

No. \_\_-\_\_

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IN THE  
**Supreme Court of the United States**

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FOURTH ESTATE PUBLIC BENEFIT CORPORATION,  
*Petitioner,*

v.

WALL-STREET.COM, LLC AND JERROLD D. BURDEN,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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October 13, 2017

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## QUESTION PRESENTED

Section 411(a) of the Copyright Act provides (with qualifications) that “no civil action for infringement of [a] 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.” 17 U.S.C. § 411(a). The question presented is:

Whether “registration of [a] copyright claim has been made” within the meaning of § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the Fifth and Ninth Circuits have held, or only once the Copyright Office acts on that application, as the Tenth Circuit and, in the decision below, the Eleventh Circuit have held.

**PARTIES TO THE PROCEEDINGS**

Petitioner Fourth Estate Public Benefit Corporation was the plaintiff and the appellant in the proceedings below.

Respondents Wall-Street.com, LLC and Jerrold D. Burden were the defendants and the appellees in the proceedings below.

**RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, petitioner Fourth Estate Public Benefit Corporation states that it is a public benefit corporation that has not issued any stock.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
RULE 29.6 STATEMENT .....	iii
TABLE OF AUTHORITIES .....	vii
OPINIONS BELOW .....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED .....	1
INTRODUCTION .....	1
STATEMENT.....	3
A. Statutory Background .....	3
B. Factual Background.....	6
C. Proceedings Below .....	7
REASONS FOR GRANTING THE PETITION.....	9
I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS ON A MATTER OF SIGNIFICANT PRACTICAL IMPORTANCE .....	9
A. The Courts Of Appeals Are Divided On The Question Presented And Will Remain So Absent This Court’s Review .....	9
B. The Question Presented Is Important .....	15
C. This Case Provides An Appropriate Vehicle For Resolution Of The Question Presented .....	17

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE COPYRIGHT ACT.....	17
A. A Careful Reading Of The Statute's Text Establishes That The Eleventh Circuit's Construction Is Incorrect.....	18
B. The Eleventh Circuit's Interpretation Is Inconsistent With The Copyright Act's Scheme Of Rights and Remedies.....	22
CONCLUSION.....	26
APPENDIX	
Opinion of the United States Court of Appeals for the Eleventh Circuit, <i>Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, et al.</i> , No. 16-13726 (May 18, 2017).....	1a
Order of the United States District Court for the Southern District of Florida Granting Motion To Dismiss, <i>Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, et al.</i> , Civil Action No. 16-60497-Civ-Scola (May 23, 2016).....	11a
Complaint for Copyright Infringement, <i>Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, et al.</i> , Civil Action No. 16-60497-Civ-Scola (S.D. Fla. filed Mar. 11, 2016) (exhibits omitted) ...	15a
Statutory Provisions Involved.....	23a
Copyright Act (17 U.S.C.):	
17 U.S.C. § 101 (excerpt) .....	23a
17 U.S.C. § 408.....	23a
17 U.S.C. § 409.....	28a

17 U.S.C. § 410 .....	29a
17 U.S.C. § 411 .....	30a
17 U.S.C. § 412 .....	32a
17 U.S.C. § 501 .....	33a
17 U.S.C. § 502 .....	35a
Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Aug. 7, 2017) .....	36a

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Alicea v. Machete Music</i> , 744 F.3d 773 (1st Cir. 2014).....	14
<i>Apple Barrel Prods., Inc. v. Beard</i> , 730 F.2d 384 (5th Cir. 1984).....	10, 12
<i>Barber v. Thomas</i> , 560 U.S. 474 (2010) .....	21
<i>Brooks-Ngwenya v. Indianapolis Pub. Sch.</i> , 564 F.3d 804 (7th Cir. 2009) .....	14
<i>Caner v. Astry</i> , 16 F. Supp. 3d 689 (W.D. Va. 2014).....	14
<i>Chevrestt v. American Media, Inc.</i> , 204 F. Supp. 3d 629 (S.D.N.Y. 2016) .....	14
<i>Chicago Bd. of Educ. v. Substance, Inc.</i> , 354 F.3d 624 (7th Cir. 2003) .....	14
<i>Cosmetic Ideas, Inc. v. IAC/Interactivecorp.</i> , 606 F.3d 612 (9th Cir. 2010) .....	10, 11, 12, 26
<i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000) .....	22
<i>Gaiman v. McFarlane</i> , 360 F.3d 644 (7th Cir. 2004).....	14
<i>Gattoni v. Tibi, LLC</i> , No. 16 Civ. 7527 (RWS), 2017 WL 2313882 (S.D.N.Y. May 25, 2017) .....	14
<i>K-Beech, Inc. v. Doe</i> , Civil Action No. 11-7083, 2012 WL 262722 (E.D. Pa. Jan. 30, 2012).....	14
<i>La Resolana Architects, PA v. Clay Realtors Angel Fire</i> , 416 F.3d 1195 (10th Cir. 2005) .....	13, 14, 15, 24



