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COPYRIGHT REGISTRATION: WHY THE U.S. SHOULD BERNE THE REGISTRATION REQUIREMENT

David R. Carducci*

INTRODUCTION

In the United States, registration is not a requirement to obtain copyright protection.¹ Rather, copyright arises automatically in “original works of authorship” the moment they are created and “fixed in a tangible medium of expression.”² However, copyrights are not self-enforcing.³ In fact, a copyright would be of no value

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1. 17 U.S.C. § 408(a) (2018) (“[R]egistration is not a condition of copyright protection.”); *see* *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1301 (11th Cir. 2012) (noting the Copyright Act of 1976 “created a new voluntary registration system”); *Automation by Design, Inc. v. Raybestos Prods. Co.*, 463 F.3d 749, 752 n.1 (7th Cir. 2006) (observing that “[r]egistration is not a condition of copyright protection”). “It is clear that, as to works created on and after January 1, 1978, the effective date of the current Copyright Act, registration is not a condition to obtaining copyright.” 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 7.16(A)(1) (Matthew Bender rev. ed. 2018).

2. 17 U.S.C. § 102(a) (2018).

The Copyright Act imposes four requirements, all of which must be met, for a work to qualify for copyright protection. First, the work must be original. Second, the work must consist of ‘expression’ and not just ‘ideas.’ Third, the work must be fixed in a tangible medium of expression. Finally, in the case of published works of foreign origin, the works must meet specified treaty-based criteria. Even if a work meets all these requirements, the work will not be protectable if it is a work of the United States government, is an official document, or consists solely of utilitarian elements of industrial design.

1 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 2.1 (3d ed. 2017). The Copyright Act defines “created” as “when [a work] is fixed in a copy or phonorecord for the first time.” 17 U.S.C. § 101 (2018).

3. *Am. Soc’y of Composers, Authors, & Publishers v. Pataki*, 930 F. Supp. 873, 878 (S.D.N.Y. 1996); *see* Matthew Africa, Note, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1172 (2000) (“[C]opyright owners must act to guarantee their exclusive rights.”).

without the ability to sue for infringement to protect the owner's exclusive rights.⁴

Despite its permissive nature, registration with the United States Copyright Office (Copyright Office) “establishes a claim to copyright” while offering domestic copyright owners certain benefits that are not available to unregistered works.⁵ First, a copyright owner cannot bring a civil action for infringement unless he registers the work with the Copyright Office.⁶ Additionally, the owner is not eligible to receive statutory damages or attorney's fees unless the work was registered prior to the infringement or within three months of the work's publication.⁷ Moreover, registration creates prima facie evidence of the copyright's validity, while also allowing the owner to further register the work with the United States Customs and Border Protection to guard against the importation of infringing copies.⁸

Though it is undisputed that registration is required to obtain the above benefits, the United States Circuit Courts of Appeals were divided in their determination of what constituted “registration”

4. *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 39 (1939) (explaining a copyright's “value depend[s] upon the possibility of enforcement”).

5. 17 U.S.C. § 408(a); U.S. COPYRIGHT OFFICE, CIRCULAR NO. 1: COPYRIGHT BASICS 4 (2017), <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/C7QB-Y8TC>] [hereinafter COPYRIGHT BASICS].

6. 17 U.S.C. § 411(a) (2018) (“[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”); see *Automation by Design, Inc. v. Raybestos Prods. Co.*, 463 F.3d 749, 752 n.1 (7th Cir. 2006) (“[Registration] is necessary before an infringement suit may be filed in court.”); 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B) (explaining that registration is a “prerequisite to suit for copyright infringement”); COPYRIGHT BASICS, *supra* note 5 (“Before an infringement suit can be filed in court, registration (or refusal) is necessary for works of U.S. origin.”).

7. 17 U.S.C. § 412 (2018) (stating that registration is a “prerequisite to certain remedies for infringement” such as statutory damages and attorney's fees); GOLDSTEIN, *supra* note 2, § 1.2 (“The Act also entitles the copyright owner to statutory damages and attorney's fees for certain infringements only if the claim to copyright is registered within three months of publication.”); 2 NIMMER & NIMMER, *supra* note 1, § 7.16(C) (“[I]n order for a copyright owner to be entitled to recover statutory damages and attorney's fees, the work must have been registered prior to commencement of the infringement for which such remedies are sought.”); COPYRIGHT BASICS, *supra* note 5, at 5 (noting registration is a requirement of eligibility for statutory damages and attorney's fees).

8. GOLDSTEIN, *supra* note 2, § 1.2 (“[T]he Act encourages prompt registration by providing that a certificate of registration made within five years of a work's first publication will automatically constitute prima facie evidence of the copyright's validity and of the facts stated in the certificate.”); COPYRIGHT BASICS, *supra* note 5, at 5 (“Registration establishes prima facie evidence of the validity of the copyright and facts stated in the certificate when registration is made before or within five years of publication.”).

under the Copyright Act of 1976 (Copyright Act).⁹ This circuit split raised the issue of whether registration—sufficient to sue for infringement per § 411 of the Copyright Act—occurs when the Copyright Office receives the work’s application (the “application approach”), or whether the Copyright Office must issue the certificate of registration prior to the plaintiff filing suit (the “registration approach”).¹⁰ On June 28, 2018, the United States Supreme Court granted certiorari to an Eleventh Circuit case, *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, to decide the issue and provide clarity to the circuit courts.¹¹

When examining congressional intent regarding the point at which registration tolls, one wonders what the practical basis is for the

9. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1340 (11th Cir. 2017), *aff’d*, 139 S. Ct. 881 (2019) (“The question when registration occurs has split the circuits.”); GOLDSTEIN, *supra* note 2, § 3.15 (“[C]ourts divide on when registration has been accomplished for purposes of section 411’s requirement of registration as a condition to instituting an action for infringement.”); Edwin Komen, *Eleventh Circuit Joins Split Court Decisions on Registration Precondition for Copyright Suits*, NAT’L L. REV. (June 5, 2017), <https://www.natlawreview.com/article/eleventh-circuit-joins-split-court-decisions-registration-precondition-copyright> [<https://perma.cc/FG6F-D7ZG>] (noting that § 411(a)’s registration requirement “has led to a variety of decisions from the Circuit and District Courts interpreting the meaning of ‘registration.’ . . . None of these positions can easily be harmonized potentially leading to inconsistent results and forum shopping.”).

10. GOLDSTEIN, *supra* note 2, § 3.15; 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b) (detailing the different approaches taken by the United States Circuit Courts of Appeals). In addition to the circuit split, disparity arose among district courts in circuits where the appellate court had not adopted either approach. Alexander Kaplan, *Copyright Registration Debate May Head to High Court*, LAW360 (Nov. 2, 2017, 12:56 PM), <https://www.law360.com/articles/980641/copyright-registration-debate-may-head-to-high-court> [<https://perma.cc/PA2E-R7B9>]. For example, take the Second Circuit Court of Appeals:

Due to the high volume of copyright infringement cases that come before the Second Circuit, its reluctance to endorse a particular side of the debate is particularly noteworthy. In *Psihoyos v. John Wiley & Sons Inc.*, 748 F.3d 120 (2d Cir. 2014), one of the Second Circuit’s most recent cases on the matter, the plaintiff had not yet submitted an application and therefore would have been unable to satisfy either approach. As a result, the court was able to avoid taking sides in the debate, stating “we need not resolve the dispute or otherwise embroil ourselves in this circuit split.” A year later, the Second Circuit again declined to choose an approach.

Because of the Second Circuit’s hesitance to take sides, there remains a lack of uniformity within the district courts. While a few cases have adopted the application approach, including as recently as 2016, it has not been the predominant view and in both the Southern and Eastern Districts of New York. Rather, the majority of cases in each district, including the most recent decision on the issue, have followed the registration approach.

Id.

11. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707, 2707 (2018) (mem.).

requirement. Under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), registration is a formality that is not required in any instance.¹² In fact, Article 5(2) of the Berne Convention states, “[t]he enjoyment and the exercise of [the copyright owner’s] rights shall not be subject to any formality”¹³ As the United States is a Berne Convention member, one would think that it should follow the standard on formalities set forth by the Berne Convention in the same manner as the other 175 Berne member states.¹⁴

The following note discusses the registration requirement under the Copyright Act and its interplay with the Berne Convention’s prohibition of formalities. Part I explains the recent division between the United States Circuit Courts of Appeals and provides an in-depth analysis of the application and registration approaches. Part II details the Supreme Court’s adoption of the registration approach in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*. Part III gives a brief history of the Berne Convention and examines registration under Berne as a nonessential formality. Finally, Part IV offers a proposed long-term solution to amend the Copyright Act by making registration a truly permissive formality and eliminating registration as a prerequisite to file suit for the infringement of United States works.

12. SUTHERLAND ASBILL & BRENNAN LLP, BERNE CONVENTION BASICS 2 (2004), <https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tO19NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuSZDo0!/fileUpload.name=/BerneConvention.pdf> [<https://perma.cc/Z8MD-F5BW>] [hereinafter BERNE CONVENTION BASICS] (“Under Berne, no formalities are required as preconditions to protection. In other words, member countries cannot require that authors and publishers give notice of the copyright status of the work in order for the work to be protected by law (e.g., mandatory use of a © symbol or required registration of copyrighted works).”).

13. Berne Convention for the Protection of Literary and Artistic Works art. 5, § 2, Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

14. U.S. COPYRIGHT OFFICE, CIRCULAR NO. 38A: INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 3 (2018), <https://www.copyright.gov/circs/circ38a.pdf> [<https://perma.cc/4CDY-9V7M>] [hereinafter INTERNATIONAL COPYRIGHT RELATIONS OF U.S.].

I. A Split in the Circuits

A. Registration as a Prerequisite to Bring a Civil Suit for Copyright Infringement

The question of timely registration becomes relevant when an unregistered work has been infringed and the copyright owner seeks to file suit.¹⁵ When this occurs, courts are concerned with the points at which the “plaintiff seeks to register; the Copyright Office issues the certificate; and the lawsuit commences.”¹⁶ Courts will dismiss an infringement suit if the plaintiff has filed a complaint before registering the copyright with the Copyright Office.¹⁷

Section 410(d) of the Copyright Act states, “[t]he effective date of a copyright registration is the day on which an application, deposit, and fee . . . have all been received in the Copyright Office.”¹⁸ Legislative history further provides, “[w]here the three necessary elements are received at different times the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim.”¹⁹ Unfortunately, the Copyright Act gives a circular definition of “registration,” which provides little clarity regarding what it means to effectively register a work.²⁰ As such, controversies arise in determining the “effective date” of registration so that a plaintiff may initiate an infringement suit. Before *Fourth Estate*, two views existed on this matter: (1) registration does not occur until the Register of Copyrights issues the registration certificate (the registration approach), and (2) the registration requirement is met when the Copyright Office receives the completed application, deposit, and fee (the application approach).²¹

15. See 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(a) (stating when “the copyright owner registers the subject work years before infringement commences . . . filing suit later based on the registration certificate is straightforward.”).

16. *Id.*

17. See *id.* § 7.16(B)(1)(a) (“[R]egistration is a condition precedent for an infringement case to move forward in federal court.”).

