IN THE SUPREME COURT OF TEXAS

No. 19-0605

JIM OLIVE PHOTOGRAPHY D/B/A/ PHOTOLIVE, INC., PETITIONER

V.

UNIVERSITY OF HOUSTON SYSTEM, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued February 25, 2021

JUSTICE DEVINE delivered the opinion of the Court.

JUSTICE BUSBY filed a concurring opinion in which JUSTICE LEHRMANN joined and in which JUSTICE BLACKLOCK joined as to part II.

The issue in this interlocutory appeal from the denial of a plea to the jurisdiction is whether a copyright infringement claim against a governmental entity may be maintained as a constitutional takings claim. The court of appeals concluded "that a governmental unit's copyright infringement is not a taking and that the trial court therefore erred in denying the plea to the jurisdiction." 580 S.W.3d 360, 363 (Tex. App.—Houston [1st Dist.] 2019). Because we agree that the violation of a copyright, without more, is not a taking of the copyright, we affirm.

I

Jim Olive Photography d/b/a Photolive, Inc. (Olive) is a professional photographer in Houston, Texas. Olive took a series of aerial photographs of the City of Houston in 2005 and

identified as SKDT1082—"The Cityscape." Before displaying these photographs, Olive registered them with the United States Copyright Office. Olive's website describes the applicable copyright protections and states that "[t]he unauthorized use of these images is strictly prohibited."

Olive alleges that sometime in June of 2012, the University of Houston downloaded a copy of The Cityscape photograph from Olive's website, removed all identifying copyright and attribution material, and began displaying the photographic image on several webpages promoting the University's C.T. Bauer College of Business. The University did not seek Olive's permission to use The Cityscape photograph, and Olive did not discover that a copy was being displayed on the University's webpages until years later. After the discovery, Olive demanded that the University cease and desist its unauthorized use, and the University immediately removed the photograph from its website. The University, however, did not pay Olive for its use of the digital copy on its website.

Olive sued the University of Houston, alleging that the University's publication of his photograph was an unlawful taking and sought compensation under Article I, Section 17 of the Texas Constitution and under the Fifth Amendment of the United States Constitution. The University answered and filed a plea to the jurisdiction, asserting its immunity from suit under the doctrine of sovereign immunity. The trial court denied the University's plea, prompting it to pursue an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing an interlocutory appeal from an order on the government's jurisdictional plea).

The University argued in the court of appeals that (1) a copyright is not property under the federal and state takings clauses, and (2) even if a copyright is property within the meaning of the Takings Clause, Olive's allegations of infringement do not state a cognizable taking. In

response, Olive argued that (1) the takings clauses protect all types of property, and (2) the University's appropriation and display of his copyrighted work was a per se taking that should not be analyzed under the multi-factor test for regulatory takings. Agreeing with the University "that a governmental unit's copyright infringement is not a taking," the court of appeals vacated the trial court's order denying the plea and dismissed the "cause for lack of subject-matter jurisdiction." 580 S.W.3d at 363, 377.

The court reasoned that the University's single act of copyright infringement was not a taking because it did not take away Olive's right to use, license, or dispose of the underlying creative work. *Id*. at 375–77. And while the University's infringement may have cost Olive a licensing fee, it did not rise to the level of a viable takings claim. *Id*. Olive appeals the court's decision.

II

Olive's petition for review begins with the proposition that the Takings Clause protects copyrights, as it does other types of intellectual property, from appropriation by the State and that the court of appeals erred in determining otherwise. Quoting Black's Law Dictionary, Olive submits that "the court's determination that copyrights are not protected by the Takings Clause ignores the core property interest protected by a copyright: the 'exclusive right to reproduce, adapt, distribute, perform, and display the work.'" *Copyright*, BLACK'S LAW DICTIONARY (10th ed. 2014).