<i>Lakedreams v. Taylor</i> , 932 F.2d 1103 (5th Cir. 1991).....	10, 12
<i>Liteky v. United States</i> , 510 U.S. 540 (1994) .....	18-19
<i>Mays &amp; Assocs. Inc. v. Euler</i> , 370 F. Supp. 2d 362 (D. Md. 2005) .....	14
<i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 564 U.S. 91 (2011) .....	25
<i>North Jersey Media Grp. Inc. v. Sasson</i> , Civ. No. 2:12-3568 (WJM), 2013 WL 74237 (D.N.J. Jan. 4, 2013).....	14
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 134 S. Ct. 1962 (2014).....	5
<i>Positive Black Talk Inc. v. Cash Money Records Inc.</i> , 394 F.3d 357 (5th Cir. 2004) .....	10, 12
<i>Prunte v. Universal Music Grp.</i> , 484 F. Supp. 2d 32 (D.D.C. 2007) .....	15
<i>Psihoyos v. John Wiley &amp; Sons, Inc.</i> , 748 F.3d 120 (2d Cir. 2014) .....	5, 14
<i>Reed Elsevier, Inc. v. Muchnick</i> , 559 U.S. 154 (2010) .....	5, 10, 15
<i>Strategy Source, Inc. v. Lee</i> , 233 F. Supp. 2d 1 (D.D.C. 2002) .....	15
<i>Syntek Semiconductor Co. v. Microchip Tech. Inc.</i> , 307 F.3d 775 (9th Cir. 2002) .....	25

## STATUTES AND REGULATIONS

Copyright Act of 1909, ch. 320, 35 Stat. 1075.....	23
Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.....	20
Copyright Act (17 U.S.C.).....	<i>passim</i>
17 U.S.C. § 101 .....	10, 17
17 U.S.C. § 102(a).....	3, 22, 25
17 U.S.C. § 106 .....	3
17 U.S.C. § 408(a).....	1, 3, 8, 22
17 U.S.C. § 408(b).....	3
17 U.S.C. § 408(c)(3).....	20
17 U.S.C. § 408(e).....	20
17 U.S.C. § 408(f) .....	21
17 U.S.C. § 409 .....	3
17 U.S.C. § 410(a).....	3, 7, 13, 20, 21
17 U.S.C. § 410(b).....	4, 7, 8, 13, 21
17 U.S.C. § 410(c) .....	6, 24, 25
17 U.S.C. § 410(d).....	4, 8, 12, 14, 23
17 U.S.C. § 411(a).....	1, 5, 6, 7, 9, 10, 12, 13, 15, 16, 17, 18, 22
17 U.S.C. § 411(b).....	18
17 U.S.C. § 411(c) .....	19, 21
17 U.S.C. § 412 .....	20, 21
17 U.S.C. § 412(2).....	20, 21
17 U.S.C. § 501(a).....	5
17 U.S.C. § 501(b).....	5

17 U.S.C. § 502 .....	5
17 U.S.C. § 504(a).....	5
17 U.S.C. § 507(b).....	5
28 U.S.C. § 1254(1) .....	1
37 C.F.R. § 202.5.....	4

## LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1476 (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 5659 .....	20, 22, 23
---	------------

## ADMINISTRATIVE MATERIALS

### U.S. Copyright Office:

<i>Compendium of U.S. Copyright Office Practices</i> (3d ed. 2017), <a href="https://www.copyright.gov/comp3/docs/compendium.pdf">https://www.copyright.gov/comp3/docs/compendium.pdf</a> .....	15, 16
<i>Fiscal 2016 Annual Report</i> , available at <a href="https://www.copyright.gov/reports/annual/2016/ar2016.pdf">https://www.copyright.gov/reports/annual/2016/ar2016.pdf</a> .....	4, 5

## OTHER MATERIALS

Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, <i>Reed Elsevier, Inc. v. Muchnick</i> , 559 U.S. 154 (2010) (No. 08-103) (U.S. filed June 8, 2009), <a href="https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0103.mer.ami.pdf">https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0103.mer.ami.pdf</a> .....	15
--	----

2	Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (2008).....	11
2	Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> (2013).....	12, 13, 22, 25
5	William F. Patry, <i>Patry on Copyright</i> (2012).....	13
	<i>Webster's New International Dictionary</i> (2d ed. 1950).....	19

The Fourth Estate Public Benefit Corporation respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit.

### **OPINIONS BELOW**

The opinion of the court of appeals (App. 1a-10a) is reported at 856 F.3d 1338. The order of the district court granting respondents' motion to dismiss (App. 11a-14a) is not reported (but is available at 2016 WL 9045625).

### **JURISDICTION**

The court of appeals entered its judgment on May 18, 2017. On August 7, 2017, Justice Thomas extended the time for filing a certiorari petition to and including October 13, 2017. App. 36a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

Relevant provisions of the Copyright Act (17 U.S.C.) are reproduced at App. 23a-35a.

### **INTRODUCTION**

The Eleventh Circuit's decision deepens division among the circuits about a question that arises at the start of most copyright infringement cases: whether the copyright holder registered the work with the Copyright Office before suing for infringement, as § 411(a) of the Copyright Act requires. The Fifth Circuit and the Ninth Circuit have held that, if a copyright holder files an application, deposits a copy of the work, and pays the required fee, as required by § 408(a) of the Copyright Act, the copyright holder has "made" the required "registration" within the meaning of § 411(a) – whether or not the Register of Copyrights has acted on that application. In the decision below, the Eleventh Circuit rejected that

view, joining the Tenth Circuit in holding that a copyright owner may not sue infringers until after the Copyright Office has acted on the application and registered (or refused to register) the copyright claim.

The Court should grant the petition. The question presented not only recurs repeatedly in copyright infringement cases but also frequently leads to wasteful litigation; worse, the interpretation adopted by the Eleventh Circuit can deprive the owner of a valid copyright of statutory remedies for infringement. Courts, including several courts of appeals, and scholars have addressed the question and reached opposing views, and there is no prospect that further litigation will resolve the conflict among the circuits. The judgment below turns wholly on the answer to the question, making this case an appropriate vehicle for this Court to resolve it.

