

No. 20-915

In the Supreme Court of the United States

UNICOLORS, INC., PETITIONER

v.

H&M HENNES & MAURITZ, L.P., RESPONDENT

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

**BRIEF FOR PROFESSORS OF COPYRIGHT LAW AS
AMICI CURIAE SUPPORTING RESPONDENT**

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INTEREST OF AMICI CURIAE

Amici curiae, whose names and affiliations are set forth in the attached Appendix, are 12 professors of law who have expertise bearing directly on the question presented in this case. They regularly teach courses in copyright law and principles, and have authored numerous articles, treatises, and textbooks on copyright law. Amici have no financial interest in the parties to or the outcome of this case.¹

¹ All parties have consented to the filing of this brief by the blanket letters of consent filed on July 13, 2021, by Petitioner Unicolors, Inc. and on July 19, 2021, by Respondent H&M Hennes & Mauritz, L.P. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae or their counsel, has made a monetary contribution to this brief's preparation or submission. The institutional affiliations of the amici are for identification only, and the views expressed herein are those of the individual signatories and not their institutions.

SUMMARY OF ARGUMENT

The copyright registration process underpins the modern copyright system. Maintaining the integrity of the registration process, particularly in light of the emerging threat posed by copyright trolls, requires adherence to the registration requirements. Title 17 U.S.C. § 411(b), which establishes a framework for the invalidation of copyright registrations containing “inaccurate information,” plays an essential role in ensuring and enforcing the registration rules. Section 411(b)(1)(A) provides that a registration may be invalidated only if inaccurate information was included “with knowledge that it was inaccurate,” while Section 411(b)(1)(B) requires, for invalidation of a registered copyright, that the inaccuracy of the information, “if known, would have caused the Register of Copyrights to refuse registration.” Together, these provisions balance the need for accurate registration applications with interests in reliance on governmental recognition of intellectual property.

Interpreting Section 411(b)(1)(A)’s knowledge requirement as requiring “intent to defraud” would contradict the plain text of the statute and disserve important policy considerations. Over the last decade, copyright trolling has taken over copyright litigation. Copyright trolls, who acquire and enforce copyrights not with the aim of protecting creative content, but as a means of extracting settlement payments through the threat or initiation of litigation, undermine the goals of the copyright system, which aims to promote creative progress. Copyright trolls, bad for creators and users alike, now account for half of all copyright

litigation, and affect numerous other individuals outside of formal litigation.

Because the business model of copyright trolls is concerned more with speed and volume than the accuracy of their copyright registrations and infringement complaints, tools to ensure the proper working of the registration system can serve as a significant check on trolling. But while many copyright trolls knowingly violate the rules for copyright registration, they are not necessarily defrauding the Copyright Office. Limiting Section 411(b)(1)(A)'s application to the fraud context would significantly reduce the utility of the registration system as a bulwark against abuse of the copyright system. And the plain text of the statute precludes rather than supports a reading of the statute that would immunize all materially inaccurate registrations not procured by outright fraud.

ARGUMENT

I. Copyright Trolling Is A Pervasive Problem And Undermines The Copyright System

Copyright trolls are a growing and problematic feature of the modern copyright system. Copyright law protects “individual expression” as a means of “encouraging creativity and maintaining the public interest in spreading ideas.” *Design Basics, LLC v. Kerstiens Homes & Designs, Inc.*, 1 F.4th 502, 503 (7th Cir. 2021). In recent years, “opportunistic copyright holders” have exploited this scheme by bringing copyright infringement claims not to protect expression, but for the sole goal of “extract[ing] payments through litigation.” *Id.*

As federal appellate courts have recognized, many claims brought by opportunistic copyright plaintiffs are of “dubious merit” and are brought in the hope of compelling settlement. *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (7th Cir. 2017). Like “the proverbial troll under the bridge,” these copyright holders “try to extract rents from market participants who must choose between the cost of settlement and the costs and risks of litigation.” *Id.*

Copyright trolling has arisen in multiple industries and contexts. In one model of trolling, a firm acquires hundreds or thousands of copyrights and then conducts a targeted search for potential infringers. Design Basics, LLC, the copyright troll at issue in a series of Seventh Circuit cases, followed that approach. Design Basics “holds registered copyrights in thousands of floor plans for suburban, single-family tract homes.” *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 882 (7th Cir. 2021). Many of these copyrights are “thin,” and “consist mainly of unprotectable stock elements.” *Id.* Although those copyrights would support infringement claims in only narrow circumstances, Design Basics employees “trawl the Internet in search of targets for strategic infringement suits of questionable merit,” with the aim of inducing settlement payments. *Id.*

Another version of trolling centers on multi-defendant “John Doe” lawsuits. In those suits, a holder of a copyright in a photo or video brings a lawsuit against numerous unknown individuals who the holder alleges have illegally downloaded the protected media. The copyright holder then attempts to discover the identities of the John Does by issuing

subpoenas to internet service providers seeking the names of the subscribers whose internet connections were used to access the protected material. These subpoenas are both overly broad and imprecise, as the subscribers are “not necessarily the individuals actually accessing the Internet through the subscribers’ connections at any given time.” *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 992 (D.C. Cir. 2014). The copyright holder subsequently pursues settlements with identified subscribers. *See, e.g., id.* (describing how plaintiff used John Doe suits to “t[ake] advantage of judicial discovery procedures” and negotiate settlements).

