Case No. 20-20503

United States Court of Appeals for the Fifth Circuit

CANADA HOCKEY, L.L.C., doing business as EPIC SPORTS; MICHAEL J. BYNUM,
Plaintiffs-Appellants
v.
TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT; ALAN CANNON; LANE STEPHENSON, in his individual capacity,
Defendants-Appellees

On appeal from the
U.S. District Court for the Southern District of Texas
Case 4:17-cv-00181

Amicus Curiae Prof. Adam Mossoff's Brief Supporting Plaintiffs-Appellants

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Interest and Independence of Amicus

Amicus curiae Adam Mossoff is a law professor who teaches and writes in patent law, copyright law, and constitutional law. He has an interest in promoting continuity in the evolution of these interrelated doctrines. His research has confirmed that courts have long secured under the United States Constitution the property rights in the fruits of productive labors of innovators and creators. He has no stake in the parties or in the outcome of the case.

No one other than Mossoff and his counsel wrote this brief or parts of it, and no one other than Mossoff and his counsel contributed money intended to fund its preparation and submission.

Mossoff has moved for leave to file this brief.

Summary of Argument

The district court incorrectly held that the plaintiffs are precluded from pursuing their legal claims for takings and copyright infringement by the defendants. Substantial case law in the U.S. Supreme Court and lower federal courts reaching back to the early American Republic support that federal intellectual property rights are "property" under the U.S. Constitution. These precedents and authorities shed important light on the merits of the plaintiffs' claims.

Patents and copyrights are "property" protected under the Fifth Amendment's Due Process and Takings Clauses and the Fourteenth Amendment's Due Process Clauset. The Supreme Court and lower federal courts have consistently held since the nineteenth century that intellectual property rights secured by Congress under the Constitution, *see* U.S. CONST. art. I, § 8, cl. 8, are "property" under these constitutional provisions in protecting citizens against unlawful governmental action. *See, e.g.*, *Horne v. U.S. Dept. of Agriculture*, 135 S. Ct. 2419, 2427 (2015), *McKeever v. United States*, 14 Ct. Cl. 396 (1878).

Today, many lawyers and judges have forgotten or misunderstood this extensive and binding case law affirming the constitutional protections afforded to federal property rights in patents and copyrights. *See, e.g.*, Adam Mossoff, *Patents as Constitutional*

Private Property: The Historical Protection of Patents under the Takings Clause, 87 B.U. L. Rev. 689 (2007) (detailing case law and explaining why it is forgotten today). Thus, this brief details these cases and authorities to better inform this Court's analysis and decision in this case.

Argument

A. Since the early American Republic, the U.S. Supreme Court and lower federal courts defined copyrights and patents as property.

In 1824, Justice Joseph Story wrote for a unanimous Supreme Court that a patent secures to an "inventor … a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession." *Ex parte Wood*, 22 U.S. (9 Wheat.) 603, 608 (1824). The *Wood* Court further recognized that patents are among "the dearest and most valuable rights which society acknowledges" given that the Founders "expressly delegated to Congress the power to secure such rights." *Id.* Although *Wood* addressed patent rights, its reasoning that "the constitution itself … means to favour" patents applies equally to copyrights. *Id.*

The constitutional favor bestowed on patents, according to *Wood*, arises from the constitutional provision authorizing Con-

gress to "secure" the same "exclusive right" for both "inventors" and "authors." U.S. CONST. art. I, § 8, cl. 8. Given this shared constitutional provenance, the Supreme Court has recognized the close affinity between patents and copyrights. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984) (acknowledging "the historic kinship between patent law and copyright law").

Nineteenth-century courts held that copyrights and patents are property rights. In 1841, Justice Story, riding circuit, recognized that copyright is "private property" that should be protected against "piracy." *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841). Federal courts also recognized that a patent "is a species of property," *Allen v. New York*, 1 F. Cas. 506, 508 (C.C.S.D.N.Y. 1879), and that infringement is "an unlawful invasion of property," *Gray v. James*, 10 F. Cas. 1019, 1021 (C.C.D. Pa. 1817).