Further, the Eleventh Circuit's decision is incorrect. The Copyright Act uses the phrase "registration . . . has been made" to refer to the action of the copyright holder in following the required procedures for registration of a copyright claim. The court of appeals misread the statute by focusing solely on the word "registration" – which by itself can refer to the action of the copyright holder or the Copyright Office – rather than reading the word in context. Moreover, the correct statutory reading leads to a far more sensible result, because the rule adopted in the decision under review leads to pointless delay and may prejudice the rights of copyright owners despite their compliance with the statute's requirements.

## STATEMENT

### A. Statutory Background

1. The Copyright Act protects “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.” 17 U.S.C. § 102(a). As soon as a work is created, the copyright owner holds exclusive rights “to do and to authorize” others to do certain things with the work. *Id.* § 106. Accordingly, unlike useful inventions – which are protected by exclusive rights only after a patent application has been reviewed and approved by the Patent and Trademark Office (“PTO”) and a patent issued – original works of authorship are protected by virtue of their creation, not an affirmative government grant.

The Copyright Act also contains provisions for registration of copyrights – even though “[s]uch registration is not a condition of copyright protection.” 17 U.S.C. § 408(a). The copyright owner “may obtain registration of the copyright claim” by depositing a copy (or, in the case of published works, two copies) of the work, along with “the prescribed application and fee” with the Copyright Office. *Id.* § 408(a), (b); *see also id.* § 409 (describing required elements of the application). The Register of Copyrights is required to conduct an examination, and, if the Register determines that “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 a “certificate of registration.” *Id.* § 410(a). The statute provides that the “effective date of a copyright registration” is not the date of issuance of the certificate but is instead “the day on which an application,

deposit, and fee, which are later determined . . . to be acceptable for registration, have all been received in the Copyright Office.” *Id.* § 410(d).

If, on the other hand, the Register 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” and notify the applicant of the reasons for refusal. *Id.* § 410(b).<sup>1</sup>

Relatively few works are registered each year, and only a small number of applications are refused for any reason.<sup>2</sup> In 2016, according to Copyright Office statistics, the Register received a little more than half a million claims and processed approximately 470,000. It refused registration on 12,656 claims, or less than 3%.<sup>3</sup> It is not clear what percentage of those rejections involved questions of copyrightable subject matter, but the very small number of requests for administrative review following a rejection – in Fiscal 2016, only 320 such requests involving 436 claims were made – may indicate that many rejections

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<sup>1</sup> Copyright Office regulations provide for internal administrative review of an examiner’s decision to refuse registration – a procedure referred to as “reconsideration.” See 37 C.F.R. § 202.5. The statute does not have any specific provision for judicial review of a refusal decision, and a copyright owner need not obtain such review to sue for infringement.

<sup>2</sup> The number of potentially copyrightable works created each year is practically limitless: a child’s thank-you note to her aunt would likely qualify. Unless the author anticipates enforcing her statutory rights, there is little reason to register.

<sup>3</sup> See U.S. Copyright Office, *Fiscal 2016 Annual Report* 9, available at <https://www.copyright.gov/reports/annual/2016/ar2016.pdf>.



are for “legal or procedural reasons” other than copy-rightability.<sup>4</sup>

2. “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright.” 17 U.S.C. § 501(a). The copyright owner “is entitled . . . to institute an action for . . . infringement.” *Id.* § 501(b). A federal court with jurisdiction over an infringement action may grant a temporary or permanent injunction, *see id.* § 502; an infringer is also liable for either “the copyright owner’s actual damages and any additional profits of the infringer” or “statutory damages,” *id.* § 504(a). The copyright owner must file that suit “within three years after the claim accrued.” *Id.* § 507(b); *see generally Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).<sup>5</sup>

Before bringing such an action, owners of a copyright in a United States (but not foreign) work must “register their works.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010). Specifically, § 411(a) of the Copyright Act provides that “no civil action for infringement of [a] copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a). The right to proceed with litigation does not depend on whether the registration is granted, though a certificate of registration obtained before or promptly after publication

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<sup>4</sup> *Id.*; *see id.* (noting that 2016 ended with “more than 316,000 claims on hand in the system, nearly 29,000 of which required more information from applicants”).

<sup>5</sup> The courts of appeals have uniformly held that an infringement claim accrues on the date the copyright owner knew, or should have known, of the infringement. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (collecting cases).

confers certain litigation advantages. In particular, if a plaintiff has a certificate of a registration “made before or within five years after first publication of the work,” the certificate “shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate”; the “evidentiary weight to be accorded” a certificate granted thereafter is left to the court’s discretion. *Id.* § 410(c).

In a case where registration has been refused, however, the applicant is nevertheless “entitled to institute a civil action for infringement.” *Id.* § 411(a). In such a case, the plaintiff is required to serve a copy of the complaint on the Copyright Office, and the Register may intervene “with respect to the issue of registrability of the copyright claim.” *Id.* But the litigation may proceed irrespective of the Register’s participation. *See id.*

## **B. Factual Background**

Fourth Estate “is an independent news organization” whose journalists produce “high quality, timely, accurate and compelling journalism.” App. 15a-16a (Compl. ¶¶ 1-2). Fourth Estate owns the copyrights in those journalists’ works and licenses them to a cloud-based news organization called AHN Feed Syndicate; AHN Feed Syndicate, in turn, licenses them to others. App. 16a, 18a (*id.* ¶¶ 2, 4, 14-15). Fourth Estate retains the right to sue for copyright infringement. App. 16a (*id.* ¶ 2).