In either framework, the copyright troll is focused on volume, rather than protection of expression or the merits of the claims, and uses the threat of damages to coerce settlement. A copyright troll “plays a numbers game in which it targets hundreds or thousands of defendants seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim.” *McDermott v. Monday Monday, LLC*, No. 17-CV-9230 (DLC), 2018 WL 1033240 at *3 n.4 (S.D.N.Y. Feb. 22, 2018) (quoting *Creazioni Artistiche Musicali, S.r.l. v. Carlin America, Inc.*, No. 14-CV-9270 (RJS), 2017 WL 3393850, at *4 (S.D.N.Y. Aug. 4, 2017)).

By invoking the potential for statutory damages, in addition to the costs of litigation, copyright trolls may pressure even innocent defendants into accepting settlements rather than attempting to mount a defense. *See, e.g., Matthew Sag & Jake Haskell, Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 573 (2018) (“Even when the infringement has not occurred or where the infringer

has been misidentified, a combination of the threat of statutory damages—up to \$150,000 for a single download—tough talk and technological doublespeak are usually enough to intimidate even innocent defendants into settling.”).

This practice has deleterious consequences for both innocent users and the copyright system at large. The Constitution provides for copyright protection “To promote the Progress of Science and useful Arts.” U.S. Const. Art. I, § 8, cl. 8. As this Court recently explained, “copyright has practical objectives.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021). The “basic constitutional objective of copyright” is “creative ‘progress.’” *Id.* at 1203. In support of that goal, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *see also Oracle Am.*, 141 S. Ct. at 1195 (copyright “grants an author an exclusive right to produce his work . . . in order to encourage the production of works that others might reproduce more cheaply”).

The copyright enforcement system reflects this objective. Copyright is enforced by private actors, whose litigation goals often align with the constitutional objective behind copyright. A traditional copyright owner – *i.e.*, the creator of a work – typically brings an infringement claim “when the harm from such infringement interferes in some way with (or is likely to interfere with) the market for creative works.” Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 730 (2013).

Copyright trolls, by contrast, do not care about marketing creative works. A copyright troll’s use of copyright litigation as a mechanism for exacting settlement payments is “far removed from the goals of the Constitution’s intellectual property clause.” *Lexington Homes*, 858 F.3d at 1097; *see also* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015) (“The essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service.”).

By threatening litigation over thin copyrights that often possess only marginal protectable material (and have little chance of standing up to judicial scrutiny), copyright trolls discourage other creators from “build[ing] freely” on existing ideas. *Feist Publications*, 499 U.S. at 350. Likewise, suing unnamed defendants and exploiting discovery procedures to identify a large group that sweeps innocent users in alongside potential infringers creates fear among consumers with no corresponding societal benefit.

Unfortunately, copyright trolling is now a dominant feature of copyright enforcement. An empirical study of copyright trolling found that, between 2014 and 2016, John Doe copyright troll cases “accounted for 49.8% of the federal copyright docket.” Sag & Haskell, *Defense Against the Dark Arts* at 577. Moreover, because each case involved multiple defendants, “hundreds of thousands” of U.S. households likely received a settlement demand letter from these copyright troll plaintiffs. *Id.* at 578. The pervasive nature of copyright trolling exacerbates its disruption of the copyright scheme.

II. The Registration System, If Properly Enforced, Provides An Important Check On Copyright Trolling

Copyright law carves out a distinct role for the Copyright Office. Although copyright protection attaches to a work immediately upon creation, the Copyright Act creates significant incentives for copyright holders to register their works. Chief among them is 17 U.S.C. § 411(a), which “[i]mpel[s] prompt registration of copyright claims” by making registration a prerequisite to an infringement lawsuit. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 886 (2019). Timely registration can also afford copyright holders evidentiary benefits, *see* 17 U.S.C. § 410(c), as well as eligibility for statutory damages and attorney fees, *see* 17 U.S.C. § 412.

