

D.C. Circuit Finds Mandatory Copyright Deposit Requirement an Unconstitutional Taking

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U.S. copyright law has long [required](#) copyright owners to send the U.S. Copyright Office one or two copies of their works, which may be [used](#) to build the collections of the Library of Congress. (Both the Copyright Office and Congressional Research Service are part of the Library of Congress, which employs the author of this Sidebar.) The so-called “deposit requirement” was [included](#) in the first Copyright Act of 1790 and has taken different forms across more than 200 years of U.S. copyright law history. Under current law, there are two distinct deposit requirements: (1) “[mandatory](#)” deposit under [17 U.S.C. § 407](#), which applies to many copyrighted works published (i.e., [offered for sale](#) to the public) in the United States; and (2) “permissive” deposit under [17 U.S.C. § 408](#), which is part of the optional copyright registration process.

In [Valancourt Books v. Garland](#), the United States Court of Appeals for the District of Columbia Circuit held that Section 407’s mandatory deposit requirement was unconstitutional as applied to the unregistered works of a “print-on-demand” book publisher. The D.C. Circuit reasoned that because deposit is no longer a condition for maintaining copyright, the Copyright Office’s demand for physical copies of books [amounted](#) to a taking of private property without compensation, in violation of the [Takings Clause](#) of the Fifth Amendment.

This Legal Sidebar reviews the factual and legal background underlying *Valancourt Books*, analyzes the D.C. Circuit’s ruling, and surveys selected issues that Congress may consider in response to the decision.

Legal Background

A Brief History of Copyright Formalities

Copyright applies to [creative works](#) such as books, music, movies, television, fine arts, and other original works of authorship. Copyright grants the authors of such works a set of exclusive [legal rights](#) in their creations for a period of time.

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Beginning with the [Copyright Act of 1790](#), U.S. copyright law required authors to comply with various legal formalities in order to obtain or maintain their copyright. Thus, under previous U.S. copyright laws such as the [Copyright Act of 1909](#), authors had to take certain actions or risk forfeiting their copyright. In particular, copyright owners had to place [notice](#) of copyright on published works (e.g., the familiar © symbol), [register](#) their works with the Copyright Office, [deposit](#) one or more copies with the Register of Copyrights (the head of the Copyright Office), and [renew](#) their copyright after a certain number of years. An author's failure to comply with these formalities in some cases [meant](#) a loss of copyright protection—that is, the work fell into the public domain.

Motivated by [fairness concerns](#) and [international copyright norms](#), U.S. law moved away from formalities in the [Copyright Act of 1976](#) and amendments such as the [Berne Convention Implementation Act of 1988](#). Under current law, copyright protection attaches [automatically](#) once a copyrightable work is fixed in a tangible medium of expression (i.e., recorded in some form, such as digitally or on paper). Formalities such as registration, notice, and deposit are no longer [conditions](#) of obtaining or maintaining copyright protection, although they may have other benefits for copyright owners.

Current Copyright Deposit Requirements under 17 U.S.C. Sections 407 and 408

Under [17 U.S.C. § 408](#), copyright owners are generally required to send the Copyright Office one or two copies of their work as part of an application to register their copyright. While registration is no longer a prerequisite for copyright protection, it has several important [legal benefits](#) for copyright owners. Most notably, a U.S. copyright owner [must](#) register their work before they can sue for copyright infringement in federal court.

For copyright owners who choose not to register their copyright, [17 U.S.C. § 407](#) imposes a separate mandatory deposit requirement. [Section 407](#) generally requires copyright owners to deposit two copies of published works “for the use or disposition of the Library of Congress.” Despite its name, Section 407 deposit is not always mandatory. Through [regulations](#), the Copyright Office exempts some types of works from mandatory deposit. Copyright owners may also ask the Register of Copyrights for “[special relief](#)” from the mandatory deposit requirement on a case-by-case basis.

