

In the
Supreme Court of the United States

UNICOLORS, INC.,

Petitioner,

v.

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

Respondent.

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

**BRIEF OF AMICI CURIAE
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
AND CALIFORNIA SOCIETY OF ENTERTAINMENT
LAWYERS JOINED BY TWELVE CREATOR RIGHTS
ORGANIZATIONS, IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICI CURIAE¹

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. (ASMP) is a 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, and sell their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-six-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.¹

CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS (CSEL) is an organization consisting of California attorneys who seek to protect and defend the rights of creative professional in the entertainment industry. CSEL strives to provide support to screenwriters, authors, and other creative professionals who are at risk of having their rights egregiously stripped away. CSEL is committed to advocating on behalf of creators, whose claims are so often not sufficiently funded, in a “dog eat dog” industry. *Montz v. Pilgrim Films & TV, Inc.*, 649 F.3d 975, 981 (9th Cir. 2011) (citing *Woody Allen, CRIMES AND MISDEMEANORS* (Orion

¹ In accordance with this Court’s Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief by blanket consent.

Pictures 1989)) (“It’s worse than dog eat dog. It’s dog-doesn’t-return-other-dog’s-phone-calls.”).

AMERICAN PHOTOGRAPHIC ARTISTS (APA) is a not-for-profit trade association of professional photographers and copyright owners. APA members have a strong interest in the issues presented by this case because their businesses and livelihoods depend upon the broadly defined subject matter that is protected under the Copyright Act.

ARTISTS RIGHTS SOCIETY (ARS) is the largest U.S. visual rights society and Copyright Management Organization (CMO), licensing the copyrights of more than 80,000 artist members worldwide. Its rolls are comprised of painters, sculptors, illustrators, and architects. While ARS’ membership includes both commercial and fine artists and their heirs, the majority of its members are fine artists who create paintings, drawings, limited edition prints and sculpture for a market consisting initially of collectors. However, all artists retain ownership of the copyrights in their works and receive ongoing income from the right of reproduction. ARS licenses such reproduction on their behalf and monitors publications and other media for unauthorized copying. When unauthorized use is discovered, ARS assists its members in enforcement of their rights. Since registration is a formality affecting copyright enforcement, any improvements that can be made to make registration simpler and less expensive are of vital interest both to ARS and its members.

AMERICAN SOCIETY FOR COLLECTIVE RIGHTS LICENSING (ASCRL) is a 501(c)(6) not-for-profit corporation founded in the United States to collect and distribute collective rights revenue for photography

and illustration to United States authors and rights holders and to foreign national authors and rights holders whose works are published in the United States. ASCRL, represents over 16,000 illustrators and photographers, and is the leading collective rights organization in the United States for this constituency of rights owners. ASCRL is a zealous defender of the primary rights of illustrators and photographers, and ASCRL actively engages in policy and legislative initiatives that advance their interests.

ASSOCIATION OF MEDICAL ILLUSTRATORS (AMI), established in 1945, is an international trade association for biomedical illustrators and animators. Their members are highly specialized visual artists that apply their creativity and scientific expertise to advance life sciences, medicine, and healthcare. The AMI engages in education and advocacy to support all creators of intellectual property to own, control and preserve their rights as guaranteed by national and international copyright laws and conventions.

CENTER FOR ART LAW, established in 2009, is a Brooklyn-based 501(c)(3) nonprofit organization that offers educational resources and programming for the advancement of a vibrant arts and law community. A world-renowned asset to the art law field, the Center is the only independent entity dedicated to writing, gathering, and sharing art law news, information, and legal analysis for the benefit of artists, attorneys, students, scholars, art market professionals and members of the general public. Through programming, its website, its newsletter, and a robust internship program, the Center engages in education and, through its Visual Artists' Legal Clinics, provides assistance to underrepresented parts of the artistic community.

DIGITAL JUSTICE FOUNDATION (DJF) is a non-profit legal organization dedicated to protecting individual rights in digital spaces, with a particular focus on being a voice for underrepresented individual users and consumers. As part of this mission, the DJF advocates for individual rights, including civil liberties, privacy rights, and intellectual property rights, especially where such rights are implicated by the internet and other digital technologies.

