

A Cautionary Tale of One Independent Press's Claim of Federal Copyright Protection

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Earlier this summer, U.S. District Judge Amy Berman Jackson refused to buy plaintiff, Valancourt Books, LLC's, claims that the Copyright Office of the United States unconstitutionally demanded books for free, when Judge Jackson granted summary judgment for the defendants Shira Perlmutter and Merrick Garland (acting in their respective official capacities as Register of Copyrights and Attorney General). The dispute arose when Valancourt brought suit, arguing the Copyright Act's deposit requirement was unconstitutional under the First and Fifth Amendments as a burden on

speech and an unconstitutional taking, respectively.

In understanding the Court's opinion, it is important to keep in mind the intricacies of the Copyright Act. The moment a work (e.g., a book) is created, it is protected by copyright. However, if the work is published, and unless it meets certain exceptions, to enforce those copyright rights under *federal* law, the work must be registered with the Copyright Office. Applicants have to submit two complete copies of the best edition of their published work to register it with the Copyright Office. 17 U.S.C. § 407(a). If applicants fail to comply, the Copyright Office can issue a demand letter and ultimately impose fines, ranging from \$250 per registration, to \$2,500 for willful or repeated failure to comply.

Valancourt is an independent literary press, operating out of the owner's home, that publishes rare, neglected, and out-of-print fiction on an "on-demand" basis. Valancourt did not apply to register its books with the Copyright Office, but it did include copyright notices in all its books, essentially availing itself of federal copyright law protections. The initial dispute arose when the Copyright Office issued a demand letter, requesting Valancourt provide deposit copies of all 341 books in its catalog. In a series of exchanges, Valancourt offered to sell the books "at cost" to the Copyright Office. The Copyright Office countered by requesting digital copies of the majority but not the entirety of Valancourt's catalog.

Judge Jackson's opinion deftly outlines an unsurprising result, in terms of constitutional law. In short, the Copyright Act's deposit requirement is constitutional. The Takings Clause of the Fifth Amendment prohibits the federal government from taking private property for a public purpose without just compensation. However, the Supreme Court has long held that statutory benefits can be conditioned upon the exchange of private property without violating the Fifth Amendment. In other words, the Copyright Act conveys the benefit of copyright protection and enforcement via federal law, in exchange for (1) filing fees and (2) deposit copies made available for public use in the Library of Congress. This exchange does not run afoul of the Fifth Amendment.

Judge Jackson's analysis on the First Amendment challenge is equally straightforward. The First Amendment protects free speech, not copyright enforcement. Valancourt can freely publish books without triggering the Copyright Office's deposit copy requirement, so long as Valancourt does not claim *federal* copyright protection in each book. Judge Jackson took issue with Valancourt's attempt to "have its cake and eat it too." Essentially, Valancourt warned the public that its books were subject to copyright protection but argued it should not be bound by the requirements for that same protection.

Reading between the lines, the real surprise of Judge Jackson's opinion is that Valancourt did not apply for federal copyright protection, yet the small press suddenly faced the prospect of providing 682 books (two copies per book in the catalog) without remuneration. Though the Copyright Office ultimately relented, offering the possibility of digital book copies, the case still presents a cautionary tale. Owners of the copyright in published works should carefully consider any copyright notice placed on works and

comply with the mandatory deposit requirements. In at least one district court, claiming federal copyright protection can trigger the Copyright Act's deposit requirement and ultimately result in fines, without anyone ever seeking federal copyright protection. Perhaps the silver lining of this story is that if you find yourself on the wrong side of the deposit requirement, the Copyright Office may offer cost-sensitive alternatives (e.g., digital deposit copies), though this happy ending is far from certain.