

No. 20-915

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**In the Supreme Court of the United States**

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UNICOLORS, INC.,  
*Petitioner,*

v.

H&M HENNES & MAURITZ, L.P.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF AMICI CURIAE CENTER FOR  
DEMOCRACY & TECHNOLOGY AND  
ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF RESPONDENT**

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### INTERESTS OF AMICI CURIAE<sup>1</sup>

The Center for Democracy & Technology (CDT) is a non-profit public interest organization. For almost 25 years, CDT has represented the public's interest in an open and accessible Internet and promoted constitutional and democratic values of free expression, privacy, and non-discrimination in the digital age. CDT's team has deep knowledge of issues pertaining to the internet, privacy, security, technology, and intellectual property and regularly convenes stakeholders across the policy spectrum and advocates before legislatures, regulatory agencies, and courts.

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that has worked for more than 30 years to protect consumer interests, innovation, and free expression in the digital world. EFF has tens of thousands of active donors and maintains one of the most linked-to websites in the world. EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity, innovation, and the spread of knowledge. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence.

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<sup>1</sup> The parties have filed blanket consents to the filing of amicus briefs. No party or counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress decided to deny registration's benefits to applicants who provide material information with "knowledge" that the information is "inaccurate," it did not excuse applicants who lacked actual knowledge of the information's falsity. See 17 U.S.C. 411(b). Instead, the "knowledge" requirement embraces knowledge in its various forms, including constructive knowledge—that is, when a reasonable applicant would have known the information supplied to be inaccurate. This reading not only gives full meaning to the text Congress adopted, but it also protects registration's role in the copyright system. And it does so while demanding only reasonable diligence from applicants in exchange for registration's significant benefits.

Copyright registration has been a feature of the American copyright system since 1790. While petitioner seeks to downplay it as a pesky formality, Congress has deemed it important enough to retain for more than two centuries while providing significant incentives to register: making registration a prerequisite to most infringement litigation and rewarding registrants with opportunities to obtain attorney fees and large statutory damages awards without proving any pecuniary harm.

Naturally, incentives like these invite abuse. Unchecked, that abuse allows unscrupulous registrants to claim the benefits of registration while authors of new works and the public bear the cost. Given the potentially lucrative benefits offered to registrants and the

public harm that can flow from improperly obtained registrations, it is not too much to ask applicants to act reasonably when applying. It is consistent both with the text of § 411(b) and copyright’s goal: to secure public access to new works.

Contrary to petitioner’s claim that understanding “knowledge” to include constructive knowledge would cause undue harm, invalidating a registration does nothing more than limit a plaintiff to the ordinary copyright remedies for past infringement once a proper registration is obtained. This is a measured response to the harms of improper registrations, and in any event, it is the response that Congress has chosen.

If the Court reaches the question whether “knowledge” in § 411(b) includes constructive knowledge, the Court should hold that it does.<sup>2</sup>

## ARGUMENT

What does it mean to have “knowledge” that information in a copyright application “was inaccurate”? 17 U.S.C. 411(b). The term “knowledge” embraces a “continuum” of concepts ranging from “actual knowledge” to “constructive knowledge.” *United States v. Spinney*, 65 F.3d 231, 237 (1st Cir. 1995). When Congress has wanted to specify that only actual knowledge will do, it has used that phrase. *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (interpreting 29

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<sup>2</sup> Amici recognize that there is a dispute about whether this issue is fairly encompassed within the question presented and, if not, whether to deviate from the question presented. See Resp. Br. 26-33. Amici take no position on that issue.

U.S.C. 1113(2)'s "actual knowledge" standard). But Congress did not make that choice in § 411(b).

That Congress chose not to limit "knowledge" to "actual knowledge" makes sense. Registration is an important, enduring element of American copyright law. It persists because Congress has concluded that registration serves the public interest. When registrations are obtained using inaccurate information, it subverts registration's role. Interpreting "knowledge" to include constructive knowledge's obligation to conduct a reasonable inquiry when applying for registration thus gives full meaning to Congress's measured response to the harms of improper copyright registrations.