We, however, do not read the court of appeals' opinion to determine whether a copyright is, or is not, a property interest protected by the Takings Clause. Although the court discusses the case law and legal scholarship on the issue in some detail, it ultimately finds the cases inconclusive on whether a copyright is a constitutionally protected property right, and the

scholars divided on whether it should be.[1] 580 S.W.3d at 366–75. And although the court describes a copyright as a "protected property interest" for due process purposes, *id*. at 366, and as "property with value to its owner" protected by a federal statutory cause of action for infringement, *id*. at 375 (citing 17 U.S.C. §§ 501(a), 504)), it never decides whether a copyright is also property protected by the Takings Clause. Instead, the court holds that the University's single act of copyright infringement—the governmental interference with property rights alleged here—does not state a viable takings claim, but rather is akin to a transitory common law trespass for which the state has not waived its immunity. *Id*. at 376.

A copyright[2] is a form of intellectual property that subsists in works of authorship that are original and are fixed in a tangible medium of expression. 17 U.S.C. § 102. Olive's photograph is such a work. So too are books, paintings, sculptures, and musical compositions to name a few. *Id*. § 102(a). For a term consisting of the author's life plus seventy years, the owner of a copyright enjoys the five exclusive rights[3] of reproduction, adaptation, distribution, and public performance and display. *Id*. §§ 302(a), 106. Infringement occurs when a person or entity exercises any of the owner's exclusive rights in a creative work without authorization or other legal defense. *Id*. §§ 501, 106.

It seems reasonably clear to some legal scholars "that the exclusive rights that federal copyright law provides to authors and copyright owners qualify as a form of property for

[1] We have received amicus briefs from Adam Mossoff, a professor of law at George Mason University, and J. Glynn Lunney, a professor of law at Texas A&M School of Law, expressing contrary views on the property rights that attach to a copyright. We have also received an amicus brief from the National Press Photographers Association and the American Society of Media Photographers, joined by several similar organizations, in support of the petition for review.

[2] The copyright clause of the United States Constitution authorizes Congress to grant authors a limited intangible property right in their creative works. *See* U.S. CONST. art. I, § 8, cl. 8. Pursuant to this authority, Congress enacted the Copyright Acts of 1909 and 1976. The Copyright Act of 1976 governs works fixed in tangible medium after 1977. *See* 17 U.S.C. §§ 101–1511.

[3] The author's exclusive rights in the work, however, are subject to certain defenses, such as fair use. *See* 17 U.S.C. § 107 (providing limited defense for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, in light of various specified factors); *see also id.* §§ 108–121 (setting forth additional limitations on exclusive rights).

purposes of takings law."[4] Others disagree.[5] In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the only recent Supreme Court case to deal with an alleged taking of intellectual property, the Court extended the Fifth Amendment guarantee to trade secrets, evoking this comment: "If trade secrets, one of the weakest forms of intellectual property, are protected by the Fifth Amendment, then patents, copyrights, and trademarks must logically be protected as well."[6]

Assuming for our purposes that a copyright is property entitled to such protection, this appeal questions whether pleading a copyright infringement claim against a state actor also encompasses a per se takings claim under the federal and state constitutions.

III

Olive contends that it does. He argues that copyright infringement by a state actor is a taking for which just compensation is owed under both the federal and state constitutions. He maintains that his copyrighted work, although intangible, is a species of personal property, which is entitled to the same protection from direct governmental appropriation as other types of tangible property. Olive's pleadings allege that the University

> without any independent verification of the rights to The Cityscape photograph, placed [Olive's] copyrighted image into circulation with no attribution or other protections whatsoever. Indeed, upon information and belief, [the University] intentionally or knowingly removed identifying material from The Cityscape before uploading it onto its webpages.

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[4] John T. Cross, *Suing the States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 390 (2001); *see also* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 693 (2007); Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 55 WASH. & LEE L. REV. 849, 855–57 (1998).

[5] *See, e.g.*, Tom W. Bell, *Copyright As Intellectual ~~Property~~ Privilege*, 58 SYRACUSE L. REV. 523, 538 (2008) ("The right to receive just compensation for governmental takings has long represented a hallmark of property. Does copyright afford such a right? The exact question remains as yet unlitigated and, thus, still subject to dispute."); 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, 28–29 (2007) ("Forms of 'property' established solely as a matter of governmental discretion, such as patents, may be entitled to procedural due process protection, but are not automatically entitled to Takings Clause protection.").

[6] Heald & Wells, *supra* note 4, at 856.

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