DIGITAL MEDIA LICENSING ASSOCIATION, INC. (DMLA) (formerly known as the Picture Archive Council of America, Inc.) is a not-for-profit trade association that represents the interests of entities who license still and motion images to editorial and commercial users. Founded in 1951, DMLA's membership currently includes over 100 image libraries worldwide that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual creators. Members include large general libraries, as well as smaller specialty libraries, all of which support and provide livelihoods to individual visual artists. Over the years, DMLA has developed licensing standards, promoted ethical business practices, and actively advocated for copyright protection on behalf of its members. In addition, DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace.

GRAPHIC ARTISTS GUILD, INC. (GAG) is a 501(c)(6) non-profit trade association which has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for fifty years. GAG educates graphic artists on best practices through webinars, Guild e-news,

resource articles, and meetups. The GRAPHIC ARTISTS GUILD HANDBOOK: PRICING & ETHICAL GUIDELINES has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

NORTH AMERICAN NATURE PHOTOGRAPHERS ASSOCIATION (NANPA) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

PROFESSIONAL PHOTOGRAPHERS OF AMERICA (PPA), the world's largest photographic trade association, represents over 31,000 photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years and have shared their creative works with the public

secure in the knowledge that their rights in those works would be protected.

TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS (TALA) is a nonprofit organization which provides Texas artists and arts organizations with pro-bono legal and accounting assistance and educational programming. Formed in 1979, TALA believes that individuals, regardless of income, should have access to business knowledge and advice to further a career in the creative industries.



SUMMARY OF ARGUMENT

The creative fabric of society is woven by the photographers, illustrators, graphic designers, 2-D and 3-D artists, and so many others whose livelihoods depend on the protections afforded them by the Constitution and the Copyright Act. Slightly more than a decade ago, Congress passed the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (“Pro IP Act”), to enhance the ability of copyright creators to enforce their copyright and to codify the doctrine of fraud on the United States Copyright Office (“USCO”) in the registration process. Pub. L. No. 110-403, 122 Stat. 4256 (2008). Title I of the Act amends federal copyright law to “. . . provide a safe harbor for copyright registrations that contain inaccurate information” unless that information was provided “with knowledge that it was inaccurate”. *Id.* § 101(b)(1). As result, 17 U.S.C. § 411(b) was amended to reflect this clarification.

The question presented in this matter, “whether t[he] ‘knowledge’ element precludes a challenge to a registration where the inaccuracy resulted from the applicant’s good-faith misunderstanding of a principle of copyright law” is of critical importance to the hundreds of thousands of individual and small creators who rely, in large measure, on copyright law to provide protection for their livelihoods. Pet.Br.i.²

For these artists and authors, navigating the complex legal process for registration of their copyrights is daunting. Photographers, illustrators, designers, 2-D and 3-D artists, and all other manner of individual copyright owners occasionally will, despite their best efforts, submit a good-faith registration with an error unknown to them, often based on a point of law which itself is subject to continually shifting jurisprudence and academic opinion.

Copyright registration, unlike other forms of intellectual property recordation, was designed to be accessible to all creators, without assistance from an attorney. The current “Electronic Copyright Office” at the website of the USCO allows individuals to follow an online, multi-step registration process, tested and designed to be as easy to use as possible. But while the process may seem straightforward, the questions asked, and the attendant answers submitted, require a detailed understanding of terms of art, legal precedent, and application of the law to the facts of the applicants work.

No question more aptly illustrates this untenable balance than that of “publication” status. As organi-

² References to the Petitioner’s Brief are designated by “Pet.Br.”.

zations who work with small creators, one of the most asked questions of *amici* by its members is “has my work been published?”. The answer to this five-word query can divide and vex experienced copyright practitioners as well as the most qualified copyright scholars. To strip an author of her protection based on a good-faith error regarding publication status, especially when that error confers no additional benefit to the applicant, strikes at the heart of the purpose of copyright law.

This is not simply supported by common-sense and principles of equity. The Copyright Act of 1976 and its subsequent amendments such as the Pro IP Act evince clear congressional intent to reduce and remove many of the burdensome formalities found in previous copyright statutes. Time and time again, we find Congress adopting a more expansive approach to providing copyright protection to all authors.

