Florida A & M University Law Review

Volume 17 | Number 1 Article 11

Fall 2022

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Cover Page Footnote

Derrick S. Gaiter, Must American Artists Starve?, 17 Fla. U & M U. L. Rev. 117 (2022).

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Derrick S. Gaiter[1]

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"If we accept and acquiesce in the face of discrimination, we accept the responsibility ourselves and allow those responsible to salve their conscience by believing that they have our acceptance and concurrence. We should, therefore, openly protest everything. . . that smacks of discrimination or slander."[2]

Opening Thoughts

Freedom is the bedrock of social, political, and industrial life in the United States of America.[3] *It is ingrained so deeply in the American psyche that many children do not consider the constraints of sexism, racism, and mere apathy toward them until early adolescence when they are inwardly driven to identify and sometimes redefine their role in*

1. Derrick S. Gaiter, J.D. Candidate, Florida A&M University College of Law, 2023; B.A. Howard University, 2015; M.A. Parsons The New School for Design/Cooper Hewitt Smithsonian, 2017. The author would like to thank Professor Patricia A. Broussard and Professor Ann Marie Cavazos for developing his interests in Constitutional Law. None of his intellectual pursuits would be possible without the love and support of his family, The Gaiters.

2. Mary McLeod Bethune, *Words of Wisdom*, Big Think (Oct. 24, 2014), https://bigthink.com/words-of-wisdom/mary-mcleod-bethune-protest-everything-that-smacks-of-discrimination/.

3. It is the author's intention for "Freedom" to mean enjoyment of all of the rights afforded to American citizens and non-citizens under the United States Constitution.

our society. For centuries, the notion of freedom has been chewed through by philosophers and scholars alike in search of a kind of certainty that can support political rule.[4] *But this thought is meaningless to many Americans because it purports that the intelligentsia is a status class without barriers to entry. By 1914, this was evident to the nation in general, and the African American community saw this in particular when the NAACP, among other entities, had moved to reimage the national character of Black folk*[5]*: George W. Johnson, the first African-American to make commercial music, began to lose prominence in the early twentieth century due to a rise of sentiments that felt his artistry mocked the plight of African Americans.*[6]

Johnson was born into slavery and developed a phenomenal musical talent in the home of a wealthy white farmer.[7] *After being freed, Johnson left Virginia for New York, finding himself singing songs on the streets of New York City, earning a modest living as a street entertainer known for his whistling.*[8] *As many artists today would have it, Johnson was discovered by distributors from the New York Phonography Company and the New Jersey Phonograph Company and began recording popular songs.*[9] *These days, music technology required that every record be a master recording until 1895 when the Berliner Gramophone was introduced.*[10] *Subsequently, as music technology advanced, Johnson no longer needed to sing each record since a single master could reproduce any subsequent records.*[11]

It would be intellectually dishonest not to concede that American jurisprudence has not progressed since Johnson's time. However, the rise of new music technology in the music industry, coupled with the onslaught of political correctness championed by nouveau-riche Blacks, solicits the question for history and the future: Must American Artists Starve? Obama once said, ". . .the basic American promise that if you worked hard, you could do well enough to raise a family, own a home, send your kids to college and put a little away for retirement. The defin-

4. HORACIO SPECTOR, FOUR CONCEPTIONS OF FREEDOM, 38 Pol. Theory 780-808 (2010).

5. Weekend Edition Sunday, *Born A Slave, Street Performer Was First Black Recording Artist,* NPR (Apr. 6, 2014), https://www.npr.org/2014/04/06/299708729/born-a-slave-street-performer-was-first-black-recording-artist.

6. *Id.*

7. *Id.*

8. *Id.*

9. TIM BROOKS, LOST SOUNDS: BLACK AND THE BIRTH OF THE RECORDING INDUSTRY, 1890-1919 15 –71 (2004).

10. *Id.* at 35.