Unlike Section 408's incentives for registration, Section 407's deposit requirement is enforced through fines and penalties. Under the statute, the Copyright Office may make a [written demand](#) for the required deposit. If the copyright owner does not provide the copies within three months of the Copyright Office's demand, the statute [authorizes](#) fines of \$250 per work, which can be increased to \$2,500 for willful and repeated non-compliance.

The Takings Clause

The Takings Clause of the [Fifth Amendment](#) states that “private property [may not] be taken for public use, without just compensation.” In simple terms, the Takings Clause [provides](#) that the federal government may take an individual's property only when (1) the taking is for a public use and (2) the government pays just compensation to the property owner.

When the government seizes or otherwise takes title to a person's property, it is a [per se taking](#) that generally requires payment of compensation to the property owner. That said, the government may require a person to give up private property as a [condition](#) of receiving a governmental benefit without violating the Takings Clause. For example, in *Ruckelshaus v. Monsanto*, the Supreme Court upheld the Environmental Protection Agency's [requirement](#) that pesticide manufacturers submit trade secret information (which may later be publicly disclosed) as part of an application for a license to market their products. The Supreme Court held that this sort of “[voluntary](#)” exchange of property in return for a government benefit (a license to sell the chemicals) was permissible under the Takings Clause. In contrast, in *Horne v. Department of Agriculture*, the Court rejected the argument that a government

requirement to turn over a percentage of a grower's raisin crop in order to sell raisins in interstate commerce could be understood as a "voluntary exchange." The Court reasoned that selling produce was not a "special government benefit" that could be withheld unless the grower surrendered its property.

The Decision in *Valancourt Books v. Garland*

Valancourt Books is an independent press, based in Virginia, that publishes rare fiction on a print-on-demand basis (that is, it prints copies of the books in response to specific orders, rather than pre-printing copies in bulk). In 2018, Valancourt received a letter from the Copyright Office seeking deposit copies for several hundred books published by Valancourt. Valancourt responded that complying with the request was unaffordable for the "very small publisher" as it would cost more than \$2,500. When the Copyright Office reiterated its request for deposit copies and threatened fines, Valancourt sued the U.S. Attorney General and the Register of Copyrights in federal court, arguing that the deposit requirement was unconstitutional under the First Amendment and the Takings Clause. In a 2019 settlement offer, the Copyright Office stated that it would accept electronic copies of Valancourt's books instead of printed copies, but Valancourt rejected that offer.

In 2021, the U.S. District Court for the District of Columbia granted summary judgment to the government, holding that application of the mandatory deposit to Valancourt was constitutional. On the Takings Clause claim, the trial court held that mandatory deposit was not a taking but instead part of a "voluntary exchange in return for federal copyright protection." Relying on *Monsanto*, the court noted that Valancourt places copyright notices in its books and benefits from copyright protection even without registering its copyrights. It therefore viewed Valancourt as "voluntarily engaging in the exchange of copies of its works for copyright protection." The district court relied on a 1985 Ninth Circuit decision that rejected a Takings Clause challenge to the Section 407 deposit requirement. That case read the 1976 Act as effectively still requiring deposit in order to obtain a copyright, with the requirement enforced through fines instead of a forfeiture of copyright.

On appeal, the D.C. Circuit reversed the district court's ruling and held that the mandatory deposit requirement as applied to Valancourt violated the Takings Clause. Key to the court's conclusion was its finding that copyright owners receive "no additional benefit" for the copies they must give the Copyright Office under Section 407. Unlike previous Copyright Acts, under current law copyright attaches automatically once a work is created and fixed. Moreover, although copyright owners may be fined for not complying with Section 407, the appeals court observed that "they retain copyright regardless of whether they pay the fines." For these reasons, the court held that mandatory deposit under current law was not a "voluntary exchange for a benefit [i.e., copyright protection]" permitted by *Monsanto*. Rather, the mandatory requirement was "untethered" from any copyright benefit. It therefore amounted to a "government demand to turn over personal property" without compensation, in violation of the Takings Clause.