Amici represent and work with tens of thousands of small creators across the country. This group of authors face unique and specific burdens in their careers and in adhering to (and working with) the copyright registration process. Many of these creators feel intimidated, concerned with making mistakes, and feeling that registration of their works is beyond their grasp. To then introduce draconian penalties against them for good-faith errors, resulting, as in this case, with their infringers receiving a windfall, only cripples the intent and the purpose of our copyright system.

These individual authors and artists are the engine that power creative output of the nation. It is critical that both the text and the spirit of the law

are honored by reversing the opinion rendered by the Ninth Circuit below.



ARGUMENT

I. COPYRIGHT REGISTRATION IS DESIGNED TO BE ACCOMPLISHED BY CREATORS WITHOUT LEGAL ASSISTANCE, YET THE PROCESS IS RIFE WITH THE POSSIBILITY OF INADVERTENT ERROR.

Under U.S. law, copyright protection attaches to an original work of authorship at the time of its creation when it is fixed in a tangible medium, such as when a photographer presses the shutter and the image is now recorded on the memory card or light-sensitive film. 17 U.S.C. § 102(a). While the work is now protected from others invading the set of exclusive rights guaranteed to the copyright owner, judicial remedies remain subject to an additional, subsequent action – registration. As this Court recently held, a copyright owner must “apply for registration and receive the Copyright Office’s decision on her application before instituting suit.” *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019). Therefore, to judicially enforce the protections granted at creation, registration becomes a critical secondary step for copyright owners.

The U.S. Copyright Office (“USCO”) has set out a path and method for registration of copyright, and, in recent years, has encouraged or required applications to be submitted electronically through the USCO’s website.³ This registration process has been designed to be as “user-friendly” as possible and is under regular

³ See Generally, U.S. Copyright Office, *Register Your Work: Registration Portal*, <https://copyright.gov/registration/>.

revision to ensure that the process is accessible to the public. Inherent in that mission is the idea that copyright registration is something that can be accomplished by the registrant themselves, without the need for an attorney and its attendant costs. Unlike other forms of registration of intellectual property, the USCO is focused on ensuring that the process is straightforward even for those without legal expertise.

Despite this, however, the copyright registrant is required to answer questions about the specific work being registered – questions that in some cases require a legal conclusion. In the instant case, Unicolors designer Hanna Lim created an artwork for a fabric design, and subsequently Unicolors included that artwork as part of a copyright registration. That registration was approved and duly registered by the USCO. The artwork was then allegedly infringed by H&M. It was only after a jury trial, a verdict that found H&M's used a "willful infringement" of the original work by Unicolors, and an award of a substantial monetary judgment to Unicolors, that H&M raised the prospect of an invalid copyright registration. Pet.Br.4.

Why did H&M allege an invalid registration? Because, they argue, Unicolors included other unpublished works on the same registration application that resulted in "inaccurate information" being provided. Pet.Br.13. Unicolors averred that it believed at every point in the registration process that the application and its information was both true and correct. Pet.Br.15.

Despite this, the Ninth Circuit reversed the jury verdict and remanded for further evaluation as to

the validity of the registration. It is not difficult to see the dangers posed by this holding. The actions of H&M, which a jury found to be not only infringement but “willful” infringement, were subsumed by an arguably inaccurate interpretation of adherence to a technicality – one that did not even affect the work at issue. In every sense of the word, the error alleged was not “material”. The error did not concern the work that was infringed.

Imagine the chill that the individual artist feels when reading this set of facts. Imagine an illustrator who creates a work based on years of creative experience and innate talent, which she then presents to her client, who could not be more impressed. In keeping with her faith in copyright, she registers the work, secure in the steps she has taken to protect her art, her craft, and her business. Later she finds the work stolen, copied line for line, and the infringer is unrepentant. A trial commences wherein a jury agrees with our illustrator – the work was infringed. They even agree that the infringer was so blatant, so egregious, that the infringement was “willful”. Only then is she told that by checking the wrong box on the application all those years ago, she is foreclosed from any remedy. Imagine the chill.

A. The Questions Posed in the Copyright Registration Application Require Complex Legal Analysis and Legal Conclusions That Vex Even Experienced Copyright Practitioners.

