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No Public Benefits for *Public Benefit*: The Eleventh Circuit's Narrow Approach to Copyright Registration

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NO PUBLIC BENEFITS FOR *PUBLIC BENEFIT*: THE ELEVENTH CIRCUIT'S NARROW APPROACH TO COPYRIGHT REGISTRATION

Abstract: In the 2017 case *Fourth Estate Public Benefit Corporation v. Wall-Street.com*, the United States Court of Appeals for the Eleventh Circuit held that before a plaintiff can bring a claim for copyright infringement under the 1976 Copyright Act, the United States Copyright Office ("Copyright Office") must officially review the work submitted for registration, and the Register of Copyrights ("the Register") must accept or refuse to register it. This ruling echoed the United States Court of Appeals for the Tenth Circuit's similar finding in 2005 in *La Resolana Architects, PA, v. Clay Realtors*. In contrast, in 2004 and 2010, the United States Courts of Appeals for the Fifth and Ninth Circuits, respectively, held that a plaintiff may commence suit upon filing an application for copyright with the Copyright Office and is not required to wait for approval or refusal from the Register. This Comment argues that the Eleventh Circuit is incorrect in its interpretation of the 1976 Copyright Act. The Tenth and Eleventh Circuits found, incorrectly, that the statute contained plain language that unambiguously supported a complete registration approach. Further, this Comment argues that the statute upon which these holdings rely is ambiguous, and where the absence of plain, unambiguous language supports either approach, public policy and congressional intent are best served by a pro-application approach.

INTRODUCTION

As the United States moved into the last quarter of the twentieth century, the development of technologies like television, radio, sound recordings, and film necessitated updating a copyright code that had not been revised since 1909.[1] Consequently, in 1976, Congress passed the Copyright Act ("the Act"), amending Title 17 of the United States Code.[2] Among the amendments was 17 U.S.C. § 411(a), which updated common law procedures for bringing a civil action for copyright infringement.[3] Under both the original 1909 Copyright Act and the 1976 Act, potential litigants must, as a precondition to filing suit, register their copyright with the United States

[1] H.R. REP. NO. 94-1476, at 47 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

[2] *See id.* The 1976 Copyright Act ensures copyright protection for all published and unpublished work, regardless of whether the copyright has not yet been formally registered. *See* Copyright Act of 1976 § 408(a), 17 U.S.C. § 408(a) (2012).

[3] *See* H.R. REP. NO. 94-1476, at 157, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5773 (clarifying that a claimant must still attempt registration of copyright to bring suit for infringement, but providing remedies if registration is refused).

Copyright Office ("Copyright Office").[4] The addition of § 411(a), allows claimants to bring a copyright suit regardless of whether the Register of Copyrights ("the Register") deems the subject matter copyrightable and issues a certificate of registration, so long as the other requirements of § 411(a) are met.[5]

Within the language of this statute lies a latent problem of construction: the text of § 411(a) begins, "[N]o civil action for infringement . . . shall be instituted until . . . registration of the copyright claim has been made . . . ."[6] If the Copyright Office refuses to issue a certificate, § 411(a) continues, "In any case . . . where the *deposit, application, and fee required for registration* have been delivered to the Copyright Office . . . and *registration has been refused*, the applicant is entitled to institute a civil action for infringement . . . ."[7]

Section 411(a)'s fluid use of the word "registration" has created tension in the courts, as the statute can be construed to refer simultaneously to the entire act of registration ("registration of the copyright claim"), and to the single act of filing with the Copyright Office ("if registration has been refused").[8] This potentially fluid language has created contention over

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[4] 17 U.S.C. § 411(a) (requiring registration as a precondition to suit under the 1976 Copyright Act); Copyright Act of 1909 § 13 (repealed 1976). *See, e.g.*, Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 260 F.2d 637, 640–41 (2d Cir. 1958) (holding that the text of Title 17 plainly requires that a copyright be registered in compliance with all the provisions of the title before the copyright owner can commence an infringement suit). Formal registration as a precondition to suit already existed under the 1909 Copyright Act, and it was left intact to incentivize creators to register their copyrights. Copyright Act of 1909 § 12 (repealed 1976); *see* H.R. REP. NO. 94-1476, at 158, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 (noting that because copyright protection is now automatic, Congress must offer incentives such as the ability to file suit to encourage registration). The Copyright Office must examine and formally register works because works not of sufficient originality of thought are not copyrightable and thus not protected by copyright law. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884) (establishing originality as the benchmark for copyright under the U.S. Constitution).

[5] 17 U.S.C. § 411(a). Under prior common law, if the Office refused to issue a certificate of registration because the material was not copyrightable, applicants seeking registration could not proceed with suit until they filed an action against the Register to compel issuance of a certificate. *See Vacheron*, 260 F.2d at 640–41.

[6] 17 U.S.C. § 411(a). The statute reads, "[N]o civil action for infringement . . . . shall be instituted until *preregistration* or registration of the copyright claim has been made . . . ." *Id.* (emphasis added). "Preregistration" is a procedure whereby a copyright holder may preregister a work prior to commercial publication, if the class of works to which it belongs has a history of infringement occurring immediately upon publication, such as commercial music. *Id.* at § 408(f). *See, e.g.*, Marino v. Usher, 673 F. App'x. 125, 130 (3d Cir. 2016) (involving musical compositions preregistered with the Copyright Office in anticipation of wide release but before official publication).