In its ruling, the D.C. Circuit distinguished Section 407's mandatory deposit requirement from Section 408's permissive deposit requirement as part of copyright registration. Because copyright registration grants the copyright owner certain benefits, it can be understood as a voluntary exchange of property for a government benefit (e.g., the ability to sue for copyright infringement). Similarly, earlier forms of the deposit requirement—in which deposit was required to maintain copyright—were constitutional as part of a "quid pro quo" to obtain federal copyright protection.

The D.C. Circuit limited the scope of its decision in several significant ways. First, the decision only holds that Section 407 is unconstitutional "as applied by the Copyright Office in this case," rather than invalidating the statute across the board. The ruling thus leaves open, at least in theory, the possibility that Section 407 may be applied constitutionally in other cases. Second, the court only addressed the Copyright Office's demand for physical copies of Valancourt's books, and did not rule on the Copyright

Office's later offer to accept electronic copies as part of a proposed settlement. Finally, the court [rejected](#) the government's argument that authors could avoid Section 407's requirements by "disavowing copyright protection" because there is no "simple, seamless, and transparent way to opt out of copyright protection" under current law. The decision [suggests](#) that if there *were* "an abandonment option" for copyright, it would be easier to uphold Section 407 as a voluntary exchange.

Considerations for Congress

As with any judicial decision striking down a congressional enactment (at least in part), *Valancourt Books* raises issues about whether and how Congress may respond legislatively.

One preliminary issue concerns possible responses from the Copyright Office. The government could choose to appeal the ruling to the Supreme Court. Although the Supreme Court accepts [few cases](#), it may be more likely to hear an appeal in *Valancourt Books* because the decision partially invalidates an act of Congress and is arguably in conflict with the [Ninth Circuit's 1985 decision](#) interpreting the same statute. The Copyright Office might also respond to the ruling through regulation. It could, for example, create additional [regulatory exceptions](#) to Section 407, or issue regulations that allow electronic deposit copies instead of physical ones in certain cases. This may lessen Takings Clause concerns, reduce costs for copyright owners like Valancourt Books, and potentially increase compliance with the mandatory deposit requirement. Another option for the Copyright Office would be to remove the threat of fines from its Section 407 demand letters and enforce the requirement on a purely voluntary basis.

Another issue influencing a potential congressional response concerns how significant the Section 407 deposit requirement is to the Copyright Office and the Library of Congress's collections. Under the reasoning of *Valancourt Books*, Section 408's deposit requirement remains in force as part of the optional copyright registration process. Many copyright owners—including entities such as movie studios or large book publishers—choose to register their copyright, and deposit their works under Section 408 (which represents about [half a million](#) works deposited per year). Although the Copyright Office collects and transfers many [unregistered works](#) to the Library each year, it is not clear whether those works are obtained through Section 407 demand letters or other means. It remains to be seen whether *Valancourt Books* will impact the volume of deposits made under Section 407 if enforcement of the mandatory deposit requirement is limited.

If Congress chooses to respond, there are several potential paths to restore a mandatory deposit requirement for published works consistent with the reasoning of *Valancourt Books*. Perhaps the most straightforward path would be to structure Section 407 like Section 408 by tying some copyright benefit (e.g., enhanced damages or a longer statute of limitations) to compliance with the mandatory deposit requirement. (To the extent that such a change would raise concerns under [international copyright treaties](#), these requirements could be limited to U.S. works or U.S. nationals.) Another potential path suggested by the D.C. Circuit would be to create a formal way for copyright owners to disclaim or abandon copyright and avoid the mandatory deposit requirement if they so choose. (Presuming the Copyright Office has sufficient [regulatory authority](#), a [costless](#) abandonment option might be created by regulation instead.) Both these routes would appear to strengthen the argument that the mandatory deposit requirement is an element of a voluntary exchange of property in return for a government benefit.

As the Takings Clause is violated only when the government does not provide "[just compensation](#)" for the taking, yet another option would be for Congress to appropriate money that the Copyright Office could use to compensate copyright owners for the copies that they provide under Section 407.

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