**I. Improperly obtained registrations deliver windfalls to registrants while hindering public access to new works.**

**A. Congress designed the registration system to benefit the public, not just copyright holders.**

Petitioner and the Copyright Alliance advocate a narrow, unwritten "actual knowledge" standard based on potential harms to copyright holders.<sup>3</sup> But the copyright system's "primary objective . . . is not to reward the labor of authors" or to "maximiz[e] the number of meritorious suits for copyright infringement." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994) (quoting *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)). Instead, copyright law is concerned more broadly with "enriching the general public

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<sup>3</sup> *E.g.*, Pet'r Br. 2; Copyright Alliance Br. 2.



through access to creative works.” *Id.* at 527. Thus, the Court has rejected interpretations of copyright law that focus too narrowly on the interests of infringement plaintiffs at the expense of subsequent authors and the public at large. *E.g., id.* at 533 (rejecting pro-plaintiff view of fee-shifting provision).

Consistent with this broader policy, registration exists to protect “the public itself.” H.R. Rep. No. 7083, 59th Cong., 2d Sess. 8 (1907). Registration has existed since the Copyright Act of 1790. Copyright Act of 1790, Pub. L. No. 1-15, § 1, 1 Stat. 124. While petitioner derides registration (at 5) as an archaic formality, the persistence of registration in the Copyright Act shows that Congress disagrees. Indeed, not only does registration remain a feature of the U.S. copyright system, but § 411(b) reinforces registration’s importance by imposing consequences for obtaining registration using information known to be inaccurate.

Congress’s decision to attach incentives to registration confirms that it views registration as an important part of the copyright system. In addition to acting as a precondition to suits for infringement in many cases, registration allows copyright holders to obtain statutory damages and attorney fees for infringements that commence after registration. 17 U.S.C. 412, 504(c), 505. Congress intended these “extraordinary’ remedies” to provide a “practical way” to induce authors to register their works. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 158 (1976).

These remedies are indeed extraordinary. Statutory damages free plaintiffs from the obligation to prove any actual damages, presumptively entitling a

successful plaintiff to as much as \$30,000 per work infringed—up to \$150,000 in case involving willful infringement. 17 U.S.C. 504(c). Likewise, registration unlocks prevailing-party attorney fees for plaintiffs, a departure from the American rule that parties bear their own costs. *Fogerty*, 510 U.S. at 533-34. These incentives reflect Congress’s judgment that registration is “useful and important to users and the public at large.” H.R. Rep. No. 1476, *supra*, at 158. The Court should therefore reject petitioner’s invitation to “second-guess” Congress about registration’s importance. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1940 (2021).

**B. Improperly obtained registrations enrich unscrupulous registrants at the expense of authors of new works and the public.**

While the registration system serves the public’s interest when registrations are properly obtained, improperly obtained registrations harm the public by unduly impeding its access to new works. This, in turn, compromises copyright law’s central aim: to “enrich[] the general public through access to creative works.” *Fogerty*, 510 U.S. at 526-27.

Registration serves the copyright system by encouraging authors to check the Copyright Office’s database to ensure that they are not infringing and to link authors of new works with those of old works to permit licensing to occur. See *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 700 (9th Cir. 2008). Registration thus provides the public with a guide to the metes and bounds of the public domain, while carrying with it a not-so-subtle threat. To risk

infringement of a registered copyright is to expose oneself to the extraordinary remedies of fee-shifting and statutory damages. Rather than risk litigation, many authors will pay for the right to be free from litigation or forego potentially infringing activity altogether.

When registration is properly obtained, this is the copyright system functioning according to Congress's design. Copyright holders are induced to let the public know about their rights, and diligent authors are given an extra incentive to avoid infringement and an avenue to arrange for appropriate licenses that reward the first author's work.

This theory does not hold when registration issues based on materially inaccurate information. In that case, the registrant may benefit from the threat of attorney fees and statutory damages unjustly, even without filing suit. Faced with such significant potential liability, rational authors may choose to pay an inflated licensing fee rather than risk losing an infringement suit, even if they believe the copyright claim could be defeated. The risk may simply be too great. As for authors who cannot afford to pay or conclude that costs outweigh the benefits, they will simply choose to avoid publication altogether. Either way the public loses, whether through increased costs to access new works or loss of access altogether.