This case concerns one of AHN Feed Syndicate’s former licensees, Wall-Street.com, LLC (“Wall-Street”). Wall-Street secured a license to put some of Fourth Estate’s works on the Internet. App. 18a (*id.* ¶ 17). Under that license, if Wall-Street canceled its account with AHN Feed Syndicate, Wall-Street was to “stop display of all Feed Syndicate provided content and permanently take down, remove and/or

delete all cached, saved, archived, stored or data-based content or data.” *Id.* (*id.* ¶ 18). Wall-Street canceled its account but continued to copy and distribute 244 of Fourth Estate’s works. App. 18a-19a (*id.* ¶¶ 15, 19); *see* Compl. Ex. 1, ECF 1-2.

In March 2016, Fourth Estate sued Wall-Street, seeking an injunction and damages. App. 21a-22a (Compl. at 7). Before it did so, it filed its application for registration with the Copyright Office; it did not wait for the Office to act on that application. App. 18a (*id.* ¶ 14). Nineteen months later – more than half the length of the Copyright Act’s statute of limitations – that application remains pending.

### **C. Proceedings Below**

Wall-Street moved to dismiss, arguing that § 411(a) bars Fourth Estate from suing until after the Register of Copyrights acts on its application. The district court granted the motion. App. 13a.

Recognizing that this case “require[d] [it] to decide an issue that has divided the circuits,” App. 1a, the Eleventh Circuit held that the text of the Copyright Act required dismissal – aligning itself with the Tenth Circuit and expressly rejecting the contrary view of the Fifth Circuit and the Ninth Circuit. App. 4a-6a. The court stated that the Act “defines registration as a process that requires action by both the copyright owner and the Copyright Office.” App. 6a. The copyright owner files an application, deposits a copy, and pays the required fee; the Register “then examines the material” and determines whether it is registrable. *Id.* The court held that the use of the phrase “after examination” in § 410(a) – which describes the procedure that the Register must follow in registering a claim – “makes explicit that an application alone is insufficient for registration.” *Id.* Furthermore, § 410(b) authorizes the Register

to “refuse registration”; the court believed that, if “registration occurred as soon as an application was filed, then the Register of Copyrights would have no power to ‘refuse registration.’” App. 7a (quoting 17 U.S.C. § 410(b)).

The court rejected Fourth Estate’s contrary arguments based on other provisions of the statute. The court read § 408(a) – which states that a copyright owner “may obtain registration of the copyright claim by delivering” the required materials to the Register, 17 U.S.C. § 408(a) – to say nothing about when registration occurs, but only about “the conditions a copyright owner must satisfy to obtain registration.” App. 7a. It likewise found it insignificant that § 410(d) provides that the effective date of registration is the date the application is complete, rather than the date the Copyright Office acts on an application. In the court’s view, that section supports its rule because “registration occurs only after the Register of Copyrights deems an application ‘to be acceptable.’” App. 8a (quoting 17 U.S.C. § 410(d)).

The court also acknowledged the harsh result that its rule, together with the statute of limitations, can bring about: “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.” *Id.* “But,” in the court’s view, “this potential loss encourages an owner to register his copyright soon after he obtains the copyright and before infringement occurs.” *Id.* The court also refused to consider the Copyright Act’s legislative history and animating policy, instead finding the language that other courts of appeals had interpreted differently to be “unambiguous.” App. 9a.

## **REASONS FOR GRANTING THE PETITION**

The Eleventh Circuit's decision deepens an acknowledged circuit split about the meaning of the statutory phrase "registration . . . has been made" in § 411(a). In the Fifth and Ninth Circuits, a copyright owner may sue to enforce exclusive rights once the materials required for registration have been submitted to the Copyright Office. But, in the Tenth and Eleventh Circuits, a copyright owner has no remedy for infringement until after the Copyright Office has acted on the application.

That conflict, on a matter of great practical significance, will not be resolved without this Court's review. Furthermore, the rule adopted by the court below and previously by the Tenth Circuit misreads the statutory language, by (incorrectly) construing the word "registration" in isolation and failing to construe the operative phrase, "registration . . . has been made" – phrasing the statute uses repeatedly to refer to the actions of the copyright holder. The court's decision in this case invites wasteful litigation and jeopardizes copyright owners' ability to enforce their statutory rights. This case provides an ideal opportunity to resolve the issue correctly once and for all.

### **I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS ON A MATTER OF SIGNIFICANT PRACTICAL IMPORTANCE**

#### **A. The Courts Of Appeals Are Divided On The Question Presented And Will Remain So Absent This Court's Review**

Four courts of appeals have resolved the question presented, dividing evenly on the issue.

1. The Ninth Circuit and the Fifth Circuit have held that “receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a).” *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th Cir. 2010); see *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), *abrogated in part on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 n.2 (2010); *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984).

a. In *Cosmetic Ideas*, after noting that the circuits were already divided on the issue, the Ninth Circuit determined that § 411(a) itself “gives no guidance in interpreting the meaning of ‘registration,’” which is “unhelpfully” defined elsewhere in the statute as “a registration of a claim in the original or the renewed and extended term of copyright.” 606 F.3d at 616 (quoting 17 U.S.C. § 101). The court found the “language of the statute as a whole” likewise to be ambiguous. *Id.* at 616-17.

