No. 17-571

IN THE

Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORP.,

Petitioner,

v.

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

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under § 411(a) of the Copyright Act, a copyright owner may file an infringement suit after delivering the requisite deposit, application, and fee to the Copyright Office—but before the Register of Copyrights has acted on the application for registration.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. Since its founding in 1977, WLF has appeared as an *amicus curiae* in important copyright cases, urging the Court to interpret and apply the Copyright Act as Congress intended. *See, e.g., Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

WLF has long supported a federal regime of robust copyright protection under the Copyright Act, to foster and reward the creativity and genius essential to a flourishing free-market economy.

To that end, WLF believes that the decision below, by requiring the Copyright Office to issue or refuse a registration certificate before a copyright is "registered" under § 411(a), best accomplishes Congress's carefully balanced policy aims. As WLF will show, those broad public concerns go far beyond protecting the interests of a copyright-infringement plaintiff in any given suit.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief. All parties have consented to the filing of WLF's brief.

STATEMENT OF THE CASE

Section 411(a) of the Copyright Act precludes a copyright holder from bringing a copyright-infringement suit until either (1) "registration of the copyright claim has been made" under the Act or (2) the required deposit, application, and fee have been "delivered to the Copyright Office in proper form" and "registration has been refused." 17 U.S.C. § 411(a).

The petitioner, Fourth Estate Public Benefit Corporation, creates online news content and—while retaining the copyright—licenses that content to third-party websites. Pet. App. 2a. The respondents, Wall-Street.com and its owner, Jerrold Burden, published some of the petitioner's news articles under a licensing agreement. *Ibid.* But after the respondents cancelled that agreement, they allegedly continued displaying the petitioner's copyrighted content without permission. *Ibid.*

The petitioner sued the respondents for copyright infringement under § 501 of the Copyright Act. Pet. App. 15a-22a. Though the complaint alleged that the petitioner had applied "to register [the] articles with the Register of Copyrights," *id.* at 18a, it failed to allege that the Copyright Office ever acted on that application.

While the petitioner's copyright application was pending, the respondents moved to dismiss the complaint. They argued that § 411(a) allows a plaintiff to sue for infringement "only after the Register of Copyrights approves or denies an application to register a copyright." Pet. App. 3a. The

district court agreed, rejecting the petitioner's suggestion that merely having "an application to register * * * pending at the time of the suit" is "sufficient to survive a motion to dismiss." *Id.* at 13a.

The Eleventh Circuit affirmed. Pet. App. 1a-10a. Observing that "the question when registration occurs has split the circuits," the appeals court noted that the Tenth Circuit follows the "registration approach," which "requires a copyright owner to plead that the Register of Copyrights has acted on the application—either by approving or denying it—before a copyright owner can file an infringement action." *Id.* at 4a (citing *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1197 (10th Cir. 2005), abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

The Fifth and Ninth Circuits, the appeals court explained, follow the "application approach," which only "requires a copyright owner to plead that he has filed 'the deposit, application, and fee required for registration' * * * before filing a suit for infringement." Pet. App. 4a (citing *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010), and *Positive Black Talk, Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004), abrogated on other grounds by *Muchnick*, 559 U.S. at 154).

The Eleventh Circuit recognized that its own circuit precedent may have already embraced the registration approach. *Id.* at 6a (citing *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1302 n.8 (11th Cir. 2012), and *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488 n.4 (11th Cir.

1990)). But the court went on to reexamine § 411(a) and reaffirm its earlier endorsement of the registration approach.

The Copyright Act "makes clear," the Eleventh Circuit found, that registration is "a process that requires action by both the copyright owner and the Copyright Office." Pet. App. 6a. While the statute requires the copyright owner to begin the registration process—by filing an application, a fee, and a deposit of its work—it directs the Copyright Office to "examine" those submissions and "determine" whether to approve or refuse registration. *Ibid.* The petitioner's arguments about "legislative history and policy," the court held, couldn't overcome the Copyright Act's plain meaning: "[f]iling an application does not amount to registration." *Id.* at 6a-9a.

