.[195]

In the absence—and high unlikelihood—of further congressional action to abrogate state sovereign immunity, the application of the Takings Clause to copyright in some form is all but a necessity.[196] If courts are to apply the Takings Clause, they need a theory of takings that is sufficiently certain in its requirements to justify its use and accurately compensate copyright owners by a non-speculative measure of compensation. Given the "muddle" of regulatory takings jurisprudence—combined with the special complexities of copyright protection—a regulatory takings regime is not sufficiently certain and non-speculative to allow courts to apply it on a workable basis.[197] The only remaining option for applying the Takings Clause to copyrights is the comparatively simple physical takings doctrine, which can only be applied to a tangible property interest; hence the suggested proxy of the tangible "right to the copy" for intangible copyright.[198]

1. Regulatory Takings: Nature and Application

The Supreme Court's regulatory takings jurisprudence is far from clear, but it does allow for some idea of the nature and application of a regulatory taking. Simply put, regulatory taking occurs when a governmental regulation "denies all economically beneficial or productive use of [property]."[199] Factors involved in determining whether the regulation does so include: (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the governmental regulation.[200] The Supreme Court has acknowledged that the findings surrounding these factors are largely "ad hoc," and that it "quite simply, has been unable to develop any 'set formula' for determining when 'justice and

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194 *See* Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1005–16 (1984) (applying regulatory takings to trade secrets).

195 *See generally* ISAACS, *supra* note 9.

196 Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

197 *See* Ghosh, *supra* note 10, at 679. *See generally* Isaacs, *supra* note 9.

198 *See* discussion *supra* Section III.A.1.

199 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16 (1992).

200 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons."[201] From this difficulty comes the morass that is regulatory takings jurisprudence, a tangle of rules that is often inconsistent and nearly always confusing.[202]

The varied character of the property interests to which regulatory takings are applied is apparent from the factors involved in determining the existence of a regulatory taking. Unlike physical takings, which typically focus on tangible property, regulatory takings focus primarily on intangible property interests, such as economic value and reasonable investment-backed expectations.[203] At first glance, this would seem to make regulatory takings the logical form of takings to apply to the intangible interests of intellectual property, but there are problems involved with doing so.[204] Applying regulatory takings to tangible property is complicated enough.[205] This difficult operation will only be complicated by application to the intangible, and often unquantifiable, property interests of intellectual property.[206] Especially when coupled with the often speculative value of intellectual property interests, the measure of "just compensation" for purposes of a regulatory takings analysis surrounding copyrights will be difficult and add another layer of inconsistency and uncertainty to an already inconsistent and uncertain area of law.

2. Regulatory Takings: The Prior Proposals

Perhaps the best (and certainly among the most cited) proposal for applying the Takings Clause to intellectual property in general is that of Dr. Shubha Ghosh in his article published in 2000 titled *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After* College Savings v. Florida Prepaid.[207] In this work, Dr. Ghosh argues that

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201 *Id.*

202 Isaacs, *supra* note 9, at 4–5.

203 *Penn Cent. Transp. Co.*, 438 U.S. at 124.

204 *See generally* 1 STEVEN J. EAGLE, *Regulatory Takings* § 1-7 (Matthew Bender, 1st. ed. 2020).

205 *See id.*

206 Isaacs, *supra* note 9, at 4–5.

207 Ghosh, *supra* note 10.

the "private property" is the licensing value of the intellectual property,[208] and it is "taken for public use" when a governmental entity that may claim Eleventh Amendment immunity from suit in federal court infringes upon it in such a way as to "substantially diminish" that licensing value,[209] and that the amount by which the licensing value is "substantially diminished" constitutes the "just compensation" required by the Takings Clause.[210]

Applying this test to intellectual property, a court would determine (1) whether a governmental entity (defined as an entity that may claim Eleventh Amendment sovereign immunity from suit in federal court)[211] has taken an action, by appropriation or otherwise, that has (2) used a protected interest held by the copyright owner,[212] thereby (3) depriving the owner of "substantial licensing value" in their intellectual property.[213] If these criteria are met, the infringement constitutes a compensable taking. The proposal is simple enough, and many of Dr. Ghosh's ideas, such as the definition of entities that may make an unconstitutional "taking," are quite sensible and convincing. However, the other portions of the "Ghosh test" present problems for practical application.