Because the court found the statutory language to be ambiguous, it sought to “discern its meaning by looking to ‘the broader context of the statute as a whole’ and the purpose of the statute.” *Id.* at 618. The court concluded that allowing a copyright holder to sue once it had submitted its complete application “better fulfills” the purpose of the statute. *Id.* at 619. The court noted that this approach “avoids unnecessary delay . . . , which could permit an infringing party to continue to profit from its wrongful acts.” *Id.* The court emphasized that § 411(a) “allows a party, after applying for registration, to litigate the claim whether the Copyright Office accepts or rejects the registration.” *Id.* Requiring a copyright holder to

wait until the Copyright Office has acted “create[s] a period of “legal limbo” in which suit is barred.” *Id.* at 620 (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][1][a][i] (2008)). At the same time, allowing a copyright owner to sue while the application is pending does not “impair[] the central goal of copyright registration” because the copyright holder is nevertheless obligated “to submit the information necessary to add the copyright to the federal registry.” *Id.*

The court also found that the “requirement of affirmative approval or rejection before suit . . . amounts to little more than just the type of needless formality Congress generally worked to eliminate in the 1976 Act.” *Id.* And, “in addition to being general inefficient, in the worst-case scenario the registration approach could cause a party to lose its ability to sue,” given the three-year statute of limitations. *Id.* “This result does not square well with § 410(d)’s mandate that an application’s effective registration date should be the day that a completed application is received.” *Id.*

The court also rejected the argument that “deference to the Register” required a different result. *Id.* at 621. First, as a practical matter, because of the pace of litigation, the Copyright Office will typically have acted before a case is decided, and the Copyright Office, if it rejects an application, will still have an opportunity to intervene in the pending litigation. *See id.* Moreover, “the Register’s decision of whether or not to grant a registration certificate is largely perfunctory, and is ultimately reviewable by the courts.” *Id.* Thus, review by the Copyright Office and underlying litigation “can occur simultaneously with little or no prejudice to any involved parties.” *Id.*

**b.** The result in *Cosmetic Ideas* accords with the result earlier reached and repeatedly reaffirmed by the Fifth Circuit, which, as the first court of appeals to address the issue, held that, “to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.” *Apple Barrel*, 730 F.2d at 386-87; *see also Lakedreams*, 932 F.2d at 1108 (5th Cir. 1991); *accord Positive Black Talk*, 394 F.3d at 365.

To support that conclusion, the Fifth Circuit relied on Professor Nimmer’s analysis. *See Apple Barrel*, 730 F.2d at 386-87. His treatise concludes that this “approach to registration better comports with the statutory structure” than the one adopted below. 2 *Nimmer on Copyright* § 7.16[B][3][b][iii] (2013). Section 411(a) “requires only that ‘registration of the copyright claim has been made *in accordance with [Title 17],*’” and Title 17 “elsewhere specifies that the ‘effective date of a copyright registration is’” backdated to the day the completed application is received in the Copyright Office. *Id.* (quoting 17 U.S.C. §§ 410(d), 411(a)) (emphases in *Nimmer*). “Given that the claimant who has submitted an application that has yet to be acted upon at that juncture has done all that she can do, and will ultimately be allowed to proceed regardless of how the Copyright Office treats her application, it makes little sense,” in Professor Nimmer’s view, “to create a period of ‘legal limbo’ in which suit is barred.” *Id.* (footnote omitted). Further, that rule promotes both judicial efficiency and copyright owners’ substantive rights – “considerations” that “become especially *apropos* when one



reflects that the Copyright Office typically registers about 99 percent of the claims submitted to it.” *Id.*<sup>6</sup>

2. By contrast, the Tenth Circuit, like the Eleventh Circuit, has held that “[t]he plain language of the statute” requires a copyright owner to await the Copyright Office’s action before he may sue. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005). The Tenth Circuit was of the view that “[n]o language in the Act suggests that registration is accomplished by mere receipt of copyrightable material by the Copyright Office.” *Id.* at 1200. Until the Register affirmatively determines that copyright protection is warranted, the court held, “registration” is not “‘made’” within the meaning of § 411(a). *Id.* at 1200-01. The court found this reading to be bolstered by § 410(a) – which requires the Register to “register [a] claim” only “after examination” – and by § 410(b) – which allows the Register to “refuse registration.” *See id.*

The court noted the contrary view of the Fifth Circuit, and acknowledged that it “has some appeal.” *Id.* at 1204 (noting that “it is odd that one can possess a copyright but be unable to file suit until it is ‘voluntarily’ registered”). Whatever the “practical force” of the contrary approach, the court stated that there were “three reasons” to reject it. *Id.* First, the court suggested that the statute does not “convey certain remedies and benefits upon application and other remedies and benefits upon registration.” *Id.* Rather, the “remedies are part of a single package.” *Id.* Second, the court found it “not illogical” for Congress to induce registration by withholding remedies until after “registration is accomplished.” *Id.* at 1204-05.

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<sup>6</sup> For what it is worth, Patry disagrees (strenuously). *See* 5 William F. Patry, *Patry on Copyright* § 17:78 (2012).

Third, the court found that a contrary approach would “allow[] for shifting legal entitlements,” *id.* at 1205, though it did not attempt to square this observation with § 410(d), which makes the effective date of registration retroactive to the date that the copyright owner submits the required materials to the Copyright Office.

3. This split among the circuits is entrenched and is unlikely to be resolved without action by this Court. Both the First Circuit and the Second Circuit have recognized the split without finding occasion to address it. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 125 (2d Cir. 2014); *Alicea v. Machete Music*, 744 F.3d 773, 779 & n.7 (1st Cir. 2014). The Seventh Circuit has issued contradictory dicta without squarely resolving the question. *See Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806 (7th Cir. 2009) (per curiam).<sup>7</sup> And district courts within the Second,<sup>8</sup> Third,<sup>9</sup> Fourth,<sup>10</sup> and

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<sup>7</sup> Compare *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (Registration “is a prerequisite to a suit to enforce a copyright. More precisely, an application to register must be filed, and either granted or refused, before suit can be brought.”), with *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (supporting the contrary approach).