11. *Id.* at 63.

ing issue of our time is how to keep that promise alive. . ."[12] *In his time, Johnson did not have the bargaining power to negotiate a contract with distribution companies. Even if an enslaved person were taught how to read and write by blessed masters, that education hardly confers business or legal aptitude. Likewise, how could any movement for the positive image of Black folk sincerely and meaningfully hold Black interests as paramount while finding fault with the type of self-expression that is responsible for our cultural authenticity? Frankly, the problem was not Johnson or the national image he might have conveyed for Black folk. The problem was that America was not ready to confront the atrocities of slavery because slavery is antithetical to the bid for freedom sold to attract African-Americans into the workforce and European migrants to the Land. Only when America decidedly confronts the realities of its past in favor of its people instead of business, industry, and politics will the nation as a whole experience its proverbial dream.*

There is absolutely no bona fide reason why American musicians should be struggling to collect profits from their work. There is also no bona fide reason for any one group to have the power to "cancel" an artist merely for appearing differently than the standard of that group's ideals. Independently, these powers are mighty, but together they are outright draconian. No artist should fret about not earning a livelihood because of their image or inability to appease arbitrary desires. When music service providers and Congress tag-team in this fight, artists have minuscule protection. Many are left to legal services that raise constitutional claims as fodder in a seemingly desperate cry for public attention and liberal salvation. The creation of such vulnerability for an artist is criminal, no matter how divinely the creation of said vulnerability is written in legislative terms.

INTRODUCTION

Digital streaming confuses even the ablest scholars, lawyers, and judges of artists' relationship with the music industry. To update the copyright law concerning three music-specific issues,[13] Congress enacted the Music Modernization Act ("MMA") in 2018.[14] However,

12. H.R. Doc. No. 112-76, (2012). (presidential address before a joint session of congress)

13. Three music specific issues include: (1) Licensing of musical works for digital delivery in interactive systems; (2) protection of sound recordings fixed before February 15, 1972; and (3) payment of royalties to sound recording producers, mixers, and recording engineers.

14. Eric Harbeson, *The Orrin Hatch – Bob Goodlatte Music Modernization Act: A Guide for Sound Recording Collectors*, NAT'L REC. PRES. BD. 1 (2021), https://www.loc.gov/

MMA's enactment suggests a likely violation of Due Process under the Fifth Amendment.

This constitutional question arises from a legal challenge brought by Eight Mile Style against Spotify. Eight Mile Style is Eminem's music publisher, which contends that the Swedish audio streaming and media service provider digitally streamed Eminem's music without payment of royalties because Spotify purports that Eminem's musical works have no known owner.[15] Congress implemented a standard[16] on locating and identifying copyright owners, intending that music service providers who stream music render royalty payments, but the "commercially reasonable efforts" standard prejudices copyright owners since stricter standards are available to protect artists and publishers from unscrupulous industrial practice.[17] Additionally, Eight Mile Style's complaint claims a constitutional violation of the Takings Clause because MMA failed to provide just compensation to the publisher.[18] While the music law community lauds the filed complaint for tackling a herculean force, Eight Mile Style's approach will likely find disappointment.

This legal essay proposes a solution to the problem of artist and publisher compensation as deprived by MMA and discusses the realities and limitations of pursuing a Takings Clause violation under the Fifth Amendment. It further proposes a modern perspective on copyrighted works as property to lay the intellectual foundation for copyright reform and offers that the "best efforts" standard should replace the "commercially reasonable efforts" standard since modernizing copyright law is essential to the music industry. Lastly, the author suggests a practical approach to pursuing a Due Process claim under the Fifth Amendment.

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static/programs/national-recording-preservation-plan/publications-and-reports/documents/Hatch-Goodlatte-Music-Modernization-Act_Guide-for-Sound-Recording-Collectors.pdf

15. Eriq Gardner, *Eminem Publisher Sues Spotify Claiming Massive Copyright Breach, "Unconstitutional" Law*, HOLLYWOOD REP. (Aug. 21, 2019), https://www.hollywoodreporter.com/business/business-news/eminem-publisher-sues-spotify-claiming-massive-copyright-breach-unconstitutional-law-1233362/.

16. 17 U.S.C. § 115(d)(10)(B)(i)(I) (1978).

17. *Id.*

18. Gardner, *supra* note 15.

I. PURSUING THE TAKINGS CLAUSE UNDER THE FIFTH AMENDMENT

Generally, the federal government has the power of an eminent domain.[19] Eminent domain is the authority to take private property to complete an urgent and direct governmental objective.[20] However, the Constitution's Fifth Amendment limits this power by stating, "nor shall private property be taken for public use without just compensation."[21] When analyzing the takings issue, the Court will recognize: (1) What is a "taking"?; (2) Does a "taking" involve "property"?; (3) Is the "taking" for "public use"?; and (4) Is "just compensation" owed? The analysis fails where any criterion is not colored, and the claim becomes moot. The purpose of the takings clause is to protect property rights provided by the Constitution while encouraging democracy through loss spreading when the federal government confiscates personal or private property for the public good.[22]