3. Problems With Regulatory Takings for Copyrights

Dr. Ghosh's analysis is thorough, and his theory, if implemented, would doubtless be an improvement on the current situation. However, his identification of the "licensing value" of intellectual property as the "private property" for purposes of the Takings Clause would require a court to make several preliminary findings before it could find that a taking had occurred. These would include: (1) the licensing value prior to the alleged taking, (2) whether the licensing value has been diminished,[214] (3) whether the reduction, if any, was caused by the state governmental action,[215] and (4)

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208 *Id.* at 686.

209 *Id.* at 685.

210 *Id.* at 688.

211 *Id.* at 687.

212 *Id.* at 688.

213 Ghosh, *supra* note 10, at 690.

214 *Id.* at 688.

215 *Id.*

whether the reduction was "substantial" and thus compensable under the Ghosh test.[216]

All of these findings would often be quite speculative. For instance, how is the original licensing value to be determined?[217] The litigants to any given case usually have wildly diverging estimates of the licensing value of the copyright at issue. How is a court not only to make the factual determination, but formulate clear, consistent rules as to *how* to make such a determination? It may be that prior licensing agreements could provide evidence as to the licensing value, but that evidence would not show what value further licensing agreements would have provided, which is an intrinsic part of "licensing value."[218] Ultimately, the court would have to rely on criteria of licensing value which are at least partially speculative. Even the second finding requires not only finding what the original licensing value was, but what the current licensing value is, which is usually impossible to determine absolutely. Dr. Ghosh hints at this difficulty, especially in relation to finding (4), when he notes that "[t]he question of what constitutes substantial . . . will be fact-dependent, requiring consideration of the alternative uses of the [property] and the nature and extent of the governmental use."[219] It is easy to envision the courts becoming hopelessly mired in the business of trying to formulate clear rules as to how much diminution is "substantial," muddying the already murky waters of regulatory takings.[220]

Ultimately, Dr. Ghosh's proposal calls for a speculative test that must be administered on a "case-by-case" basis.[221] Given the proliferation of intellectual property interests as items of commerce in the United States, this difficulty may explain why today, more than twenty years after Dr. Ghosh made his proposal, it has yet to be adopted by a court.[222] Courts have

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216 *See id.* at 685–92.

217 *See id.* at 689. ("Difficult questions arise when the government makes partial use of the product or the use does not completely destroy the owner's ability to license the . . . work.")

218 *Id.* at 688.

219 *Id.* at 690.

220 *See generally* Isaacs, *supra* note 9, at 26–28.

221 Ghosh, *supra* note 10, 688.

222 Dr. Ghosh's article was cited in passing by the Texas Court of Appeals in *University of Houston System v. Jim Olive Photography*, 580 S.W.3d 360, 367 n.7 (Tex. App. 2019), but the

long declined to award damages or assign remedies where their basis is excessively speculative.[223] The use of licensing value as both the definition of the property and the measure of just compensation may simply be too speculative for courts to stomach.

4. Prudential Considerations: The Advantages of Physical Takings

By contrast, the physical theory of takings has the benefit of being less speculative. The factual findings required for a physical copyright takings claim would not be substantially different from the findings required for a statutory infringement action. In focusing on the exclusive rights to use and possess the individual copy of the work, the physical theory merely uses a proxy for the statutory scheme of infringement, one that is consistent with the rights conferred by the copyright statutes. Even in a statutory claim, infringement cannot occur without some appropriation of a tangible copy of the work involved.[224] Therefore, the physical takings theory is in large part guided by the judgment of Congress as expressed in the copyright statutes.[225]

Dr. Ghosh allows for the courts to be guided by the copyright statutes in using his proposed theory of regulatory takings, specifically in exempting infringements that fall within the "fair use exception" from the category of compensable takings.[226] This common-sense approach may extend to other matters, such as the nature of a physical taking or the measure of "just compensation."

Physical takings law is built upon the straightforward proposition that a physical occupation of a private property interest by a governmental entity is a compensable taking under the Takings Clause.[227] Applied to copyright,

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court declined to apply his proposal. *See* Univ. of Hous. Sys. v. Jim Olive Photography, 580 S.W.3d at 377. No other court has yet cited this article.