A cursory examination of the various applications for registration of copyright reveals a series of decisions

that require much of the applicant.⁴ From the very first determination of which application to choose, authors must ensure they correctly delineate between, for example, when a piece of audio they have created is a “sound recording” (requiring Form SR) or is part of an “audiovisual work” (requiring Form PA). Visual artists would use Form VA, unless they wish to register a group of up to ten unpublished works, when they would then use the new application for a Group of Unpublished Works (“GRUW”). They would use GRUW, that is, unless they are photographers, who, if they wish to register a group of works, would be able to register up to 750 images, published or unpublished, using the individual applications for a Group of Published Photographs (“GRPPH”) or a Group of Unpublished Photographs (“GRUPH”) respectively. Those choices are, quite literally, only the very first step.

Creators must make other, equally critical, legal conclusions in the following sections of the application. For example, authors must correctly identify if the work is a “work made for hire” as that term is defined by statute. They must be savvy enough in legal nuance to determine if their work is considered a “derivative work” or possibly a “changed version” or even a “compilation”. Each of these terms of art have meanings different than their colloquial counterparts. The creator is now thrust into needing to know both the factual background of the work they have made and the legal definitions of the phrases they encounter. Then, they must determine how the facts intersect with the

⁴ See U.S. Copyright Office, *Register Your Work: Registration Portal*, <https://copyright.gov/registration/>.

legal terms and come to a conclusion on which box to check.

Yet no single question may prove more complex to individual creators than that of “publication” and when a work is considered published. Section 101 of the Copyright Act states:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101. (Emphasis Added).

This definition proves problematic not only on its face, but also in its application in a digital world. *See* Deborah R. Gerhardt, *Copyright Publication on the Internet*, 60 IDEA 1, 2 (2020). As outlined by the Coalition of Visual Artists (of which multiple undersigned *amici* are members) in their *Comments in Response to the U.S. Copyright Office Notice of Inquiry Regarding Online Publication*, visual artists reading the definition above are faced with multiple, immediate questions:

- What is a “distribution”? Is that the same as simply sending work? Does “distribution” include posting online?

- What is a “distribution”? Is that the same as simply sending work? Does “distribution” include posting online?
- What are “copies”? Copies are further defined in § 101 as “material objects”. Is a digital photo or illustration a “material object”? Or must a visual artist make a print of the digital file?
- Why is “copies” plural? If a visual artist sells a single, original work like an original painting or illustration, is that a publication?
- What is a “sale” What is a “lease”? If a visual artist licenses an image but doesn’t “sell” it is that a publication?
- What is an “offering to distribute”? When does one make an “offer”?
- What is a “group of persons”? Is this the same thing as “public” or is it supposed to have a different meaning?

Coalition of Visual Artists, *Comments in Response to U.S. Copyright Office NOI Re Online Publication*, 84 Fed. Reg. 66328 (Dec. 4, 2019).

This partial list serves to illustrate just the tip of the confounding “publication” iceberg. These questions, and the many others that arise in the registration process, require answers that depend on an in-depth understanding of copyright law; law which is unsettled and nebulous at best.

The USCO recently acknowledged continued confusion regarding the distinction between published and unpublished works. 84 Fed. Reg. at 66328. Citing to

the comments of the Copyright Alliance in response to an Office *Notice of Inquiry Regarding Registration Modernization*, the Alliance described the question of publication as “so complex and divergent from an intuitive and colloquial understanding of the terms that it serves as a barrier to registration.” *Id.* This barrier is decidedly *not* what was envisioned by the creation of the Copyright Act. The USCO itself has acknowledged that, “[v]arious individuals and groups have repeatedly expressed frustration to the Office regarding difficulty in determining whether a work has been published when completing copyright application forms.” *Id.*

Copyright legal scholar Melville Nimmer notes that there is still the lack of a clear definition of what publication means and how courts should interpret it. Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 187 (1956). Nimmer states publication usually occurs when “by consent of the copyright owner the tangible copies are sold, leased, loaned, given away, or otherwise made available to the general public.” *Id.* He further suggests there is ambiguity within the meaning of publication that makes it extremely difficult to determine how “comprehensive and unrestricted” the disposition must be “in order to constitute public disposition.” *Id.* He suggests that it is difficult, for example, to determine whether a television network distributing prints of its films to different stations that generally televise all network programs constitutes distribution to the general public. *Id.*

Although it is without question that there are competing “statutory and case law definitions of [the term] publication,” the Ninth Circuit metes out extreme

punishment on the copyright creator when a court sides with an alleged infringer regarding whether a work was “published.” Thomas F. Cotter, *Toward A Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1784 (2008). If the best legal minds cannot come to a consensus on if a certain work would be “published”, how can the courts, the USCO, or any other body expect a photographer, an artist, a graphic designer, or any one of the creative individuals who are trying to complete this registration form to make that determination? More importantly, given this background, if they happen to make the wrong choice, it is simply inequitable to then run them out of court and deprive them of their rights for a good-faith error.

