

No. 20-915

IN THE
Supreme Court of the United States

UNICOLORS, INC.,

Petitioner,

v.

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

Respondent.

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

**Brief of the Copyright Alliance as *Amicus Curiae* in
Support of Petitioner**

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INTEREST OF *AMICUS CURIAE*¹

The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators. It is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization. The Copyright Alliance represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations across the entire spectrum of creative industries, including graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers, as well as the small and large businesses that support them.

The Copyright Alliance's members depend on copyright law to protect their works against infringement and to sustain their ability to continue creating expressive works for the benefit of the public. Members thus depend on effective, efficient procedures for registering and enforcing their copyrights. Most members register their own works, and many do so without the assistance of counsel. Members also depend on the benefits that registration confers, including in particular the right to proceed to federal court to defend and enforce their copyrights and the ability to seek meaningful remedies for infringement such as statutory damages and attorneys' fees.

¹ Counsel for all parties have filed blanket consents to the filing of *amicus* briefs. In accordance with Rule 37.6, *amicus* confirms that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

In the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (PRO IP Act or Act), Congress codified decades of case law holding that unknowing errors in copyright registrations do not invalidate those registrations. See 17 U.S.C. 411(b)(1). That rule properly acknowledges the importance of preventing copyright registrants from knowingly misleading the Copyright Office, while ensuring that copyright registrants who make innocent mistakes do not effectively lose their ability to enforce their copyrights against infringers in federal court. The Copyright Alliance’s members, who are both plaintiffs and defendants in infringement litigation, have an interest in ensuring that the Act is interpreted so as to further Congress’s intent and to ensure that the registration process will remain efficient, effective, and fair for all interested parties.

SUMMARY OF ARGUMENT

The question presented in this case is what it means for a copyright registrant to “include” inaccurate information on a copyright registration with “knowledge that” the information is inaccurate. 17 U.S.C. 411(b)(1)(A). The text of that provision and the context in which it operates make clear that a copyright registration may be invalidated on the basis of an error only if a registrant has actual knowledge of that error when submitting the registration. Constructive knowledge—the standard applied by the Ninth Circuit in the decision below—does not suffice.

The purpose and contours of copyright registration help to explain the importance of an actual knowledge standard. Congress intended for copyright registration to be a voluntary, easily accessible system. Con-

gress did not design the registration system to scrutinize the validity of a claimed copyright, as is done in the system for issuing patents, but instead to create a centralized database of works claimed to be copyrighted. Many thousands of creators use the registration system each year, and many of them register their works without the assistance of counsel.

Although accessibility is a critical facet of the registration process, in practice registration can pose challenges and make unknowing errors inevitable. Information that the Copyright Act requires to be included in registration, such as the identification of the author or the date of publication, are seemingly simple items that in many cases involve complex legal questions, the answers to which are not always intuitive. On top of that, the Copyright Office, which is charged with administering the registration process, has its own rules and practices that add still additional complexity and thereby increase the possibility of unknowing errors on applications for registration. Given the complexity inherent in the process and the consequences that flow from invalidating a registration, a rule that would allow registrations to be invalidated on a standard of constructive knowledge of an inaccuracy would undermine the interests and rights Congress intended the system to protect.

Invalidating a copyright registration on the basis of constructive knowledge also risks providing a windfall to a culpable defendant while destroying the ability of an innocent copyright holder to seek redress for clear and even willful infringement. The argument that a copyright registration is invalid because of an error is almost always a purely technical defense that does not

suggest that a defendant is innocent of copyright infringement. But invalidating a registration on the basis of an error made without actual knowledge can substantially delay copyright litigation in a way that may be prohibitively expensive for an individual copyright owner; cut off vital remedies such as statutory damages and attorneys' fees on which copyright owners rely; and even result in dismissal, with no ability for the copyright owner thereafter to refile a timely suit. The draconian consequences of such invalidation underscore why Congress would permit those consequences only when doing so truly deters abuse of the copyright registration system—*i.e.*, when a registrant has actual knowledge of an error.