[223] Blue Shield of Va. v. McCready, 457 U.S. 465, 475 n.11 (1982) (noting that the Supreme Court takes a "cautious approach to speculative, abstract, or impractical damages theories"); *see also* Tractebel Energy Mktg. v. AEP Power Mktg., 487 F.3d 89, 110 (2d Cir. 2007) ("[D]amages . . . 'must be not merely speculative, possible, and imaginary, but they must be *reasonably certain* . . . .'").

[224] *See* 17 U.S.C. § 106–22.

[225] Ghosh, *supra* note 10, at 691–92.

[226] *Id.* at 691.

[227] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 433 (1982).

the theory would apply to the tangible interest with which copyright is associated, a sort of "tangible by proxy" approach to copyright for purposes of a takings claim. Simply put, a governmental entity that infringes an author's copyright has also physically occupied the author's exclusive right to possession and use of the copy or copies that it has appropriated. The adjustment of the subject matter of the taking need not change the rule or add any element of proof to a physical Takings Clause analysis, or indeed to any other area of law surrounding copyright.

D. Practical Implementation: Anatomy of a Physical Copyright Takings Claim

This proposal is specifically designed to be practical and easy for courts to use, as well as to solve the legal problem presented by the Supreme Court's sovereign immunity jurisprudence applied to copyright. The question virtually asks: how will a court implement this proposal?

1. The Claim: Elements and Necessary Preliminary Findings

A Takings Clause claim always consists of three basic elements: (1) private property, which is (2) taken for public use, necessitating (3) just compensation.[228] Each element has its own elements, burdens of proof at trial, and legal tests to determine whether the element is met for purposes of the Takings Clause. To illustrate the anatomy of a copyright takings claim under this proposal, it is instructive to take the facts of *Allen v. Cooper*[229] and apply this theory of physical takings to it, which will illustrate how the various parts of the theory would have worked had they been argued and adopted.

a. "Private property:" Ownership and appropriation

Allen's first burden would be to prove that the materials in question were copies of his copyrighted works. Allen had registered copyrights in all his photographs and videos of the shipwreck recovery operation.[230] By producing his certificate of registration of the photographs and videos in question, Allen could—and did, in the infringement case—prove that he

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228 *See* U.S. CONST. amend. V.

229 *See* discussion *supra* Section II.D.

230 *See* Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

owned a valid copyright to the copies North Carolina had appropriated.[231] Allen would then have to prove that North Carolina had access to his works, and thus that the similarities between his copyrighted works and those appropriated by North Carolina were not accidental.[232] In the case, the State admitted that it had used Allen's photographs, settling with Allen for its first appropriation before reappropriating them under its new "Blackbeard's Law."[233] Allen's demonstrations in the actual case would also have satisfied the first element of his alternative takings claim.[234]

b. "Public use:" Entity and immunity

Allen would next need to prove that the appropriation of his work by North Carolina constituted a "taking for public use."[235] For this purpose, the court should use an entity-based test: North Carolina may claim sovereign immunity under the Eleventh Amendment from suit in federal court,[236] and therefore any appropriation by North Carolina of Allen's work would constitute a taking for public use. Because North Carolina may raise the defense of sovereign immunity to the statutory copyright infringement claim, the court would have concluded that North Carolina had appropriated, or taken, Allen's copyright property for public use, satisfying the second element of the physical takings analysis.

c. "Just compensation:" The measure of monetary relief

The first two elements of a takings claim being established, the only task remaining would be to establish the amount of "just compensation."[237] There are several options available for this determination. These include: (1) the fair market value of the copies appropriated; (2) the statutory damages provided by the Copyright Act;[238] and (3) actual damages,

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231 *Id.*

232 *See* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.01 (Matthew Bender, rev. ed. 2023); *see also* Mazer v. Stein, 347 U.S. 201, 218 (1954).

233 Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

234 *Id.* at 996–97, 999.

235 U.S. CONST. amend. V.

236 *See* Ghosh, *supra* note 10, at 685, 687.