B. Under the Ninth Circuit’s Reasoning, the Penalty for Making a Good-Faith Error in Your Legal Conclusion Can Result in Invalidation of Your Copyright and Its Attendant Protections, a Result That Awards Infringers and Punishes Those Who Were Infringed.

Crime should not pay. In this case, H&M was found to be a willful infringer by a jury. Pet.Br.13. Only after that verdict did H&M seek any avenue they could find to obscure what the jury determined after hearing all the evidence: the work that was protected by copyright was infringed. To the millions of other creators who rely on the protections of U.S. copyright law, the spectre of this happening to them when they seek to enforce the protections granted to their works is in itself a barrier to registration. *Amici* regularly speak to creators who cite the perceived futility of the process.

The chilling effect is especially pronounced when examining the monetary barriers that impede an individual creator when she seeks to enforce her rights. According to the *2019 Report of the Economic Survey* published by the American Intellectual Property Law Association, the average cost of copyright litigation cases with damages of less than \$1,000,000 is \$397,000.⁵ Contrast that with \$41,280, the median pay in 2020 of a professional photographer as reported by the Bureau of Labor Statistics.⁶ When the possibilities of checking the wrong box on a form can result in owing almost ten years of your salary to cover your legal costs in a single infringement matter, one can begin to see why so many are intimidated by the registration process.

These are not simply theoretical concerns. Recent cases have shown the practical result of this type of inadvertent error. In *Gold Value International Textile Inc. v. Sanctuary Clothing, LLC*, the Ninth Circuit upheld a District Court opinion that invalidated a copyright registration based on alleged “inaccurate information” regarding publication status. *Gold Value Int’l Textile v. Sanctuary Clothing*, 925 F. 3d 1140 (9th Cir. 2019), cert. denied. In this case, the court sided with the infringer that a work was “published” and rejected the copyright creator’s good faith arguments that the work was “unpublished” which resulted in the court: (1) invalidating the copyright registration

⁵ American Intellectual Property Law Association, *2019 Report of the Economic Survey*, at I-208 (2019).

⁶ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, Photographers, at <https://www.bls.gov/ooh/media-and-communication/photographers.htm>

for the work on the ground the work was “published”, not “unpublished”; (2) dismissing the creator’s infringement action based upon an error in the copyright registration regarding “unpublished”; and, (3) awarding over \$120,000.00 to the infringer based upon a copyright registration technicality. *Gold Value*, 925 F.3d at 1148.

Citing *Gold Value*, the USCO recently noted the dire “consequences an applicant may face if it incorrectly indicates on an application for a copyright registration that the work at issue is unpublished.” 84 Fed. Reg. at 66330. Thus, the end result is “gotcha” allegations by infringers who argue published works were unpublished (*Unicolors*) or unpublished works were published (*Gold Value*).

Importantly, publication can happen only once. The artist is put in an impossible position when they are asked not only to draw a legal conclusion, but also predict the future by knowing at the time of registration what the future publication status of the work will be if a court happens to disagree with the creator’s determination.

In this case, Unicolors testified that they initially published these 31 works to their showroom before later reserving a selection for certain clients. Pet.Br.14. Because publication occurs at a singular moment in time, when the works were released to the showroom as a group the publication status was established for the purposes of registration. Yet those designs could, and did, find life separate from their initial grouping. The Ninth Circuit punished Unicolors by creating and then imposing a “bundled / unbundled” framework on the works at issue. The end result was a requirement by the court that works that are joined together at

one point in time must remain so forever, something neither supported by law nor opinion. Pet.Br.17. As a result, the reasoned verdict of a jury was discarded not because of error by the lower court during trial, but because of the error of not being able to prognosticate at the time of registration what the Ninth Circuit would proclaim the facts to be years later.