Against that backdrop, it is clear that Section 411(b)(1)(A) commands an actual knowledge standard and does not contemplate that constructive knowledge could suffice. That conclusion is bolstered by examination of decades of precedent that preceded the PRO IP Act and that universally applied at least an actual knowledge standard to determine whether an error in a copyright registration should invalidate that registration. Nothing in the PRO IP Act suggests an intent by Congress to *lower* that preexisting knowledge standard, thus allowing even willful infringers to use Section 411(b) as a tool to delay and defeat meritorious copyright suits.

ARGUMENT

I. Congress Intended The Copyright Registration Process To Be Streamlined And Accessible

The relevant provisions of the PRO IP Act, 17 U.S.C. 411, are part of a comprehensive statutory

scheme that governs and incentivizes copyright registrations and provides copyright owners with certain rights when they enforce their copyrights in federal court. That statutory context makes clear that a standard that allows unknowing errors to destroy the validity of copyright registrations would undermine the operation and purpose of the copyright registration system.

1. a. The copyright registration process is completely different from and serves a fundamentally different purpose than the patent application process. Applying for a patent is mandatory for any party that seeks to possess patent rights in an invention. See, e.g., *GAF Bldg. Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed. Cir. 1996) (“[A] patent does not exist until it is granted”). The patent process is complex and rigorous because the United States Patent and Trademark Office must scrutinize the patent application in great detail to determine whether the applicant has satisfied the various prerequisites for obtaining patent protection. See 35 U.S.C. 111-123.

Copyright registration, in contrast, is voluntary. The process is not designed to determine the validity of the underlying intellectual-property right. Indeed, in the copyright system, unlike the patent system, a valid intellectual-property right does not require *any* registration, application, or other official approval. See 17 U.S.C. 102(a). Thus, “[a]n author gains ‘exclusive rights’ in her work,” *i.e.*, a valid copyright, “immediately upon the work’s creation,” even if she has not taken any steps to register her copyright. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (quoting 17 U.S.C. 106); see U.S. Cop-

yright Office, *Copyright Basics* 4 (2021) (*Copyright Basics*) (“Copyright exists automatically in an original work of authorship once it is fixed in a tangible medium”), <https://www.copyright.gov/circs/circ01.pdf>.

Not surprisingly, then, when a copyright owner registers a copyright, her “claim to copyright is not examined for basic validity before a [registration] certificate is issued.” 3 *Nimmer on Copyright* § 12.11 (2021) (quoting H.R. Rep. No. 94-1476, at 157 (1976)). The Copyright Office does engage in a brief review of whether the subject matter of the copyright is copyrightable, and for that reason registration can provide prima facie evidence of a valid copyright in subsequent litigation under certain circumstances. See *Cosm. Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 n.13 (9th Cir. 2010), *abrogated on other grounds by Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); 17 U.S.C. 410(c) (if registration occurs within five years of publication, the registration “constitute[s] prima facie evidence of the validity of the copyright,” although the “evidentiary weight” of such presumption remains subject to the court’s discretion). But beyond that presumption of validity, registration does not establish that a copyright is valid, and it is not intended to do so. See *Cosm. Ideas*, 606 F.3d at 621 n.13.

Instead, in general, the purpose of copyright registration is to create a central database of registered works, as well as a collection of deposit copies of registered works in the Library of Congress. The database of registered works assists authors, copyright owners, members of the general public, and even potential infringers by providing a comprehensive listing of works as to which owners have claimed copyright protection.

See *Copyright Basics* 5; see also, *e.g.*, *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 700 (9th Cir. 2008) (incentives for registration encourage creators to register their works and “encourage[] potential infringers to check the Copyright Office’s database”); *Johnson v. Jones*, 149 F.3d 494, 505 (6th Cir. 1998).