<sup>8</sup> Compare *Gattoni v. Tibi, LLC*, No. 16 Civ. 7527 (RWS), 2017 WL 2313882, at \*3 (S.D.N.Y. May 25, 2017), with *Chevrestt v. American Media, Inc.*, 204 F. Supp. 3d 629, 631 (S.D.N.Y. 2016).

<sup>9</sup> Compare *North Jersey Media Grp. Inc. v. Sasson*, Civ. No. 2:12-3568 (WJM), 2013 WL 74237, at \*2 (D.N.J. Jan. 4, 2013), with *K-Beech, Inc. v. Doe*, Civil Action No. 11-7083, 2012 WL 262722, at \*2-3 (E.D. Pa. Jan. 30, 2012).

<sup>10</sup> Compare *Caner v. Autry*, 16 F. Supp. 3d 689, 706-08 (W.D. Va. 2014), with *Mays & Assocs. Inc. v. Euler*, 370 F. Supp. 2d 362, 368-70 (D. Md. 2005).

D.C.<sup>11</sup> Circuits have recognized the split, reaching different conclusions.

The government and the Copyright Office in particular have likewise made their view known. In *Reed Elsevier*, the government acknowledged the split and endorsed *La Resolana Architects'* analysis. See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 24 n.14, *Reed Elsevier*, No. 08-103 (U.S. filed June 8, 2009) (“U.S. *Reed Elsevier* Br.”), <https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0103.mer.ami.pdf>; see also U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 625.5, at 217 (3d ed. 2017) (“*Copyright Office Compendium*”) (acknowledging the split and stating that, “[i]n the Office’s view, . . . filing a lawsuit based solely on the submission of an application for registration does not satisfy” the statutory requirement), <https://www.copyright.gov/comp3/docs/compendium.pdf>. The government has argued that, “if the district court were to adjudicate an infringement suit on the merits while the plaintiff’s application was pending before the Copyright Office, the court would be deprived of the Register’s views on such issues as copyrightability.” U.S. *Reed Elsevier* Br. 25 n.14.

### **B. The Question Presented Is Important**

The question presented is of significant practical importance. Whether the plaintiff has satisfied the registration requirement of § 411(a) may arise at the outset of any infringement case involving a non-exempt U.S. work. In cases where infringement

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<sup>11</sup> Compare *Prunte v. Universal Music Grp.*, 484 F. Supp. 2d 32, 40 (D.D.C. 2007), with *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3 (D.D.C. 2002).

is ongoing and an application for registration is complete but not yet acted on, an infringer can, at a minimum, delay proceedings on the merits and impose additional costs on the copyright owner while the question of compliance with § 411(a) is resolved. (That is what occurred here.) This is especially true in those eight regional circuits where the question has not yet been resolved by the court of appeals.

Even worse, in cases where a combination of delay in registration and delay by the Copyright Office leads to expiration of the statute of limitations before the Copyright Office acts, a copyright owner may lose a remedy altogether. And that is so even though the copyright exists from the time the work is first created, and registration, if granted, is retroactive to the date of application, and even though, if registration is denied, the copyright owner is nevertheless entitled to sue.

It is true that the Copyright Office has created a process for parties to request expedited “special handling” by filing additional paperwork and paying an additional \$800 per work claimed. *Copyright Office Compendium* § 623, at 199. But that is many times the standard registration fee, and it can amount to a prohibitive sum when alleged infringement involves a number of separately registered works (for example, recordings by various artists on the same independent record label). In any event, the Copyright Act precludes the Office from exacting a significant surcharge simply to ensure that copyright owners can enforce their statutory rights.

### **C. This Case Provides An Appropriate Vehicle For Resolution Of The Question Presented**

This case is the ideal vehicle in which to resolve the statutory issue presented. The question was squarely raised below, and the Eleventh Circuit's answer forms the sole basis for its judgment. App. 1a-2a. No better vehicle will emerge.

## **II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE COPYRIGHT ACT**

The Eleventh Circuit's decision is incorrect. The court focused on the word "registration" and concluded that the term must refer to the registration, memorialized by a certificate, that is granted by the Register after examination. But "registration" is not so defined in the statute. *Cf.* 17 U.S.C. § 101 (providing a circular definition of "registration" to mean "registration of a claim in the original or the renewed and extended term of copyright"). And the term "registration" is used in the statute in its ordinary sense to refer to both the action of the Copyright Office – that is, registration that the Office grants – and the action of a copyright owner, who registers a claim by following the required statutory procedures.

If the court had instead looked at the word in the context of the phrase it was construing – "registration . . . has been made" – the court would have found much more guidance in the statutory language, including both its immediate context and the use of the phrase elsewhere in the statute. Using these tools of statutory construction, it becomes clear that "registration has been made" for purposes of § 411(a) once a copyright holder submits the materials required for registration. Furthermore, that construction is

both more sensible and more consistent with the basic policies of the Copyright Act.

**A. A Careful Reading Of The Statute’s Text Establishes That The Eleventh Circuit’s Construction Is Incorrect**

Careful attention to the text makes clear that “registration . . . has been made” refers to the action of the copyright holder.

1. Start with the language of § 411(a) itself. That provision states, subject to a specified exception and the provisions of § 411(b), 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 in accordance with this title.” 17 U.S.C. § 411(a). Yet the statute goes on to state that, “[i]n 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,” provided that the copyright owner gives notice to the Copyright Office. *Id.* The fact that a copyright holder is permitted to “institute a civil action” even though the Copyright Office refuses the application means that “registration . . . has been made” is most logically read to refer to the action of the copyright holder – that is, applying for registration – and not the action of the Copyright Office. Otherwise, the two sentences would contradict each other – that is, the second sentence would mean that a suit for infringement may be instituted even though registration had *not* been made. Statutes should be read to avoid, not create, such contradictions. *See Liteky v. United States*, 510 U.S. 540, 552

(1994) (rejecting reading that would cause statute “to contradict itself”).