[7] 17 U.S.C. § 411(a) (emphasis added). The Register can then join the suit and challenge the copyrightability of the claim, but failure to join the suit does not deprive the court of jurisdiction to determine that issue. *Id.*; *see* Reed Elsevier v. Muchnik, 559 U.S. 154, 169 (2010) (finding that registration is not a jurisdictional element that bars a court from hearing a claim).

[8] *Compare* Corbis Corp. v. UGO Networks, Inc., 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004) (finding that a court cannot hear a copyright claim until the Copyright Office has examined and

whether the statute's language is plain or ambiguous, and thus whether a suit may be commenced when the rights holder files his application for registration, or when the Copyright Office reviews and either accepts and registers the copyright, or rejects the application.[9] The temporal distance between application and final registration is not negligible—the Copyright Office has experienced serious delays when approving or refusing registration as a result of administrative issues such as regulatory changes.[10] Because the Copyright Office may reject any material it deems not copyrightable, mere application is not a rubber stamp process and does not necessarily result in complete registration of a copyright.[11]

As a result of Congress's chosen language in § 411(a), Federal Circuit Courts of Appeals are split over when a plaintiff may file suit: upon review, or upon application.[12] The most recent division comes from the U.S. Court of Appeals for the Eleventh Circuit, where the court in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* ("*Fourth Estate II*") held that Congress' use of the term "registration" in the 1976 Act refers to the complete process of application and review.[13]

This Comment argues that the Eleventh Circuit incorrectly decided that the Copyright Act's language is unambiguous and, as a result of concluding their analysis at statutory language, failed to adequately consider policy ramifications of their decision.[14] Part I of this Comment details the history of the circuit split leading to the Eleventh Circuit's decision.[15] Part II analyzes the Eleventh Circuit's reasoning for finding in favor of the complete registration approach, including its heavy reliance upon the U.S. Cir-

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then either approved or rejected the application), *and* Haan Crafts Corp. v. Craft Masters, Inc., 683 F. Supp. 1234, 1242 (N.D. Ind. 1988) (holding that a plaintiff cannot file suit for copyright infringement until the copyright is registered), *with* Positive Black Talk v. Cash Money Records, Inc., 394 F.3d 357, 365 (5th Cir. 2004) (noting that, although other federal circuits hold differently, in the Fifth Circuit, the only requirement for an infringement action is that the Copyright Office receive the application, deposit, and fee), *and* Iconbazaar L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (finding that a claim will survive a motion to dismiss if a completed application has been filed).

[9] *See supra* note 8 and accompanying text.

[10] *See, e.g.*, Kregos v. Associated Press, 795 F. Supp. 1325, 1328 (S.D.N.Y. 1992). The plaintiff filed his application for copyright in 1985, but because the Copyright Office had issued an administrative delay in evaluating works displayed on a computer screen, the Copyright Office did not issue a final decision until late 1988. *See* 37 C.F.R. § 202.20(C)–(D) (2016) (issuing new and specific instructions for presentation of audiovisual works and automatic databases to the Copyright Office during application); *Kregos*, 795 F. Supp. at 1328.

[11] *See, e.g.*, *Kregos*, 795 F. Supp. at 1328. Despite this delay, the plaintiff's copyright was ultimately rejected by the Copyright Office. *Id.* Rejection of a copyright is not a bar to suit, so long as the Register is notified. 17 U.S.C. § 411(a). Section 411(a) permits a claimant to bring suit even if the copyright was refused. *Id.*

[12] *See supra* note 8 and accompanying text.

[13] Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, 856 F.3d 1338, 1339 (11th Cir. 2017).

[14] *See infra* notes 18–90 and accompanying text.

[15] *See infra* notes19–39and accompanying text.

cuit Court of Appeals for the Tenth Circuit's pro-complete registration rationale.[16] Part III argues that the Eleventh Circuit erred in this reliance, and should have instead considered that the construction of the statute is ambiguous, that Congress's intent to formalize copyright is equally served by the application approach, and that the benefits of the registration approach are wholly outweighed by its drawbacks.[17]

I. A BRIEF HISTORY OF THE SPLIT: *POSITIVE BLACK TALK*, *LA RESOLANA*, *COSMETIC IDEAS*, AND *FOURTH ESTATE II*

This Part will first discuss the groundwork for the split among Federal Circuit Courts of Appeals, describing the development of federal doctrine through decisions and dicta.[18] The split began in 2004 when the United States Court of Appeals for the Fifth Circuit decided *Positive Black Talk, Inc., v. Cash Money Records, Inc*.[19] This decision was the first circuit opinion to turn on the timing of registration.[20] The Fifth Circuit held without elaboration that the United States Copyright Office ("Copyright Office") need only receive the application, deposit, and fee before a plaintiff may file an infringement action.[21]

The U.S. Court of Appeals for the Tenth Circuit disagreed, creating a split among the circuit courts one year later in *La Resolana Architects, PA v. Clay Realtors Angel Fire*.[22] The Tenth Circuit did not consider § 411's language particularly ambiguous, instead holding that "registration" for the purposes of being eligible to file suit refers to the complete act and is thus

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[16] *See infra* notes 40–67and accompanying text.

[17] *See infra* notes 68–90 and accompanying text.

[18] *See infra* notes 19–39 and accompanying text.

[19] *See Positive Black Talk*, 394 F.3d at 365 (finding that when hip-hop artist Jerome "Jubilee" Temple filed his application for copyright registration the day before filing suit for infringement against Terius "Juvenile" Gray, the application was sufficient to confer subject-matter jurisdiction).

[20] *See id*.