Although registration is not a prerequisite for copyright protection, Congress provided important statutory incentives—in addition to the presumption of validity discussed above, see 17 U.S.C. 410(c)—for copyright claimants to register their works. First, although an infringer may be held liable for infringement occurring prior to registration, a copyright owner must register the work with the Copyright Office before filing an infringement action in court. See 17 U.S.C. 411(a). The requirement is not jurisdictional, but it may be enforced by defendants. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-158 (2010). Second, in order to seek statutory damages or recover attorneys’ fees under the Copyright Act as a remedy for infringement, the copyright owner must (subject to certain exceptions) register her work before the infringement commences or within three months of the first publication of the work. See 17 U.S.C. 412(2).

Other benefits flow to copyright holders by virtue of including their works in the Copyright Office’s centralized database. For instance, inclusion in that database can provide notice to individuals who might wish to license the work, thus providing potential income to creators. See, *e.g.*, Dotan Oliar *et al.*, *Copyright Registrations: Who, What, When, Where, and Why*, 92 Tex. L. Rev. 2211, 2216-2219 (2014).

b. As a result of the accessibility and streamlined nature of the registration process (particularly as compared to the patent system), the process is not understood to require the routine use of legal counsel. See, e.g., UMass Copyright Librarian/Attorney's Office, *Copyright News & Opinion* ("Registration is relatively easy, and inexpensive: You can do it at the Copyright Office, for about \$35, with an online form. You don't have to have a lawyer do it, and you probably don't need to hire a service."), <https://blogs.umass.edu/lquilter/copyright/should-i-register-my-copyright/>; Christopher Buccafusco *et al.*, *Intelligent Design*, 68 Duke L.J. 75, 96-97 (2018) ("If they do want the additional benefits of copyright registration, creators can pay \$40 and fill out a very simple form online, no lawyers or bankers required."); cf. World Intell. Prop. Org., *Frequently Asked Questions: Patent Basics* ("[G]iven the complexity of patent documents and the legal skills required, such as claim drafting, it is highly advisable to seek legal assistance from a patent attorney/agent when drafting a patent application."), https://www.wipo.int/patents/en/faq_patents.html.

Countless copyright holders register their works every year without using the services of lawyers. *Amicus* is not aware of any compiled statistics on the specific number of copyright holders who register their works annually without using legal counsel, but the number is likely quite high. Between 2008 and 2012, there were more than 2.3 million copyright registrations. See Oliar, *supra*, at 2220 (compiling and analyzing statistics from the Copyright Office). Almost half of those registrations were submitted by individuals rather than businesses. See *id.* at 2225. Individuals were more likely to submit registrations for the

kinds of smaller-scale works that do not require extensive financial resources to create, such as dramatic works, musical works, and sound recordings. See *ibid.* And individuals were also more likely than businesses to register unpublished works, which in many cases will not have generated revenue for the creator at the time of registration and may not do so post-registration. See *id.* at 2226 (noting that individuals were more likely than businesses to register unpublished works, which may reflect that “more valuable works are more likely to be commercialized and offered to the public”).

Many individual creators are in no position to hire attorneys to assist them with registering their works. Anecdotal evidence indicates that even some businesses are unable to do so. See, e.g., Stanford Law School, Law & Policy Lab, *Revising the Requirements for Software Registration* 25 (2018) (“In interviews, independent developers, as well as engineers and business leaders for smaller companies and nonprofits, consistently revealed that they find the [Copyright Office] Circular guidelines difficult for non-lawyers to understand. They further pointed out that they may not engage or have access to lawyers for registration.”), https://law.stanford.edu/wp-content/uploads/2018/01/Software_Registration_USCO_Report_1-2-18_FINAL.pdf. And many businesses that do use lawyers for some services may not regularly use counsel in the process of filling out and submitting copyright registrations.