On that basis, the appeals court entered judgment for the respondents. Several weeks later, the Copyright Office refused the petitioner's registration application for failing to "meet the legal or formal requirements for registration." U.S. Cert. Br. App. 3a-9a. Among other defects, the petitioner had improperly submitted "multiple articles for registration" within a single application. *Id.* at 7a-8a.

SUMMARY OF ARGUMENT

The Copyright Act establishes a copyright holder's rights and remedies under federal law. While formal registration with the Copyright Office isn't a condition of copyright protection, it is a condition for filing a copyright-infringement suit.

Section 411(a) of the Copyright Act provides that "no 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" or until the Register has refused registration. 17 U.S.C. § 411(a).

As the respondents and the Unites States have convincingly shown, the text, structure, and history of the Copyright Act support the commonsense view that copyright "registration" means more than just *applying* for registration. That is, registration under § 411(a) occurs when the Copyright Office *acts* on the application—either by issuing a certificate or by refusing one. "Although registration is 'permissive,' both the certificate and the original work must be on file with the Copyright Office before a copyright owner can sue for infringement." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1977 (2014) (citing § 411(a)).

The petitioner's contrary view—that merely applying for a registration certificate accomplishes registration under the Copyright Act—flouts fundamental canons of statutory construction and does violence to the unambiguous words of the statute. WLF won't rehash those statutory-construction arguments here.

WLF wishes to emphasize, however, that the petitioner's reading of § 411(a) severely disrupts Congress's careful balancing of incentives and deterrents in the Copyright Act. Contrary to the petitioner's narrow focus, the Copyright Act advances federal policy concerns that go well beyond

the mere convenience of plaintiffs suing for alleged infringement.

First, vigorous copyright registration promotes a robust public registry that puts the world on notice of copyrighted works. *Second*, pre-suit registration conserves judicial resources by ensuring that federal courts have the benefit of the Register's considered view in copyright litigation. And *third*, by encouraging authors to deposit their creative works with the Copyright Office, § 411(a) gives the Library of Congress a vital source of works for its permanent acquisitions. In contrast, the petitioner's extra-statutory approach to copyright registration advances *none* of these broader policy goals.

The petitioner offers a parade of horribles that supposedly arise from copyright-registration lag time. According to the petitioner, requiring a copyright owner to wait to sue until the Copyright Office acts on the registration application forces the owner "to endure the ongoing theft of intellectual property." Pet. Br. 41. But the Copyright Office provides an expedited registration option for all pending or prospective copyright litigants. And while § 411(a) inconveniences an unregistered copyright owner by forcing her to register before bringing an infringement suit, the time the Copyright Register takes to process her application won't reduce the damages she ultimately recovers.

Here, because the petitioner filed its copyright-infringement suit before the Register of Copyrights acted on the registration application, the Eleventh Circuit rightly affirmed dismissal of the petitioner's suit.

ARGUMENT

I. THE REGISTRATION APPROACH BEST ACCOMPLISHES CONGRESS'S VITAL AIMS.

"The mere submission of an application to the U.S. Copyright Office does not amount to a registration. This is corroborated by the statute and the legislative history." U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 625.5 (3d ed. 2017). The petitioner insists, however, that "a copyright owner's statutory rights do not depend on administrative action." Pet. Br. 37. That is certainly true. But a copyright owner's available *remedies* depend on precisely that.

All the more because § 411(a) promotes distinct public ends that go well beyond the mere convenience of litigants bringing infringement suits. The Copyright Act "is underpinned by a number of incentives—legal, business, and personal—all of which point an author or other copyright proprietor toward the option of registration." S. Rep. No. 100-352, at 20 (1988).

By conditioning the right to sue for copyright infringement on review by the Register of Copyrights, Congress sought to maintain a public registry of copyright ownership, to conserve judicial resources, and to enlarge the Library of Congress's collection of original works. Contrary to the petitioner's view, each of those ends is best advanced by the Eleventh Circuit's registration approach.

