No. 17-571

IN THE
Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,
v.
WALL-STREET.COM, LLC, ET AL.,
Respondents.

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

BRIEF OF PUBLIC KNOWLEDGE AND THE R STREET INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

The R Street Institute is a non-profit, non-partisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

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[1] Pursuant to Supreme Court Rule 37.3(a), this brief is submitted under parties' blanket consents of Jul 24-25, 2018. Pursuant to Rule 37.6, 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 the brief. No person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court should be wary of Petitioner's "application approach" to the registration requirement of 17 U.S.C. § 411(a), as it severely limits the incentive structure, policy rationale, and stated Congressional intent underlying § 411(a)'s registration requirement. By contrast, the "registration approach," adopted by the court below, provides better outcomes on all three fronts.

The Court has before it two opposing interpretations of § 411(a)'s registration language. Petitioners contend that "registration" for the purposes of this section occurs at the moment of filing, while respondents argue that a work is only "registered" once its application has been accepted or rejected by the Register of Copyrights. Aside from parties' rhetorical incongruity, these two visions of registration manifest two completely different incentive structures, with a rational actor approaching registration differently in each case. By withholding the ability to litigate until after the Register of Copyrights has completed the registration process, the "registration approach" espoused by respondents encourages prompt, prophylactic registration well in advance of any potential litigation. In essence, it creates a deterrent against skipping—or untimely making—registration of a work. Conversely, the application approach treats registration as a litigation "step zero" whose value is limited only to cases where an infringement has occurred and litigation is desirous (or inevitable).

This is at odds with the fundamental policy rationale of registration, namely maintaining a

comprehensive public record of ownership in copyrighted works (a category that grows larger with each passing revision of the statute). The size, scope, and growth rate of copyright-reliant industries makes this uniquely important. That same boom growth amplifies the risks posed by orphan works—those works whose owners, due to an incomplete or untimely public record, cannot be determined, and which represent a substantial, endemic risk to the licensing marketplace.

In addition to forestalling those dangers, the data provided by a robust public record can prove exceedingly useful to researchers and policymakers, as demonstrated by the insightful research conducted on the Patent and Trademark Office's public datasets. This is uniquely important to anyone seeking to study the dynamics creative industries, where complex legal regimes, poor historical recordkeeping, and opaque business practices create a dearth of reliable data.

When drafting the 1976 Act, Congress was well aware of the risks that removing formalities posed to the public record. By preserving and modifying the registration requirement into its modern form, Congress expressly sought not to erase, but to *improve upon* the 1909 Act's mandatory registration system as a tool of public record keeping. Missing and tardy registrations were a well-documented problem by 1976, and the legislative record shows that Congress actively sought to ameliorate the problem by the provisions of the new Act.

In light of these logical incentives, policy rationales, and the stated Congressional intent

underlying § 411(a)'s registration requirement, the Court should uphold the decision below.

ARGUMENT

Registration of a work with the United States Copyright Office, though no longer prerequisite for copyright protection, continues to serve an important function in the modern licensing market. When correctly implemented and maintained, registration provides a public record of ownership, tracking who owns what works, and thus providing potential licensees with information that is both practically and legally indispensable to making use of the work.

The notion that the provisions of 17 USC § 411 are nothing more than a vestigial remnant of the old system ignore both the public policy rationale underlying modern formalities, and Congress's explicit intent in crafting those formalities. Not only are modern formalities more critical than ever, but they were explicitly designed to encourage *greater* and more comprehensive registration than occurred under the old system—an outcome that can only be meaningfully achieved by upholding the "registration approach" adopted by the court below.

I. PERMITTING THE FILING OF REGISTRATION ON THE EVE OF SUIT WILL LEAVE THE REGISTER INCOMPLETE AND INCONSISTENT

Petitioners' view—that the benefits of registration are available immediately upon application to the Copyright Office—treats the registration requirement as little more than a strategic prelude to litigation, rather than a reflection of a Congressional policy to encourage a

public record. A rational actor in this scenario would only seek to register their works once (1) an infringement has occurred, and (2) the rightsholder has decided to litigate. This skews incentives away from proactive registration; indeed, absent imminent litigation, a rational rightsholder has little incentive to invest the requisite time and money to register.