[21] *See id.* The Fifth Circuit did not discuss its reasoning in detail, instead acknowledging that although some federal circuits require the Register to approve and issue a certificate, the Fifth Circuit requires only a complete application. *Id.* Although *Positive Black Talk* was the first definitive federal circuit opinion, the Fifth Circuit had previously discussed the same pro-application approach. *See id.*; Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384, 386–87 (5th Cir. 1984) (allowing standing for a copyright infringement suit when plaintiffs had filed an application but not received a registration certificate).

[22] *See* La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1200 (10th Cir. 2005) (finding that registration had not been fulfilled in a copyright infringement dispute between an architectural firm and realtor group, consequently barring the plaintiffs from filing suit). Before the Tenth Circuit created what is generally regarded as the first point of the circuit split, the Eleventh Circuit had actually upheld a pro-registration approach, though its reasoning was discussed in brief dicta. *See* M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1489 (11th Cir. 1990) (holding that the appropriate point at which the suit could proceed was upon receipt of the registration certificate).

only satisfied when the Copyright Office examines the application, registers it, and issues a certificate of registration.[23] The Tenth Circuit buttressed its interpretation by drawing comparisons to congruent language from § 410(a) and (b), both of which "require affirmative acts" on behalf of the Register of Copyrights ("the Register") to "examine," "register," and "issue" certificate of registration.[24]

In 2010, the U.S. Court of Appeals for the Ninth Circuit further widened the split with its decision in *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*[25] The court held that receipt of a complete application by the Copyright Office satisfied the Act's registration requirement because this approach better fulfilled Congress's purpose in passing the Act in the first place—specifically its desire to reduce, not increase, formality in the registration process.[26] Like the Tenth and Eleventh Circuits, the Ninth Circuit also considered the structural context of the statute, but conversely found § 410 to be ambiguous and not dispositive of Congress's intent.[27] The Ninth Circuit also held that § 408, passed in the same 1976 Act, was supportive of *both* the registration and application approaches.[28] To resolve this ambiguity, in addition to analyzing the statute itself, the Ninth Circuit relied on broad policy arguments in favor of efficiency and protecting litigants against disadvantages that could be caused by the delay between application and approval.[29] The Fifth, Ninth, and Tenth Circuits were the only circuit courts to focus directly on the issue, although dicta in the Seventh and Eighth Circuits has concretized the split, as has the First and Second Circuits' refusal to engage the issue.[30]

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[23] *La Resolana*, 416 F.3d at 1200.

[24] *Id.* at 1201. *Compare* Copyright Act of 1976 § 410(a), 17 U.S.C. § 410(a) (2012) ("When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter . . . the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office."), *with id.* at § 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 . . . .").

[25] *See* Cosmetic Ideas, Inc. v. IAC/Interactivecorp., 606 F.3d 612, 621 (9th Cir. 2010) (finding the registration requirement had been fulfilled in an action by a jewelry designer for copyright infringement against a competitor).

[26] *See Cosmetic Ideas*, 606 F.3d at 621 (holding that application is a more practical approach than registration, which only serves to add an extraneous level of formality to registering a copyright); *see also* H.R. REP. NO. 94–1476, at 158 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 (explaining the importance of copyright registration for the public at large, and emphasizing that any inducements to register should be practical).

[27] *Cosmetic Ideas*, 606 F.3d at 617.

[28] *Id.* at 617; *see* 17 U.S.C. § 408(a) ("[T]he owner of copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office . . . the application . . . .").

[29] *See Cosmetic Ideas*, 606 F.3d at 619–20 (analyzing negative ramifications of the registration approach and Congressional intent in passing the 1976 Copyright Act).

[30] *See* Alicea v. Machete Music, 744 F.3d 773, 779 (1st Cir. 2014); Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 125 (2d Cir. 2014); Brooks-Ngwenya v. Indianapolis Pub. Sch., 564 F.3d 804, 806 (7th Cir. 2009); Action Tapes, Inc. v. Mattson, 462 F.3d 1010, 1013 (8th Cir. 2006)

In the wake of this split, Fourth Estate Public Benefit Corporation, a news corporation that generates and syndicates online-only journalism on a subscription model, filed suit in the Southern District of Florida for copyright infringement in 2016.[31] Fourth Estate licensed syndicated news stories to the defendant, Wall-Street.com, with the condition that any cancellation of Wall-Street's subscription with Fourth Estate also terminated the license to host Fourth Estate's stories.[32] When Wall-Street cancelled its subscription, its refusal to remove the hosted stories allegedly constituted copyright infringement.[33]

At the time of the alleged infringement, Fourth Estate had not yet registered their stories with the Copyright Office.[34] Knowing that this was a bar to suit, but believing that an application to the Copyright Office would allow a suit to proceed, Fourth Estate filed an application to register the copyrighted articles.[35] Wall-Street moved to dismiss, arguing that copyrightable works are not registered until the Register has issued a certificate of registration, and therefore that Fourth Estate had erroneously brought suit over unregistered works.[36] The district court agreed, holding that a party cannot file suit before obtaining registration for the work, and dismissed the suit without prejudice.[37] In its ruling, however, the district court did not address the distinction between registration by the Copyright Office and ap-

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The Seventh Circuit's dicta conflicts with itself, holding both for and against the application approach. *Compare* Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631 (7th Cir. 2003) (holding without expansion that a plaintiff must file an application for registration before suit can be filed), *with Brooks-Ngwenya*, 564 F.3d at 806 (declining both to state the circuit's position and cite the previous case when discussing the circuit split). The Eighth Circuit has not analyzed the issue but has arguably taken a position in favor of application. *See, e.g.*, *Action Tapes, Inc.*, 462 F.3d at 1013 (stating briefly that until the owner has filed the entire application, deposit, and registration fee, the owner cannot file suit). Both the First and Second Circuits have acknowledged the circuit split but have declined to decide whether to adopt the application approach or the registration approach. *See Alicea*, 744 F.3d at 779 (acknowledging the split but declining to decide either way because under either approach the defendants were entitled to summary judgment); *Psihoyos*, 748 F.3d at 125 (declining to decide the issue because the plaintiff had not filed an application in the instant controversy).