A. The Registration Approach Best Ensures a Robust Copyright Registry.

As Congress has explained, registration as a prerequisite to suit "helps to ensure the existence of a central, public record of copyright claims." H.R. Rep. No. 100-609, at 42 (1988). Since 1790, a federal copyright registry has enabled a free market in creative works, allowing consumers to identify copyrighted works and their owners. Under the Copyright Act of 1909, federal copyright protection attached only upon publication, and even then only if the required notice, registration, and deposit occurred. But in 1976, Congress overhauled federal copyright law to create a uniform system giving "federal copyright protection to all works at the time of creation." *Cosmetic Ideas*, 606 F.3d at 618 (citing Pub. L. No. 94-553, 90 Stat. 2541 (1976); H.R. Rep. No. 94-1476, at 129 (1976)).

Though Congress eliminated the mandatory registration of copyrights, it didn't jettison the important goal of maintaining a public registry. On the contrary, Congress was concerned that "[c]opyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way." H.R. Rep. 94-1476, at 158. In early deliberations preceding the 1976 revision, the Register of Copyrights lamented that "[i]t is often cumbersome for would-be users to seek out the copyright owner and get permission." *Report of the Register of Copyrights on the General Revision of the U.S.*

Copyright Law, 87th Cong., Copyright Law Revision 6 (H.R. Judiciary Comm. Print 1961).

So Congress insisted that before a copyright holder may sue to enforce her copyright, she must either obtain a certificate of registration or be refused one. A certificate of registration "creates a public record of key facts" including "the title of the work, the author of the work, the name and address of the claimant or copyright owner, the year of creation, and information about whether the work is published, has been previously registered, or includes preexisting materials." U.S. Copyright Office, *Circular 1—Copyright Basics*, at 5 (Rev. 09/2017), https://www.copyright.gov/circs/circ01.pdf.

True enough, "copyright holders frequently register specifically for the purpose of being able to bring suit." *Cosmetic Ideas*, 606 F.3d at 619. To stop the infringement, a copyright holder whose works are being infringed presumably desires to bring suit as soon as possible. But that is precisely why the Eleventh Circuit's construction of § 411(a) best ensures a comprehensive public registry.

To work as intended, a public copyright registry must include both infringed and uninfringed works. So Congress needed some way to motivate copyright holders to register their works *before* infringement occurs. Only by requiring copyright claimants to obtain a certificate of registration before being able to sue for infringement could Congress guarantee greater public access to all copyrighted works.

By barring suit until the Copyright Office has acted on a registration application, the Eleventh Circuit's approach discourages a copyright holder from registering belatedly only after suffering an infringement. Of course, a copyright holder can avoid any inconvenience simply by registering her copyrighted work soon after she creates it. The registration approach thus ensures that more copyright holders will register more of their works sooner, resulting in a more robust and accurate registry.

The petitioner's application approach, by contrast, rewards delay and invites an incomplete registry. Under the petitioner's reading of § 411(a), dilatory copyright owners suffer only the slightest delay if they wait until infringement before applying for a certificate. They may sue for infringement as soon as the Register receives their application materials. Even worse, the petitioner's approach gives copyright owners *no* incentive to register uninfringed works. Indeed, if this Court were to adopt the petitioner's view, the federal copyright registry would likely become little more than a repository of previously infringed works. But that would defeat the purpose of having a public registry.

In sum, the registration approach best supports "a comprehensive and reliable copyright database, available freely to the public." Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit—Letter and Report of the Co-Chairs* 17 Colum.-VLA J.L. & Arts 271, 280 (1994). Such a registry has proven all the more

valuable "[a]s the communications revolution gathers momentum." *Ibid.*

B. The Registration Approach Best Conserves Judicial Resources.

The decision below furthers another vital public-policy purpose—judicial economy. Far from a "needless formality," *Cosmetic Ideas*, 606 F.3d at 620, requiring a plaintiff to obtain (or to fail to obtain) a registration certificate as a prerequisite to suit insulates the federal courts from dubious copyright-infringement claims by "allow[ing] the Copyright Office to make an initial judgment about the validity of copyrights, based on its experience and expertise." *Torres-Negón v. J & N Records, LLC*, 504 F.3d 151, 161 (1st Cir. 2007). This "reduce[s] the burdens of litigation by giving that judgment some weight in subsequent litigation." *Ibid.*

But allowing copyright-infringement claims for uncertified works (as the petitioner urges) would extract more, not fewer, judicial resources from the federal courts. A party bringing an infringement suit without a registration certificate "bears a greater evidentiary burden of proving the validity of its copyright." *Cosmetic Ideas*, 606 F.3d at 621 n.14. And yet, a court obliged to scrutinize plaintiffs' attempts to clear that higher evidentiary burden must expend extra time and resources to do so.