18. 17 U.S.C. § 410(d) (2018).

19. H.R. REP. NO. 94-1476, at 157 (1976).

20. 17 U.S.C. § 101 (2018) (“‘Registration’ . . . means a registration of a claim in the original or the renewed and extended term of copyright.”).

21. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1339 (11th Cir.

1. *The Registration Approach*

Circuit courts that adopted the registration approach applied a formalistic reading of the Copyright Act’s plain language.²² As its name suggests, this approach “tends towards hyper-technical application, in which the *paper certificate is required* as a condition to suit.”²³ Beyond the approach’s plain reading of the Copyright Act, the Tenth Circuit gave credence to the registration approach by citing the oft-quoted Judge Learned Hand:

[T]he text of the [statute] denies the right to sue for infringement “until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with[.]” Since the owner must submit an application and pay the required fees in order to make a deposit, we can think of no other added condition for “registration” but acceptance by the Register.²⁴

The Tenth Circuit also relied on a history of statutory interpretation—dating back to the Copyright Act of 1909—that similarly requires registration to be completed prior to filing suit.²⁵ More recently, in 2017, the Eleventh Circuit found in *Fourth Estate*

2017), *aff’d*, 139 S. Ct. 881 (2019) (“This appeal requires us to decide an issue that has divided the circuits: whether registration occurs when an owner files an application to register the copyright or when the Register of Copyrights registers the copyright.”); GOLDSTEIN, *supra* note 2, § 3.15. “The Tenth Circuit appears to have coined the terms ‘application approach’ and ‘registration approach’ in describing the two schools of thought.” *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 615 n.3 (9th Cir. 2010) (citing *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1202–04 (10th Cir. 2005), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

22. *La Resolana Architects*, 416 F.3d at 1202; *see, e.g., M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990); *Specific Software Sols., LLC v. Inst. of Workcomp Advisors*, 615 F. Supp. 2d 708, 715–16 (M.D. Tenn. 2009), *abrogated in part by Sony/ATV Music Publ’g LLC v. D.J. Miller Music Distribs.*, No. 3:09-cv-01098, 2010 U.S. Dist. LEXIS 103795, at *13 (M.D. Tenn. Sept. 28, 2010).

23. 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b)(i) (emphasis added). *But see La Resolana Architects*, 416 F.3d at 1202–03 (stating the Copyright Act “demonstrates that registration is separate from the issuance of a registration certificate and that a court’s jurisdiction does not turn on the existence of a paper certificate, but rather on the fact of registration, however it is demonstrated”).

24. *La Resolana Architects*, 416 F.3d at 1202 (quoting *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 640–41 (2d Cir. 1958)).

25. *Id.* at 1199.

that “the text of the *Copyright Act* makes clear the registration approach . . . is correct.”²⁶ After examining the registration process put forth in §§ 408 and 410, the Eleventh Circuit concluded “[the Copyright Act] establishes that registration can occur only after application *and* examination.”²⁷

2. *The Application Approach*

Opposite the registration approach is the application approach. Under the application approach, § 411’s registration requirement is met when the Copyright Office receives a work’s completed application, deposit, and fee.²⁸ The Fifth and Ninth Circuits officially adopted the application approach prior to the Supreme Court’s decision in *Fourth Estate*.²⁹ Although the Eighth Circuit did not formally employ this approach, it endorsed it in dictum.³⁰ Additionally, the Seventh Circuit has self-contradicting dicta as to which approach best comports with the statute.³¹

When examining these two “interpretive camp[s],” the Tenth Circuit noted that the application approach uses a “policy-based methodology”:

26. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341.

27. *Id.* (emphasis added); see 17 U.S.C. §§ 408, 410 (2018). Regarding § 410(d), the court stated: Section 410(d) also supports the registration approach, . . . relat[ing] registration back to the date that the owner files an application, but section 410(d) also makes evident that registration occurs only after the Register of Copyrights deems an application “to be acceptable.” Like other provisions of Title 17, section 410(d) establishes that registration occurs only after review and approval by the Register of Copyrights.

Fourth Estate Pub. Benefit Corp., 856 F.3d at 1341–42 (quoting 17 U.S.C. § 410(d)).

28. See GOLDSTEIN, *supra* note 2, § 3.15 (defining the application approach as “a claim to copyright registered, so that a lawsuit can be filed, at the time the complete application is received in the Copyright Office”). See generally 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b)(ii).

29. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621 (9th Cir. 2010) (holding “receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a)”); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (noting that the Fifth Circuit follows the application approach).

30. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1340 (citing *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006)).

31. *Compare* *Chi. Bd. of Educ. v. Substance, Inc.* 354 F.3d 624, 631 (7th Cir. 2003) (“[A]n application for registration must be filed before the copyright can be sued upon.”), *with* *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (“[A]n application to register must be filed, and either granted or refused, before suit can be brought.”).

Looking to the Act, courts adopting the Application approach conclude that because a copyright owner can sue regardless of whether an application for registration is ultimately granted or rejected, delaying the date on which a copyright owner can sue is a senseless formality. These courts also rely on the language of § 408, that registration is not a condition of copyright protection, and § 410(d), that once a copyright is registered, the effective date of the registration relates back to the date the Copyright Office received the last of the filing materials (i.e., the deposit, fee, and application).

Finally, these courts look to the date of the application for registration as a condition to filing an infringement action, [but] issuance of a registration certificate is a condition to statutory damages and other statutory remedies. Thus, the argument goes, a copyright owner can get into court without being held hostage by the vagaries of the Copyright Office in its ministerial act of issuing the certificate.³²

Further, some argue that the application approach helps ensure infringement filings are not delayed for months, if not longer, thereby allowing plaintiffs to sue without fearing that the statute of limitations will expire.³³ An amicus brief submitted to the Supreme Court on behalf of Fourth Estate Public Benefit Corporation noted that “delays of a year or more are not uncommon,” and processing time for some works “is so long that it exceeds the Copyright Act’s three-year limitations period for infringement suits.”³⁴

32. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1203–04 (10th Cir. 2005), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (citations omitted); *see Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (endorsing the application approach because it “best effectuate[s] the interests of justice and promote[s] judicial economy”).

33. *See* GOLDSTEIN, *supra* note 2, § 3.15.

34. Brief for The Nat’l Music Publishers’ Ass’n & Recording Indus. Ass’n of Am. et. al. as Amici Curiae Supporting Petitioner at 5, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (2018) (mem.) (No. 17-571), 2018 U.S. S. Ct. Briefs LEXIS 3235, at *8. Amici’s members “are leading music trade organizations and performing rights societies representing the interests of music

B. Circuits Applying the Registration Approach

The Eleventh Circuit Court of Appeals recently weighed the two approaches and opted for the registration approach in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*—the case in which the Supreme Court ultimately resolved the circuit split.³⁵ In this case, Wall-Street.com continued to display online articles produced by Fourth Estate Public Benefit Corporation despite termination of the parties’ licensing agreement.³⁶ Though Fourth Estate filed an application to register the works at issue, the Copyright Office had not yet registered the copyrights at the time Fourth Estate filed suit against Wall-Street.com for copyright infringement.³⁷

In holding that “[f]iling an application does not amount to registration,” the circuit court found the text of the Copyright Act “establishes that registration occurs only *after* review and approval by the Register of Copyrights.”³⁸ The court relied on § 410(a)’s language, which provides registration occurs “after examination” by

publishers, record companies, and individual songwriters and composers. Amici’s members . . . collectively register tens of thousands of musical works and sound recordings each year with the Copyright Office.” *Id.* at 1.

35. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341; *see infra* Part II.

36. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1339. Fourth Estate is a news organization specializing in online journalism. *Id.*

37. *Id.* The United States District Court for the Southern District of Florida granted Wall-Street.com’s 12(b)(6) motion to dismiss where the plaintiff had filed a completed application with the Copyright Office, but the Register of Copyrights had not yet decided on the application. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 16-60497-Civ-Scola, 2016 U.S. Dist. LEXIS 187499, at *3–4 (S.D. Fla. Mar. 23, 2016), *aff’d*, 856 F.3d 1338 (11th Cir. 2017) (“[Registration is] a procedural bar to infringement claims. . . . As a result, because a plaintiff must first obtain registration for the work at issue prior to initiating suit, the Court must dismiss Fourth Estate’s claims for copyright infringement.”).

38. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341–42 (emphasis added). “Fourth Estate has not alleged infringement of any *registered* work.” *Id.* at 1342 (emphasis added). The court explained the registration process as follows:

The Copyright Act defines registration as a process that requires action by both the copyright owner and the Copyright Office. A copyright owner must first deposit a copy of the material with the Copyright Office, file an application, and pay a fee. The Register of Copyrights then examines the material. If the material is copyrightable the Register shall register the claim and issue to the applicant a certificate of registration. If the material deposited does not constitute copyrightable subject matter, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

Id. at 1341 (citations omitted).

the Register.³⁹ Further, the court noted the Register “would have no power to ‘refuse registration’” if it were effectuated by merely filing an application.⁴⁰ Additionally, though Fourth Estate argued that § 410(d) shows congressional intent to establish the application approach by relating registration back to the date when the copyright owner *files* an application, the court interpreted that section as supporting the registration approach because “[l]ike other provisions of [the Copyright Act], section 410(d) establishes that registration occurs only *after* review and approval by the Register of Copyrights.”⁴¹ Lastly, the court determined that the three-year statute of limitations for copyright infringement further supports the registration approach, seeing it as a deliberate choice the legislature made to encourage registration.⁴²

The Tenth Circuit Court of Appeals also adopted the registration approach.⁴³ In *La Resolana Architects v. Clay Realtors Angel Fire*,

39. *Id.* The statute provides:

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

17 U.S.C. § 410(a) (2018) (emphasis added). “After” is defined as “during the period of time following (an event).” *After*, THE NEW OXFORD AMERICAN DICTIONARY 28 (Elizabeth J. Jewell & Frank Abate eds., 2001).

40. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341. The court stated:

Section 410(b) also establishes that registration can occur only after application and examination. That section states, “In any case in which the Register of Copyrights determines that . . . the Register shall refuse registration.” And section 411(a) allows a copyright holder who filed an application for registration to file an infringement suit if “registration has been refused.”

Id. (quoting 17 U.S.C. §§ 410(b), 411(a) (2018)).

41. *Id.* at 1342 (emphasis added). The statute provides: “The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.” 17 U.S.C. § 410(d).

42. *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1342. The court stated:

True, an owner who files an application late in the statute of limitations period risks losing the right to enforce his copyright in an infringement action because of the time needed to review an application. But this potential loss encourages an owner to register his copyright soon after he obtains the copyright and before infringement occurs.

Id.

43. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1208 (10th Cir. 2005), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (“A suit for

the court held that an architecture firm could not sue a developer for infringement of building plans because the firm had not yet received confirmation from the Copyright Office that it had registered the copyrights in the plans.⁴⁴ Similar to the Eleventh Circuit in *Fourth Estate*, the *La Resolana* court relied on the plain language of the Copyright Act in determining that the registration approach is the better reading of the statute.⁴⁵ The Tenth Circuit reasoned that registration “requires a series of affirmative steps by both the applicant and the Copyright Office.”⁴⁶ Although the Copyright Office confirmed receipt of the firm’s application, no admissible evidence could confirm that the applicant completed registration.⁴⁷ Therefore, the circuit court held that the case had been properly dismissed.⁴⁸

copyright infringement cannot be brought unless and until the copyright is registered.”); *10th Circuit Rules Plaintiffs Must Register Copyrights Before Filing Suit*, ANDREWS INTELL. PROP. LITIG. REP., Aug. 25, 2005, at *2, 2005 WL 2036166 (“The appeals court said the law’s plain meaning is that a potential plaintiff must first have registered the copyright.”).

44. *La Resolana Architects*, 416 F.3d at 1208. La Resolana applied to register its copyrights in the plans and sued Clay Realtors for copyright infringement on November 20, 2003, after receiving confirmation from the Copyright Office that it had received the application materials. *Id.* at 1197. Clay Realtors moved to dismiss the complaint, arguing that La Resolana could not sue for infringement until it had received a certificate of registration from the Copyright Office. *Id.* La Resolana responded with a letter from the Copyright Office, dated March 10, 2004, stating that the Register of Copyrights had registered the drawings on January 22, 2004, with an effective registration date of November 19, 2003 (one day before La Resolana filed suit). *Id.* at 1197–98. Still, La Resolana had not yet received a certificate of registration from the Copyright Office. *Id.* at 1198. The United States District Court for the District of New Mexico found the March 10 letter to be inadmissible hearsay and dismissed the case without prejudice because the drawings were not registered at the time La Resolana filed suit. *Id.* The Tenth Circuit upheld the district court’s ruling on appeal. *La Resolana Architects*, 416 F.3d at 1208.

45. *Id.* at 1200–05.

46. *Id.* at 1200. The court stated:

No language in the Act suggests that registration is accomplished by mere receipt of copyrightable material by the Copyright Office. Instead, the Register of Copyrights must affirmatively determine copyright protection is warranted § 411 before registration occurs under the Act. And only upon registration or refusal to register is a copyright holder entitled to sue for copyright infringement under § 411. Until those steps are followed and registration is “made,” federal courts lack subject matter jurisdiction over the infringement claim.

Id. at 1200–01.

47. *Id.* at 1208. The court opined that the March 10 letter relating registration back to November 19, 2003, “should have been sufficient evidence of registration,” acknowledging that “[p]roving a copyright is registered can be accomplished in a variety of [adequate] ways” and that showing the certificate of registration “is not required to demonstrate registration.” *Id.* However, the court found that the letter was inadmissible because La Resolana did not appeal the district court’s finding that it was unauthenticated hearsay. *La Resolana Architects*, 416 F.3d at 1208. Even so, the circuit court indicated the “the better practice” is to rely on extrinsic evidence when examining subject matter jurisdiction. *Id.*

48. *Id.*

C. Circuits Applying the Application Approach

The Ninth Circuit Court of Appeals is one example of a circuit that favors the application approach.⁴⁹ In *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, the Ninth Circuit adopted the application approach, holding that § 411's registration requirement is satisfied upon the Copyright Office's receipt of a completed application.⁵⁰ In this case, Cosmetic Ideas, Inc. alleged that IAC/InteractiveCorp, Home Shopping Network, Inc., HSN LP, and HSN General Partner LLC (collectively "HSN") infringed on its copyright in a necklace by manufacturing and distributing a "virtually identical" necklace.⁵¹ Cosmetic applied for copyright registration of its necklace on March 6, 2008. The Copyright Office sent Cosmetic confirmation that it received Cosmetic's application on March 12, 2008.⁵² Cosmetic filed suit against HSN on March 27, 2008—before it had received a registration certificate from the Copyright Office.⁵³ Accordingly, the

49. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621–22 (9th Cir. 2010). The Fifth Circuit also upheld the application approach in *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). In *Positive Black Talk*, two New Orleans based rappers released songs using the same unique phrase. *Id.* at 363. D.J. Jubilee received a certificate of registration from the Copyright Office for his song *Back That Ass Up* in 2000. *Id.* On February 15, 2002, Positive Black Talk ("PBT") filed a supplemental registration application to add itself as an additional author of the song and filed suit against Cash Money for its song *Back That Azz Up* on the same day. *Id.* at 363–64. However, the Copyright Office did not receive the supplemental application until February 19, 2002—four days after PBT filed suit. *Id.* at 364. Favoring judicial economy, the district court declined to dismiss PBT's case, even though it acknowledged that PBT had failed the registration prerequisite to file an infringement suit and allowed PBT to cure the initial application. *Id.* On appeal, the Fifth Circuit held that "the jurisdictional defect was cured when the Copyright Office received PBT's application, deposit, and fee *four days* after PBT filed suit." *Positive Black Talk*, 394 F.3d at 365 (emphasis added). The court stated that allowing plaintiffs to amend their complaints supports the principle that technicalities should not prevent a party from having its day in court. *Id.* at 366. Further, the circuit court reasoned that—because PBT had complied with the substantive requirement of § 411 by filing a registration application, deposit, and fee—"considerations of finality, efficiency, and economy" counsel us to disregard the technical defect in timing in this particular case." *Id.* at 367 (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996)).

50. *Cosmetic Ideas*, 606 F.3d at 621; see GOLDSTEIN, *supra* note 2, § 3.15 (noting that the Court of Appeals for the Ninth Circuit concluded in *Cosmetic Ideas* that "the application approach is the better alternative").

51. *Cosmetic Ideas*, 606 F.3d at 613–14. In 1997, Cosmetic designed a necklace known as the Lady Caroline Lorgnette which it began selling through various stores and websites in 1999. *Id.* at 614. HSN began manufacturing and distributing its necklace between 2005 and 2008. *Id.*

52. *Id.*

53. *Id.*

United States District Court for the Central District of California dismissed Cosmetic's claim for lack of subject-matter jurisdiction.⁵⁴

On appeal, the Ninth Circuit first relied on the Supreme Court's holding in *Reed Elsevier, Inc. v. Muchnick* that "§ 411(a)'s registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction."⁵⁵ The court analyzed what it means to register a copyrighted work by looking at the plain language of the Copyright Act.⁵⁶ The court also considered whether the application approach or registration approach better achieves the Copyright Act's purpose.⁵⁷

Looking at the Copyright Act's plain language, the court examined §§ 410(a), 408(a), 411(a), and 410(d).⁵⁸ Like the Tenth and Eleventh Circuits, the Ninth Circuit found that §§ 410(a) and 411(a) suggest that, in addition to filing an application, registration requires that the Register take affirmative steps.⁵⁹ In spite of this, the court determined that § 408's permissive registration requirements blur the lines between the two approaches, favoring the application approach.⁶⁰

54. *Id.*

55. *Reed Elsevier*, 559 U.S. at 157.

56. Alexander D. Boyd, *Reducing the Register of Copyrights to the Receiver of Applications: The Ninth Circuit in Cosmetic Ideas, Inc. v. IAC/InteractiveCorp. Erroneously Interpreted the Copyright Act's Registration Requirement and Adopted the Application Approach*, 44 CREIGHTON L. REV. 499, 503 (2011).

57. *Id.*

58. *Cosmetic Ideas*, 606 F.3d at 616–18.

59. *Id.* at 617. Regarding § 410(a), the court noted that the provision requiring the Register to examine the application materials and register the claim if the requirements have been met "places an active burden of examination and registration upon the Register, suggesting that registration is not accomplished by application alone." *Id.* The section provides:

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

17 U.S.C. § 410(a) (2018). Additionally, the court indicated that § 411(a) "could be read to mean that Congress intended registration to require acceptance or refusal by the Register, not mere delivery." Section 411(a) of the statute provides:

In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

Id. § 411(a) (2018).

60. *Cosmetic Ideas*, 606 F.3d at 617 ("[§ 408] implies that the sole requirement for obtaining

The Ninth Circuit also observed that § 410(d)—relating registration back to the date that the Copyright Office receives the application, deposit, and fee—does not clearly support one approach over the other.⁶¹ Backdating registration to the application date “supports the interpretation that application is the critical event”; however, the court acknowledged that this subsection could also be read to require the Copyright Office to decide on the application before the work is registered.⁶² Accordingly, the Ninth Circuit concluded that the plain language of the Copyright Act is ambiguous and does not “unequivocally support[] either the registration or application approach.”⁶³

The court then turned to the purpose of the Copyright Act.⁶⁴ After discussing the statute’s history, the *Cosmetic Ideas* court considered three policy arguments in holding that the purpose of the Copyright Act is better satisfied by the application approach.⁶⁵ First, the court noted that the application approach avoids delays in copyright infringement suits.⁶⁶ Though a plaintiff can litigate an infringement claim regardless of whether the registration is accepted or refused, under the registration approach, the plaintiff must wait until the Register has decided on the registration before the suit can proceed.⁶⁷

registration is delivery of the appropriate documents and fee.”). Section 408 of the Copyright Act provides in pertinent part:

[T]he owner of copyright of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified Such registration is not a condition of copyright protection.

17 U.S.C. § 408 (2018).

61. *Cosmetic Ideas*, 606 F.3d at 618.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 618–21; see also Boyd, *supra* note 56, at 506.

66. *Cosmetic Ideas*, 606 F.3d at 620.

67. 17 U.S.C. § 411(a) (2018) (allowing an applicant to institute an infringement suit after registration has been refused); *Cosmetic Ideas*, 606 F.3d at 619–20. Allowing an applicant to file suit after the Copyright Office has refused the registration was a major change from the Copyright Act of 1909 to the Copyright Act of 1976. GOLDSTEIN, *supra* note 2, § 3.15.1. “Under the 1909 Copyright Act, a copyright claimant whose application had been rejected by the Copyright Office could institute a copyright infringement action only if it first prevailed in a mandamus action against the Register of Copyrights to compel the issuance of a certificate.” *Id.* (citing *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 640–41 (2d Cir. 1958)).

The court reasoned that the application approach avoids this practice of “wait and see” by permitting a plaintiff to institute an infringement suit once the application materials have been received by the Copyright Office.⁶⁸

Next, the court determined that approval or refusal of registration prior to filing suit is the type of “needless formality” that Congress attempted to eliminate in writing the Copyright Act.⁶⁹ The court did not see the logic in dismissing a case that would likely be refiled shortly thereafter “simply because the Copyright Office has not made a prompt decision that will have no substantive impact on whether or not a litigant can ultimately proceed.”⁷⁰ Additionally, the court recognized that a plaintiff who applies for registration toward the end of the three-year statute of limitations for copyright infringement may see the statute of limitations expire while waiting for the Copyright Office to make a determination on the registration.⁷¹

Finally, the Ninth Circuit found the argument that Congress required deference to the Register to be unpersuasive.⁷² Quoting a leading treatise on American copyright law, the court explained that “the pace of litigation entails that the Copyright Office will typically have granted or refused registration during its pendency.”⁷³ Therefore, the Register will still have an opportunity to appear in the lawsuit.⁷⁴ Furthermore, the court reasoned that because the Register’s registration decisions are ultimately reviewable by the courts, there is

68. *Cosmetic Ideas*, 606 F.3d at 620; see also 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b)(ii).