The registration process gives the Copyright Office an opportunity to assess the validity of a copyright and creates a public record for registered copyrights. To register a proposed copyright, an applicant must provide details about the claimed work. *See* 17 U.S.C. § 409. Among other things, applicants must disclose the name of the author of the work, information about whether the work was made for hire, the year in which the work was completed, the date and nation of publication, and any preexisting works that the claimed work is based on or incorporated along with a statement of the additional material covered by the copyright claim. § 409(1)-(10). The Register then assesses whether “the material deposited constitutes copyrightable subject matter” and whether “the other legal and formal requirements of this title have been met,” and either grants or refuses registration. 17

U.S.C. § 410(a)-(b). If the Register grants the registration, the Register issues a “certificate of registration” containing the information provided in the application. § 410(a). This information then becomes part of the public record.

The functioning of the copyright system depends, in large part, on a claimant’s honest and accurate disclosure in a registration application. Section 411(b), at issue in this case, balances the public interest in an accessible registration system with the need for accuracy by providing that registration may be invalid if “inaccurate information was included . . . with knowledge that it was inaccurate,” and if the inaccuracy “would have caused the Register of Copyrights to refuse registration.”

Enforcing those provisions as written should deprive no one of the ability to enforce a legitimate copyright: In *every* case, the Register has the ability to determine that the copyright would have been registered even if accurate information had been provided, or in other words that the error was immaterial. Adding an extratextual “fraud” requirement to the statute, by contrast, ensures that some copyrights that *would not* have been registered but for the submission of inaccurate, material information will nevertheless be enforced as if they were valid because the knowing submission of inaccurate information did not rise to the level of fraud. Reading the statute to allow invalidation without fraud may deter copyright trolls in at least two ways.

1. The registration requirement creates additional work for copyright trolls, whose business model emphasizes quantity over accuracy. By providing

correct information about its work, a traditional copyright claimant protects its own rights and market access. Copyright trolls have no such incentive. Instead, trolls are motivated to register a high volume of claims in order to leverage copyrights against as many defendants as possible. As copyright trolls typically seek settlement, rather than adjudication, the accuracy of the information on these registrations is of little import. *See, e.g., AF Holdings*, 752 F.3d at 993 (noting that, “[i]f an identified defendant sought to actually litigate, [a copyright troll] would simply dismiss the case” and that, “of the more than one hundred cases that AF Holdings has initiated, none has proceeded to trial or resulted in any judgment in its favor other than by default”).

This behavior, although damaging to the entire copyright system, rarely involves outright fraud. Trolls do not typically set out to deceive the Copyright Office, but are simply indifferent to the truth or legal sufficiency of their representations.² If prospective copyright litigants understand that they will be held accountable for knowingly including material, inaccurate information on registration applications, they may be deterred from playing fast and loose with the registration rules and prioritizing speed and quantity over accuracy.

² As one recent sanctions order against a notorious copyright troll and his law firm noted, it was “the regular practice of [their firm] to file copyright infringement cases without verifying that the works in question are properly registered.” *Liebowitz v. Bandshell Artist Mgmt.*, 6 F.4th 267, 293 (2d Cir. 2021) (brackets in original). That conduct, standing alone, may not rise to the level of fraud. If unchecked, however, it would allow trolls to pursue repeatedly claims containing “a fatal flaw.” *Id.* at 284.

The present case provides just such an example. Unicolors registered the 31 different works at issue in this case through the Copyright Office’s “group registration” procedure. Although copyright applicants are generally required to submit separate applications and filing fees for each individual work, the Copyright Office allows applicants to “register a group of related works in certain limited categories with one application and one filing fee.” U.S. Copyright Office, *Multiple Works (Circular 34)* 3 (revised Mar. 2021).

The group registration procedure can be – and is – misused by trolls. One of the “limited categories” recognized by the Copyright Office are works that “are physically bundled or packaged together and first published as an integrated unit” and thus comprise a single “unit of publication.” *Id.* at 1. But, if copyright applicants face no repercussions for known inaccuracies in any circumstance falling short of copyright fraud, copyright trolls will be able to circumvent standard registration procedures simply by refusing to check whether works have *actually* been bundled and published as a single unit. Enforcing the registration requirements – especially where, as here, the unit-of-publication exception is “very specific, and most works do not qualify for this option,” *id.* at 6 – prevents opportunistic copyright holders from taking advantage of rules designed to facilitate copyright protection to advance their interests in exacting settlement payments.

2. Enforcing registration requirements empowers defendants to push back against trolling. Trolls profit from the costs they impose on defendants: By pressuring defendants to settle claims for less than the amount required to hire counsel, copyright trolls

often discourage even innocent users from contesting claims. *See* Sag & Haskell, *Defense Against the Dark Arts* at 612 (explaining that “the copyright trolling business model has only lasted this long because of information asymmetries”). The public copyright records, however, provide important information for defendants resisting infringement claims. For example, because the registration process requires a claimant to identify “any preexisting work or works that [the claimed work] is based on or incorporates,” 17 U.S.C. § 409(9), a defendant – or recipient of a demand letter – may be able to determine quickly that the challenged work was predicated on the preexisting work, rather than the copyright at issue.