The fact that copyright holders are able to apply for copyright registrations without the expense of using legal counsel serves the objectives of the registration

process. Creators of all stripes are creating new, copyrighted works every day. See, *e.g.*, Buccafusco *et al.*, *supra*, at 96-97 (“Every reader of this article has created at least one and probably several copyrights today, just by living an ordinary life.”). If applying for a copyright registration required a law degree, then the process would be prohibitively expensive for numerous individual creators and small businesses, who would likely choose not to register their works at all unless and until they had a reason to litigate. See Oliar, *supra*, at 2240.

2. Although the registration process is intended to be accessible and streamlined, the potential for unintentional errors is high. Complexities presented by the registration process can create a significant and unavoidable risk that creators will make unknowing errors in registering their copyrights.

First, the individuals completing the registration forms often not only lack formal legal training but also are not well versed in the intricacies of copyright law. Indeed, those individuals are often the creators themselves. Cf. *Roberts v. Gordy*, 877 F.3d 1024, 1030 (11th Cir. 2017) (“Rappers are skilled in poetry and rhythm—not necessarily in proper copyright registration procedures.”). Some individuals may register hundreds or even thousands of works annually—and that volume substantially increases the potential for errors both factual and legal.

Second, although the copyright registration process is intended to be straightforward, the specifics of the process frequently involve legally complex questions that compound the risk of unknowing errors. Such issues may arise in the context of providing the limited

information that must be included in a copyright registration by statute. See 17 U.S.C. 409. They may also arise when a registrant attempts to comply with the numerous requirements created by the Copyright Office to implement Congress’s statutory scheme—requirements that detail, for instance, when a registrant can or cannot file multiple works under a single registration. See, e.g., *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194, 1198 (9th Cir. 2020) (“collection of published works” must be “‘included in a single unit of publication’ ” (quoting 37 C.F.R. § 202.3(b)(4)(i)(A)); U.S. Copyright Office, Notification of Inquiry, 84 Fed. Reg. 66,328, 66,330 (Dec. 4, 2019) (providing examples of regulations governing when multiple works can or cannot be included in the same registration, under which “groups of up to 750 *unpublished* photographs created by the same author for whom the copyright claimant is the same can be registered with one application and filing fee” (citing 37 C.F.R. § 202.4(h)). In that regard, it is notable that the *Compendium of U.S. Copyright Office Practices* (3d ed. 2021), which is intended to provide instructions to Copyright Office staff as well as guidance to registrants and practitioners, contains over 1,300 pages of information, the lion’s share of that dealing with matters related to copyright registration. Moreover, many of the legal questions that can arise as a result of registration requirements may be unsettled or the subject of disagreements among different courts. See, e.g., *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 990 (9th Cir. 2017) (requirements of copyright registration can present a “minefield for applicants attempting to properly register a * * * work”).

A closer examination of the information that a registrant must submit to the Copyright Office helps illustrate the potential pitfalls. That information includes the author of the work, whether the work has been published and the date and nation of first publication, and the nature of the work, including whether it is a compilation or derivative work. See 17 U.S.C. 409; see also U.S. Copyright Office, *Copyright In Derivative Works and Compilations 3-4 (Copyright in Derivative Works)* (2020) (listing required information in copyright registrations), <https://www.copyright.gov/circs/circ14.pdf>; U.S. Copyright Office, Form TX (2019), <https://www.copyright.gov/forms/formtx.pdf>; U.S. Copyright Office, *Standard Application Help: Author* (“You should identify the author by providing the full name of the person who created the work unless the work is anonymous or pseudonymous.”), <https://www.copyright.gov/eco/help-author.html>. Those categories of information may appear straightforward—and many copyright holders who are not themselves lawyers may well believe exactly that, until they discover otherwise in the middle of a copyright suit.