[31] Fourth Estate Pub. Benefit Corp. v. Wall-Street.com (*Fourth Estate II*), 856 F.3d 1338, 1339 (11th Cir. 2017); Fourth Estate Pub. Benefit Corp. v. Wall-Street.com (*Fourth Estate I*), No. 16–60497, 2016 WL 9045625, at *1 (S.D. Fla. 2016).

[32] *Fourth Estate II*, 856 F.3d at 1339.

[33] *See id.*

[34] *See* Brief for Appellant at 14, *Fourth Estate II*, 856 F.3d 1338 (No. 16–13726) (admitting that after discovering the infringement, Fourth Estate filed its application with the Copyright Office).

[35] *See id.* at 20 (recognizing as Appellant that the Eleventh Circuit had thus far not ruled in favor of the application approach, but nevertheless asserting in its brief that it had pled in compliance with § 411(a)).

[36] *See generally* Defendant's Motion to Dismiss, *Fourth Estate I*, No. 16–60497, 2016 WL 9045625 (S.D. Fla. 2016) (filing the motion because on the face of the complaint, under the registration approach, Fourth Estate had not registered its copyright and thus could not state a claim).

[37] *See Fourth Estate I*, 2016 WL 9045625, at *1.

plication by the copyright holder, assuming without analysis that "registration" refers to the approval and registration of the copyright by the Copyright Office.[38] Unhappy with dismissal and confident that they satisfied the registration requirement, Fourth Estate appealed to the Eleventh Circuit.[39]

II. SHORT, BUT SWEET: A COMPARISON OF THE ELEVENTH CIRCUIT'S STATUTORY AND POLICY ANALYSES

The U.S. Court of Appeals for the Eleventh Circuit's opinion in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* ("*Fourth Estate II*") is short, a concise four pages of statutory interpretation wherein the court affirmed its adoption of the registration approach, and consequently also affirmed the district court's dismissal.[40] Part A of this Section will compare the Eleventh Circuit's opinion with the Federal Court of Appeals for the Tenth Circuit's similar but more robust analysis supporting registration occurring at the point of approval or rejection by the Copyright Register ("pro-registration").[41] Part B will contrast both opinions with the U.S. Court of Appeals for the Ninth Circuit's opposing holding in favor of registration occurring at the point of application ("pro-application").[42]

A. The Tenth and Eleventh Circuit's Pro-Registration Approach

While the source of the conflict between circuit courts is a disagreement over whether § 411(a) of the 1976 Copyright Act ("the Act") requires complete approval or refusal of registration versus filing an application, the Eleventh Circuit looked to and relied upon surrounding provisions to clarify congressional intent.[43] The language of § 410(a) states plainly that the Register of Copyrights ("the Register") first examines the copyright application to determine if the submitted material qualifies as a copyrightable work, and

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[38] *See id.* Although the district judge's opinion was short and did not elaborate on his reasoning, the judge drew from the registration approach adopted in dicta in *M.G.B. Homes*. *See id*. at *2; 903 F.2d at 1489 (holding that a plaintiff cannot file suit for copyright infringement unless he or she "has a *registered* copyright") (emphasis added). The Eleventh Circuit later explicitly affirmed in dicta that it had ratified the registration approach when it authored *M.G.B. Homes*. *See* Kernel Records Oy v. Mosley, 694 F.3d 1294, 1302 n.8 (11th Cir. 2012).

[39] *See* Brief for Appellant at 14, *Fourth Estate II*, 856 F.3d at 1338 (No. 16–13726) (appealing to the Eleventh Circuit and arguing that "registration" in § 411(a) refers to filing an application with the Register).

[40] *See* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com (*Fourth Estate II*), 856 F.3d 1338, 1339 (11th Cir. 2017).

[41] *See infra* notes 43–54 and accompanying text.

[42] *See infra* notes 55–67and accompanying text.

[43] *See Fourth Estate II*, 856 F.3d at 1341. In total, the Eleventh Circuit analyzed §§ 411(a), 410(a), 410(b), and 410(d) and found that each supported the registration approach such that no further analysis of legislative history or policy was necessary. *See id.* at 1341–42. The court acknowledged § 408(a) but ultimately concluded that it pertained only to the requirements of obtaining copyright registration and was not relevant to timing. *Id.*

upon such a positive finding, the Register then registers the copyright and issues a certificate of registration.[44] The enumeration of this timeline was key in the Eleventh Circuit's analysis: the court held that because the statutes requires examination prior to registration, registration necessarily cannot be fulfilled *without* examination, and therefore the application approach is invalid.[45] The subsequent section of the Act, § 410(b), further allows the Register to "refuse registration" if the material is deemed invalid or uncopyrightable.[46] Section 410(d) contains similar "later-in-time-than" language, which the court found implied that the Register's positive examination is a requirement for registration.[47] In the Eleventh Circuit's view, had Congress intended "registration" to be defined as the act of filing an application, there would be no statutory language allowing the Register to refuse registration after the point of application.[48]