69. *Cosmetic Ideas*, 606 F.3d at 620.

70. *Id.*

71. *Id.*; see 17 U.S.C. § 507(b) (2018) (providing a three-year statute of limitations for copyright infringement); 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b)(iii) (noting that the three-year statute of limitations for copyright infringement “may indeed occasion complete inability to recover damages” under the registration approach).

72. *Cosmetic Ideas*, 606 F.3d at 621.

73. *Id.* (quoting 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(1)(a)(i)). NIMMER ON COPYRIGHT has been quoted by the Supreme Court of the United States, all of the Circuit Courts of Appeals, and several federal district courts dealing with copyright issues. *David Nimmer*, IRELL & MANELLA LLP, <https://www.irell.com/professionals-51.html> [<https://perma.cc/AY5Z-377Q>] (last visited Mar. 9, 2020).

74. *Cosmetic Ideas*, 606 F.3d at 621.

no compelling justification to delay registration until the Register has acted on an application.⁷⁵

D. The American System: The Registration Approach Versus the Application Approach

At the beginning of his *Alicea v. Machete Music* opinion, First Circuit Judge Jeffrey R. Howard noted that “[o]ver a century ago, Mark Twain lamented that ‘[o]nly one thing is impossible for God: to find any sense in any copyright law on the planet.’”⁷⁶ It seems that not only God, but also the United States Circuit Courts of Appeals are vexed by copyright law. This vexation is illuminated by the circuits’ differing interpretations of copyright registration.⁷⁷

1. The Plain Language of the Copyright Act of 1976

Simply defining registration as a “registration of a claim” does nothing to tell the copyright owner, let alone the courts, what constitutes registration.⁷⁸ As a result of this circular and unhelpful definition, courts analyzed the language of the statute as a whole to establish the legislature’s intended meaning of the term.⁷⁹ This plain language reading informs courts when determining whether § 411’s registration requirement has been met.⁸⁰

First, § 408 of the Copyright Act makes registration permissive.⁸¹ As a result, courts such as the Ninth Circuit in *Cosmetic Ideas* have

75. *Id.*

76. *Alicea v. Machete Music*, 744 F.3d 773, 775 (1st Cir. 2014) (quoting MARK TWAIN, THE COMPLETE WORKS OF MARK TWAIN: MARK TWAIN’S NOTEBOOK 381 (Albert Bigelow Paine ed., 1935)).

77. *See, e.g.*, *Boyd*, *supra* note 56, at 499 (“[T]he United States Circuit Courts of Appeals disagree as to when [copyright registration] actually occurs.”).

78. 17 U.S.C. § 101 (2018) (defining “registration” as “a registration of a claim in the original or renewed and extended term of copyright”).

79. *See, e.g.*, *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 616 (9th Cir. 2010). Importantly, the Supreme Court has stated that “statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 809 (1989).

80. *See, e.g.*, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1341–42 (11th Cir. 2017), *aff’d*, 139 S. Ct. 881 (2019); *Cosmetic Ideas*, 606 F.3d 612, 616–18.

81. 17 U.S.C. § 408(a) (2018). The section provides:

ruled that this section “blurs the line” between the two approaches but seems to favor the application approach.⁸² Indeed, as registration is not required to obtain a copyright, it should also be nonessential when enforcing the copyright owner’s exclusive rights. However, the statute’s language that the copyright owner “*may* obtain registration of the copyright claim” is viewed by some as evidence that the Copyright Act “envisions substantive review of the material by the Register of Copyrights” prior to registration being made.⁸³ Yet, the Copyright Act also provides that an owner obtains registration “by delivering to the Copyright Office” the application, deposit, and fee.⁸⁴ This process puts the onus on the copyright owner, suggesting that she effectuates registration upon delivery of the application materials. Still, given that neither the application nor the registration approach advocates for the complete elimination of § 411’s registration requirement, § 408’s permissive registration does not seem to provide support for one approach over the other.

Next, proponents of both approaches acknowledge that § 410(a)—the subsection governing registration of a claim and issuance of a certificate—favors the registration approach because the subsection requires a series of steps by the Copyright Office before effectuating registration.⁸⁵ Per the statute, registration only

At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

Id.; see also Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1555 (2018) (“There is no application or claiming requirement to obtain copyright protection. Instead, for a work to be copyrightable, it need only satisfy a low threshold of originality (i.e., be independently created and exhibit a ‘modicum of creativity’) and be fixed in a tangible medium of expression.”).

82. *Cosmetic Ideas*, 606 F.3d at 617.

83. 17 U.S.C. § 408(a) (emphasis added); *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); see also Boyd, *supra* note 56, at 529 (arguing that “[t]he only language [in § 408(a)] that would support the application approach is *shall* obtain, rather than *may* obtain”) (emphasis added).

84. 17 U.S.C. § 408(a).

85. See *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341 (finding “the phrase ‘after examination’ in section 410(a) makes explicit that an application alone is insufficient for registration”); *Cosmetic Ideas*, 606 F.3d at 617 (observing that § 410(a) “places an active burden of examination and registration

occurs “after examination” by the Register.⁸⁶ Additionally, it is up to the Register to actually register the copyright and issue the registration certificate.⁸⁷ Further, § 410(b) puts the denial of registration in the Register’s hands.⁸⁸ Taken together, these subsections make the Register the determining factor in whether registration is approved or denied. This language supports the proposition that registration requires review and affirmative steps by the Register. In contrast, merely delivering an application to the Copyright Office does not require the Register to take any action.

Then again, though determining the date of registration under § 410(d) also requires action by the Register, the subsection better supports the application approach. Section 410(d) sets a registration’s effective date as the date the Copyright Office received the application materials.⁸⁹ Courts differed in their interpretation of this section when examining a plaintiff’s ability to bring an infringement suit.⁹⁰ For example, though the Eleventh Circuit viewed § 410(d) as further requiring the Register to act to effectuate the copyright’s registration, the Ninth Circuit observed that backdating registration to

upon the Register, suggesting that registration is not accomplished by application alone”); *La Resolana Architects*, 416 F.3d at 1201 (noting that § 410(a) requires “affirmative acts by the Register”).

86. 17 U.S.C. § 410(a) (2018).

87. *Id.* (stating “the Register shall register the claim and issue to the applicant a certificate of registration”).

88. *Id.* § 410(b) (“In any case in which the Register of Copyrights determines that . . . the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall *refuse* registration . . .”) (emphasis added); see *Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1341 (holding § 410(b) “establishes that registration can occur only after application and examination . . . [i]f registration occurred as soon as an application was filed, then the Register of Copyrights would have no power to ‘refuse registration’”).

89. Section 410(d) of the Copyright Act provides: “The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.” 17 U.S.C. § 410(d).

90. Though the courts are divided on this issue in regard to § 411’s registration requirement to file a civil infringement suit, one treatise recognizes that:

Connecting a registration’s effective date to the date on which a complete application is received by the Copyright Office rarely presents issues when the question is whether the registration was sufficiently timely to qualify the registration certificate for prima facie effect under section 410(c) or to qualify the copyright owner for statutory damages and attorney’s fees under section 412

GOLDSTEIN, *supra* note 2, at § 3.15.

the application date implies that the application is the crucial component to registration.⁹¹

To illustrate this point, consider the following: the Copyright Office registers an extremely high volume of works each year.⁹² The online registration system began the 2018 fiscal year with more than 336,220 open claims and ended the year with more than 248,000 claims still open in the system.⁹³ In 2017, the registration system closed with nearly 20,000 more open claims than were in the system at the beginning of the fiscal year.⁹⁴ This disparity suggests a significant lag time between submitting an application and receiving a certificate of registration.⁹⁵ Even with a time lapse of several months, Congress saw fit to relate the effective date of registration back to when the Copyright Office receives a completed application. Regardless of any affirmative steps the Register has to make in

91. *Compare Fourth Estate Pub. Benefit Corp.*, 856 F.3d at 1342 (“[S]ection 410(d) establishes that registration occurs only after review and approval by the Register of Copyrights.”), and *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1204 n.9 (10th Cir. 2005), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (“It is not logical to assume that the relation-back provision subsumes the explicit requirements of § 411”), with *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010) (noting that “[b]ecause [§ 410(d)] dates a later-approved registration as of the date of its application, it supports the interpretation that the application is the critical event”).

92. See U.S. COPYRIGHT OFFICE, ANNUAL REPORT FOR FISCAL 2018, at 2 (2019), <https://copyright.gov/reports/annual/2018/ar2018.pdf> [<https://perma.cc/Y2YA-34QZ>] (noting that the Copyright Office examined more than 640,000 registration claims in 2018).

93. *Id.* at 6.

94. U.S. COPYRIGHT OFFICE, FISCAL 2017 ANNUAL REPORT 4 (2018), <https://copyright.gov/reports/annual/2017/ar2017.pdf> [<https://perma.cc/G6RY-325W>] (detailing that the online registration system began the 2017 fiscal year with 316,000 open claims but ended the year with more than 335,000 claims still open in the system).

95. An amicus brief submitted to the Supreme Court on behalf of Fourth Estate notes that “the wait from the time of submission to the issuance of certificate can be daunting [D]elays of a year or more are not uncommon.” Brief for The Nat’l Music Publishers’ Ass’n & Recording Indus. Ass’n of Am. et. al., *supra* note 34, at 21. These long delays seem to be indiscriminate of a copyright owner’s level of notoriety:

To cite recent examples, on April 11, 2017, a music publisher submitted its registration materials for a musical work written by Justin Timberlake Although the registration submission included the required payment, deposit of the work, and application, the Office still has not issued a certificate of registration or refused to do so—a delay of 14 months and counting. Similarly, registration materials for a musical work . . . by Neil Diamond were submitted to the Copyright Office on February 2, 2017, with all of the statutory requirements completed on that date The certificate of registration has yet to be issued—a delay of more than 16 months.

Id.

eventually ensuring that an owner receives a certificate for his registered copyright, Congress elected to make the application date paramount when determining copyright registration.

2. *The Purpose of Copyright Law*

Beyond the statute's text, consider also which approach best comports with the legislative purpose of copyright law. First, though the Copyright Act did not remove registration as a prerequisite to filing an infringement suit, the statute allows an applicant to ultimately file suit regardless of whether the Register eventually approves or denies the registration.⁹⁶ This language implies that Congress intended the application—rather than the certificate—to be the determining factor in filing suit.⁹⁷ This interpretation is supported by Congress's deliberate elimination of unnecessary formalities with the Copyright Act.⁹⁸ Additionally, the Copyright Office's determination on whether a work is copyrightable is not binding on the courts.⁹⁹ Therefore, a requirement to wait for the Register to process a claim prior to filing suit is superfluous and runs counter to the purpose of copyright law.¹⁰⁰

96. Section 411(a) of the Copyright Act provides:

[Once] the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. § 411(a) (2018).

97. See 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(a) (“[I]t makes sense under the 1976 Act to refer to *application for registration* as a condition to filing an infringement action . . .”).

98. See, e.g., *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 620 (9th Cir. 2010) (noting that “affirmative approval or rejection before suit thus amounts to little more than just the type of needless formality Congress generally worked to eliminate in the 1976 Act”); Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 566 (1993) (“In the 1976 Act, Congress began the journey toward eliminating formalities from our copyright law.”).