Likewise, a defendant may be able to identify a defense to an infringement claim based on the recorded date of creation or publication. As with disclosure of prior works, the date of creation may allow a defendant to argue that its own work antedated the copyright at issue. And the date of publication is particularly relevant to damages, as the Copyright Act provides for a reduction of statutory damages if an infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). *See, e.g., Bell v. Wilmott Storage Servs., LLC*, No. 19-55882, 2021 WL 4097499, at *13 (9th Cir. Sept. 9, 2021) (Clifton, J. concurring) (noting that the plaintiff, who was “solidifying his identification as a ‘copyright troll,’” only registered the photograph at issue eleven years after it was first published, and that accordingly “it seems doubtful that there was sufficient notice of the copyright” to support a significant damages award).

* * *

Copyright trolls should not be permitted to profit from a litigation model predicated on flouting the rules of the registration system. By raising the costs of trolling and providing additional tools for defendants, enforcement of the registration scheme furthers the aim of deterring and reducing trolling. Section 411(b)(1)(A)'s knowledge limitation serves this goal by holding copyright applicants accountable for the information they provide to the Copyright Office and deterring copyright trolls from knowingly submitting registrations that do not comply with Copyright Office rules. If Section 411(b)(1)(A)'s knowledge requirement is interpreted to encompass only intent – notwithstanding the plain text of the statute – this provision will do little to discourage the ongoing manipulation of the copyright system. Far from deterring trolls, an intent standard would incentivize litigants to avoid close scrutiny of registration applications and thereby escape liability for even obvious mistakes falling short of fraud.

Amici note that there are additional policy issues related to the registration system. As the United States observed in this case, copyright holders are not typically experts in copyright law or procedure. *See* U.S. Br 27. Concerns about excluding unsophisticated applicants based on insignificant mistakes, however, are effectively mitigated by Section 411(b)(1)(B)'s materiality provision, rather than by tightening the scope of Section 411(b)(1)(A). Section 411(b)(1)(B) provides that inaccurate information renders a registration invalid only if the inaccuracy, “if known, would have caused the Register of Copyrights” to refuse registration. The Ninth Circuit, in the decision

below, explained that the district court was required to request this analysis from the Register of Copyrights “before deciding whether Unicolors’s registration is invalid.” Pet. App. 13. Taken together, sections 411(b)(1)(A)-(B) allow both for effective enforcement of the registration rules and for flexibility around accommodation of inconsequential errors.

III. Section 411(b) Requires Knowledge, Not Intent

Section 411(b) establishes a “knowledge” requirement for invalidation of a copyright registration. This conclusion is compelled by the plain text of the statute, which explicitly provides for invalidation if “the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate.” 17 U.S.C. § 411(b)(1)(A).

As this Court has repeatedly reiterated, the proper starting point for statutory interpretation “lies in a careful examination of the ordinary meaning and structure of the law itself.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *see also Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020) (“only the words on the page constitute the law adopted by Congress and approved by the President”); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (“it is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms”) (internal quotations omitted). If “that examination yields a clear answer, judges must stop.” *Food Mktg.*, 139 S. Ct. at 2364; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432,

438 (1999) (“where the statutory language provides a clear answer, it ends there as well”).

The Ninth Circuit, in the decision below, did just that. The court explained that it “recently clarified that there is no such intent-to-defraud requirement” in *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140 (9th Cir. 2019), cert. denied, 140 S. Ct. 1294 (2020). Pet. App. 9. In *Gold Value*, the Ninth Circuit held that “the plain language of § 411(b) . . . does not require a showing of fraud, but only that the claimant included inaccurate information on the application ‘with knowledge that it was inaccurate.’” *Gold Value*, 925 F. 3d. at 1147 (quoting 17 U.S.C. § 411(b)(1)(A)). Having found a clear answer in the statutory text, the Ninth Circuit properly stopped its analysis.

Other amici urge this court to look to the legislative history behind Section 411(b) as a basis for concluding that this provision codifies the doctrine of “fraud on the Copyright Office.” Br. Intellectual Property Law Profs. 12. But legislative history has no bearing where, as here, it serves only “to muddy clear statutory language.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011). Section 411(b)(1)(A) could hardly be clearer: a registration may be invalid if it contains inaccurate information included “with knowledge” of the inaccuracy. This is not a fraud standard.³

³ Amici take no position on the arguments posed in Petitioner’s merits brief concerning the type of knowledge encompassed by the term “with knowledge” in Section 411(b). Amici limit their response to the question presented in the petition for a writ of certiorari, which asks about Section 411(b)’s application “where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration.” Pet. i.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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