The Eleventh Circuit also discussed § 408(a), which pertains to the procedure for obtaining copyright registration in general.[49] The court rejected Fourth Estate's argument that because § 408(a) refers to obtaining registration by submitting an application, and does not refer to issuance of a certificate, "registration" therefore is the act of submitting an application to the Register.[50] The court instead held this section speaks only to the procedures that must be followed, including filling application materials, to receive copyright registration.[51]

This analysis closely follows that of the Tenth Circuit: like its successor, the Tenth Circuit in *La Resolana Architects, PA v. Clay Realtors Angel Fire* framed its interpretation of § 411 through the lens of § 410.[52] The court found that § 410's plain language, which allows the Register to "refuse registration" should the material not be copyrightable, clearly creates a linear

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[44] Copyright Act of 1976 § 410(a), 17 U.S.C. § 410(a) (2012). To qualify as a copyrightable work subject to copyright protection, a work must be an original work of authorship fixed in a tangible medium. *Id*. at § 102. An original work is one of independent creation that exhibits a "modicum of creativity." Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 346 (1991). Copyright protection does not extend to products of an author's labor but without original conception or contribution by that author. *Id.* at 349.

[45] *See Fourth Estate II*, 856 F.3d at 1341.

[46] 17 U.S.C. § 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 . . . .").

[47] *Id*. at § 410(d) (stating in relevant part that the Register of Copyrights determines at a later date whether a work satisfies basic standards for copyright protection); *Fourth Estate II*, 856 F.3d at 1342.

[48] *Fourth Estate II*, 856 F.3d at 1341.

[49] *See id.*; 17 U.S.C. 408(a).

[50] *Fourth Estate II*, 856 F.3d at 1341; *see* Brief for Appellant at 23, 25, *Fourth Estate*, 856 F.3d 1338 (No. 16–13726).

[51] *Fourth Estate II*, 856 F.3d at 1341.

[52] *Compare Fourth Estate*, 856 F.3d at 1341 (analyzing § 410(a)–(d)), *with* La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1201 (10th Cir. 2005) (turning likewise to surrounding language for structural interpretation).

endpoint for registration which is not satisfied by mere application and *must* be preceded by examination.[53] The Eleventh and Tenth Circuits employ comparable analyses, coming to the same conclusion that nothing in either statute implies that the act of registration is automatic, or that the act of filing is sufficient to constitute registration.[54]

B. The Ninth Circuit's Pro-Application Approach

The Ninth Circuit does not view the statutes as favorably.[55] In its *Cosmetic Ideas, Inc. v. IAC/Interactivecorp* ruling, the court agreed that § 410(a) and § 411(a) address registration as an act that requires forward action by the Copyright Office, but pointed out that other sections of the statute muddy any clarity § 411's text might have provided on its own.[56]

For the Ninth Circuit, § 410(d)'s reference to the Register's ability to accept or decline a copyright registration does not override its otherwise ambiguous construction.[57] The section states that, for the purposes of eligibility to file suit, "the effective date of copyright registration is the day on which *an application* . . . which is later determined by the Register . . . to have been acceptable for registration, *[has] been received* in the Copyright Office."[58] The court acknowledged that § 410(d) could be interpreted as requiring affirmative action from the Register before registration is com-

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[53] *See* 17 U.S.C. 410(b); *La Resolana*, 416 F.3d at 1201. The Tenth Circuit first holds that the statute plainly indicates that the applicant and Copyright Office must undertake a "series of affirmative steps" before filing suit. *Id.* at 1200. Where the Tenth Circuit diverges from the Eleventh is in its assertion that § 408 is unambiguous in its inclusion of the Register's role, and thus unambiguous in its pro-registration support. *See id.* at 1201. *Cf. Fourth Estate II*, 856 F.3d at 1341 (refraining from characterizing § 408 to contain more than an absence of support for pro-application). Additionally, although the Tenth Circuit favors the registration approach, the court's interpretation of "registration" differs slightly from the precedent discussed in the opinion. *See La Resolana*, 416 F.3d at 1202–03. The district court cases discussed in *La Resolana* require not only that the copyright owner have filed his or her copyright and had the Register examine, approve, and register their copyright, but also that the owner must have received the paper certificate of registration prior to filing suit. *See, e.g.*, Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc., 315 F. Supp. 2d 1053, 1055 (C.D. Cal. 2004) (dismissing the jewelry maker plaintiff's suit specifically because the plaintiff had not yet received a registration certificate from the Office); Strategy Source, Inc. v. Lee, 233 F. Supp. 2d 1, 3–4 (D. D.C. 2002) (finding that absence of a registration certificate is a bar to suit under § 410). *La Resolana* rejected this approach. *See* 416 F.3d at 1202–03. The language of § 410 refers to "register[ing] the claim" and "issu[ing] a certificate" as two distinct acts, which the Tenth Circuit considers proof positive that issuance and registration are not one and the same. *Id.* A certificate may be evidence of the validity of a copyright, but in the Tenth Circuit it is not a prerequisite to suit. *See id.*

[54] *Compare Fourth Estate II*, 856 F.3d at 1341 (analyzing § 410(a)–(d)), *with La Resolana*, 416 F.3d at 1201 (likewise turning to surrounding language for structural interpretation).

[55] *See infra* notes 56–67.

[56] *See* Cosmetic Ideas, Inc. v. IAC/Interactivecorp., 606 F.3d 612, 617–18 (9th Cir. 2010) (discussing § 408(a) and § 410(d)).