237 U.S. CONST. amend. V.

238 17 U.S.C. § 504(c).

including all excess income derived by the state governmental entity from the appropriation.[239]

(1) Fair market value of the copy: logical, but not best

The measure of "just compensation" that perhaps comes first to mind when considering copyright infringement as a "taking" of the copies involved is the fair market value of the tangible copies themselves. In *Allen*, this measure of "just compensation" would require North Carolina to pay Allen the fair market value of the copies of his photographs and videos if they were offered for sale on the open market. After all, if the "thing" is the copy, the fair market value of the copy presumably should be the measure of "just compensation."

While perhaps the most logical, fair market valuation is probably not the best measure of "just compensation," at least not by itself. It does not effectively serve the deterrence purpose of the Takings Clause.[240] The value of the tangible copies will usually be small, and in all but the most egregious appropriations will probably not be sufficient to cover the cost of recovery.[241] And in any case, the "taking" of the copies is not the only deprivation the author will have flowing from the governmental appropriation; in many cases, the licensing value of the copyright may indeed be impacted negatively,[242] even though such impact may be too speculative to be used as a measure of compensation. Even if the licensing value of the work was not impacted, it is unlikely that an author would go to court just to recover the face value of a few copies of the work. Thus, this measure of compensation, standing alone, would not materially better the position of copyright owners relative to state entities, contrary to the intention of the Intellectual Property Clause and of Congress in passing the CRCA.[243]

To be consistent with the application of a physical takings analysis to the tangible property interest in individual copies of the work both in its own

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239 17 U.S.C. § 504(b).

240 Ghosh, *supra* note 10, at 688.

241 *Id.*

242 *Id.* at 685.

243 U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 511; Allen v. Cooper, 140 S. Ct. 994, 1008–09 (2020) (Breyer, J., concurring).

right and standing as a proxy for the copyright of the work, an award of compensation for such a takings claim should include the fair market value of the tangible property that the state entity appropriated. This is the same analysis, applied in precisely the same way, as a typical takings analysis applied to personal property.[244] However, since an appropriation by a state entity of a copyrighted work would constitute not merely a taking of tangible personal property, but also a violation of the owner's vested rights in copyright protection, the author should be compensated both for his tangible copies and for the infringement of his copyright.[245] Therefore, more than the mere fair market value of certain individual copies is required to provide "just compensation" for such an appropriation.

(2) Actual and statutory damages

The other possibility is for the court to utilize the judgment of Congress regarding just compensation for copyright infringement as expressed in the provisions of the Copyright Act.[246] As Dr. Ghosh noted, "Even though the plaintiff cannot sue the state under the statute, a court can still make use of the statute in interpreting the Takings Clause."[247] The Takings Clause demands "just compensation" for a taking.[248] Congress, in the Copyright Act, has determined what "just compensation" is for violation of a copyright owner's rights.[249] Therefore, a court may avail itself of this ready-made interpretation of the "just compensation" portion of the Takings Clause for purposes of awarding just compensation to the claimant. The Copyright Act provides for damages measured by the actual damages derived by the infringer, or by the statute itself, at the election of the plaintiff.[250] The statutory damages provision would probably be most used; however, the "actual damages" measure should also be available, where applicable.

The statutory damages measure should be applicable in all copyright physical takings claims. The Act provides that a basic award of statutory

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244 Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015).

245 *See* discussion *supra* Section III.A.1.

246 *See* 17 U.S.C. § 504.

247 Ghosh, *supra* note 10, at 692.

248 U.S. CONST. amend. V.

249 *See* 17 U.S.C. § 504(a).

250 *Id.* § 504.

damages is "a sum of not less than $750 or more than $30,000 as the court considers just."[251] Where the plaintiff proves to the court's satisfaction that the appropriation was willful, the court may increase this award "to a sum of not more than $150,000;" but if the appropriator proves to the court's satisfaction that the appropriation was merely accidental and unknowing, it may be reduced "to a sum of not less than $200."[252] The determination may be made precisely in the manner of a standard statutory infringement claim. Because the statutory measure of damages should be applicable in all copyright takings claims, whereas the "actual damages" measure would only apply in unusual circumstances, the former should be the presumptive default rule, subject to a right of the claimant to specifically request the "actual damages" measure of compensation.

In addition to statutory damages, the Act provides that the claimant may request "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[253] For this determination, the claimant must prove only their own actual damages plus the governmental entity's gross revenue derived from commercial exploitation of its appropriated copies of the work; the entity must prove its deductible expenses.[254] A simple calculation will then provide the amount of compensation.