There are two types of takings, possessory and regulatory.[23] The "copyright control" provision constitutes a regulatory taking: a complete denial of any reasonable, economically viable use of music through digital streaming since permitting Spotify to avoid paying royalties by misclassification, however deliberate, is legally possible. Eight Mile Style will likely assert this legal theory, and the Court will likely consider the factor test[24] articulated in *Penn Central Transportation Co. v. New York City* to make this determination. However, Eight Mile Style will likely not prevail at the Supreme Court on taking action in the instant case since the Court may reason that the economic impact sustained by Eight Mile Style is not severe enough to declare a takings violation because of the social goals promoted by Con-

19. *History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUST. (Jan. 24, 2022), https://www.justice.gov/enrd/history-federal-use-eminent-domain

20. *Id.*

21. U.S. CONST. amend. V, § 8; *See also Amdt5.8.1 Overview of the Takings Clause*, CONGRESS.GOV (2022), https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE_00013280/.

22. U.S. CONST. amend. V, § 8.

23. The author intends that a possessory taking is one that the government takes all or part of real or personal property by physical attachment to the property. A regulatory taking is one that the government reduces the use of real or personal property to the extent of depriving all economically reasonable utility or value in the property.

24. Courts should consider the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.

gress through the MMA if the Court does not expand its interpretation of "public use'.[25]

Despite a history of uncertain jurisprudence applied to property in general and copyrights in particular, historical implications would best guide the Court to perceive copyright as a less traditional form of property as it did in *Ruckelshaus v. Monsanto Co.*[26] However, the trouble for the Court emerges in its interpretation of "public use."

Historically, the Court has very broadly defined "public use," but commercial transactions conducted electronically on the Internet reside outside the bounds of the Court's opinion in *Berman v. Parker*.[27] The analogy "beautiful as well as sanitary" used by the Court indicates the condition of real property as an immediate public need that requires urgent fulfillment. "Modernization," here, shows the condition of intellectual property as an immediate business need with public necessity as either incidentally affected at worst or secondary interest to reform copyright law at best. Acts of Congress that incidentally update laws or safeguard public needs as a secondary interest in response to desires for changing any laws in general, but copyright law, in particular, is not social legislation. It does not comport with the Court's understanding[28] since the right of eminent domain implicates an opportunity for direct, not circuitous, fulfillment of governmental activity serving a public purpose. Additionally, the Court cannot justify MMA's "copyright control" provision to mean "public use" merely because Congress is the guardian of the public need since no legal benefit is conferred to the public when a musician's work is digitally streamed for free.[29]

The declaration of public necessity to take such property through the "copyright control" provision is a red herring because busi-

25. Musical Works Modernization Act, 17 U.S.C. § 101 (2016).

26. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-04 (1984). ("To the extent that appellee has an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment. Despite their intangible nature, trade secrets have many of the characteristics of more traditional forms of property. Moreover, this Court has found other kinds of intangible interests to be property for purposes of the Clause.").

27. Berman v. Parker, 348 U.S. 26, 33 (1954). ("If Congress decides that the Nation's Capital shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.").

28. *Id.* at 33. ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.").

29. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18, 96 S. Ct. 2882, 2893, 49 L. Ed. 2d 752 (1976) ("[T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers.").

ness interests lie before the interests of the public. It yields false conclusions about MMA's intent and impact in reforming copyright laws. The Internet cannot foreseeably be a public commodity or become confiscated to serve a public function despite consumers' growing interest in streaming music online. Perhaps someday there might be a right to Internet access, or the federal government might one day become an Internet Service Provider, but today is not that day, and certainly not through MMA. Since the "public use" criterion implicates particular focus under the Takings Clause, "public use" remains uncolored through legal methods, which would render such a claim fruitless. Sufficiently the publisher will likely not prevail on this constitutional issue for this reason.