[57] *See id.* at 618.

[58] Copyright Act of 1976 § 410(d), 17 U.S.C. § 410(d) (2012) (emphasis added).

plete, which therefore implies that "registration" is the complete process of application and examination.[59] While the court considered this pro-registration reading to be plausible, they ultimately held that § 410(d) could just as reasonably be read to endorse a pro-application interpretation.[60] The court reasoned that if an application for copyright registration is the effective date of registration, as is plainly stated in § 410(d), then the catalyst event for registration is the application itself, not examination.[61]

The Ninth Circuit considers § 408(a) to be likewise supportive of more than one interpretation.[62] Although this section concerns copyright registration in general, it briefly states that a copyright owner "may obtain registration" by filing an application with the Copyright Office.[63] Both *Fourth Estate II* and *La Resolana* dismissed this language quickly as unsupportive of the application approach.[64] The Ninth Circuit, by contrast, considered plausible the possibility that under § 408(a), the sole requirement for obtaining registration is to apply for it.[65]

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[59] *Cosmetic Ideas*, 606 F.3d at 618.

[60] *Id.*

[61] *See id.* Under the back-dating interpretation of § 410(d), the date on which the copyright application was submitted to the Office becomes the date when registration officially occurs. *See* 17 U.S.C. 410(d); La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1203 (10th Cir. 2005). Official registration commences the statute of limitations for an infringement claim; therefore, the statute of limitations begins at the point of application, regardless of when the Copyright Office registers the copyright. *See* 17 U.S.C. § 410(d); *La Resolana*, 416 F.3d at 1203.

[62] *See* 17 U.S.C. § 408(a) ("[T]he owner of copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office . . . the application . . . ."); *see infra* notes 57–61.

[63] 17 U.S.C. § 408(a).

[64] *See* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com (*Fourth Estate II*), 856 F.3d 1338, 1341 (11th Cir. 2017) (dismissing § 408(a) as irrelevant to a construction analysis); *La Resolana*, 416 F.3d at 1203 (asserting that § 408(a) directly supports registration as an affirmative act). The Eleventh Circuit's brief discussion of § 408(a) in *Fourth Estate II* characterizes the section as a mere precondition to registration that must be fulfilled. *See* 856 F.3d at 1341. The Tenth Circuit discussed this section in more detail in *La Resolana*, but ultimately did not consider it a challenge to the pro-registration approach. *See* 416 F.2d at 1201. The court held that the statute's use of the word "may" instead of "shall" indicated that filing an application is only a preliminary step in obtaining copyright. *See id.*; *see also* Corbis Corp. v. UGO Networks, Inc., 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004) (holding that no part of the statute's language suggested that registration occurred at the point of application).

[65] *See Cosmetic Ideas*, 606 F.3d at 617. The Ninth Circuit acknowledged *La Resolana*'s reading of § 408(a), but considered it incomplete. *See id.* at 617 n.7. A copyright owner "may obtain registration" under § 408(a), but this is not necessarily a construction that indicates that further review is necessary; rather, the Ninth Circuit considered use of the word "may" to be consistent with the broader context of § 408(a). *See id.* Section 408(a) is entitled "Registration Permissive," and its purpose is to make clear that under this statute, registration is optional and not a prerequisite to copyright protection. *See id.* Prior to the 1976 Act, which added this provision, registration of a copyright was mandatory if the owner wanted any copyright protection at all. *See* H.R. REP. NO. 94-1476, at 143, 146, 150 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5759, 5762, 5766 (discussing the forfeiture of copyright under the old regime if the owner of a work failed to meet certain statutory requirements). The Ninth Circuit held that § 408's inclusion of the word "may" rather than "shall" can be plausibly read to indicate that unlike before, registration is permissive under the 1976 Act, rather than mandatory. *See Cosmetic Ideas*, 606 F.3d at 617–18 n.7.

Having found the statute ambiguous, the court then looked to purpose, context, and public policy and consequently found in favor of the application approach, determining that it better served the purpose of the 1976 Copyright Act.[66] There was no such discussion in *Fourth Estate II*, as the Eleventh Circuit followed principles of statutory construction and chose to end its inquiry when it held that the plain words of the statute were not ambiguous.[67]

III. WHY CAN'T WE BE FRIENDS?: SMART POLICY IS NOT IN CONFLICT WITH THE 1976 COPYRIGHT ACT

Copyright protections are best served by the application approach, and the split among Federal Circuit Courts of Appeals should resolve accordingly.[68] This Part will argue that the U.S. Court of Appeals for the Eleventh Circuit erred first in holding that § 411(a)'s language is plain and unambiguous, and second in dismissing purpose, context, and policy arguments.[69]

Because provisions in the 1976 Copyright Act ("the Act") can be read as plausibly in support of either approach, courts can and should analyze broader policy concerns and consequences of adopting a registration approach.[70] Foremost, requiring complete registration as a precondition to suit creates an unnecessary and potentially harmful delay in litigation.[71] A plaintiff may ultimately file suit regardless of whether the copyright is approved or rejected by the Register of Copyrights ("the Register"), yet during the examination period the plaintiff is temporarily left in a legal period of purgatory.[72] During this period, despite knowing that a lawsuit will eventually be available, the copyright owner has no recourse against continuing harmful infringement.[73] Furthermore, the greatest danger of a delay between application and registration is that the statute of limitations for a copyright infringement suit will run out.[74] The Act provides a three-year statute of

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[66] *See Cosmetic Ideas*, 606 F.3d at 618 (agreeing with the Supreme Court ruling in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), finding that in the wake of an ambiguous statute, courts look beyond statutory language and consider which interpretation better suits the purpose of the statute itself).