The actual damages measure of compensation is of limited applicability. In *Allen*, this measure would not have compensated the plaintiff at all since the state did not apparently derive any profit from displaying his photographs and videos on a website.[255] In most cases, a claimant would probably be able to recover more under the default statutory damages measure than under the actual damages measure. However, there may be cases in which statutory damages are insufficient to justly compensate a claimant for the deprivation of their property interest due to the governmental appropriation of their copies, and in such cases, the claimant should be allowed to specifically request the actual damages measure.

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251 *Id.* § 504(c)(1).

252 *Id.* § 504(c)(2).

253 *Id.* § 504(b).

254 *Id.*

255 *See* Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

(3) Costs and attorney's fees

Litigation is expensive. It is not inconceivable that the costs of litigating a copyright infringement claim may exceed the actual recovery of the claim itself. To mitigate this problem and encourage copyright owners to gain a remedy for violations of their rights at law, Congress has allowed courts, in their discretion, to award reasonable costs and attorney's fees to plaintiffs suing for copyright infringement against any parties but the United States or officers thereof.[256] Nothing prevents a court considering a copyright takings claim from utilizing this statutory provision in its interpretation of the meaning of "just compensation" in the Takings Clause.[257] For purposes of a physical copyright takings claim, a court should be allowed to award reasonable costs and attorney's fees to the claimant in its sound discretion. Since the Federal Government has waived sovereign immunity for copyright infringement, the statutory limitation of this provision as to the United States or its officers is immaterial.[258]

2. Defenses: Fair Use and Non-Governmental Use

Consideration of a new copyright claim under the Takings Clause would not be complete without a consideration of the defenses a state may raise against it. These defenses include, but will probably not be limited to, fair use and non-governmental use. A more comprehensive "fleshing out" of available defenses to copyright takings claims must rest ultimately with the courts.

a. The fair use doctrine

Chief among the defenses available under this proposal is a rather novel defense to a takings claim, but one that has been suggested before—the "fair use" defense.[259] This defense should be allowed for a simple reason: if the claimants are to have the benefit of the court utilizing the Copyright Act in its interpretation of the Takings Clause,[260] then the defendants should have

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256 17 U.S.C. § 505.

257 Ghosh, *supra* note 10, at 692.

258 28 U.S.C. § 1498(b) (waiving sovereign immunity as to the Federal Government in copyright infringement cases); 17 U.S.C. § 505 (prohibiting the recovery of court costs against the United States or any officer thereof in copyright infringement cases).

259 17 U.S.C. § 107; *see also* Ghosh, *supra* note 10, at 691.

260 *See* 17 U.S.C. § 107; *see also* Ghosh, *supra* note 10, at 691.

the same benefit. The "fair use doctrine" is an exception to the exclusive rights held by a copyright owner.[261] It provides that copying or appropriating a copyrighted work for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" are not infringement.[262] A court deciding a copyright takings claim under this doctrine may use this statutory provision to interpret when a private property copyright interest has been "taken" for public use.[263] If a state entity appropriates a copy for such a purpose, its use should not be considered a taking.[264] Fair use, if proven by the statutory factors,[265] should be a dispositive defense to a copyright takings claim.

b. Non-governmental use

The language of the Takings Clause includes a stipulation that private property must be taken "for public use" in order to constitute a compensable taking.[266] A situation may arise, however, where a claim under this proposal is made against an officer of a state in their official capacity, when in fact the officer appropriated the copy in their private capacity, for private use or exploitation. In such a case, the official should be able to avoid the takings claim by proving that their use was non-governmental. A legal test for this determination may be that a use should be considered non-governmental if (1) no other agencies of the state were involved in the use or appropriation of the copy in question, (2) the copy was not held out to any third party as being held by the state or any agency thereof, and (3) no technology or equipment owned by the state or any agency thereof was used in the appropriation, transportation, or use of the copy in question. If the defendant proves these elements, the court should dismiss the takings claim. But by raising this defense, the officer admits that they did not appropriate the copy in their official capacity, and therefore is not entitled to a sovereign immunity defense against a statutory infringement claim.

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261 *See* 17 U.S.C. § 107.