II. PROPOSED APPROACH TO DEFINING "PROPERTY" IN COPYRIGHT LAW

The approach to defining property in copyright law does not have to be mysterious or complicated. It is understood in United States jurisprudence that copyright is a bundle of rights comprising an "original work of authorship."[30] Where another work embodies the copyrighted work, it is necessary to note that the original work is separate from that.[31] As seen in *Ruckelshaus*, the Court will not be unreasonable in comparing the nature of copyrights to other property types since copyrights' intangible interests are comparable to the metaphysical qualities of traditional property types.[32] Equally important, copyright is assignable; copyright can be the subject of a trust account, and, in bankruptcy, it will pass to a trustee. Therefore, copyright comports the Court's understanding of property to include hand and mind works.[33]

Furthermore, copyrights are generally personal-type property.[34] If taking action were to be asserted, it would likely only be on regulatory grounds. It is no secret that the government can regulate

30. 17 U.S.C. § 102(a) (1976). ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

31. Cf. 17 U.S.C. § 202 (1976). ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

32. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984).

33. *See* Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?,* 50 FLA. L. REV. 529, 566 (1998).

34. *See* Stewart v. Abend, 495 U.S. 207, 219 (1990).

the music industry to deny all economic value of a property to its owner.[35] The "copyright control" provision does precisely this. This provision allows royalties not to be paid to copyright owners by classifying known artists as unknown without rigorous search or evaluation for ownership, especially when business records prove prior compensation issued to "unknown" artists and publishers.[36]

III. PROPOSED MMA STANDARD IN THE INTEREST OF LOCATING AND IDENTIFYING COPYRIGHT OWNERS

"Best efforts" is the highest standard nationally recognized in the performance of obligations between parties.[37] This standard seemingly requires that efforts be futile, and because of this misbelief, courts have consistently misinterpreted the term and its counterparts and have also applied these terms subjectively.[38] "Best efforts" would require a music service provider's effort, minus bankruptcy, to locate and identify copyright owners. Contrastingly, "commercially reasonable efforts" subject music service providers to an objective standard. While this may appear reasonable in the short term for the music industry, in the long haul, the use of the objective standard will only create an unpersuadable position, or bottom line, when later controversies emerge. For example, if the Court finds that the "commercially reasonable efforts" standard is appropriate, it may encourage lower courts to overlook any future acts less than the current standard. While an objective standard assists in the fundamental desire for fairness, it should not be the determining criterion that defines strength in the search for copyright owners to pay.

IV. PURSUING THE DUE PROCESS CLAUSE UNDER THE FIFTH AMENDMENT

The illustration is simple: The federal government enacts legislation permitting the nonpayment of royalties to artists and publishers

35. *See* Andrus v. Allard, 444 U.S. 51, 66–67 (1979) (upholding a ban on the sale of bald eagle feathers).

36. Complaint at 28, Eight Mile Style, LLC v. Spotify USA Inc., (M.D. Tenn. 2019)(No. 3:19-CV-0736, 2019 WL 4017301).

37. Best Efforts, Commercially Reasonable Efforts, and Reasonable Efforts Provisions in Commercial Contracts, LexisNexis (Oct. 26, 2022), https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-best-efforts-commercially-reasonable-efforts-and-reasonable-efforts-provisions-in-commercial-contacts.pdf.

38. *Id.*

when their copyrighted music digitally streams through music service providers. Because there is a governmental interest in updating copyright laws in a way that affects an owner's property, the law will be subject to Due Process review.

Although copyrights are interests in property that the Takings Clause protects, the Fifth Amendment states that the United States, nor the respective states, shall deprive any person "of life, liberty, or property without due process of law."[39] Traditionally, the Due Process Clause provides two constitutional limitations generally known as "substantive due process" and "procedural due process."[40] Substantive due process searches whether the government had sufficient justification for depriving people of life, liberty, or property.[41] The validity of the rationale is contingent upon the appropriate standard of judicial scrutiny applied.[42] Since the Takings Clause does not apply to the instant case, substantive due process will likely protect the retroactive impairment of private vested rights executed by MMA.

The right of self-government—autonomy—is contingent upon a copyright owner identifying and organizing their unique interests and priorities. To some extent, it may involve executing those ideals. Recognizing MMA as having not violated the Due Process Clause of the Fifth Amendment would indicate a fundamental shift in the understanding of property rights. The Court would also recognize the music industry's increasing reliance on digital streaming and not the authors of these creative works, whether they are unknown or known, since eCommerce is the legally operative fact of the modernization of copyright law. The Court would be affirming an antithetical principle that it does not particularly matter if copyright owners have economic and moral rights because the hope of this Court is not freedom. Where streamed copyrighted music is used to effectuate industrial interests seeking to

39. U.S. CONST. amend. XIV.

40. Omission of procedural due process is largely due to space constraints, but it may not be very significant. The Due Process Clause, which safeguards against the arbitrary and irrational retroactive impairment of private vested rights, can offer protection since the Takings Clause is unavailable. See Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 472 (1985); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

41. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship.