Without a registration certificate to help streamline the issues for litigation, a claimant must prove authorship, copyrightability, and the lack of any competing claim with priority. And those showings, in turn, require more evidentiary filings,

motions, and arguments—all consuming more of the court's time and attention.

In contrast, the registration approach motivates potential claimants to organize and explicitly define the contours of their creative works ahead of unforeseen litigation. Rightly understood, § 411(a) "greatly ease[s] the strain on the courts by providing a reliable record and screening process." Letter from Ralph Oman, Register of Copyrights, to L. Ralph Mecham, Director, Administrative Office of the U.S. Courts (June 4, 1987). That is why eliminating the Copyright Act's registration prerequisite to suit would "grievously compromise" the "speedy and inexpensive resolution of copyright litigation in the federal courts." *Ibid.*

Indeed, § 411(a)'s registration requirement often relieves the court from ever having to adjudicate an infringement claim. After all, a putative plaintiff whose registration application is denied by the Copyright Office will often forgo suing rather than challenge the Register's determination. Likewise, a copyright defendant confronted with a claimant's bona fide registration certificate is much more likely to settle than to litigate. So after "the Copyright Office makes its preliminary findings, many potential court cases just disappear." Letter from Oman to Mecham, *supra*.

Congress feared that, without § 411(a)'s meaningful precondition to suit, claimants could force courts "to rule on an increased number of novel copyright issues, without benefit of an administrative record to expedite their proceedings." S. Rep. 100-352, at 23. Rather than arrest that fear,

the petitioner's reading of § 411(a) exacerbates it. Under the application approach, copyright claimants with dubious claims could require "courts—often in the context of a shortfused temporary restraining order or a preliminary injunction—to rule directly on their claims without risking the negative implications that would arise from a possible Copyright Office denial of registration." *Ibid.*

In other words, the Register's grant or denial of a certificate materially "assists the courts in resolving the underlying copyright dispute." H.R. Rep. No. 100-609, at 41. Above all, Congress wanted the courts, as well as copyright holders, to benefit from the presumption of validity that attaches to a registered copyright. So if registration occurs within five years of the work's first publication, the certificate is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c).

Section 411 also empowers the Copyright Office's active participation in many infringement suits after the Register's initial registration decision. The Copyright Office may partake in litigation not only when a plaintiff sues for infringement after his registration application has been denied, *see* § 411(a), but also when the defendant alleges that the plaintiff's certificate contains deliberately misleading information, *see* § 411(b).

Nor is that all. Congress enlisted district courts to ensure that claimants satisfy § 411(a)'s registration requirement. Section 508(a) instructs district courts "[w]ithin one month after the filing of any action under this title," to "send written

notification to the Register of Copyrights [of] * * * the names and addresses of the parties and the title, author, *and registration number* of each work involved in the action." § 508(a) (emphasis added). And the court must update these notices by advising the Register of the registration numbers of any new works added to the litigation. *Ibid.*

Why would Congress insist that courts provide notice of infringement actions to the Copyright Office? To ensure that premature claimants will complete the otherwise voluntary registration process before being allowed to proceed in court. By directing district courts to send registration numbers to the Copyright Office, § 508's notice requirement allows courts to identify—for dismissal—deficient, unregistered infringement claims at the outset of litigation, even if the defendant otherwise may have waived pre-suit registration.