The use of the word “however” does not resolve the contradiction created by the Eleventh Circuit’s reading of the statute – the word signals contrast or qualification, not literal contradiction. *See Webster’s New International Dictionary* 1209 (2d ed. 1950) (defining “however” as “[n]evertheless; notwithstanding; yet; still”). The “however” signals that, if the Copyright Office refuses registration, an additional requirement is imposed – notice to the Office. It cannot reasonably be read to state that a civil action may be instituted even though registration has not been made at all. Put another way, cases where “the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused” constitute a subset of those cases where “registration . . . has been made” that are subject to an additional procedural requirement.

The conclusion that the phrase “registration . . . has been made” refers to the action of the copyright holder is confirmed by the language of § 411(c). That provision, which applies to works consisting of “sounds, images, or both, the first fixation of which is made simultaneously with transmission,” allows a copyright owner to institute an action for infringement if (among other requirements) “the copyright owner . . . makes registration for the work, if required by subsection (a), within three months after its first transmission.” 17 U.S.C. § 411(c). This provision confirms, first of all, that “registration” can indeed refer to the action of the copyright owner in applying for registration. Moreover, the construction “copyright owner . . . makes registration” parallels the

passive-voice construction “registration . . . has been made,” confirming that, while the Copyright Office “register[s] [a] claim,” *id.* § 410(a), the copyright owner “makes registration.”<sup>12</sup>

2. The use of similar constructions elsewhere in the statute reinforces the conclusion that “registration . . . has been made” refers to the action of the copyright owner. For example, § 408(c)(3) provides that “a single renewal registration *may be made* for a group of works by the same individual author . . . upon the filing of a single application and fee.” 17 U.S.C. § 408(c)(3) (emphases added). This provision naturally is read to refer to the action of the copyright holder, as the only action required for such “registration” is the filing of the application and fee – not any action by the Copyright Office. *See also id.* § 408(e) (providing that “[r]egistration for the first published edition of a work previously registered in unpublished form *may be made*”) (emphasis added).

Likewise, in § 412, the statute uses the phrase “registration is made” with clear reference to the action of the copyright holder. *Id.* § 412(2). That provision deals with limitations on certain remedies

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<sup>12</sup> The legislative history of the Copyright Act of 1976 likewise refers to the owner registering his claim – not the Copyright Office. *See* H.R. Rep. No. 94-1476, at 157 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5773 (Comm. on the Judiciary) (“[A] copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.”); *id.* at 152, 1976 U.S.C.C.A.N. 5768 (“Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by ‘the owner of copyright or of any exclusive right in the work’ at any time during the copyright term.”). This is consistent with the statutory construction that petitioner urges here.



in actions for infringement of a copyright of a work that has been preregistered under § 408(f); § 412 specifies that “no award of statutory damages or attorney’s fees . . . shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, *unless such registration is made* within three months after the first publication of the work.” *Id.* (emphasis added). It would make no sense for the three-month deadline to apply to action by the Copyright Office; rather, as with § 411(c), this provision requires *copyright owners* to make registration within three months (even though the Copyright Office may act later).

3. The Eleventh Circuit correctly noted that “registration” is also used in the statute to refer to the action of the Copyright Office – for example, § 410(a) directs the Register to “register” a claim when legal and formal requirements have been met, and § 410(b) directs the Register to “refuse registration” when such requirements are not met. But the observation that registration *can* refer to the action of the Copyright Office does not mean that it *cannot* refer, in appropriate context, to the action of the copyright holder in applying for registration. *See Barber v. Thomas*, 560 U.S. 474, 484 (2010). On the contrary, as explained above, the statute uses the term repeatedly in this sense.

As a matter of ordinary language, there is nothing paradoxical about this, because the word “registration” has substantial flexibility built in. A college student may register for classes (and thus complete registration) yet not get into a particular course (and thus be denied registration). Given the absence of any limiting definition of “registration” and the

diverse use of the word in the Copyright Act, the Eleventh Circuit’s analysis does not hold up.

At the same time, the statute never uses the construction “make registration” or its passive-voice counterpart to refer specifically to the action of the Copyright Office. That phraseology is, however, repeatedly used to connote action by the copyright holder – and that is how it is used in § 411(a).

### **B. The Eleventh Circuit’s Interpretation Is Inconsistent With The Copyright Act’s Scheme Of Rights and Remedies**

The statutory language resolves the question presented; furthermore, that reading avoids the inefficiency and inconsistency that the interpretation adopted by the court below invites. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (noting that “[a] court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole”) (citation omitted); *see also 2 Nimmer on Copyright* § 7.16[B][3][b][ii] (“Indeed, some courts that follow the [Eleventh Circuit’s] approach concede that it yields an inefficient and peculiar result.”).

1. Making the Copyright Office the gatekeeper to enforcement of copyrights is inconsistent with the rest of the Copyright Act, which makes clear that a copyright owner’s rights do not depend on any affirmative government grant. The Act grants a copyright owner exclusive rights in a work as soon as it is fixed in a tangible medium of expression. *See* 17 U.S.C. § 102(a). Those rights are not granted by the Copyright Office; they, instead, come about by virtue of the creation of the work. *See id.* § 408(a) (“[R]egistration is not a condition of copyright protection.”); *see also* H.R. Rep. No. 94-1476, at 129, 1976

U.S.C.C.A.N. 5745 (protecting a work “as soon as it is ‘created’”).