262 *Id.*

263 *See* Ghosh, *supra* note 10, at 691.

264 *Id.*

265 17 U.S.C. § 107.

266 U.S. CONST. amend. V.

E. Answering Objections

This proposal would serve the purposes of the Takings Clause,[267] the Intellectual Property Clause,[268] and the intent of Congress as evidenced by the Copyright Remedies Clarification Act[269] by providing an effective remedy at law for copyright owners whose works are appropriated by a state government or entity. It would restore the balance of equities between such parties to what it was before *Allen*, while leaving that holding, and the rest of the Supreme Court's sovereign immunity jurisprudence, intact. However, this proposal is bound to raise objections; if it were really so simple, why have courts not applied this theory before? Doesn't this proposal break from long-established precedent? Aren't certain parts contrived ad hoc to fit, rather than being rigorously consistent with precedent and current law? What happens when a government infringes without copying by putting on a live performance of a musical or literary work? How does an upload to a website constitute a possessory taking of a copy?

The short answer to all these questions is necessity.[270] The policy of allowing state entities to pirate intellectual property with impunity is unsustainable. It may be, as the Supreme Court stated in *Allen*, that there is little evidentiary record of a pattern of states infringing copyrights;[271] however, if states have not yet embarked on a course of widespread copyright infringement, there is now nothing to hinder them from doing so.[272] However, necessity is not the only answer. A better consideration of some objections is in order.

1. Consistency: The Stare Decisis Objection

Perhaps the most serious objection that may be urged against this proposal is that it departs from long-established precedent concerning both copyright and the Takings Clause. Applying a theory of physical takings to a decidedly non-physical property interest is certainly a difficult pill to

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[267] *See* discussion *supra* Section II.B.1.; *see also* Ghosh, *supra* note 10, at 688. "[D]eterrence" is one of the "goals" of the Takings Clause. *Id.*

[268] *See* discussion *supra* Section II.A.2. *See generally* U.S. CONST. art I, § 8, cl. 8.

[269] Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

[270] *See* discussion *supra* Section II.C.

[271] *Allen*, 140 S. Ct. at 1005.

[272] *Id.* at 1009 (Breyer, J., concurring).

swallow, even in such a nuanced form as utilizing a proxy.[273] And there are legitimate interests in the stability of the law such that departures from precedent should be viewed with a very careful, if not suspicious, eye.[274]

However, this proposal is more consistent with previous precedent than it might seem at first glance. Nothing in this proposal would fundamentally change the law of copyright. There is no attempt to argue that copyright is a tangible property interest. The proposal merely takes advantage of a closely related tangible property interest to which a physical theory of takings undeniably applies,[275] and "piggybacks" off that interest to allow compensation for *both* interests, instead of only one, to better further the policy goals of the Intellectual Property and Takings Clauses and the prudential considerations connected with the practical operations of the courts.[276] There is no copyright precedent that would conclusively foreclose such an operation.

Nor does the proposal present insoluble problems for takings precedents. It is true that the application of physical takings to intangible property has not been done before.[277] But it is also true that, at one time, a governmental regulation would never have been considered a taking.[278] The Supreme Court has not been averse to adopting ad hoc jurisprudence in a problem-based approach to novel situations in the past.[279] This proposal merely advocates that the Court adopt another such approach to solve a problem created by the Court's approach to the abrogation of sovereign immunity.[280] Such an action would be less a departure from precedent than a continuation of a larger pattern of the Court's past behavior.

Legal scholars and judges can rest easy on the precedential score. Neither copyright nor takings law will be revolutionized by this proposal, and any departure from precedent involved will be more in the nature of an adjustment—to which the Court is no stranger—than an earth-shattering

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273 *See* discussion *supra* Section II.C.2.

274 *See supra* note 97 and accompanying text.

275 *See* Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015).

276 *See* discussion *supra* Section III.B.

277 *See* discussion *supra* Section II.C.2.

278 *See* discussion *supra* Section III.B.2.a.

279 *See* Ghosh, *supra* note 10, at 679; *see also* discussion *supra* text accompanying note 139.