Under the Copyright Act, obtaining—not merely applying for—a copyright certificate is mandatory *before* burdening the courts. "Key evidence in [infringement] litigation, then, will be *the certificate*, the original work, and the allegedly infringing work." *Petrella*, 134 S. Ct. at 1977 (emphasis added). Congress insisted that the Copyright Office have a chance to weigh in before saddling the courts with litigation. That way, federal courts enjoy the benefit of the Copyright Office's expertise *before* expending precious time and resources.

C. The Registration Approach Best Sustains the Library of Congress.

The Library of Congress is the world's largest library, housing "more than 167 million items on approximately 838 miles of bookshelves." Library of Congress, *About the Library: Fascinating Facts*, http://www/loc.gov/about/fascinating-facts/html. "The collections include more than 39 million books and other printed materials, 3.6 million recordings, 14.8 million photographs, 5.5 million maps, 8.1 million pieces of sheet music and 72 million manuscripts." *Ibid.* By motivating authors to deposit their creative works with the Copyright Office, § 411(a)'s pre-suit registration requirement provides the Library of Congress with a major source of works for its acquisitions.

When a copyright holder deposits the registration copy of its work with the Register of Copyrights, the Copyright Office then forwards that work to the Library of Congress's permanent collection. *See* 17 U.S.C. § 407(b), 408(b). "Each year, the Copyright Office registers more than 500,000 claims and transfers more than 1 million copyrighted works to the Library's collection." Library of Congress, *Annual Report of the Librarian of Congress for the Fiscal Year Ending September 30, 2007*, at 25 (2008). In fiscal year 2017, the Copyright Office "forwarded more than 658,045 copies of works with a value of almost $41 million to the Library's collections." U.S. Copyright Office, *Fiscal 2017 Annual Report*, at 10 (2018).

As the oldest federal cultural institution in the United States, the Library of Congress confers a

vital public benefit. By conditioning the right to sue for copyright infringement on registration, Congress sought to expand the Library of Congress's collection of copyrighted works. As Congress recognized, § 411(a)'s pre-suit registration requirement "provides the Library of Congress with an efficient means of obtaining copies of copyrighted works." S. Rep. 100-352, at 19.

Just as it best ensures a robust public registry that includes both infringed and uninfringed copyrighted works, the registration approach best supplies the Library of Congress with the broadest assortment of unique works. Not so the petitioner's application approach, which removes any incentive for copyright holders to provide a copy of *every* work to the Copyright Office, leaving the Library of Congress deprived of countless uninfringed works.

II. THE PETITIONER'S PRACTICAL CONCERNS ARE OVERSTATED.

Urging the Court to sweep aside the plain text and broad public purposes of § 411(a), the petitioner contends that requiring a copyright owner to await registration before suing forces that owner "to endure the ongoing theft of intellectual property rights." Pet. Br. 41. What's more, the petitioner says, "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 rights the Act grants." *Ibid.*

These fears are unfounded. If anything, such concerns are best addressed by the registration approach.

1. "[I]t makes little sense," the petitioner says, for Congress "to give the Copyright Office the power to block suit through bureaucratic delay." Pet. Br. 20. But that assertion begs the question. After all, federal copyright remedies are matters of legislative grace. And the Copyright Act generally protects not the creator of a work, but the owner of a copyright.

To register timely before filing suit isn't that onerous. And like any other intellectual-property litigation, federal copyright-infringement actions are filed by highly specialized attorneys who are presumed to know the Copyright Act's statutory prerequisites. "Under these circumstances, it is not unfair to require strict compliance with a statutory condition precedent to suit." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 28 (1989).

In all events, it is hardly the case that requiring copyright holders to satisfy a straightforward precondition to suit makes "little sense." To cite just one example from above, although § 411(a) allows a copyright owner to sue regardless of the Register's decision on her registration application, the district court adjudicating the infringement suit will benefit greatly from knowing that decision. But under the petitioner's view, the district court can be left to guess. By postponing suit until the Copyright Office has made an initial determination, § 411(a) motivates copyright owners to register as promptly as possible rather than to wait until infringement.

2. At bottom, the petitioner claims that it is unfair to require a copyright plaintiff to endure any pre-suit interval of alleged infringement because of

the Register's bureaucratic delay. But Congress contemplated this very possibility when it enacted § 410(d)'s back-dating provision, which specifies the effective date of registration. Under that provision, registration is effective "the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights * * * to be acceptable for registration, have all been received in the Copyright Office." 17 U.S.C. § 410(d).