To be sure, before a copyright owner can sue to enforce those rights, the copyright owner must register the claim with the Copyright Office. In this way, copyright owners that intend to seek judicial enforcement of their copyrights are given an incentive – indeed, they are required – to make use of the statutory system of registration. But once the copyright owner has made registration, that policy is fully vindicated. That is confirmed by the fact that registration *by the Register* is not a precondition to enforcement of copyright at all: on the contrary, if the Register refuses registration, the copyright owner may sue nevertheless.

Furthermore, none of the copyright owner’s statutory remedies turns on the timing of action by the Copyright Office: the Copyright Act deems registration effective on the day a complete application for registration is received. *See* 17 U.S.C. § 410(d). That is so whether the determination that the requirements for registration are met is made by the Register or “by a court of competent jurisdiction.” *Id.*<sup>13</sup>

Because neither the copyright holder’s right to sue nor the copyright holder’s remedies depend on the outcome of the examination by the Register, it makes

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<sup>13</sup> This is in marked contrast to the regime that governed under the Copyright Act of 1909. That statute had imposed “a dual system” that distinguished between registered, published works, which Congress protected by federal law, and unpublished works, which received their only copyright protection by the States. *See* H.R. Rep No. 94-1476, at 129, 1976 U.S.C.C.A.N. 5745. Congress abandoned that “anachronistic, uncertain, impractical, and highly complicated dual system” system in favor of a “single Federal system” that granted “statutory protection” to a work “as soon as it is ‘created.’” *Id.*

little sense to place a copyright holder in months of “legal limbo” while the examination of a registration application is completed.

2. Nor is the Eleventh Circuit’s reading required to allow courts to take advantage of the expertise of the Copyright Office on matters of copyrightability. At the outset, it is not the case, as the Eleventh Circuit thought, that allowing litigation to be instituted after the copyright holder has registered the claim (but before the Copyright Office has acted) would deprive the Register of “power to ‘refuse registration.’” App. 7a. Whatever the status of any litigation commenced in federal court, the Register will be able to act in due course on the application submitted to the Copyright Office. Nor is it correct, as the Tenth Circuit thought, that “an applicant could obtain the advantage” of a presumption of validity “upon application” only to lose it if the Register denied the application. *La Resolana Architects*, 416 F.3d at 1205. The presumption of validity depends on a “*certificate* of a registration,” not registration. 17 U.S.C. § 410(c) (emphasis added). Accordingly, if the Copyright Office has not registered the claim and issued a certificate of registration, the copyright holder will not gain any evidentiary advantage from having made registration. In any event, the statute has a degree of “shifting legal entitlements” built in, *La Resolana Architects*, 416 F.3d at 1205, because it makes the effective date of registration retroactive to the date of application.

It is likewise not the case (as the government has asserted in the past) that allowing litigation to proceed while registration is pending will deprive the Copyright Office of its right to intervene in litigation in cases where registration is refused: if an application were refused, notice would be required, and the

government could choose to intervene at that point. Absent unreasonable delay in examination, there is no risk that the government will lose its chance to participate at a meaningful time – and the possibility of such unreasonable delay is an argument in favor of petitioner’s reading of the statute.

As noted, litigation may proceed irrespective of the view of the Copyright Office, and the determination of the Copyright Office constitutes “prima facie” evidence only in cases where it *grants* a certification of registration, 17 U.S.C. § 410(c).<sup>14</sup> As the leading treatise has pointed out, in most cases, even if litigation begins before the Copyright Office has granted or refused registration, such action can be expected during the course of litigation, giving the court the benefit of the Register’s views. *See 2 Nimmer on Copyright* § 7.16[B][3][b][ii]. Just as important, in any case where a claim’s eligibility for copyright protection presents a substantial issue, a court can make use of the ordinary tools of litigation management – including the doctrine of primary jurisdiction – to give the Copyright Office the first crack at determining whether the subject matter of the work is copyrightable. *Cf. Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (similar). Given the breadth of copyright law’s protections, *see* 17 U.S.C. § 102(a), the Office typically grants the overwhelming majority of applications. *See 2 Nimmer on Copyright* § 7.16[B][3][b][ii]. There is no reason to believe that substantial issues of

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<sup>14</sup> By contrast, after the PTO has issued a patent, a litigant must present “clear and convincing” evidence to overcome the presumption that the patent is valid. *See generally Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91 (2011).

copyrightability will arise often – and no such defense has been asserted in this case.

3. By contrast, the Eleventh Circuit’s approach creates significant practical problems, some of which the Ninth Circuit recognized in adopting the contrary rule. First, by barring a copyright owner from seeking the injunctive relief to which the Copyright Act entitles copyright owners until the Copyright Office acts, the rule requires the copyright owner to endure the ongoing theft of intellectual property rights the copyright owner already possesses – to the benefit of the infringer. *See Cosmetic Ideas*, 606 F.3d at 620. Second, if the Act’s statute of limitations elapses before the Office acts on the application, the copyright owner may forever lose any ability to enforce the very same rights the Act grants. *See id.*

Third, the Eleventh Circuit’s rule creates a procedural trap and invites pointless litigation. In many cases, the consequence of dismissal is simply to require refiling of a suit once the Copyright Office has acted. In such a situation, even if no remedy is lost, the copyright holder will necessarily incur the additional – and needless – expense of filing a duplicative complaint. That, in turn, imposes a corresponding administrative burden on the district courts. And, in the typical case where disputed issues involve the parties’ conduct and not the validity of copyright, additional passage of time may risk blurring the evidence.

It is of course within the power of Congress to mandate such results, but the Copyright Act requires the opposite, and sensible, result here.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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