This is not a speculative circumstance for the small creator. It is a commonplace scenario to find a photographer or artist grouping a set of works together for sale as a collection, only to then see them split the works later in the lifecycle of the pieces and sell them individually. The creative output generated by an artist should not be subject to more or less protection from infringement by the occurrence of some unknown future event.

The devastating consequences of *Unicolors* and *Gold Value* are, without question, contrary to the aims of copyright law. The copyright owner, who brought suit in accordance with the law to stop the act of infringement, was rebuffed in their search for justice by the Ninth Circuit, and in *Gold Value* even ordered to pay the attorney's fees of the infringer. What was the egregious action warranting these punitive measures? Making a good-faith error regarding publication status, a topic we already know to be actively debated in the most advanced legal scholarship and practice. To indicate that creators are, and should be, terrified by this result is not an overstatement.

This Court has recognized that the “well settled” objective of copyright law is to “ultimately serve[] the purpose of enriching the general public through access to creative works.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). As this Court held in *Kirtsaeng v. John*

Wiley & Sons, Inc., “The [copyright] statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.” 136 S. Ct. 1979, 1986 (2016).

No balance can be achieved when a creator, making every effort to comply with the rules as set forth, find themselves coming to a conclusion different than that of a federal judge trained and expert at legal analysis. If the end result is an invalidated registration and your case being dismissed, that is a concerning prospect. If you are then ordered to pay the hundreds of thousands of dollars of the infringer’s attorney’s fees in the course of attempting to protect your rights, that is simply unconscionable. Crime should not pay.

C. Small and Individual Creators Are Disproportionally Reliant on Statutory Damage Awards That Are Most Easily Lost When Error Occurs.

The individual creator already faces significant hurdles in protecting their works in world where infringement is quickly becoming the norm, not the exception. Given the shockingly high cost of federal copyright litigation, Congress established a safeguard to ensure that even small copyright owners could have their day in court. Section 504 of the Copyright Act offers a lifeline to creators by allowing the copyright owner to forgo seeking the actual damages of the infringement, but instead to elect a set of statutory damages between \$750 and \$30,000, with an additional upper bound of \$150,000 per work infringed if the violation was found to be “willful”. 17 U.S.C. § 504(c)(1)-(2). This is only an option, however, if the

work was registered either prior to the infringement, or registered “within three months after the first publication of the work.” 17 U.S.C. § 412(2).

Equally important are the provisions of § 505 which allow full costs, including attorney’s fees, to be awarded to the prevailing party at the court’s discretion. 17 U.S.C. § 505. Yet this too is predicated on compliance with § 412 and its requirement of registration prior to infringement or within three months of first publication. If you fail to meet that bar, you are neither eligible for statutory damages nor attorney’s fees.

Many photographers, for example, first find their work infringed by seeing it appear on a website not controlled by them. This activity is infringing on the exclusive protected rights to reproduce, distribute, and display the images created. This infringement, though, is often of minimal “actual” damages. Without the possibility of statutory damages or an award of costs and attorney’s fees, nearly every small infringement would go unacknowledged and unpunished based on the straightforward economics of litigation. Section 504 and 505 allow small creators to have a voice and a level playing field. Yet if the creator were to make a good-faith error regarding the publication status of her work, and, like here, the court interpreted the circumstances differently than the author, she may find herself summarily excluded from the benefits of the law designed to prevent the exact type of theft that occurred. Good-faith errors by applicants should never result in the deprivation of rights based in the Constitution and grounded in statute.

II. SECTION 411(B) IS CLEAR: TO CONSTITUTE FRAUD ON THE COPYRIGHT OFFICE, INACCURATE INFORMATION MUST BE *KNOWN* TO BE INACCURATE.

The standard that § 411(b)(1)(A) applies is one of “knowledge” of the inaccuracy. Simply put, a good-faith error can never be considered fraud on the copyright office as there was never any knowledge of the error to begin with. There is nothing in the legislative history of the Pro IP Act that suggests that § 411(b) was intended to *increase* the ability of a willful infringer to argue a copyright registration should be invalidated due to an “inaccuracy.”