And under § 412, Congress made statutory damages, costs, and attorney fees available to prevailing copyright owners for any infringement occurring after the effective date of registration. *See* § 412. So under the registration approach, the copyright holder can recover for any damages, costs, or fees incurred while the Register considers the registration application.

3. The petitioner also worries that the statute of limitations may expire while a copyright holder's registration application awaits the Copyright Register's review. Pet. Br. 41. But the petitioner cites no case in which that has ever happened.

Such a nightmare scenario is highly implausible. Under the Copyright Act, any civil infringement action must begin "within three years after the claim accrued." 17 U.S.C. § 507(b). As this Court knows, "the separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Petrella*, 134 S. Ct. at 1969.

Besides, the federal courts of appeals have adopted the "discovery rule" for copyright-infringement claims. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) (collecting cases). Under this rule, the limitations period starts to run when "the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009); *see* 6 Willam F. Patry, *Patry on Copyright* § 20:19 (2017) ("The overwhelming majority of courts use discovery accrual in copyright cases.").

According to the Copyright Office, the Register takes an average of eight months to resolve a registration application. *See* U.S. Copyright Office, "Registration Processing Times," (October 2, 2018) *available at* https://www.copyright.gov/registration/docs/processing-times-faqs.pdf. And the Register resolves nearly 70% of all applications within two to ten months. *Ibid.* So in the mine-run case, a copyright owner would have to sit on her rights, for years—in the face of glaring, ongoing infringement—before the statute of limitations would cause her to lose out on her claim.

Still, insisting that the petitioner's statute-of-limitations concern is "not idle conjecture," one of the petitioner's *amici* relies on *Kregos v. Associated Press*, 795 F. Supp. 1325 (S.D.N.Y. 1992). *See* ABA Br. at 30. But that case only bolsters the registration approach. As the court's decision reveals, Kregos's statute-of-limitations problem was "a self-induced problem." 795 F. Supp. at 1331. "Had plaintiff not sat on his rights for so long, the Copyright Office's prolonged delay would have been avoided

completely." *Ibid.* In any case, it turns out that Kregos's claim failed to "satisfy the creativity requirement for copyrightable expression." *Id.* at 1332. So any statute-of-limitations concerns were beside the point.

Yet even a dilatory plaintiff isn't without recourse. The Copyright Office's "Special Handling" option allows an applicant in "pending or prospective litigation" to pay a fee to "expedit[e] the examination of an application to register a claim to copyright." U.S. Copyright Office, *Circular 10—Special Handling*, at 1 (Rev. 09/2017), https://www.copyright.gov/circs/ circ10.pdf. "Once a request for special handling is approved, the Office will make every effort to complete its examination of the claim or document within *five working days*." *Id.* at 2 (emphasis added).

And to address the problem of pre-publication infringement, which often can't be remedied while the copyright owner waits to secure a certificate, the Copyright Act permits a claimant to sue for infringement if she has "preregistered." *See* 17 U.S.C. § 408(f). Preregistration "focuses on the infringement of movies, recorded music, and other copyrighted materials" before the copyright owners have had a chance to market their works. U.S. Copyright Office, "Preregister Your Work," at https://copyright.gov/ prereg.

Section 411(a) confers an immediate right to sue for infringement after preregistration. *See* 17 U.S.C. § 411(a). Yet in keeping with Congress's overall desire to cajole owners into formally registering all copyrighted works, the Copyright Act

provides that failure to timely register renders the preregistration ineffective, which can lead to dismissal of the suit. *Id.* at § 408(f)(4).

* * *

While § 411(a) inconveniences an unregistered copyright holder by forcing her to register before she may sue for infringement, the time the Copyright Register takes to process that registration won't reduce the damages she can recover. Even so, Congress provided an expedited registration process for all "pending or prospective litigation." Any gripes the petitioner has about the registration approach are far outweighed by the need to further Congress's broader public goals.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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