[67] *Fourth Estate II*, 856 F.3d at 1342; *see* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (finding that judicial inquiry ends when a statute's language is unambiguous and its scheme consistent and coherent).

[68] *See infra* notes71–90and accompanying text.

[69] *See infra* notes71–90and accompanying text.

[70] *See supra* notes 59–61 and accompanying text.

[71] *See, e.g.*, Kregos v. Associated Press, 795 F. Supp. 1325, 1328 (S.D.N.Y. 1992) (noting that three-year delay in plaintiff's registration allowed the alleged infringement to continue unchecked).

[72] Cosmetic Ideas, Inc. v. IAC/Interactivecorp., 606 F.3d 612, 620 (9th Cir. 2010).

[73] Copyright Act of 1976 § 411(a), 17 U.S.C. § 411(a) (2012).

[74] *See* 17 U.S.C. § 507(b) (2012); *see also, e.g.*, *Kregos*, 795 F. Supp. at 1329–30 (resulting in plaintiff being barred from suit because of administrative delay in processing his copyright application).

limitations, which commences at the point of the alleged infringement.[75] If an applicant has not been approved for registration, yet resides in a pro-registration jurisdiction, the applicant is barred from suit.[76]

While the Eleventh Circuit completely declined to review policy considerations, the U.S. Court of Appeals for the Tenth Circuit briefly discussed the possibility of uncertainty during a lawsuit that could result from allowing suit to commence before the Register makes a determination on the instant work's copyrightability.[77] Should the suit commence with the advantageous presumption that the copyright is valid, a contrary determination by the Register could destabilize copyright litigation proceedings, which *La Resolana* contends is counter to the aims of the 1976 Act.[78] Although this argument carries some validity, it does not outweigh the harm of continuing infringement of a plaintiff's copyright and, worse, potential expiration of the statute of limitations.[79]

Pro-registration arguments also focus heavily on Congress's intentions in passing the Act—specifically their intent to incentivize copyright owners to register their copyrights.[80] In addition to the ability to file suit, other litigiously focused benefits of registration include collecting attorney's fees and statutory damages, as well as—if the Copyright Office accepts the copyright—a *prima facie* presumption of the copyright's validity.[81] Congress

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[75] 17 U.S.C. § 507(b).

[76] *See, e.g.*, *Kregos*, 795 F. Supp. at 1329–30 (finding multiple claims barred from suit even though the plaintiff could not have filed while still awaiting registration approval).

[77] La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1205 (10th Cir. 2005); *see* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com (*Fourth Estate II*), 856 F.3d 1338, 1342 (11th Cir. 2017) (affirming and quoting Eleventh Circuit precedent in *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) that reads "judicial inquiry is complete" if there is no ambiguity in the face of a statute).

[78] *La Resolana*, 416 F.3d at 1205.

[79] *See Cosmetic Ideas*, 606 F.3d at 620. The Eleventh Circuit disagrees, finding in *Fourth Estate II* that the potential time bar is not a flaw but rather a feature by design—the fear of inability to file suit encourages copyright owners to register their copyrights promptly. *Fourth Estate II*, 856 F.3d. at 1342. The court contends that this design is evident in other provisions of the Act, specifically § 410(c), which grants the registrant's copyright the privilege of "*prima facie* presumption of validity" if the registration was completed within five years of initial publication. 17 U.S.C. § 410(c) (2012); *Fourth Estate II*, 856 F.3d at 1342.

[80] *See Fourth Estate II*, 856 F.3d at 1342; *La Resolana*, 416 F.3d at 1206. The Tenth Circuit notes in particular that in 1993, Congress considered an amendment to Title 17, which would dispose of the registration requirement entirely, yet declined to adopt this amendment. *La Resolana*, 416 F.3d at 1206; *see* Copyright Reform Act of 1993, H.R. 897, 103d Cong. § 6 (1993).

[81] *See* 17 U.S.C. § 410(c) (allowing a registration certificate to constitute *prima facie* evidence of the copyright's validity in the event of litigation); *id.* § 411(a) (granting access to courts after registration of copyright); *id.* § 412 (granting copyright owner the ability to collect attorneys' fees in the event of a judgment in the owner's favor if the copyright owner registered the copyright either within three months of the work's publication, or before the infringement of the work). A registered copyright carries *prima facie* presumption of validity because the Register has already examined the work and deemed it copyrightable. *Id.* § 410(c). This presumption is valuable to a plaintiff, who otherwise bears the burden of proving that the central work in an infringement

further contemplated other, less tangible benefits, which a copyright owner may experience, such as knowing that the government has approved his or her labor and creativity.[82] Yet these incentives are not zero-sum game pieces, applicable only if a circuit court chooses one approach over the other; their benefits apply equally to both a holder of a certificate of registration and an applicant still awaiting examination, with the only distinction being *time*.[83] Copyright owners whose work risks infringement or is already infringed ultimately register their copyrights because the Act incentivizes them to do so.[84] This registration may be done solely in anticipation of litigation, but nothing in the Act's drafting suggests that enforcing one's protection from copyright infringement is a less legitimate goal than upholding formal registration processes as currently required by the Eleventh Circuit.[85]

Perhaps the weakest yet most prevalent argument in favor of the registration approach is that Congress's consistent tendency toward formality in copyright registration necessitates the greatest amount of bureaucracy allowed in the statute before registration can be considered legitimate.[86] The Tenth Circuit—upon whom the Eleventh Circuit relies in its brief consideration of intent—both overemphasized and mischaracterized this goal.[87] The

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action is copyrightable. *See id.*; *see also, e.g.*, Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 908 (2d Cir. 1980) ("[T]he existence of a valid copyright can be established by the introduction into evidence of a Copyright Office certificate of registration."); 3 MELVILLE B. NIMMER & DAVID NIMMER, M. NIMMER ON COPYRIGHT § 12.11 (1980) (discussing the evidentiary weight of the registration certificate).