The identity of the author of a work, a seemingly obvious matter, may in fact be fraught with legal complexity. For instance, the Copyright Office acknowledges that “[t]he concept of work made for hire can be complicated and has serious consequences for both the individual who creates the work and the hiring party who is considered to be the author and copyright owner of the work.” *Copyright Basics* 3. Relying on that very ambiguity, defendants accused of infringement have in many cases attempted to invalidate registrations by arguing that plaintiffs misidentified the author based on a misunderstanding of work-for-hire requirements.

See, e.g., *Urantia Found. v. Maaherra*, 114 F.3d 955, 956-957 (9th Cir. 1997); *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1097-1098 (N.D. Cal. 2002).

Ambiguity also may arise as to the nature of the copyrighted work. It may be difficult for a registrant—even one well-versed in the law—to determine whether a work is a derivative work, *i.e.*, “based on or derived from one or more already existing works.” *Copyright in Derivative Works* 1. Defendants accused of infringement have, again, cited precisely that kind of mistake in seeking to invalidate copyright registrations. See, e.g., *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144-1145 (9th Cir. 2003); *Lenert v. Duck Head Apparel Co.*, 1996 WL 595691 (5th Cir. 1996) (unpublished); see also *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 278-279 (5th Cir. 2020) (addressing argument that registration was inaccurate for failing to identify work as a compilation).

Providing the Copyright Office with information regarding whether the work was “published” and, if so, when, 17 U.S.C. 409(8), also has potential pitfalls. Although the meaning of “published” may seem simple, the term implicates numerous unsettled legal questions. See *Copyright In Derivative Works* 3-4. Indeed, the substantial confusion regarding publication status has led the Copyright Office to open a Notice of Inquiry (still pending) on the subject. See U.S. Copyright Office, Notification of Inquiry, 84 Fed. Reg. 66,328 (Dec. 4, 2019) (“Commenters to the Office have indicated that the distinction between published and unpublished works is ‘so complex and divergent from an intuitive and colloquial understanding of the terms

that it serves as a barrier to registration, especially with respect to works that are disseminated online.”); see also *id.* at 66,330 (“A recent Ninth Circuit case illustrates the consequences an applicant may face if it incorrectly indicates on an application for a copyright registration that the work at issue is unpublished.” (citing *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140 (9th Cir. 2019))).

Defendants in many copyright-infringement cases (including the instant case) have pointed to such unsettled questions in arguing that registrations are invalid because they included errors in describing the date or status of publication. See, e.g., *Unicolors*, 959 F.3d at 1196; cf. *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 853 (9th Cir. 2012), *as amended* (June 13, 2012) (inclusion of two published works in an unpublished collection was an error, but did not invalidate the registration because the error was innocent and unknowing).

One such area of uncertainty around the publication requirement relates to the problems associated with applying copyright requirements to the internet. See Notification of Inquiry, 84 Fed. Reg. 66,329 (“While the definition of ‘publication’ may have provided sufficient clarity when the Copyright Act was enacted in 1976, adapting this definition to the modern electronic era has proven challenging.”); Deborah R. Gehardt, *Copyright Publication on the Internet*, 60 IDEA: L. Rev. Franklin Pierce Ctr. for Intell. Prop. 1, 3, 5 (2020) (observing that “[c]opyright laws were originally designed for textual works sold in hard-printed copies” and that “copyright law can appear hopelessly unclear on [the] basic issue” of “when * * * distribu-

tion” of works on the internet “constitutes publication”). Even now, in the lower courts, there is no “binding law or even a clear consensus” as to whether “material is ‘published’ merely because it is posted online.” *Internet Prods. LLC v. LLJ Enters., Inc.*, 2020 WL 6883430, at *5 (D.N.J. Nov. 24, 2020) (collecting cases); accord Notification of Inquiry, 84 Fed. Reg. 66,331 (collecting cases). Defendants accused of infringement have sought to invalidate registrations by arguing that works posted online and registered as unpublished were in fact “published.” See, e.g., *Rogers v. Better Bus. Bureau of Metro. Houston, Inc.*, 887 F. Supp. 2d 722, 731 (S.D. Tex. 2012) (“Although the current trend appears to favor finding works posted on the internet to be published, the reasons for finding publication varies from case to case and is fact dependent.” (collecting cases)); cf. Notification of Inquiry, 84 Fed. Reg. 66,333 (“In the online environment, each new feature or application can raise additional wrinkles regarding publication.”).

