

## FIFTH AMENDMENT TAKINGS OF A PATENT

### **Fifth Amendment to the Constitution of the United States:**

"No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**Article 10** reads, in relevant part, ". . . no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

**Section 261 of the Patent Act** itself states that "[s]ubject to the provisions of this title, patents shall have the attributes of personal property.

It is well settled that a taking of private property for which compensation must be paid is not necessarily restricted to an actual physical taking of the property. See *Nichols, Eminent Domain (Rev.3d ed.) § 6.1*.

This rule has long been recognized in this Commonwealth. In *Old Colony Fall River R.R. v. County of Plymouth, 14 Gray, 155, 161*, we stated that private property can be "appropriated" to public use "by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it."

Likewise, the Supreme Court of the United States has stated that "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *United States v. General Motors Corp. 323 U.S. 373, 378*.

*Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1377-78 (Fed. Cir. 2008)* ("The protections of the Takings Clause apply to real property, personal property, and intangible property.") (citations omitted) (emphasis added);

*Causby v. United States, 75 F. Supp. 262, 264 (Ct. Cl. 1948)* ("We see no difference in the destruction of personal property and real property, where is [sic] either case the owner is deprived of its use.... In each case there is a taking for which the Constitution requires just compensation.")

Notably, Black's Law Dictionary defines "private property" presently as "[p]roperty-protected from public appropriation-over which the owner has exclusive and absolute rights." BLACK'S LAW DICTIONARY 1337 (9th ed. 2009)