

LEGAL UPDATES

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# Texas Appeals Court Says University's Copyright Infringement Is Not a Taking

## Key Points

The Court of Appeals for the First District of Texas held that a public university's alleged copyright infringement is not a "taking" under the U.S. or Texas constitutions.

The opinion was based on the nexus of previous rulings as regards copyright, the definition of "property" and the takings clause as applied to state actors.

The court, however, specifically cautioned against alleged copyright infringement.

On June 11, 2019, the Houston First Court of Appeals issued a 34-page opinion holding that the University of Houston's alleged infringement of a private citizen's copyrighted photograph was not a taking under the Fifth Amendment or the Texas Constitution. *University of Houston System v. Jim Olive Photography, DBA Photolive*, No. 01-18-00534-cv (Tex. App.—Houston [1st Dist.] June 11, 2019). The court's opinion, written by Justice Richard Hightower and joined by Chief Justice Sherry Radack and Justice Laura Carter Higley, finds the lower court erred in ruling that it had jurisdiction to hear takings clause allegations by Jim Olive Photography against the University of Houston. *Id.* at 25.

## The photo in question: from helicopter to appeals court

Olive, a professional photographer, rented a helicopter, hired a pilot and, utilizing special photography equipment, suspended himself from the

helicopter to take an aerial photograph of the City of Houston at dusk. *Id.* at 2. Olive registered the photo with the U.S. Copyright Office in 2005 and owned all rights associated with it. *Id.* He then displayed it for purchase on his website. *Id.* Olive alleged that the University of Houston downloaded the photo from his site, removed all identifying material and displayed it on several pages of its website to promote its business school, without authorization. *Id.*

Because the state was immune from a copyright infringement claim, Olive sued the university in Texas state court for an unlawful taking by the university under the Texas and U.S. constitutions. The university responded by challenging the lower court's jurisdiction, arguing that Olive did not plead a viable takings claim and that the trial court lacked subject-matter jurisdiction due to the university's governmental immunity. The trial court denied the university's plea to the jurisdiction. The university then filed an interlocutory appeal.

### **Copyright, property and the takings clause**

In its opinion, the appellate court considers the nexus between intellectual property rights and the Fifth Amendment's takings clause. The court grappled with the "scant" authority on the issue, stating that "[n]o Texas case appears to have addressed whether a copyright is property for purposes of the takings clause and whether copyright infringement by a state actor is a taking." *Id.* at 13. The court reasoned the term "property" is more narrowly interpreted in the takings clause than the same term in the due process clause. Ultimately, the court determined that although the copyright is a property interest, copyright infringement is not a taking because courts have previously found that no takings claim exists for similar trademark and patent interests.

The court of appeals reversed the lower court, stating Olive's case amounted to an infringement claim and the state has sovereign immunity in copyright, patent and trademark infringement cases (but not trade secrets cases). *Id.* at 32.

### **What this means to you**

For public universities and other state actors, it remains important to avoid the use of copyrighted materials. The court even cautioned its "opinion should not be construed as an endorsement of the university's alleged copyright infringement." *Id.* at 32. Although the court foreclosed monetary relief by holding that government infringement on a copyright is not a "taking," copyright owners can still seek injunctive relief against a state actor for ongoing and prospective infringement. Governments and other public entities should avoid using copyrighted material unless the material is: (1) reproduced for "fair use;" (2) part of the public domain; or (3) authorized by the copyright owner.

## Contact us

If you have questions about this update or how it might affect your business, contact Kate David, Robert Eckels, Sandy Hellums-Gomez, Arturo Michel, Heidi Rasmussen, Mike Stafford or Ben Stephens.