Under this approach, the record created by registration is substantially diminished: Rather than being a substantially comprehensive list of ownership, the record reduces down to those works which have been, or will soon be, litigated. This is a far cry from the full public record that Congress sought to achieve by the incentives structure embodied in the 1976 Act.

Respondents' view, by contrast, incentivizes a wider range of rightsholders to register *before* the potential for litigation looms. As noted below, Congress explicitly designed the 1976 Act, with its penalties for non-registration and delay, with the intent "to produce a more effective deposit system than the present [mandatory] one." H.R. Rep. No. 94–1476, at 150. If infringement suits can commence only *after* the Register has examined the work and issued a certificate, then creators have greater incentive to submit their registration as close in time to the moment of fixation as possible—in other words, to create a near-contemporaneous entry in the public record of their ownership.

This is a feature, not a bug. By encouraging copyright holders to preemptively file for registration rather than waiting until an

impending lawsuit, the statute encourages registration by a wider swath of creators—all who might *possibly* want to file suit in the future, rather than only those who will *actually* sue. This most clearly effectuates a holistic, comprehensive public record of ownership.

II. PUBLIC POLICY FAVORS A COMPLETE AND COMPREHENSIVE PUBLIC RECORD OF OWNERSHIP

A. The Registration Record Is Only Valuable To The Extent That It Is Complete

As software, news reporting, and other copyright-protected works have grown more central to the American economy, the importance of a licensee's ability to easily identify owners of these works, and to license these works, has also grown. As early as 1939, Justice Black noted:

> It is of far greater importance to the public today than it was in 1790, 1831, 1870, or 1891, that public record be made of copyright monopolies granted to further the arts and sciences, since these privileges have been extended by statute to include almost every conceivable type of production of the human mind.

Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 54 (1939)) (Black, J., dissenting). That importance

has grown not only due to the increased scope of copyright-protectable works, but also due to their economic impact.

The copyright-dependent segments of the economy are large, and fast-moving. According to one industry study, industries that depend on copyright licensing accounted for over $1.9 trillion of U.S. GDP in 2013—an economic impact orders of magnitude greater than the total GDP at the time of the 1790 Act. STEPHEN E. SIWEK, *Copyright Industries in the U.S. Economy* 2 (International Intellectual Property Alliance 2014); Louis Johnston & Samuel H. Williamson, *What Was the U.S. GDP Then?*, MeasuringWorth (2018), https:// www. measuringworth. com/ datasets/ usgdp/ result. php. The recording industry alone contracts with over 2,500 domestic streaming services in the United States, and licenses over 4 million tracks globally. *See* RECORDING INDUS. ASS'N OF AM., *Labels At Work: The Music Business in the Digital Age* 7 (2018); INT'L FED'N OF THE PHONOGRAPHIC INDUS., *Investing in Music: The Value of Record Companies* (2016).

To comply with the licensing requirements of copyright law, potential users—including businesses, filmmakers, educational and cultural institutions, to name only a few—need robust, reliable, and usable information. That in turn requires the existence of a comprehensive public ledger of protectable works. "The maintenance of a complete public record is vital to a functioning marketplace for the transfer of rights in copyrighted works and, concomitantly, their exploitation in both original and derivative forms."

Arthur J. Levine & Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 UCLA L. REV. 1232, 1253 (1977).

To be useful, the public record must be comprehensive; to be comprehensive, it must be promptly and regularly updated. Because copyright protection inheres at the moment of fixation, the onus for maintaining the record's timeliness falls on copyright holders, who hold all the necessary information to keep the record up-to-date. "It goes without saying that we cannot build a robust and accurate database of copyright title unless copyright owners provide the necessary data." Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L. J. 1415, 1421 (2013). A licensee cannot reasonably trust an out-of-date record any more than a policy advocate can rely on a seven-month-old newspaper.