The legal complexities underlying registration information may readily result in unknowing errors by the people who are responsible for filling out registration forms, many of whom are non-lawyers. Depending on the standard applied for invalidating a registration based on an error, those complexities may give rise to protracted legal battles about whether registrations should be invalidated. The potential for such unknowing errors is particularly high for individual copyright owners and small businesses whose creativity involves a large volume of copyrighted works—for instance, photographers, designers, or owners of sound recordings or musical works.

II. Invalidating A Registration On The Basis Of An Error Has Serious Consequences For A Copyright Owner, Which Is Why Section 411(b)(1)(A) Requires That The Registrant Actually Know Of The Error

Severe consequences accompany invalidation of a registration on the basis of an error. Those consequences underscore why Congress provided in Section 411(b)(1)(A) that a prerequisite to invalidation is that the registrant actually knew that it was providing inaccurate information.

1. a. Numerous severe consequences can arise from invalidation of a registration on the basis of an error, depriving a copyright holder of the ability to enforce her rights and seek important remedies.

A defendant in a copyright-infringement suit may use a registration-invalidity defense to create substantial delay or to impose burdensome costs on a plaintiff, even when the defendant has no meaningful merits defenses. If the defendant raises an argument that the registration is invalid late in a litigation, that threatens to render all that has happened before an expensive waste of resources. The Court need look no further than the timing of defendant's Section 411(b) motion in this case to see the potential for abuse. See *Unicolors*, 959 F.3d at 1197 (defendant raised invalidity after a negative trial verdict). Especially for smaller copyright owners—who in many cases are individual creators with limited budgets—the cost of having to stop and re-start litigation will be significant. Indeed, in many cases, the cost may be prohibitive of any additional litigation.

In any event, an argument that a registration is invalid can significantly delay the resolution of infringement litigation, including against defendants who are notorious mass infringers of copyright. See, e.g., *In re Napster*, 191 F. Supp. 2d at 1099 (deferring resolution of motion for summary judgment against notorious pirate service Napster so it could take discovery to support argument that certain registration certificates erroneously listed plaintiffs as authors under work-made-for-hire doctrine). The potential for a defendant to use an allegation of error in a copyright registration to create delay is particularly high because such an allegation can, in certain circumstances, force a court to seek advice from the Register of Copyrights as to the materiality of the error, a time-consuming process that poses an “obvious potential for abuse.” *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 625 (7th Cir. 2013); see 17 U.S.C. 411(b)(2) (“In any case in which inaccurate information described under paragraph (1) is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.”).

b. Invalidating a registration based on errors in the application also can significantly jeopardize important remedies that Congress provided to copyright owners: statutory damages and attorneys’ fees. See *Derek Andrew*, 528 F.3d at 699; *Johnson*, 149 F.3d at 505.

As noted, a copyright owner generally may recover statutory damages and attorneys’ fees only for infringements that occur after the effective date of her registration. See 17 U.S.C. 412(2). If the registration is ultimately found invalid, statutory damages and attorneys’ fees associated with even clear infringement

that post-dates that registration may, in some circumstances, become unavailable. That is a serious problem for many copyright owners, because actual damages may be difficult to quantify, and the cost of prosecuting a meritorious suit may be prohibitive unless statutory damages and/or attorneys' fees can be recovered.