99. See, e.g., *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946 (2d Cir. 1975) (noting “the Copyright Office has no authority to give opinions or define legal terms”); *Darden v. Peters*, 402 F. Supp. 2d 638, 641 (E.D.N.C. 2005), *aff’d*, 488 F.3d 277 (4th Cir. 2007) (stating that “copyrightability is a question of law reserved to the judge and subject to *de novo* review by appellate courts”).

100. Article I, Section Eight of the U.S. Constitution grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.” U.S. CONST. art. I, § 8; see also U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1 (1977), <https://www.copyright.gov/reports/guide-to-copyright.pdf> [<https://perma.cc/666P-BVJC>] [hereinafter GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976] (observing that “the primary purpose of copyright

Furthermore, adherence to the registration approach risks that the three-year statute of limitations for copyright infringement could expire while an owner waits for the Copyright Office to process her registration claim.¹⁰¹ Processing a registration can take several months, if not years.¹⁰² This delay can have severe limitations on the relief that American authors are able to obtain. Though the time could be cut significantly shorter by filing for “special handling” with the Copyright Office, this expedited form of registration costs hundreds of dollars more than regular registration, is not available for all works, and has no guaranteed turnaround time.¹⁰³ Congress would not have provided a means to file suit even after denial of registration if it intended to leave copyright owners in this “legal limbo” while waiting for the Copyright Office to decide on their application.¹⁰⁴

II. *The Supreme Court Adopts the Registration Approach*

In 2017, the Eleventh Circuit adopted the registration approach via *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*.¹⁰⁵ In response to this ruling, Fourth Estate filed a petition for a writ of certiorari with the Supreme Court on October 13, 2017.¹⁰⁶ The

legislation is to foster the creation and dissemination of intellectual works for the public welfare; an important secondary purpose is to give creators the reward due them for their contribution to society”).

101. See 17 U.S.C. § 507(b) (2018).

102. *Registration Processing Times*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> [https://perma.cc/392F-ZK3E] (last visited Mar. 9, 2020) (stating that registration of a copyright claim can take an average of six months to twenty months). The Copyright Office can take as long as thirty-seven months to decide on a claim. *Id.*; see also Kaplan, *supra* note 10 (“[In November 2017] the Copyright Office advise[d] that the registration process takes about six to eight months using its electronic registration system, and about eight to [ten] months for hard-copy registrations.”).

103. U.S. COPYRIGHT OFFICE, CIRCULAR 10 SPECIAL HANDLING 1–2 (2017), <https://www.copyright.gov/circs/circ10.pdf> [hereinafter SPECIAL HANDLING]. Special handling costs \$800 per work and has an estimated, but not guaranteed, turnaround time of five days. *Id.* at 2; see also Kaplan, *supra* note 10 (“Copyright owners have the ability to expedite the registration process with an expedited review taking five to fifteen days. But, it costs \$800 per work.”). Due to the expense in the expedited special handling offered by the Copyright Office, one commentator observes “copyright owners are likely to favor the application approach over the registration approach from a flexibility and cost-savings standpoint.” Kaplan, *supra* note 10.

104. 2 NIMMER & NIMMER, *supra* note 1, § 7.16(B)(3)(b)(ii).

105. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1341 (11th Cir. 2017), *aff’d*, 139 S. Ct. 881 (2019).

106. *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/fourth-estate-public-benefit-corp-v-wall-street-com/>

Supreme Court granted certiorari on June 28, 2018, and heard oral arguments on January 8, 2019.¹⁰⁷ The arguments focused on the plain text of the statute and policy concerns surrounding the registration requirement.¹⁰⁸

In a unanimous decision, the Court held “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.”¹⁰⁹ As such, the Court rejected the application approach, finding instead that the registration approach “reflects the only satisfactory reading of § 411(a)’s text.”¹¹⁰ Delivering the opinion for the Court, Justice Ruth Bader Ginsburg clarified that “a copyright owner can recover for infringement that occurred both *before* and *after* registration.”¹¹¹

A. *The Plain Text of the Copyright Act*

First, looking to the statute’s text, the Court concluded that, when read together, the three sentences comprising § 411(a) require an affirmative action by the Register rather than the claimant’s act of simply applying for registration.¹¹² Justice Ginsburg noted the section’s second sentence allowing lawsuits when a registration claim is refused “would be superfluous” if “registration” is the copyright

[<https://perma.cc/7JLB-54BJ>] (last visited Mar. 9, 2020).

107. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707, 2707 (2018) (mem.); *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, *supra* note 106.

108. See Transcript of Oral Argument at 1, 3, *Fourth Estate Pub. Benefit Corp., LLC*, 139 S. Ct. 881 (No.17-571). In addition to the petitioner and respondent, the United States argued in support of respondent. *Id.* at 1.

109. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 886.

110. *Id.* at 888.

111. *Id.* at 886–87 (emphasis added). Though Justice Ginsburg did not attend the oral argument because she was home recovering from lung cancer surgery, she wrote her opinion based on the oral argument transcript and briefs. Jon Levitan & Andrew Hamm, *Case Study on the Ginsburg Conspiracy Theories in Action*, SCOTUSBLOG (Mar. 15, 2019, 11:37 AM), <https://www.scotusblog.com/2019/03/case-study-on-the-ginsburg-conspiracy-theories-in-action/> [<https://perma.cc/5DHY-U3L9>]; Jessica Litman, *Opinion Analysis: A Copyright Owner Can’t Sue for Infringement Before the Register Has Processed Its Copyright Registration Application*, SCOTUSBLOG (Mar. 4, 2019, 5:41 PM), <https://www.scotusblog.com/2019/03/opinion-analysis-a-copyright-owner-cant-sue-for-infringement-before-the-register-has-processed-its-copyright-registration-application/> [<https://perma.cc/J2T7-6MDL>].

112. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 888–89 (“[Section] 411(a)’s opening sentences focus not on the claimant’s act of applying for registration, but on action by the Copyright Office—namely, its registration or refusal to register a copyright claim.”).

owner’s act of filing an application rather than the Register’s act of reviewing the application.¹¹³ As such, the Court resisted the “implausible assumption that Congress gave ‘registration’ different meanings in consecutive, related sentences within a single statutory provision.”¹¹⁴

Further, Justice Ginsburg pointed to other sections of the Copyright Act to support the proposition that “registration” requires actions by the Register.¹¹⁵ For instance, § 410(a) provides “after examination . . . the Register shall register the claim and issue to the applicant a certificate of registration”¹¹⁶ Section 410 also permits the Register to refuse registration.¹¹⁷ Therefore, Justice Ginsburg concluded that § 410 “confirms that application is discrete from, and precedes, registration.”¹¹⁸ Lastly, the Court pointed to § 408(f)’s preregistration option for authors of works that are “vulnerable to predistribution infringement.”¹¹⁹ The Court reasoned that preregistration would be a pointless provision if one were permitted to file suit after merely completing an application for registration.¹²⁰

B. Policy Concerns Relating to Registration Delay

As of this writing, the Copyright Office takes an average of six months to process a registration claim.¹²¹ Even still, processing times can be significantly longer—sometimes taking nearly two years to register a claim.¹²² Recognizing that “delay” was a major policy concern for proponents of the application approach, Justice Brett

113. *Id.* at 889.

114. *Id.* (citing *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 440, 448 (2005)).

115. *Id.*

116. 17 U.S.C. § 410(a) (2018).

117. *Id.* § 410(b).

118. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 889.

119. *Id.*

120. *Id.*

121. *Fourth Estate v. Wall-Street.com*, COPYRIGHT ALLIANCE, <https://copyrightalliance.org/copyright-law/copyright-cases/fourth-estate-v-wall-street-com/> [https://perma.cc/ULT2-PHFR] (last visited Mar. 9, 2020).

122. *Registration Processing Times*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf> [https://perma.cc/FC9D-MQEK] (last visited Mar. 9, 2020); *see also supra* text accompanying note 95.

Kavanaugh pressed Aaron Panner (counsel for Fourth Estate) to explain the “practical problems” with the registration approach.¹²³ Stating, “[T]he most severe practical problem is the inability to receive prompt injunctive relief,” Mr. Panner detailed a hypothetical in which an infringed song is distributed over the Internet and is “so widely disseminated that its value for the author has been lost.”¹²⁴

In addition to potential losses in value, Fourth Estate raised concerns that the lag time between filing an application and receiving the Register’s determination may cost a copyright owner the ability to enforce her rights.¹²⁵ Nevertheless, the Court found the fear that the statute of limitations may run before the Copyright Office acts on the registration application was “overstated.”¹²⁶ Justice Ginsburg suggested that the average processing time leaves “ample time to sue after the Register’s decision,” regardless of whether the infringement began before the copyright owner submitted his application for registration.¹²⁷ Additionally, the Court rightly points out that copyright owners can choose expedited processing for an additional fee in situations involving “[p]ending or prospective litigation.”¹²⁸ Nevertheless, though the Copyright Office “make[s] every attempt to examine the [expedited] application . . . within five working days[,]” there is no guarantee that the Register will decide on the application in an accelerated fashion.¹²⁹ Echoing Justice Kavanaugh’s concerns at oral argument regarding administrative delays, Justice Ginsburg recognized that it is an “unfortunate” reality that such delays may prevent a copyright owner from enforcing his rights.¹³⁰ Ultimately, however, the Court did not find this argument persuasive and held

123. Transcript of Oral Argument, *supra* note 108, at 25.

124. Brief for the Petitioner at 2, *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. 881 (No. 17-571); Transcript of Oral Argument, *supra* note 108, at 25.

125. Brief for the Petitioner, *supra* note 124, at 41 (citing *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 620 (9th Cir. 2010)).

126. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 892.

127. *Id.*

128. *Id.* at 892 n.6 (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 623.2 (3d ed. 2017) [hereinafter COMPENDIUM (THIRD)]); *see also* SPECIAL HANDLING *supra* note 103 and accompanying text.

129. COMPENDIUM (THIRD), *supra* note 128, § 623.4; *see* SPECIAL HANDLING, *supra* note 103, at 2.

130. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 892.

that it has no bearing on the text of the statute as written by Congress.¹³¹ Accordingly, the Court held registration occurs “when the Register has registered a copyright after examining a properly filed application[,]” thereby putting § 411(a)’s inconsistent circuit readings to rest.¹³²

III. The Berne Convention for the Protection of Literary and Artistic Works

In contrast to the United States, the rest of the world has long decided the copyright registration issue.¹³³ Although registration is a nonessential formality under the Berne Convention, several Berne member countries have voluntary registration systems; however, registration is often not required for a copyright owner to exercise her rights.¹³⁴ This lack of a registration requirement creates a disparity between what is required for an American author to sue for copyright infringement in the United States versus what is required for a foreign author to do the same.¹³⁵

131. *Id.* (noting “the current administrative lag . . . does not allow [the Court] to revise § 411(a)’s congressionally composed text”).

