# Schillinger v. The United States

## The States Cannot Be Sued Without Consent

*Schillinger v. the United States* was a petition by J. Schillinger in the court of claims against patent infringement by the U.S. government. A landmark case in the history of patent law, the *Shillinger* case states that the United States cannot be sued in its courts without its consent and that a suit for patent infringement cannot be brought forth against it because patent infringement is a tort covered under sovereign immunity.

This case subsequently led to the passing of 28 U.S.C. § 1498, which states that intellectual patent owners (people who have patents, copyrights, layout designs of integrated circuits, etc.) have the right to petition against the United States for "just and entire compensation" when the United States makes unjust use of such intellectual property.

## Schillinger sues the United States

On March 22, 1887, J. Schillinger and the others filed a petition against the United States for infringement of a patent in Schillinger's name for an improvement in concrete pavement.

The original patent in question (US 105,599) was granted to Schillinger on July 19, 1870. It stated, in detail, the technique of laying disjointed concrete blocks using tar paper or its equivalent. In a later reissue of the same, Schillinger added a disclaimer stating:

*"Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."*

In 1875, the architect of the capitol hired G.W. Cook for laying pavement blocks on capitol grounds. Frederick Law Olmsted, the person responsible for laying plans and designs for this work, stated that the pavements were to be laid in the 'best possible manner'. It was also agreed that in case of patent infringements, deadlines not being met, and other obstacles, the United States shall not be held responsible.

When Schillinger sued the United States, the case was dismissed as being outside of jurisdiction as there was no mention of the patent anywhere in the plans and designs laid out for the pavement project. Based on this ground, the Court of Claims dismissed the petition.

## The opinion of the court

The court's majority opinion (7-2) was authored by Justice Brewer and dissented by Justice Shiras and Justice Harlan. It clearly stated that violation of patents was a tort or a civil wrong and the United States cannot be sued for a mere tort in its courts. Sovereign immunity, which is a doctrine stating that a sovereign cannot be held wrong and is immune from civil prosecutions in its courts, holds strong for all torts including patent infringement.

While the constitution clearly forbids the government from using private property without meting out just compensation to the individuals involved, it does not mean that the government can be sued in its courts for the same. While the Court of Claims can admit cases where the government is known to enter contracts that make use of private property without adequate compensation, it can only do so 'in cases that do not sound like torts' - a clause that did not hold true for Schillinger's patent.

## The Court explains why Schillinger's petition was a tort

The petition in consideration had one primary motive: to recover damages from the United States on charges of appropriation of the claimant's patent. While a case that talks about a breach of contract, in assumpsit, would have been treated positively, the petition by Schillinger alluded to no such 'coming together of the minds', as the court puts it. This sets it apart from cases like *U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104,* a case that talked about an authorized use of a patent by the government. However, in the present case, there was no authorization made by Cook or any government official to use the Schillinger patent at any stage of the project. The petition was a clear tort against the United States government, removing it from the Court of Claims' jurisdiction.

Having said that, there exists another way to look at this case. If the parties involved had agreed that Cook, indeed, authorized the use of tar paper or its equivalent for disjoint concrete blocks, then it might have been said that he had violated the patent held by Schillinger. But the completed pavement, as delivered to the

government, does not automatically become intellectual property by this virtue. An easy way to understand this would be to consider the construction of a building. Suppose the contractor hired to build a unit of the building uses patented drills and trowels to finish the work. Does this imply that in doing so, the contractor has violated the patent? Certainly. But does this mean that the owner of the project, the person who hired the contractor, and the people who would occupy the building in the future would all be liable to pay damages to the patentee? Certainly not! Following this line of thought, the government shunned all responsibility of honoring the patent filed by Schillinger.

## What does this mean for future government versus patentee cases?

The United States Court of Appeals for the Federal Circuit, the court that specializes in patent cases, maintains that patent infringement is not considered as taking of property under the Fifth Amendment. While this goes against several rulings in the previous cases brought forth by the Court of Claims as cited by the two dissenting judges in the Schillinger case, the Federal Circuit continues to deny that violating a patent is the same as taking away property by the government. The Supreme Court's current legal philosophy is the same because, as pointed out by the Court, patent infringement does not deprive the owner of the intellectual property of all the value of the patent.

In recent times, the verdict laid down in *Shillinger vs. The United States* has been cited in a number of cases, one of them being *Christy, Inc. vs. the United States, No. 18-657C (USCFC)* wherein it was reiterated that a claim for patent infringement against the United States cannot be given the guise of a Fifth Amendment Takings claim. And in that sense, patents are not really "property" (as understood in the usual sense of the term) but "public franchises."

Needless to say, *Shillinger* has been instrumental in opening up the debate to a lot many deeper questions than the one it initially set out to answer.

# REFERENCES


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