The classification of both copyrights and patents as property rights by early American courts was supported by legal authorities. In his influential *Commentaries on American Law,* Chancellor James Kent classified copyrights and patents under the section title, "Original Acquisition by Intellectual Labor." 2 James Kent, *Commentaries on American Law* 497 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826). Here, Chancellor Kent explained that "literary

property" is a form of "property acquired by one's own act and power." *Id.* Both authors and inventors, he explained, "should enjoy the pecuniary profits resulting from mental as well as bodily labor." *Id.* Sir William Blackstone similarly recognized in his famous *Commentaries* that "the right, which an author may be supposed to have in his own original literary compositions" is a "species of property" because it is "grounded on labour and invention." 2 William Blackstone, *Commentaries on the Laws of England* *405 (referring to "Mr. Locke" for support and citing the *Second Treatise*). Indeed, before the Constitution was adopted in 1787, several states enacted statutes that secured copyrights, "there being no property more peculiarly a man's own than that which is produced by the labour of his mind." *Copyright Enactments of the United States, 1783–1906*, at 14, 18–19 (Thorvald Solberg, ed., rev. 2d ed. 1906) (quoting copyright statutes adopted in Massachusetts, New Hampshire, and Rhode Island).

Lastly, the Framers of the Constitution recognized that copyrights and patents are property. Writing as Publius, James Madison stated, "The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors." FEDERALIST NO. 43, at 271–72 (Clinton Rossiter ed., 1961). The "right of common law" was a property right. In 1792,

Madison, writing in his own name, further confirmed his view that property inheres in things other than tangible goods, as it "embraces every thing to which a man may attach a value and have a right." James Madison, "Property," *National Gazette*, Mar. 29, 1792, in James Madison, *Writings* 515 (Jack N. Rakove ed., 1999). Thus, Madison wrote, "a man has property in his opinions," and "he may be equally said to have a property in his rights." *Id.*

Justice Levi Woodbury, riding circuit in 1845, explained that "we protect intellectual property, the labors of the mind, … as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears." *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845); *see also Brooks v. Bicknell*, 4 F. Cas. 247, 251 (C.C.D. Ohio 1843) (stating that "a man should be secured in the fruits of his ingenuity and labor" and that "it seems difficult to draw a distinction between the fruits of mental and physical labor"). In 1879, the Supreme Court recognized this similarity in copyrights and patents given that both secure "the fruits of intellectual labor." *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

B. Since the early nineteenth century, the U.S. Supreme Court has protected patents as private property rights under the U.S. Constitution.

There is no textual basis in the Due Process or Takings Clauses to discriminate as a matter of constitutional law between the "property" secured in a patent or copyright. Nor is there a textual basis in the Patent and Copyright Clause to discriminate as a matter of constitutional law between the "exclusive right" in a copyright or patent. For this reason, the consistent and repeated protection of patents under the Constitution against unauthorized uses by federal officials is instructive. Because this case law has been forgotten today, Mossoff, *Patents as Constitutional Private Property*, *supra*, it is recounted here for ease of reference.

In 1843, the Supreme Court unanimously ruled in *McClurg v. Kingsland* that the Constitution prohibits Congress from retroactively abrogating the property rights vested in issued patents. 42 U.S. (1 How.) 202, 206. The Court held that "a repeal [of a patent statute] can have no effect to impair the right of property then existing in a patentee." *Id.* A patent issued to an inventor is a vested property right, and "the patent must therefore stand" even if Congress repealed the statute under which the patent originally issued. *Id.* The Court emphasized that its decision was

based on the "well-established principles of this court" that the property rights in patents are constitutionally secured. *Id.*

According to *McClurg*, those "well-established principles" had been stated in real-property cases such as *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, which addressed property rights in land under the Treaty of Paris that concluded the Revolutionary War. 42 U.S. (1 How.) at 206, citing 21 U.S. (8 Wheat.) 464 (1823). *McClurg* thus confirmed as early as 1843 that patents are on par with property rights in land as a matter of constitutional doctrine.

In the second half of the nineteenth century, the Supreme Court and lower federal courts built upon *McClurg* and other precedents, consistently holding that patents are property rights protected under the Takings Clause. For example:

- "[T]he government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him." *United States v. Burns*, 79 U.S. 246, 252 (1870).

- A patent owner can seek compensation for the unauthorized use of his patented invention by federal officials because "[p]rivate property … shall not be taken for public use without just compensation." *Cammeyer v. Newton*, 94 U.S. 225, 234 (1876).

- "Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property…. Private property, the constitution provides, shall not be taken for public use without just compensation…." *Brady v. Atlantic Works*, 3 F. Cas. 1190, 1192 (C.C.D. Mass. 1876) (Clifford, Circuit Justice), *rev'd on other grounds*, 107 U.S. 192 (1883).