132. *Id.*

133. Berne Convention, *supra* note 13 (eliminating formalities under the Berne Convention). The World Intellectual Property Organization explains:

Before the 1886 Berne Convention, each country had its own rules for recognition of copyright in a work. Consequently, authors had to comply with formalities on a country-by-country basis. The Berne Convention introduced the principle that authors in Union countries need only comply with the formalities imposed by the country of origin of a work. This rule was replaced in the 1908 Berlin revision of the Convention by the current principle of formality-free protection, reflected in Article 5(2) of the present Paris Act 1971, according to which the enjoyment and the exercise of copyright shall not be subject to any formality.

Copyright Registration and Documentation Systems, WORLD INTELL. PROP. ORG., http://www.wipo.int/copyright/en/activities/copyright_registration/index.html [https://perma.cc/JM9P-ENY2] (last visited Mar. 9, 2020) [hereinafter *Copyright Registration and Documentation Systems*].

134. *Copyright Registration and Documentation Systems*, *supra* note 133 (observing that “several Berne Union members have established voluntary national registration systems for copyright and sometimes also for related rights”); see also JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 108 (2011) (noting that two countries with legal systems similar to ours do not require copyright registration—the United Kingdom has no registration system and Canada lacks a registration requirement to enforce the copyright owner’s rights).

135. See 17 U.S.C. § 411(a) (2018) (stating that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made”); see also GOLDSTEIN, *supra* note 2, § 3.15 (noting that § 411(a) “exempt[s] qualified foreign works from the requirement of registration as a condition to suit”).

A. The Berne Convention and Registration as a Nonessential Formality

The international nature of copyright law in today's world cannot be overestimated, nor should it be overlooked.¹³⁶ Foreign markets account for over forty percent of the United States' copyright revenue.¹³⁷ Moreover, foreign and international copyright has never been as prominent a subject as it is today.¹³⁸ As a result of this focus, the Berne Convention has emerged as the governing instrument of international copyright law.¹³⁹ "With U.S. accession to the Berne [C]onvention in 1989, . . . 'internationalization [has become] an integral component of U.S. copyright lawmaking.'"¹⁴⁰

1. A Brief History of the Berne Convention

The Berne Convention of 1886 was borne from nearly three decades of conferences and studies dating back to the Congress of Authors and Artists in Brussels, Belgium.¹⁴¹ Ralph Oman, former Register of Copyrights, observed that "[b]y this time, several countries had already undertaken individual efforts to protect the works of foreign authors on the basis of reciprocity."¹⁴² After several European congresses were held in the latter part of the nineteenth century, the delegates of the 1878 Literary Congress (held in Paris under the leadership of Victor Hugo) created the International

136. 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01 (Matthew Bender rev. ed. 2018) ("In decades past, an American copyright practitioner could wind up a career that included only fleeting encounters with foreign and international copyright. No longer is that isolation possible—the world is upon us, just as we are actively exploiting our copyrights worldwide.").

137. *Id.* § 17.01 n.2 (quoting Hearings on GATT Intellectual Property Provision (Statement of MPAA)).

138. *See id.* § 17.01 (noting that the internationalization of copyright law "arguably eclipses in importance all else in the copyright world").

139. *Id.*; *see also* Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights*, 68 N.C. L. REV. 363, 363 n.2 (1990) (observing that "[t]he Berne Convention is the oldest and most comprehensive copyright treaty in the world").

140. 5 NIMMER & NIMMER, *supra* note 136 (quoting Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 483 (2000)).

141. David Ladd, *To Cope with the World Upheaval in Copyright*, 19 COPYRIGHT 289, 290 (1983).

142. Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 72 (1988).

Literary Association.¹⁴³ The Association intended to create an international copyright union and held a conference in Berne, Switzerland in 1883 to begin drafting a constitution.¹⁴⁴ This first conference created a twenty-one-article draft, which was later amended and approved by a second conference in 1886.¹⁴⁵ Though Berne “was an ‘open convention,’” the United States did not assent to the union.¹⁴⁶ In fact, due to incompatibilities with Berne requirements, the United States refrained from joining the Berne Convention for over a century—finally acceding in 1989 with the codification of the Berne Convention Implementation Act of 1988.¹⁴⁷

143. *Id.* Victor Hugo was a nineteenth century French author whose seminal works include *The Hunchback of Notre Dame* and *Les Miserables*. Hugo, Victor Marie, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 856 (5th ed. 2011).

144. AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA 134 (1960); *see also* Oman, *supra* note 142.

145. CLARK, *supra* note 144, at 135.

Fifty-five nations were invited to sign. The final protocol was signed by Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunis on September 8, 1886. France, Great Britain and Spain specifically included their colonies and possessions under their signatures, which then meant that a large part of the civilized world had adhered to the convention. Ratifications were exchanged September 5, 1887, and the Berne Convention went into effect on December 5, 1887.

Id.

146. *Id.* at 136. The United States’ holdout from the Berne Convention was criticized by members of the nineteenth-century literary community, including a committee member of the American Copyright League and editor of *The Century Magazine* named Richard Watson Gilder. *Id.* In an article released at the time the Berne Convention went into effect, Gilder stated:

Another reason for prompt action lies in the fact that during the past year the rest of the civilized world has put the seal of shame upon us anew by uniting, at the Berne Copyright Conference, in an international arrangement which is at once the most definite recognition and complete protection of literary property in existence. From this honorable compact the United States Government alone [sic] has excluded itself. . . .

THE CENTURY CO., THE CENTURY ILLUSTRATED MONTHLY MAGAZINE, NOVEMBER 1886 TO APRIL 1887, at 490 (1887).

147. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended at 17 U.S.C. § 101 (2018)); AM. SOC’Y FOR INFO. SCI., MODERN COPYRIGHT FUNDAMENTALS: KEY WRITINGS ON TECHNICAL AND OTHER ISSUES 445 (Ben H. Weil & Barbara Friedman Polansky eds., American Society for Information Science 1989) (1985) [hereinafter MODERN COPYRIGHT FUNDAMENTALS] (“In October 1988, Congress finally passed the [Berne Convention Implementation Act of 1988], and the Senate ratified the Berne treaty, effective in early 1989.”); *see also* Ross, *supra* note 139, at 363 (observing that “[s]ome commentators have hesitated to advocate [U.S.] membership [in Berne] because several aspects of American copyright law were incompatible with Berne”).

Currently, 177 of the world's 195 countries are parties to the Berne Convention.¹⁴⁸

2. *Registration Is a Nonessential Formality Under the Berne Convention*

One of the main principles of the Berne Convention is the elimination of several formalities that were normally required to enforce copyright protection.¹⁴⁹ The Convention states that no formality shall limit “[t]he enjoyment and the exercise” of a copyright owner’s exclusive rights.¹⁵⁰ This lack of formalities is one of the major features that kept the United States from joining the Berne Convention for over a century.¹⁵¹

The Copyright Office views § 411’s registration requirement as a permitted formality.¹⁵² However, prior to becoming a signatory to the Berne Convention, the United States Congress had “different views as to whether the registration requirement was a formality prohibited by the Berne Convention.”¹⁵³ Nonetheless, Congress eventually amended the Copyright Act to eliminate registration as a prerequisite for Berne Convention claimants while continuing to require United States claimants to register prior to filing suit.¹⁵⁴ As a result, the

148. INTERNATIONAL COPYRIGHT RELATIONS OF U.S., *supra* note 14, at 4; *WIPO-Administered Treaties: Contracting Parties, Berne Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 [https://perma.cc/MS4-KQ8W] (last visited Mar. 9, 2020); see *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1205 (10th Cir. 2005), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (recognizing that the Berne Convention “is adhered to by much of the global community”).

149. *La Resolana Architects*, 416 F.3d at 1205 (“The Berne Convention eliminates most, if not all, formalities that are required to obtain and enforce copyrights.”); *BERNE CONVENTION BASICS*, *supra* note 12 (“Under Berne, no formalities are required as preconditions to protection.”); *MODERN COPYRIGHT FUNDAMENTALS*, *supra* note 147 (noting that the Berne Convention requires the “removal of formalities”).

150. *Berne Convention*, *supra* note 13.

151. Jon A. Baumgarten & Charles W. Lieb, 68: *Trademarks and Copyrights*, in *MODERN COPYRIGHT FUNDAMENTALS*, *supra* note 147, at 399–400.

152. *Oman*, *supra* note 142, at 85 (“Registration and recordation as a prerequisite to an infringement suit, in the view of the Copyright Office, are also permissible formalities . . .”).

153. GOLDSTEIN, *supra* note 2, § 3.15.

154. 17 U.S.C. § 411 (1988) (current version at 17 U.S.C. § 411 (2018)) (upholding the registration requirement “[e]xcept for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States . . .”); *La Resolana Architects*, 416 F.3d at 1202–04 (quoting 134 CONG. REC. 10,095 (1988)) (“Registration is continued as a prerequisite to suit by *domestic* authors.

United States is the only major country that requires any form of registration to obtain relief for copyright infringement.¹⁵⁵

B. America and the Berne Convention: Two Systems in Disharmony

In contrast to the American copyright scheme, which has long held formalities to be essential to copyright protection, the Berne Convention provides that copyright protection does not require formalities such as registration.¹⁵⁶ Regardless, by becoming a signatory to the Berne Convention in 1989, the United States loosened its system of formalities in order to comply with Berne's

Only foreign origin works are excepted from the registration requirement.”). Though the Berne Convention language has since been deleted from § 411, the Copyright Act continues to provide that any “United States work” must be registered or preregistered prior to filing a “civil action for infringement.” 17 U.S.C. § 411 (2018). The Copyright Act defines a “United States work” as:

- (1) in the case of a published work, the work is first published—
 - (A) in the United States;
 - (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
 - (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
 - (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;
- (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or
- (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

17 U.S.C. § 101 (2018).

155. MODERN COPYRIGHT FUNDAMENTALS, *supra* note 147 (“Mandatory registration as a precondition to lawsuits is now required only for domestic works . . .”); TEHRANIAN, *supra* note 134, at 98 (“[T]he United States is the only major country in the world with a timely registration prerequisite for the recovery In other countries, full legal vindication of one’s exclusive rights does not require the added procedure of registration, let alone timely registration.”).

156. Berne Convention, *supra* note 13 (eliminating formalities as a requisite to copyright protection); see Perlmutter, *supra* note 98 (observing that “[s]ince its eighteenth-century origins, [U.S.] law has required various steps to be taken in order to obtain and enjoy federal copyright protection”); Barbara Friedman Polansky, *International Recommendations for Handling Copyright Questions About Computer-Generated Works: What Are Our Concerns?*, 23 J. CHEMICAL INFO. COMPUTER SCI. 168, 168 (1983) (“Nations that belong to the Berne Union do not have required copyright formalities and have the minimum standards of copyright protection.”); 5 NIMMER & NIMMER, *supra* note 136, § 17.04(B)(3)(a) (“Berne permits no formalities as a condition to copyright protection outside the country of origin.”).

prohibition of the same.¹⁵⁷ For example, the United States eliminated the notice requirement in § 401 of the Copyright Act, instead making notice optional.¹⁵⁸ In fact, Shira Perlmutter—the Chief Policy Officer and Director for International Affairs at the United States Patent and Trademark Office—has noted “[t]he major change in formalities accomplished by the Berne Convention Implementation Act was the repeal of the notice requirement.”¹⁵⁹ However, certain formalities are still required to enjoy the full weight of the copyright protections offered by the American system.¹⁶⁰ The issue of registration exemplifies this contrasting view of formalities between the American and Berne Convention.¹⁶¹

One of the Berne Convention’s main objectives was to create a “national treatment.”¹⁶² This means “works originating in a member state receive the same treatment whether the author is domestic or a foreign national.”¹⁶³ Therefore, rights that are made available to American copyright owners under the Copyright Act must also be made available to copyright owners who are citizens of another Berne Convention country.¹⁶⁴ Consider statutory damages as an

157. See Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 867 (2007) (noting that formalities were either “relaxed or eliminated” when the United States became a member of the Berne Convention).