Compounding that problem, a court might even award a *defendant* attorneys' fees for winning on a technical defense of copyright registration invalidity—even if the defendant lacked substantial merits defenses. See *Gold Value Int'l Textile*, 925 F.3d at 1150 (affirming district court's grant of attorneys' fees to defendant that prevailed on the basis of copyright registration invalidity under Section 411(b)). If such fees may be awarded even when a registration is invalidated for an unknowing error by the registrant, that could well have a chilling effect on small copyright holders, who may fear not only the loss of a meritorious copyright claim but also the risk of having to pay for their opponent's win on a technicality.

c. Finally, when a defendant succeeds in invalidating a copyright registration on the basis of an error, that dismissal—even if it is without prejudice to bringing suit based on a new registration—may often act as a final and dispositive determination of the case, further rewarding a defendant who may have committed clear infringement. For instance, even if a plaintiff manages to re-register her copyright, she may face a statute of limitations issue that prevents her from recovering even actual damages for serious infringement. Cf. *Fourth Est. Pub. Benefit Corp.*, 139 S. Ct. at 891-892 (identifying a statute of limitations problem that could arise if a copyright plaintiff has to await the

formal grant of a registration to bring suit, although ultimately concluding that such a grant is indeed a prerequisite to litigation).

2. The consequences discussed above demonstrate the harshness of any rule that would invalidate a copyright registration on the basis of an *unknowing* error—an invalidation that serves only to provide a windfall to alleged infringers. As noted above, a valid copyright registration is not a prerequisite for a creator to hold a valid copyright. See *Fourth Est. Pub. Benefit Corp.*, 139 S. Ct. at 887. Thus, when an infringement defendant challenges a copyright registration as invalid, such a challenge need not have any connection to whether the defendant actually infringed the copyright. See, e.g., *L.A. Printex Indus.*, 676 F.3d at 852 (“Defendants contend that even if the district court erred in concluding that there was no genuine dispute of material fact on access or substantial similarity, summary judgment was proper on the alternative ground that L.A. Printex’s copyright registration in C30020 is invalid.”).

For that reason, defendants who have indisputably infringed, and particularly those who have infringed willfully, have strong incentives to attack the validity of a copyright registration—a purely “technical defense.” *Gold Value Int’l Textile*, 925 F.3d at 1150; see, e.g., *Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Mfg. Co.*, 308 F.2d 377, 380 (5th Cir. 1962) (“The defendant can hardly in good faith deny that it copied plaintiff’s catalogue sheet. Instead, the defendant is the party who becomes highly technical.”). Doing so can have enormous benefits to a defendant, including

creating substantial delay in litigation, cutting off valuable forms of relief, and even in some cases ending the litigation altogether.

Conversely, declining to invalidate a registration in the case of an unknowing error on the registration form does not prejudice a defendant who has legitimate grounds to challenge the validity of the plaintiff's copyright. The defendant retains any defense that the copyright itself (as opposed to the registration) is invalid, or any other defense to the merits of the plaintiff's suit. See, e.g., *Lamps Plus*, 345 F.3d at 1144-1147 (rejecting argument that error in copyright registration rendered it invalid, but agreeing that the work itself was not subject to copyright protection); *L.A. Printex Indus.*, 676 F.3d at 846; cf. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 972 (2017) (Breyer, J., dissenting) (“[t]o win a copyright suit the copyright holder must show that the defendant copied his work,” whereas patent infringement “is a strict-liability offense” for making, using, or selling the patented invention).

III. Consistent With The Purposes Of Copyright Registration And The Severe Consequences Of Invalidation, Section 411(b)(1)(A) Requires Actual Knowledge Of An Inaccuracy In An Application For Registration

The purpose of copyright registration, and the severe consequences of invalidating a registration on the basis of an error, underscore the important function of Section 411(b)(1)(A). Through that statutory provision, Congress ensured that an error in a copyright registration will not invalidate that registration unless, at a minimum, the registrant possessed actual

knowledge that there was an error in the application—and submitted it anyway.