B. Incentives Aimed Toward Comprehensive Registration Ameliorate the Problem of Orphan Works and Generate Scientifically and Socially Useful Data

When a potential licensee cannot identify the owner of a copyright, they face what is known as an "orphan work" problem. An orphan work is one where "the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner." MARYBETH PETERS, U.S. COPYRIGHT OFFICE, *Report on Orphan Works* 1 (2006). In these scenarios, "the user cannot

identify and/or locate the owner and therefore cannot determine whether, or under what conditions, he or she may make use of the work." MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* 35 (2015).

A potential licensee is faced with a choice: find a substitute work (which may not serve their needs), or use the orphan work, with a risk that "the copyright owner could emerge after the use has commenced and seek substantial remedies, including "substantial infringement damages, injunctions, and attorneys' fees." *Id*. at 38.

Orphan works are a known, and much-debated problem in copyright: They have been the subject of two multi-year Copyright Office studies, which referred to their proliferation as a "major source of gridlock in the digital marketplace." *Id*. at 35. They have been called "the starkest failure of the copyright framework to adapt," *id*. at 28, and also a "by-product of the United States' modern copyright system [that] has been with us since the day the 1976 Act went into effect." PETERS, *supra* at 43.

While the stymieing of one potential licensee is a nuisance, the aggregate impact of these obstacles is substantial. The burden of orphan works is, at present, a "major cause of gridlock in the digital marketplace":

> The consequences of this uncertainty reverberate through all types of uses and users, all types and ages of works, and across all creative sectors. By

> electing to use a work without permission, users run the risk of an infringement suit resulting in litigation costs and possible damages. By foregoing use of these works, a significant part of the world's cultural heritage embodied in copyright-protected works may not be exploited and may therefore fall into a so-called "20th century digital black hole." This outcome is difficult to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public.

Pallante, *Orphan Works and Mass Digitization*, supra at 35.

Not only does spotty registration damage search and licensing efforts by users, but it also deprives researchers and scientists of useful data. The Patent and Trademark Office releases and updates comprehensive datasets on its patent and trademark filings. These have proven to be fertile ground for researchers studying the demographics of market participation and innovation. The Office's Patent Claim, Examination, and Assignment Datasets have provided a wealth of valuable insight. Using these datasets, researchers have learned that patenting rates among women applicants have climbed substantially in the past decades. Cassidy R. Sugimoto, *The Academic Advantage: Gender Disparities in Patenting*, 10 PLoSONE 5 (2015), However, researchers also discovered that the gender gap—with women

comprising only 10% of patent holders—is strongly tied to several structural problems, including higher rejections for traditionally female-sounding names, as well as systematic disparities in rejection rates, limiting language, and appeals outcomes. Kyle Jensen et al., *Gender Differences in Obtaining and Maintaining Patent Rights*, 36 NATURE BIOTECHNOLOGY 307 (2018).

Copyright, despite its centrality to the modern economy, generates no comparable wealth of data. What little information is available is provided largely by corporate players, who have a vested interest in portraying their investments and market conditions in the most favorable possible light. Moreover, complex private ordering of licensing, ownership transfers, and work-for-hire provisions—compounded by a pervasive use, in some sectors, of non-disclosure agreements—makes gleaning a real picture of these markets a Herculean task. *See, e.g.*, Joseph F. Aceto, *Intellectual Property Licensing and Confidentiality Agreements, an Overview*, Am. Mgmt. Ass'n (last visited Oct. 17, 2018), https:// www. amanet. org/ training/ articles/ intellectual- property- licensing- and- confidentiality- agreements- an- overview. aspx (describing confidentiality provisions as "[a]rguably one of the most critical aspects in any agreement" over intellectual property).