When examining the question of error, many circuits have required materiality, intent to defraud, or reliance by the infringer on the error to invalidate a copyright registration. *See, e.g., Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007) (“[M]ost errors or mistakes in a copyright registration application will be inadvertent or immaterial, and thus will not invalidate the application.”); *Fonar Corp. v. Domenick*, 105 F.3d 99, 106 (2d Cir. 1997) (“Absent a showing that [plaintiff] defrauded or made a deliberate misrepresentation to the Copyright Office, we think that a presumption of regularity and appropriateness in filing is ordinarily subsumed in the presumption of validity that attaches to a certificate of copyright registration.”); *Gallup, Inc. v. Kenexa Corp.*, 149 F. App’x 94, 96 (3d Cir. 2005) (“[I]t is not clear that even knowing misrepresentations can void a copyright registration where the Register has not relied on them.”); *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 357 (4th Cir. 2001) (“Accidental but harmless mistakes in a copyright application do not

subsequently preclude an infringement action against an alleged copier.”).

Still other cases have continued in support of this seemingly well-settled assertion of law: *One Treasure Ltd., Inc. v. Richardson*, 202 F. App'x 658, 660 (5th Cir. 2006) (“Courts have repeatedly excused a wide range of errors, like those complained of by the defendant including misidentification of copyright claimant, misclassification of a work, misstatement of work’s author, misstatement of a work’s creation and publication dates, and misstatement that a work is made for hire.”); *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706, 708 (6th Cir. 1956) (“It is our conclusion, nevertheless, that an innocent misstatement, or a clerical error, in the affidavit and certificate of registration, unaccompanied by fraud or intent to extend the statutory period of copyright protection, does not invalidate the copyright, nor is it thereby rendered incapable of supporting an infringement action.”); *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003) (“[C]ase law is overwhelming that inadvertent mistakes on registration certificates do not . . . bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement.”) (citations omitted); *Roberts v. Gordy*, 877 F.3d 1024, 1029 (11th Cir. 2017) (“intentional or purposeful concealment of relevant information is required to invalidate a copyright registration.”); and *Bouve v. Twentieth Century-Fox Film Corp.*, 122 F.2d 51, 55 (D.C. Cir. 1941) (“nor shall any error in classification invalidate or impair the copyright protection secured under this title”).

Collectively these cases, along with the express text of the Pro IP Act and § 411(b) have set the framework for evaluating error made on a copyright registration application.

A. A “Knowing Inaccuracy” in a Registration Should Only Be Penalized Based on a Series of Affirmative Choices on the Part of the Copyright Owner.

In this case, the alleged “inaccurate information” on the application was the categorization of the work as a published “collection of works”. This determination was based on the knowledge available to Unicors at the time of registration based on the then-current Copyright Office *Compendium II*. Pet.Br.15. The determination that this was error worthy of remand was made years later by the Ninth Circuit, citing to a revised version of the Copyright Office *Compendium (Compendium III)* that was not in existence when the registration was completed by Unicors. Pet.Br.17.

To hold a registrant responsible for law and regulation not even in existence at the time of registration is obviously unjust. Yet, all small creators would benefit if this Court were to clarify what an “knowing inaccuracy” on a registration application consisted of. *Amici* contend that a finding of a “knowing inaccuracy” should have three components:

- (1) The registrant must have knowledge of the underlying facts; AND,
- (2) The registrant must have knowledge of the relevant law; AND,

- (3) The registrant must have knowledge that he is misapplying the law at the time of registration.

This three-part evaluation would give honest import to the “knowing inaccuracy” standard. If a registrant were to know the facts, know the law, and know they were misapplying the law, then that is exactly the definition of “fraud on the copyright office” and should be handled accordingly. That is a knowing inaccuracy.

III. FOR INDIVIDUAL AND SMALL CREATORS, THE PROTECTIONS GRANTED BY COPYRIGHT LAW ARE VITAL TO ENSURING THEIR CREATIVE CONTRIBUTIONS TO SOCIETY.

When copyright owners are denied registration based on circumstances where there is “no indicia of fraud or material error as to the work at issue,” it creates a landscape in which those who would infringe become the beneficiaries of unwarranted windfall. This irreparably harms creators.