This case well illustrates the hazards of allowing improperly obtained registrations to go unchecked. While petitioner repeatedly invokes the plight of unsophisticated poets (at 2, 44, 48), petitioner is a corporation claiming more than 4,500 copyright registrations. Resp. Br. 8. Its CEO admitted grouping many

works into one application to “sav[e] money” by reducing the fees it paid the Copyright Office. J.A. 53-54. Such tactics, as respondent points out (at 8), allow unscrupulous actors to smuggle non-copyrightable works through the registration process without Copyright Office scrutiny. The result is that a registrant can threaten statutory damages and attorney fees for works without even a minimally plausible claim to copyright protection. Suffice it to say, that is not why registration exists.

The potential for applicants to improperly secure the benefits of registration by submitting applications with inaccurate, material information thus poses a significant threat to the benefits the registration system is designed to secure. It is not a victimless transgression, nor is the Copyright Office the sole victim. Instead, it reduces the public’s access to creative works, contrary to copyright law’s central purpose.

**II. Section 411(b) protects the public’s interest in the integrity of the registration system by imposing a limited sanction for providing inaccurate information without reasonable diligence.**

Copyright registration is an enduring, important part of the American copyright system. But abuse of the registration system by those who would obtain registrations using incorrect information poses a threat to registration’s public benefits. Enter § 411(b), which directs courts to disregard registrations obtained with material inaccurate information when the applicant had “knowledge” that the information was “inaccurate.” Properly understood to embrace constructive

knowledge, the provision imposes only a modest but important check to the harms that can flow from registrations based on material, inaccurate information.

*First*, § 411(b)'s application is limited. Even supplying false information on an application with actual knowledge of its falsity does not on its own invalidate the registration. Only material information—that is, information that, “if known, would have caused the Register of Copyrights to refuse registration”—matters. 17 U.S.C. 411(b)(1)(B). To guide courts in this inquiry, Congress required them to put the question directly to the Register of Copyrights. *Id.* § 411(b)(3). Immaterial inaccuracies, even if made with actual knowledge and an intent to defraud, do not trigger § 411(b) at all.

*Second*, § 411(b)'s consequences are limited. The Copyright Act's plain terms emphasize that “registration is not a condition of copyright protection.” 17 U.S.C. 408(a). While registration is often necessary to sue for infringement, a plaintiff whose registration is procured using incorrect information may apply for a new registration, which may be expedited when needed for “pending or prospective litigation.” *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891-92 & n.6 (2019) (alterations omitted).<sup>4</sup>

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<sup>4</sup> The Copyright Alliance (at 17-18) frets that the three-year statute of limitations could preclude infringement claims when registrations are attacked late in a case. Even if this could be relevant to the interpretation of “knowledge,” other tools exist to address that issue. The Eleventh Circuit, for example, has interpreted § 411(b) as an affirmative defense that may be waived if not timely raised. *Roberts v. Gordy*, 877 F.3d 1024, 1028 (11th Cir.

An infringement plaintiff does permanently lose the right to obtain statutory damages or attorney fees for infringement that commenced before it obtains registration properly, but that makes sense. 17 U.S.C. 412. Attorney fees and statutory damages exist to encourage registration. H.R. Rep. No. 1476, *supra*, at 158. It should be no surprise that registering improperly would forfeit registration’s benefits. Even a plaintiff who loses the benefits of an earlier registration may still obtain the remedies “ordinarily available in infringement cases”: damages, plus the infringer’s profits. *Ibid.* Perhaps some potential plaintiffs who obtain registrations using inaccurate information will forego infringement litigation as a result, but copyright law does not exist to maximize infringement litigation. *Fogerty*, 510 U.S. at 526-27. In any event, enforcing rights without the benefit of statutory damages and attorney fees is the norm in our system.<sup>5</sup> It is no reason to impose limits on the meaning of “knowledge” that Congress declined to supply.

## CONCLUSION

If the Court reaches the issue, it should reject petitioner’s attempt to engraft an “actual knowledge” requirement on § 411(b)’s “knowledge” standard. Embracing all types of knowledge under the rule,

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2017). District courts, moreover, possess broad authority to impose litigation deadlines. See Fed. R. Civ. P. 16(b)(3)(B)(vii) (allowing scheduling orders to control any “appropriate matters”).

<sup>5</sup> Indeed, few countries provide statutory damages for infringement at all. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 William & Mary L. Rev. 439, 441 (2009).

including constructive knowledge, gives full meaning to the text and provides a measured check on the significant risk of abuse, and resulting public harm, posed by the incentives to register copyrights.

Respectfully submitted,

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