III. CONGRESS HAS CONSISTENTLY SOUGHT TO PROMOTE THE COMPLETENESS OF THE PUBLIC RECORD AND DISCOURAGE DELAYED REGISTRATION

Prior to the 1976 Act, the copyright registration system faced a problem: Courts took an increasingly lax stance on the registration requirement, allowing suits over works that had been published years—and, in some cases, decades—before the owner filed for registration. The legal and legislative history of the 1976 Act shows that Congress was abundantly aware of this trend, and sought to correct it. In constructing the 1976 Act, Congress went to great lengths to both address the growing problem of delayed registration, and preserve the benefits that registration provided.

A. Congress Explicitly Sought To Prevent Delayed Registration

Delayed registration was a known problem by 1976. The structure of the 1976 Act indicates that Congress intended to cure the problem by incentivizing creators to register their works as soon as possible to the point of fixation.

In the decades leading up to the 1976 Act, courts had repeatedly given broad leeway to rightsholders who waited to register their work. In many cases, the requirement for timeliness in deposit was rendered practically null; courts held that delays from 14 months, *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, to thirteen years,

Silvers v. Russell, 113 F. Supp. 119 (1953), were all acceptably "timely."

Congress was keenly aware of these cases; the committee report notes that "[t]here have been cases under the present law in which the mandatory deposit provisions have been deliberately and repeatedly ignored, presumably on the assumption that the Library is unlikely to enforce them." H.R. Rep. No. 94-1476, at 152 (1976). In an attempt to correct this frustrating trend, the new law included fines and "increased inducements" for registration and deposit. *Id*. at 150. This included a $2,500 fine—a number that, adjusted for inflation, represents nearly $11,000 in 2018 dollars. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STAT., https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sep. 21, 2018). Congress *explicitly* viewed these provisions as a way "to produce a more effective deposit system than the present [mandatory] one," H.R. Rep. No. 94-1476, at 150—that is, one that would effectuate a greater number of registrations and deposits, with less delay on the part of rightsholders.

B. Congress Deliberately Preserved Registration To Promote A Public Record

Given Congress's awareness of the importance of a comprehensive registration record, the 1976 Act is consistently designed to encourage early registration, even while removing other formalities such as mandatory deposit and printed notice.

Prior to the 1976 Act, copyright was issued—and revoked—by government action. In order to obtain protection, authors had to submit their works to the government for examination and deposit. "The requirement that an author must, as a precondition to the full benefits of copyright, register his claim and deposit his work with a designated public official antedates American copyright law and has been a part of every copyright law enacted in this country." Arthur J. Levine & Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 UCLA L. REV. 1232, 1253 (1977). Under the 1909 Act, a work had to go through a number of formalities to obtain copyright protection, including registration with the Copyright Office; deposit at the Library of Congress; and the inclusion of a conforming notice printed on the work itself. An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, 35 Stat. 1075 (1909).

The 1976 Act sought to weaken the harsh consequence of failure to comply with formalities—invalidation of the copyright[2]—but even so, Congress still maintained the importance of a comprehensive registration record. As one

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[2] These changes were largely made to implement the Berne Convention, which called for nations to remove formalities precedent to copyright. Even so, Congress did not fully implement Berne: The treaty's moral rights schema was not implemented, and the encouragements toward registration are another deviation from the Convention.

Congressional study on copyright registration noted,

> In the absence of a basic copyright registry system, identifying the work, the first owner of the copyright, the date from which the term is computed, and other pertinent information, the recording of transfers would often fail to identify the work covered by the transfer, the term of the copyright, and especially the derivation of the transferee's claim to ownership.

Alan Latman, *Study 19: The Recordation of Copyright Assignments and Licenses*, *in* COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS 111, 124 (1956). In other words, Congress not only saw *ex ante* the potential dangers posed by removing formalities, but—as the legislative record shows—sought explicitly to mitigate them through the structure of the new Act.

Thus, Congress took deliberate steps to *preserve* the registration and deposit requirements by attaching them to a complex web of benefits and penalties. This is a testament to the unique and ultimately irreplaceable role that registration plays in the market for creative works; namely, its value in creating and maintaining a comprehensive public record of ownership rights.

CONCLUSION

For the above reasons, the Court should uphold the decision of the Eleventh Circuit.

Respectfully submitted,

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