158. Berne Convention Implementation Act of 1988, 102 Stat. 2853, 2857–59. However, one commentator has observed that there are still incentives for placing notice on a copyrighted work, such as (1) protection against a defendant claiming to be an “innocent infringer,” (2) a cause of action under the Digital Millennium Copyright Act against a defendant “who removes ‘copyright management information’ from a work,” and (3) informing the world of ownership. Landau, *supra* note 157.

159. Perlmutter, *supra* note 98, at 569–70. For Ms. Perlmutter’s biography, see *Shira Perlmutter*, USPTO (Jan. 13, 2012, 12:20 PM), <https://www.uspto.gov/about-us/executive-biographies/shira-perlmutter> [<https://perma.cc/4JQ8-QTV3>].

160. See Perlmutter, *supra* note 98 (“[W]hile most traditional formalities have been eliminated, some vestiges remain.”).

161. Oman, *supra* note 142, at 84 (“The present registration system, while generally permissive, has retained its vitality under the current Copyright Act because of its clear benefits and certain inducements to make registration.”); see also Perlmutter, *supra* note 98 (demonstrating that 17 U.S.C. § 411(a) provides that Berne country works, other than United States works, are no longer required to register prior to filing suit for copyright infringement).

162. 5 NIMMER & NIMMER, *supra* note 136, § 17.01(B)(1)(a); Oman, *supra* note 142; Ross, *supra* note 139, at 365.

163. BERNE CONVENTION BASICS, *supra* note 12; see also 5 NIMMER & NIMMER, *supra* note 136, § 17.04 (defining “national treatment” as affording foreigners “equality of protection with the state’s own nationals”).

164. See 5 NIMMER & NIMMER, *supra* note 136, § 17.01(B)(1)(a).

example of the national treatment afforded to Berne claimants in the United States.¹⁶⁵ Statutory damages are a remedy that may be denied to all plaintiffs in an infringement suit, regardless of the plaintiff's nation of origin. However, because they are afforded to American authors, statutory damages must also be extended to foreign authors so as to not impinge on Berne's national treatment rule.¹⁶⁶ This adherence to the concept of national treatment is an example of when the international system works in harmony between different member countries.

The Berne Convention's prohibition of formalities bars those that have an effect on the copyright owner's "enjoyment and [] exercise" of his rights.¹⁶⁷ Therefore, the question is whether the formality of a registration requirement so limits a copyright owner's ability to obtain relief that it impermissibly hinders that owner's enjoyment and exercise. As stated above, § 412 of the Copyright Act requires all claimants—regardless of their nation of origin—to register the copyright at issue in order to obtain statutory damages.¹⁶⁸ However, though "Berne may not ban a copyright registration system that serves a procedural end," one critic opines that the remedy's registration requirement runs afoul of Berne's formalities prohibition.¹⁶⁹ This discrepancy comes from the bar on substantive rights to American authors absent registration.

165. Section 412 of the Copyright Act provides that registration is a prerequisite to receive statutory damages. 17 U.S.C. § 412 (2018).

166. 5 NIMMER & NIMMER, *supra* note 136, § 17.01(B)(1)(a). Nimmer posits that by affording foreign Berne authors the right to seek statutory damages, "the United States has exceeded the Berne *minima* as to remedies." *Id.*

167. Berne Convention, *supra* note 13.

168. 17 U.S.C. § 412.

169. TEHRANIAN, *supra* note 134, at 115 ("[Berne's] language appears to render suspect any copyright registration system that affects substantive rights, including significant remedies."). On the other hand, the Ad Hoc Working Group on U.S. Adherence to the Berne Convention concluded that § 412 complies with the Berne Convention because it affects specific remedies rather than eliminating the ability to obtain relief at all. *Id.* (citing FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION, *reprinted in* 10 COLUM.-VLA J.L. & ARTS 513 (1986)). The Ad Hoc Working Group on U.S. Adherence to the Berne Convention was put together by the United States Department of State and made up of Copyright Office staff members, legal scholars, and copyright attorneys. *Id.*; Ross, *supra* note 139. Its purpose was to advise Congress on the necessary changes to American copyright law required to comply with the Berne Convention. *Id.* Nimmer further provides "Berne imposes a condition that copyright subsistence for works emanating from other member states may not be premised on formal requirements. It does not, however, prohibit formalities

Congress passed the Berne Convention Implementation Act to comply with the Berne Convention's provisions, including the prohibition of formalities.¹⁷⁰ In doing so, Congress eliminated the presuit registration requirement for Berne Convention works.¹⁷¹ However, the requirement is still intact for United States works and those from non-Berne Convention countries.¹⁷² As Shira Perlmutter has noted, while eliminating the presuit registration requirement for Berne member countries "may satisfy our Berne obligations, the result is to disadvantage U.S. copyright owners relative to their counterparts from our chief trading partners."¹⁷³ This treatment both inconveniences American authors and puts them at a financial disadvantage compared to their foreign counterparts.¹⁷⁴

Under the current American copyright scheme, foreign authors are afforded quicker and cheaper access to relief than American authors. The lack of a registration requirement for foreign authors allows them to file suit immediately upon learning of an alleged infringement. In contrast, American authors must comply with the registration requirements under § 408, pay the registration fee, and wait for the Copyright Office to receive the application materials. Had the Supreme Court adopted the application approach in *Fourth Estate*, the American copyright owner could file suit at this point.

as a condition to certain types of remedies, licenses, exemptions, etc." 5 NIMMER & NIMMER, *supra* note 136, § 17.01(B)(1)(a); *see also* Perlmutter, *supra* note 98, at 570 (explaining that "restricting remedies is not inconsistent with Berne's prohibition on formalities, because it does not prevent 'the enjoyment or exercise' of rights").

170. S. REP. NO. 100-352, at 1 (1988).

171. 17 U.S.C. § 411(a) (1988) (current version at 17 U.S.C. § 411(a) (2018)).

172. *Id.*; *see also* Perlmutter, *supra* note 98, at 570.

173. Perlmutter, *supra* note 98, at 572.

174. *Id.* at 572–73 ("[O]ne U.S. software company testified that it spent hundreds of thousands of dollars a year preparing applications for registration—an expenditure not necessary for its foreign competitors."). Perlmutter further explains:

The provision of benefits only to works from outside a Berne member's borders is an odd twist in Berne's history. The Convention was written to achieve a satisfactory minimum level of rights around the world, while barring discrimination against foreign works through the principle of national treatment. Although a member is free to be more stingy with its own works, such an approach undercuts the goal of worldwide minimum rights.

Id. at 572 n.41.

Nevertheless, the Supreme Court held the registration approach is the better reading of the Copyright Act.¹⁷⁵ As such, American authors in all circuits must additionally wait for the Copyright Office to decide on their application before they are allowed to file suit. Due to the severe delays associated with the registration approach, American authors must live with the risk that the three-year statute of limitations for copyright infringement will expire while they wait for the Copyright Office to decide on their application.¹⁷⁶ Though they could pay the \$800 special handling fee to expedite their applications, this additional, nonstatutory step puts American authors at a further disadvantage as it will cost them hundreds of dollars more—if not thousands for the registration of multiple works—than Berne authors simply to register their works so that they are able to enforce their exclusive rights.¹⁷⁷

IV. Proposal

Formalities have largely impacted American copyright law since the first Copyright Act was enacted in 1790.¹⁷⁸ Unfortunately, though the relaxation of formalities was a goal of the current Copyright Act, certain formalities remain.¹⁷⁹ Indeed, the registration formality “provides the key to the courthouse” for infringement suits.¹⁸⁰ However, the current statutory scheme governing registration is ambiguous.¹⁸¹ Moreover, regardless of the Supreme Court’s

175. *See supra* Part II.

176. *See* 17 U.S.C. § 507(b) (2018).

177. *See* SPECIAL HANDLING, *supra* note 103, at 2.

178. *See* GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 100 (noting “[t]he first federal copyright statute was enacted in 1790”); Oman, *supra* note 142, at 82 (explaining that “[f]ormalities have played an important role in United States copyright law”). As an example of the prevalence of formalities in U.S. history, one former Register of Copyrights observes that, prior the joining Berne, “[n]otice ha[d] been a requirement of United States copyright law since 1790, and the requirement that such notice be placed on published copies has been in the law since 1802.” *Id.*

179. GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 100, at A1:6 (stating that formalities have been “relaxed” under the current Copyright Act); *see also* Matthew P. Gelfand, *A Perfect (Copyright) Union: Uniting Registration and License Designation*, 25 HARV. J.L. & TECH. 711, 713 (2012) (“Although formalities once operated to substantially limit the number of works protected by copyright law, they have been relegated to an inferior status over time. Today, they operate only to limit enhanced damages or prevent certain evidentiary presumptions.”).

180. Boyd, *supra* note 56, at 499.

181. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010) (finding the

endorsement of the registration approach, the United States remains out of step with the majority of the world, which holds that registration and other formalities shall not impede the copyright owner's "enjoyment and [] exercise" of her exclusive rights.¹⁸² Accordingly, Congress should eliminate § 411's registration requirement so that American authors receive the same opportunities for relief as their foreign counterparts from Berne Convention countries.

A. The Application Approach Best Supports U.S. Copyright Law's Statutory Scheme

Contrary to the Supreme Court's *Fourth Estate* holding, the application approach best protects copyright owners' exclusive statutory rights. First, the application approach better comports with the purpose of the Copyright Act. Unlike a patent, which does not exist until the United States Patent and Trademark Office issues it after analyzing the application for multiple factors, a copyright arises automatically.¹⁸³ Copyright merely requires a low bar of originality and fixation in a tangible medium.¹⁸⁴ Registration with the Copyright Office is not required to obtain the exclusive rights afforded to the copyright owner. Even still, registration should be encouraged, and both approaches continue to require registration prior to filing suit. However, putting registration in the hands of the applicant rather than those of the Register supports adherence to the application approach while continuing to encourage registration.

Next, the application approach will prevent the legal limbo in which litigants may find themselves if they do not already hold a registration certificate at the time they learn of an infringement.¹⁸⁵ As

Copyright Act's plain language ambiguous).

182. Berne Convention, *supra* note 13.

183. 17 U.S.C. § 102(a) (2018); *see* 35 U.S.C. §§ 111–123 (2018) (detailing the requirements for a patent application).

184. *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that copyright permits any work that is "independently created by the author" and possesses "at least some minimal degree of creativity").