42. County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998). (the Supreme Court has explained that the due process clause "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them'."). (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

change copyright law, an owner of copyrighted music has a right that their music not be digitally streamed without payment of royalties.

Furthermore, MMA's limitation of liabilities to those after January 1, 2018, does not constitute federal regulation of future action entirely since MMA was enacted ten months after the indication of liability limitation. The impairment, representing an unconstitutional deprivation of property since the owners' rights are vested, also impairs the obligation of royalty payments before 2018.

MMA significantly interferes with the exercise of autonomy by copyright owners with citizenship status.[43] Fear of maladaptation in the law is not a compelling government interest without regard for distinctive policy considerations. The government's interest in merely modernizing copyright law by utilizing the music industry as a broker does not represent the notion of "close tailoring" required to survive judicial review since digital streaming does not implicate values that could inform governmental interests. Digital streaming is merely the result of applying a technological concept,[44] not the concept itself—the object from which values derive. MMA is unreasonable since it is unsupported by sufficiently compelling government interests, and the "copyright control" provision remains loosely tailored in the endeavor to accomplish those interests. Without more, MMA unnecessarily infringes on the right to self-government because the theory of an uncertain legal future is not a practically compelling reason to deprive copyright owners of royalty payments today[45] or the interests these owners have in copyright as property.

CONCLUSION

The principles of American copyright law are largely based upon theories of personhood, utilitarianism, and the theories of John Locke (1764).[46] As a competing justification for private property rights, the theory of personhood stands for the notion that property is necessary for an individual's personal development.[47] The theory of utility, likewise, stands for the notion that property exists to ensure that the

43. It is the author's intention for "citizenship status" to highlight how the current law purported to progress American life is in fact restricting the promise of freedom that American citizens in particular enjoy.

44. *What is streaming? How video streaming works,* CLOUDFLARE (2022), https://www.cloudflare.com/learning/video/what-is-streaming/.

45. *Cf.* Zablocki v. Redhail, 434 U.S. 374, 389 (1978).

46. John Locke, *Two Treatises of Government,* 5 Works of John Locke 5 (1823), https://oll.libertyfund.org/title/hollis-the-two-treatises-of-civil-government-hollis-ed.

47. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

owners use resources in a manner that maximizes economic value. Contrastingly, John Locke finds that such rights are sincerely and meaningfully encompassed by the justification for personal development and of value derived from labor and merit.[48] When American copyright law came to being through Article I, Section 8, Clause 8 of the United States Constitution, it did so by the full import of the utility principle.[49]

By no means should the "copyright control" provision be construed as a default defense for music service providers, nor should the Supreme Court be so enticed to see such a conclusion as valuable to the interest of enterprise or a new generation in copyright law. The Court has seen this dynamic with the economic substantive due process doctrine from the late nineteenth century until 1937. However, it is different because hypothetical intention informs the effort to modernize copyright law, not a public necessity. "Compelling government purpose" and hypothetical intentionalism are not the same because necessity implies a genuine purpose to solve an evident problem. Hypothetical intentionalism is unrestrained by the consciousness of reality or codes of formality as it purports. It is, in fact, the best estimation of what could be a likely problem. Therefore, MMA is aspirational at best—arbitrary and irrational in truth.

CLOSING THOUGHTS

Discussion on the American Dream is incomplete without mention of the human condition. To be an artist in America, in terms of existentialism, is to be in full possession of oneself and not contoured by public morals as to what constitutes good taste. Social movements reacting against Johnson in the twentieth century, for instance, missed this point on what cultural authenticity means because those movements were concerned with social mobility. No one is truly free if everyone is defined by rules that are not their own, even when ascription provides social and economic success. Equally important is the fact that one's right to not conform does not obviate the need for equity considera-

48. Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L.J. 287 (1988).

49. U.S. CONST. art. I, § 8, cl. 8 (Article I, Section 8, Clause 8, of the United States Constitution grants Congress the enumerated power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Utilitarianism is the doctrine that actions are right if they are useful or for the benefit of a majority; the doctrine that an action is right insofar as it promotes happiness, and that the greatest happiness of the greatest number should be the guiding principle of conduct.).

tion and legal protection. In Johnson's case, business prevailed because Johnson was underrepresented.