280 *See* discussion *supra* Section III.B.2.a.

rejection of settled law. The legal implications might be slightly heartburn-inducing, but as with all such new areas of jurisprudence, any wrinkles may be worked out with time and experience. And in any case, it is appropriate not to adhere too slavishly to precedent when a new legal problem presents itself.[281]

2. Picking in the Cherry Orchard: The "Ad Hoc" Objection

Another serious objection is that this proposal might seem to be rather "cherry-picked" from different theories and areas of law, a mishmash of mismatched parts put together in a substantially ad hoc fashion. Indeed, viewed as a whole, its mechanics do look strikingly similar to those of a typical statutory infringement claim, and this resemblance may give the proposal the appearance of being no more than a statutory copyright infringement claim being shoehorned onto a "takings" analysis as little more than a pretextual work-around to the Supreme Court's sovereign immunity jurisprudence.

In one sense, this proposal is precisely a work-around to the Court's sovereign immunity decisions. However, it is no more pretextual than the Supreme Court's regulatory takings jurisprudence in general, which the Court itself has admitted is based on "essentially ad hoc" rules and applications.[282] If custom-shaping a rule to provide a remedy for the exigencies of an experiential wrong is improper, a substantial number of judicial precedents are in deep trouble indeed. That said, nothing in this proposal is new in itself. It is merely allowing one property interest to represent another for a particular and special purpose, which would work to solve an undeniable legal problem. In essence, this proposal is an ad hoc solution, narrowly tailored to address the specific problem caused by sovereign immunity's application to copyright infringement, and thereby better serves the policy goals of both the Intellectual Property and Takings Clauses.[283]

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[281] Allen v. Cooper, 140 S. Ct. 994, 1007–08 (Thomas, J., concurring).

[282] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see also* Ghosh, *supra* note 10, at 679.

[283] *See* discussion *supra* Section II.B.1.

3. What About Live Performances?

Copyright applies to performance art, as well as to books, DVDs, and other tangible objects.[284] The proposal advanced by this Comment has dealt primarily with copyrights, which apply to works embodied in tangible media of expression. The question thus naturally arises, what is the relationship of this proposal to live performances of a work, subject to copyright, yet not consisting of tangible property?

This question is difficult to answer, given that a physical theory of takings applies only to tangible property.[285] Indeed, in keeping with the general principle that "transitory" trespasses are not takings,[286] a live performance would seem to be more of a transitory trespass than a taking, whether a regulatory or physical theory is applied.[287] One of the chief limitations of a takings theory for copyright is that a takings theory will not provide a remedy for all situations where the statute would. Under the statute, a copyright owner can recover for every infringement, however transitory.[288] Under a takings theory, the owner can recover only if the copyright infringement rises to the level of a "taking," which cannot be merely transitory.[289] With works that are embodied in tangible objects (including digital files),[290] this is usually the case. But perhaps the most unfortunate limitation of this proposal is that it would leave owners of copyrights in performance works without a remedy when a state entity publicly performs their works. Even if a state repeatedly staged performances of a copyright owner's work, no tangible property interest of the owner can rightfully be said to be "taken," and therefore there would be no remedy under this proposal.

Perhaps a theory of regulatory takings along the lines of Dr. Ghosh's proposal would be a better answer to the live performance problem. After

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[284] 17 U.S.C § 106(4). *See generally* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.14 (Matthew Bender, rev. ed. 2023).

[285] *See* Jim Olive Photography v. Univ. of Hous. Sys., 624 S.W.3d 764, 773 (Tex. 2021).

[286] Univ. of Hous. Sys. v. Jim Olive Photography, 580 S.W.3d 360, 376 (Tex. App. 2019), *aff'd*, 624 S.W.3d 764, 777 (Tex. 2021).

[287] *Jim Olive Photography*, 624 S.W.3d at 773–74.

[288] *See generally* 2 MELVIN B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8 (Matthew Bender, rev. ed. 2023).

[289] *Univ. of Hous. Sys.*, 580 S.W.3d at 376.

[290] *See* discussion *infra* Section III.C.4.

all, both physical and regulatory takings regimes are applied to other forms of property, depending primarily on the nature of the governmental action.[291] Although the regulatory takings proposals for copyright are generally too speculative to be practical,[292] this idea may be the last remaining hope for authors whose primary work consists of a live performance. Shaping a theory of regulatory takings for live performances is outside the scope of this Comment; it is sufficient to note that this is one area of copyright in which this proposal is simply insufficient to provide a remedy.