185. *Cosmetic Ideas*, 606 F.3d at 620 ("The application approach avoids this legal limbo—and avoids prolonging the period of infringement—by allowing a litigant to proceed with an infringement suit as

previously noted, it is common for the Copyright Office to take months, sometimes years, to perform its administrative functions and issue a certificate of registration.¹⁸⁶ The high volume of registration claims the Copyright Office receives each year makes its task particularly daunting.¹⁸⁷ It is unreasonable to make a potential litigant wait for as much as two years before allowing him to file suit simply because of backlog at the Copyright Office. Additionally, the three-year statute of limitations for copyright infringement suits will expire on at least some potential plaintiffs, thereby preventing them from obtaining relief.¹⁸⁸ Further, for those litigants who remain within the statute of limitations, a motion to dismiss for failure to state a claim will merely delay the suit while wasting judicial resources as the plaintiff will simply refile her suit once she has the registration certificate in hand.¹⁸⁹

Moreover, neither approach frustrates the overall purpose of copyright registration. When making registration voluntary, Congress left certain incentives in the Copyright Act to encourage registration to create a “robust national register of copyrights.”¹⁹⁰ In fact, within Congress’s goal of relaxing formalities, it acknowledged that “[c]opyright registration for published works, which is useful and important to users and the public at large . . . should . . . be induced in some practical way.”¹⁹¹ Adherence to the application approach would have no bearing on this overall goal. Both approaches require that the copyright owner file a completed application, deposit, and fee with the Copyright Office.¹⁹² These materials can be used to create a healthy national library of copyrights regardless of whether the

soon as he has taken all of the necessary steps to register the copyright at issue.”).

186. *See supra* notes 34, 95 and accompanying text.

187. *See supra* notes 92–94 and accompanying text.

188. 17 U.S.C. § 507(b) (2018).

189. *Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (adopting the application approach because it “best effectuate[s] the interests of justice and promote[s] judicial economy”). *See generally* Kaplan, *supra* note 10 (observing “copyright owners are likely to favor the application approach over the registration approach from a flexibility and cost-savings standpoint”).

190. *Cosmetic Ideas*, 606 F.3d at 620.

191. H.R. REP. NO. 94-1476, at 158 (1976).

192. *See* 17 U.S.C. § 408 (2018).

applicant filed a suit for infringement before or after issuance of a registration certificate. Additionally, copyright owners are further incentivized to register their works with the Copyright Office in order to take advantage of §§ 504 and 505, which allow a plaintiff to receive statutory damages and attorney's fees.¹⁹³ Statutory damages do not require the plaintiff to show actual damages and can be as much as \$30,000 per work infringed.¹⁹⁴ When coupled with the opportunity to also receive costs and attorney's fees, these two sections of the Copyright Act maintain a lucrative incentive for copyright owners to voluntarily register their works.

Finally, in holding for the registration approach, the Supreme Court ensures that authors of United States works remain on unequal footing with foreign authors from Berne Convention member countries. Currently, foreign authors are exempt from § 411's registration requirement while American authors are bound by it.¹⁹⁵ As a result, foreign authors have cheaper, quicker, and less burdensome access to the United States judicial system than America's own citizens.¹⁹⁶ Adoption of the application approach eliminates the additional burden that Americans experience when filing an infringement suit. With registration costing \$35 to as much as \$800 per work, it is easy to see how expensive registration can become.¹⁹⁷ This is especially true when the claimant is litigating the infringement of multiple works. Had the Justices adopted the application approach, American authors could avoid filing special handling applications, thereby minimizing some of the additional expense seen in suits that are close to being barred by the statute of limitations.

193. *Id.* §§ 504–505 (2018).

194. *Id.* § 504.

195. *Id.* § 411 (2018).

196. *See* Landau, *supra* note 157, at 869 n.84 (“The Berne Convention . . . provides reciprocal protection and access to the courts to signatory countries.”).

197. *Fees*, COPYRIGHT.GOV, <https://www.copyright.gov/about/fees.html> [https://perma.cc/7V5S-3WDF] (last visited Mar. 9, 2020); *see also* SPECIAL HANDLING, *supra* note 103, at 2.

B. Elimination of the Registration Requirement Under § 411

Regardless of the Supreme Court's *Fourth Estate* holding, Congress should go one step further and entirely eliminate the requirement to register a copyright prior to filing suit for infringement. This elimination would further harmonize the American and Berne Convention copyright schemes relating to formalities. For example, consider an infringement suit between an American and Canadian. Unlike the United States, Canada does not have a copyright registration requirement—making registration truly voluntary.¹⁹⁸ Under the current American copyright scheme, if an American author were to file a copyright infringement suit in Canada, Berne's reciprocal protection would require her to register her work in Canada prior to bringing suit.¹⁹⁹ This holds true because her home country (the United States) requires registration prior to filing suit, and she must comply with her home country's laws when suing for infringement abroad. If we take the flipside of that scenario and have the Canadian suing for infringement in the United States, the Canadian author would not be required to register his copyright.²⁰⁰

198. TEHRANIAN, *supra* note 134. Though registration is not required in Canada, the Canadian Intellectual Property Office points out that “a certificate of registration of copyright is evidence that copyright exists and that the person registered is the owner of the copyright.” *A Guide to Copyright, CANADIAN INTEL. PROP. OFF.*, https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02281.html#benefitsRegistration [<https://perma.cc/Z3DW-UJ5K>] (last visited Mar. 9, 2020). The Canadian Copyright Office does have certain limitations, however, continuing that “the Copyright Office is not responsible for policing or checking on registered works and how people use them.” *Id.* The Canadian Copyright Office “also cannot guarantee that the legitimacy of ownership or the originality of a work will never be questioned.” *Id.*

199. One case explains reciprocal protection in treaties as follows:

The central thrust of these multilateral treaties is the principle of “national treatment.”

A work of an American national first generated in America will receive the same protection in a foreign nation as that country accords to the works of its own nationals. Although the treaties do not expressly discuss choice-of-law rules, it is commonly acknowledged that the national treatment principle implicates a rule of territoriality.

Subafilms, Ltd. v. Mgm-Pathe Commc'ns. Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (citations omitted); *see also* Richard Stim, *Does My U.S. Copyright Give Me Worldwide Protection from Infringement?*, NOLO, <https://www.nolo.com/legal-encyclopedia/international-copyright-protection.html> [<https://perma.cc/2TK9-5ZWX>] (last visited Mar. 9, 2020) (noting the “reciprocal approach is commonly called ‘national treatment’”).

200. In addition to the Berne Convention's reciprocal protection, the Copyright Act eliminates the requirement for foreign authors whose nation of origin is a Berne Convention member. 17 U.S.C.

Elimination of § 411's registration requirement for United States works would remove this disparity and put the American author on a level playing field with the Canadian author. Not only would the American not have to register to obtain relief in her own country, but she would also be exempt from registering in Canada, as her home country would no longer require registration. As a result, reciprocal protection would continue to be adhered to while eliminating the registration formality in accordance with Article 5(2) of the Berne Convention.²⁰¹

Consequently, the lack of a registration requirement does bring some important questions to the fore. Most notably, how does one know if a work is protected if it cannot be found in a national registry? However, discarding the registration requirement to file suit does not remove all incentives for a copyright owner to register.²⁰² For example, foreign authors from Berne Convention countries are not exempt from presuit registration if they want the possibility of being awarded statutory damages and attorney's fees.²⁰³ Similarly, elimination of § 411's registration requirement for authors of American works would not affect the requirements for American authors to also be awarded statutory damages and attorney's fees. The large monetary awards that these sections can provide are enough incentive for an author to continue registering his works with the Copyright Office.

Moreover, just as eliminating the notice requirement did not stop copyright owners from putting notice on their published works, abandoning the registration requirement will not keep owners from

§ 411(a); *see also* GOLDSTEIN, *supra* note 2, § 3.15.

201. *See* Berne Convention, *supra* note 13.

202. In addition to bringing an infringement action, copyright registration has other benefits including: (1) evidence that you have a valid copyright, (2) the ability to claim statutory damages and attorney's fees, (3) the creation of a public record, and (4) satisfaction of the Copyright Office's deposit requirement. *Why Should I Register My Work if Copyright Protection Is Automatic?*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/ca_faq_post/copyright-protection-ata/ [<https://perma.cc/26YL-87NW>] (last visited Mar. 9, 2020).

203. *See* COMPENDIUM (THIRD), *supra* note 128, § 2000 (explaining that, though "foreign works do not need to be registered (or refused registration) in order to file an infringement lawsuit in the United States . . . they must be registered in a timely manner to seek statutory damages and attorney's fees").

registering their works voluntarily.²⁰⁴ One comparable incentive between voluntary notice and voluntary registration is alerting the world that the author has created the work.²⁰⁵ Registration forever attaches the author's name to the work in the Library of Congress for all the world to see.²⁰⁶ Also, like voluntary notice, voluntary registration is a deterrent against infringement because it enables anyone to see if a work is protected.²⁰⁷ As such, elimination of the registration requirement under § 411 will not deter authors or copyright owners from voluntarily registering their copyrights with the Copyright Office.

CONCLUSION

The United States Supreme Court has officially resolved the circuit split regarding the interpretation of § 411's requirement to register a work with the Copyright Office prior to filing an infringement suit.²⁰⁸ Though the Supreme Court interpreted the Copyright Act to support the registration approach, the application approach best effectuates the Copyright Act's purpose by preventing legal limbo, promoting judicial economy, and putting Americans on more level ground with foreign authors.²⁰⁹ Moreover, the purpose of copyright registration would not be frustrated if Congress were to completely eliminate

204. See Landau, *supra* note 157, at 869 (“When the United States became a member of the Berne Convention, the requirement that one must publish a work with proper copyright notice (e.g., © 2007, Michael Landau) was made optional, instead of mandatory. The publication of a work without copyright notice on or after March 1, 1989 would not result in the work falling into the public domain.”).

205. See *id.* at 867 (noting that “an author or a copyright owner might want the world to know who is associated with the work”); see also Jonathan Bailey, *Why Bother with a Copyright Notice?*, PLAGIARISM TODAY (June 27, 2012), <https://www.plagiarismtoday.com/2012/06/27/why-bother-with-a-copyright-notice/> [<https://perma.cc/GLA9-6QFY>] (explaining that even though notice is not required in most countries, “having a notice may provide some protection in those that do,” because putting notice on a work “prevents confusion on the nature of the work and keeps others from thinking it is not copyrighted . . . [and] eliminates innocent infringer claims”).

206. The Library of Congress's catalog can be searched online. *Catalog*, LIBR. CONGRESS, <https://catalog.loc.gov/vwebv/searchBrowse> [<https://perma.cc/T4HH-QF9K>] (last visited Mar. 9, 2020).

207. Cf. H.R. REP. NO. 100-609, at 27 (1988) (stating that notice is “the cheapest deterrent to infringement which a copyright holder may take”).

208. See *supra* Part II.

209. See *supra* Section IV.A.

§ 411's registration requirement.²¹⁰ Continuing to require registration in order for copyright owners to obtain statutory damages and attorney's fees, coupled with a desire to put the world on notice that they have created a copyrightable work that may not be infringed will continue to encourage copyright owners to register their works—thus, maintaining a robust library of copyrights.

210. *See supra* Section IV.B.