[82] S. REP. NO. 100–352, at 19–20 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3724–25.

[83] *See id.* (recognizing benefits which, in addition to the impalpable validation of creativity, include *prima facie* presumption of validity in infringement suits, statutory damages and attorney's fees).

[84] *See, e.g.*, Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 363 (5th Cir. 2004). The plaintiff and defendant recorded songs with the identical lyric, "back that ass up" as a major part of each song's respective hook. *Id.* Each recording occured in the fall of 1997. *Id.* Desiring to enter into litigation, the plaintiff registered the copyright pursuant to the 1976 Act's requirements on the same day that it filed suit for infringement against the defendant. *Id.* at 364.

[85] *See* H.R. REP. NO. 94-1476, at 157 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5773. In fact, the passage of the 1976 Act can be construed as encouraging leniency in registration and relaxation of formal procedures, because Congress extended a genuine cause of action to unregistered copyright holders. *See id.* The House Report discusses only that although a copyright owner who has not registered his claim still enjoys protection, registration is still a prerequisite to enforcing copyright. *Id.*; *see Cosmetic Ideas*, 606 F.3d 612 at 619 (recognizing that Congress's loosening of notice requirements and rejection of mandatory registration was indicative of its intent to relax, not reinforce, formality).

[86] *See, e.g.*, *La Resolana*, 856 F.3d at 1205–06 (discussing at length the history of copyright law and Congress' tendencies toward formality). H.R. REP. NO. 94-1476, at 152–53, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5768–69 (detailing meticulous standards for depositing phonographic materials for registration).

[87] *See La Resolana,* 856 F.3d at 1206. The lynchpin of the Tenth Circuit's analysis was Congress' rejection of the proposed Berne Act in 1988. *See id.* at 1205–06. The Berne Act was a proposed series of amendments to Title 17, which sought to abandon the registration requirement so that the United States could ally with international copyright accords ("Berne Convention") and deliberately avoid formality. *See id.* Congress ultimately rejected this proposal, eliminating the

Act did create statutory incentives to register through formal policies, but it also eliminated the notice requirement for a valid copyright, granted greater flexibility to the Register when accepting different types of materials, and most importantly, completely eliminated mandatory registration as a prerequisite to copyright protection.[88] Because the application approach is simply a different interpretation of the moment at which a copyright is considered "registered" such that a plaintiff may file suit, there is no practical distinction as to which approach better serves the goal of formality.[89] Congressional intent to retain formality in United States copyright law is not affected by adoption of either approach, which the Eleventh Circuit should have considered in its analysis.[90]

CONCLUSION

The U.S. of Appeals for Eleventh Circuit erred in its approach to interpreting § 411 of the Copyright Act of 1976 when it held that the statute is unambiguous and consequently engaged in no further policy consideration. The Copyright Act continued the American tradition of formality in copyright law, but it also relaxed a significant amount of those formalities for the benefit of functionality. Section 411, which both requires registration for suit and permits protection for intellectual property before registration, is emblematic of that balance.

Conflicts within the law are often visualized as a balance scale, where two conflicting arguments must be assessed until the more meritorious argument outweighs the lesser. For this circuit split, however, this kind of binary assessment is not necessary. Most arguments purported by pro-registration circuits regard benefits and incentives which apply equally to the application approach. The strengths of the registration argument not

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requirement for foreign works but leaving in place the registration requirement for domestic works, in part to preserve the Library of Congress' ability to receive significant works registered by the Copyright Office. *Id.* at 1206; *see also* H.R. REP. NO. 94-1476, at 107, 150, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5722, 5766. The Tenth Circuit discusses this rejection in the context of Congress's decision to retain the registration requirement, framing it as supportive of a registration approach. *See La Resolana*, 416 F.3d at 1205–06. The support for this argument is unclear; there is no discussion of why drawing the line of registration at the point of application disincentivizes copyright holders from filing their copyrights. *See id.* at 1206.

[88] *See, e.g.*, 17 U.S.C. §§ 401–412 (establishing protection and eliminating mandatory registration); H.R. REP. NO. 94-1476 at 107, 150, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5763 (blanketing protection to copyrights published even without notice for the full statutory period). H.R. REP. NO. 94-1476 at 107, 150, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5770 (discussing the Register's flexibility in what constitutes an appropriate deposit of materials for registration).

[89] *Cosmetic Ideas*, 606 F.3d 612 at 619.

[90] *Compare Fourth Estate II*, 856 F.3d at 1342 (considering the formality requirement met when the plaintiff had filed the application and the Office of the Register has analyzed the work), *with Cosmetic Ideas*, 606 F.3d 612 at 619 (considering the formality requirement met when the Office of the Register has received formal application, deposit, and filing fee of the work at issue).

shared by the application approach are rooted in arbitrary statutory interpretation, which are shaky at best, and cherry-picking at worst. Allowing a copyright to be registered for litigation purposes at the time of application makes functional sense and protects litigants from the disadvantages of a registration approach without in turn disadvantaging defendants.

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