The creative community, including designers, photographers, painters, writers, and many more groups, act as an economic engine for the U.S. economy. In 2018, the International Intellectual Property Alliance studied the impact of “core copyright industries”—*i.e.*, businesses whose “primary purpose is to create, produce, distribute, or exhibit copyright materials”—on the economy, and determined that they contributed more than \$1.3 trillion to the GDP

of the United States.⁷ Such businesses are the engine of innovation in the United States, and they rely on the Copyright Act to protect their creations.

As part of the genesis of the Pro IP Act, Congress expressly recognized that copyright creators have a tremendous positive economic impact on our nation and should be supported in creating new works and in prosecuting copyright infringement. As Congresswoman Sheila Jackson Lee said during the legislative session, “[t]he knowledge and innovation of American citizens contributes significantly to the economic strength of our nation. Intellectual property law provides the principal incentives that are calculated to lead to the creation and production of new works.” 110 Cong. Rec. H3078 (daily ed. May 6, 2008) (statement of Rep. Lee).

Congressman Lamar Smith further stated:

Over the past 25 years, perhaps no group of industries has been more responsible for the sustained growth in our economy than those who rely on strong patent, trademark, and copyright protections. Today, our technology, entertainment, and productivity-based enterprises stand as pillars of our economic and export strength. They employ 18 million Americans and account for 40 percent of our economic growth.

110 Cong. Rec. H10238 (daily ed. Sept. 27, 2008) (statement of Rep. Smith).

⁷ Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* p.3 (2018), available at <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf>.

It is amid this background that creators and copyright owners now find their works to be even further at risk and devalued by the holdings of this and other cases. Each hurdle, each barrier, erected between creators and the limited protections of their works offered by copyright serve to reduce the creative output of the nation and undercut the historic purpose of copyright.

The experience of medical illustrator Mica Duran provides a window into the real-world implications of rulings like that in *Unicolors*. Ms. Duran is a professional commercial illustrator who has, over the past 20 years registered hundreds of works. Her clients are large multi-national corporations, all of whom have legal departments. As she says, “Every decision to enforce my rights is weighed against the possibility of being held responsible for attorney fees, which would bankrupt my family.” It is an untenable position faced by graphic designers and illustrators each day.

Photographers face a related set of challenges. The rise of social media sites like Instagram and Facebook have connected the world in ways unimaginable just a few years ago. Yet these sites also are designed to facilitate “sharing” of media, often photography. When a business uses an image in its advertising on social media without permission, it is no longer “sharing”, it is straightforward infringement. By its nature, the digital image is tailor-made to propagate through the internet at lightning speed. Photographers, like many artists, therefore, face a critical decision each day: do I put my work out into the world where potential client can view and appreciate it while risking theft and infringement? Or do I hold

my creative output close, depriving society from its benefits?

Frankly, for the working creative professional, it is often a decision in name only: in 2020, the photo-based social media site Instagram marked 1 billion monthly users.⁸ Yet that pales in comparison with Instagram’s corporate owner, Facebook, who in 2019 touted 2.89 billion monthly active users.⁹ These users upload over 300 million photographs every day.¹⁰ To avoid posting your work to social media over the very real threat of infringement is not a business proposition that makes sense when doing so would eschew 20% of the world’s population.

Artists, writers, musicians, choreographers, and myriad other creators wake each morning and face the same dilemmas of photographers, graphic designers, and illustrators. For far too many of these authors, copyright feels like a protection they are not “important” enough to receive. Yet the Copyright Act is not designed to protect only the largest producers, it is also designed to protect the smallest. Decisions such as the one in *Unicolors* serve to erode the core protections that allow society to benefit from creation.

⁸ eMarketer, *Global Instagram Users 2020*, <https://www.emarketer.com/content/global-instagram-users-2020>

⁹ Statista, *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2021*, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

¹⁰ Dustin Stout, *Social Media Statistics 2021: Top Networks By the Numbers*, <https://dustinstout.com/social-media-statistics/>.

Unfortunately, this erosion is often silent; it is the story unwritten, the photograph not captured, the canvas bereft of paint. What we lose is greater than we can imagine. It is the potential of creation blunted and a world left poorer without any of us being able to quantify exactly why. If only we could allow creators to create, secure in the knowledge that their best efforts matter and their good-faith is enough. They deserve that from each of us and from this Court.



CONCLUSION

For the reasons set forth above, *amici* join the Petitioner in respectfully requesting that the Court reverse the Ninth Circuit's opinion.

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