4. Digital Infringements: Copyright and Takings in the Digital Age

With the use of computers, the internet, and digital technology becoming exceedingly widespread in the United States,[293] it is logical to deduce that digital copyright infringement will only become more common. This was precisely the type of copyright violation at issue in *Allen v. Cooper*.[294] Because the application of this proposal to such infringements has been assumed throughout this Comment, it may seem redundant to include an objection based on the nature of the vast array of digital works subject to copyright.[295]

The issue with digital materials is that they have no tangible existence outside of a machine (the computer or device) used to make them perceptible. The tangible object is the machine, not the digital file. The Copyright Act, however, addresses this issue by stating that "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly

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[291] *See generally* EAGLE, *supra* note 204, at § 1-13.

[292] *See* discussion *supra* Section III.C.3.

[293] Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults say They are 'Almost Constantly' Online*, PEW RSCH. CTR. (Mar. 26, 2021), https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/ ("Overall, 85% of Americans say they go online on a daily basis.").

[294] Allen v. Cooper, 140 S. Ct. 994, 999 (2020).

[295] *See generally* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (holding that digital computer code is itself subject to copyright law).

or with the aid of a machine or device."[296] This statutory definition specifically includes works that require a machine to make them perceptible within the realm of tangible media of expression.[297] Thus, this proposal may apply to digital files as well as to copies of works which require no mechanical assistance to make them tangible.

It is a generally accepted principle that "the placement of a work into a computer is the preparation of a copy."[298] Therefore, the uploading or downloading of a digital file to a computer or website owned by a governmental entity constitutes a compensable taking, to which this proposal would apply.

IV. CONCLUSION

"[S]omething is amiss" with the current inability of copyright owners to have a remedy at law when a state violates their copyright.[299] This state of affairs fails to meet the purpose of the Intellectual Property Clause of the Constitution "[t]o promote the Progress of Science and useful Arts, *by securing* for limited Times to Authors . . . *the exclusive Rights to their respective Writings* . . . ."[300] The same state of affairs also allows governmental entities to violate private property rights with impunity, in defiance of the policy goals of the Takings Clause.[301]

This proposal admittedly advocates for the development of an entirely new area of jurisprudence that seems to run counter to precedent. But the proposal would adjust—not overturn—precedent, and doing so is justified by the nature of the problem.[302] The policy goals of both the Intellectual Property Clause and the Takings Clause align to indicate a strong constitutional policy of protection for all private property interests against

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296 17 U.S.C. § 102(a).

297 *Id.*

298 *See* MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 519 (9th Cir. 1993) (quoting U.S. NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT ON THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 13 (1978)); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 n.24 (5th Cir. 1988); *see also* NIMMER, *supra* note 22, at § 8.08(A)(5)(a).

299 *Allen*, 140 S. Ct. at 1009 (Breyer, J., concurring).

300 U.S. CONST. art. I, § 8, cl. 8. (emphasis added); *see also* discussion *supra* Section II.A.2.

301 U.S. CONST. amend. V.; *see also* discussion *supra* Section II.B.1.

302 *See* discussion *supra* Section III.E.1.

governmental infringement.[303] The current application of sovereign immunity to copyright infringement operates counter to that policy.[304] This proposal would serve as a necessary corrective: to implement that policy instead of defying it.

The courts of the United States should immediately adopt a theory of physical takings applicable to copyright. The problem posed by the unintended consequences of the Supreme Court's strengthening of state sovereign immunity in *Allen* and its predecessors, though great, may thus be solved. A physical theory of takings along the lines advanced by this Comment would have the added advantage of avoiding many of the pitfalls inherent in a regulatory takings regime.[305] The "right to the copy" paves a new path for private copyright owners to "resort to the laws of [their] country for a remedy" when government oversteps its bounds.[306] If courts adopt this proposal, the now-blocked path to fairness and equal justice for all against the power of the state will again be opened, and the progress of science and the useful arts will be more vigorously promoted.

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303 *See* Ghosh, *supra* note 10, at 688.

304 *See* discussion *supra* Section II.C.1.

305 *See* discussion *supra* Section III.C.4.

306 Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring) (quoting Marbury v. Madison, 5 U.S. 137 (1803)).