- A patent is not a "grant" of special privilege; the text and structure of the Constitution, as well as court decisions, establish that patents are property rights secured under the Takings Clause). *McKeever v. United States*, 14 Ct. Cl. 396, 421 (1878)

Indeed, by affirming *McKeever*, the Supreme Court necessarily confirmed that patents are property rights secured under the Takings Clause. *See United States v. Palmer*, 128 U.S. 262, 267 (1888) (noting that *McKeever* was appealed and affirmed but that "no opinion was delivered or report made").[1]

At issue in *McKeever* was the government's manufacturing a patented cartridge box without first securing a license from the inventor. The only two legal issues were whether the government was entitled to do so and, if not, if its doing so was a tort (over which the claims court had no jurisdiction) or a violation of a

[1] While this quotation appears in the U.S. Reports, it does not appear in the Supreme Court Reporter.

property right. *McKeever*, 14 Ct. Cl. at 422–23, 431–34. [2] The holding—that the government had no right to gratuitous use and that the use was an invasion of a property right—reflects now-classic textualist and original public-meaning analysis. First, the court analyzed the text of the Patent and Copyright Clause, identifying the legal differences between the English Crown's personal privilege and the American property right. It explained that the language in the Patent and Copyright Clause—the use of the terms "right" and "exclusive," the absence of the English legal term "patent," and the absence of an express reservation in favor of the government—evidenced that the property right in a U.S. patent issued by the federal government is fundamentally different from the personal privilege in an English patent bestowed by the Crown. *Id.* at 421.

The *McKeever* court supported this conclusion by identifying the structural constitutional differences between the American and English grants of patents. The Framers placed the Patent and

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[2] While only Claims Court jurisdiction was at issue in *McKeever*, the Supreme Court unanimously held in *Jacobs v. United States* that the Takings Clause is self-executing—that is, a lawsuit for a federal taking may be brought even if no statute waives the federal government's sovereign immunity. 290 U.S. 13, 16 (1933) (interest was available as a remedy even though not authorized by statute because plaintiff's claim "rested upon the Fifth Amendment. *Statutory recognition was not necessary* … because of the duty to pay imposed by the amendment") (emphasis added).

Copyright Clause in Article I, not in Article II—empowering Congress, not the Executive, to secure an inventor's rights. This meant the Framers viewed patents as property rights secured by the people's representatives, not as a special grant issued by the prerogative of the Executive. *Id.* The court concluded that the Framers "had a clear apprehension of the English law, on the one hand, and a just conception, on the other, of what one of the commentators on the Constitution has termed 'a natural right to the fruits of mental labor.'" *Id.* at 420.

Second, the *McKeever* court noted the significance of the federal government's own interpretation of the Patent and Copyright Clause, finding again that patents are property rights, not grants of privilege. Accordingly, Congress's enactment of the patent statutes since 1790, the "express contract[s]" entered into by federal officials in the Executive Branch in using patents, and the Judiciary's interpretation and enforcement of these statutes and contracts all "forbid the assumption that this government has ever sought to appropriate the property of the inventor." *Id.* Throughout its opinion, the *McKeever* court repeatedly cites the Supreme Court's earlier decisions in *Cammeyer*, *Burns*, and *McClurg*—each of which held that patents are "property" secured under Takings Clause.

C. The modern Supreme Court has reaffirmed that patents and copyrights are property rights secured under the Constitution.

The Supreme Court's modern decisions confirm the long-standing rule that patents and copyrights are property rights secured under the Takings Clause and Due Process Clauses. Roughly twenty years ago, the Supreme Court held that patents are "property" under the Due Process Clause of the Fourteenth Amendment. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642–43 (1999). In 2015, the Court approvingly quoted an 1882 decision stating that "[a patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *Horne*, 135 S. Ct. at 2427 (Roberts, C.J.) (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)).

Consistent with these decisions concerning patents, the Supreme Court acknowledged last year that "[c]opyrights are a form of property" under the Fourteenth Amendment Due Process Clause. *Allen v. Cooper*, 140 S. Ct. 994, 1005 (2020). This

Court should similarly follow the long-standing historical precedents recognizing that copyrights are secured under the Due Process and Takings Clauses.

Conclusion

The Court should reaffirm the longstanding precedents and authorities that copyrights and patents are "property" secured under the Due Process and Takings Clauses of the U.S. Constitution. It should thus reverse the district court.

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Respectfully submitted,

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