That conclusion unambiguously flows from the text of Section 411(b)(1)(A). It is also dictated by decades of case law that preceded the PRO IP Act and required that a registrant have actual knowledge of an error in a registration to justify the draconian consequences of invalidation—a common-law rule that Congress did not purport to displace in Section 411(b)(1)(A). And, crucially, that reading of the text is the only one that ensures that Section 411(b)(1)(A) performs its function of stopping copyright registrants from abusing the copyright registration process, while preventing that statutory provision from becoming a tool through which culpable defendants may routinely delay and defeat meritorious copyright suits.

1. The text of Section 411(b)(1)(A) unambiguously requires actual knowledge of an error in a registration to trigger the potentially severe consequence of invalidation. The statute provides that any error must be “*included on the application for copyright registration with knowledge that it was inaccurate.*” 17 U.S.C. 411(b)(1)(A) (emphases added). The applicant thus must knowingly “include[]” the error in the registration. *Ibid.* An applicant cannot knowingly *include* an error in an application if the applicant sincerely, albeit erroneously, believes that the information is accurate and that there is therefore no error.

Contrary to the Ninth Circuit’s holding in this case, nothing in the provision’s text contemplates that constructive knowledge (whether of the facts or the law) suffices in the absence of actual knowledge. See *Unicolors*, 959 F.3d at 1200 (“[T]he knowledge inquiry is not whether Unicolors knew that including a mixture

of confined and non-confined designs would run afoul of the single-unit registration requirements; the inquiry is merely whether Unicolors knew that certain designs included in the registration were confined and, therefore, were each published separately to exclusive customers.”); see also *Gold Value Int’l Textile*, 925 F.3d at 1147 (suggesting that even a reasonable mistake of law might not be enough to defeat the conclusion that knowledge of inaccuracy existed under Section 411(b)(1)(A)). Nothing in Section 411(b)(1)(A) (or any other provision of the PRO IP Act) suggests that the knowledge inquiry centers on what a registrant *should have known*.

The absence of such language in Section 411(b)(1)(A) is significant given that such language *does* exist elsewhere in the Copyright Act. See, e.g., 17 U.S.C. 506(a)(1)(C) (for criminal copyright infringement, a willful infringer may be punished if, *inter alia*, she distributed a work she “knew or should have known * * * was intended for commercial distribution” (emphasis added)); 17 U.S.C. 504(c)(2) (permitting reduction of statutory-damages floor to \$200 upon finding the infringer “was not aware *and had no reason to believe* that his or her acts constituted an infringement of copyright” (emphasis added)). Congress’s choice not to include analogous language in setting forth the knowledge requirement in Section 411(b)(1)(A) indicates that constructive knowledge does not suffice for that provision. See *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (ruling that knowledge requirement under an ERISA provision did not encompass constructive knowledge, as Congress had expressly used language in other ERISA provisions that encompassed constructive knowledge but had not done so in the provision at issue).

2. Even if Section 411(b)(1)(A)'s knowledge standard were ambiguous, the context within which Congress enacted that provision shows that Congress adopted an actual-knowledge standard. Congress enacted the provision to codify decades of authority that had overwhelmingly ruled that a registrant, at a minimum, had to have actual knowledge of an error for the registrant's mental state to support invalidation of the registration. See *Urantia Found.*, 114 F.3d at 963 ("The case law is overwhelming that inadvertent mistakes on registration certificates do not invalidate a copyright and thus 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." (collecting cases)); cf. *Freedman v. Milnag Leasing Corp.*, 20 F. Supp. 802, 804 (S.D.N.Y. 1937) (acknowledging the potential for error resulting from "the technicalities of the Copyright Act" and rejecting argument that registrations should be invalidated under an "overstrict" approach to compliance).

In articulating the required level of knowledge, courts sometimes phrased their inquiry as whether a registrant intended to defraud the Copyright Office. See, e.g., *Urantia Found.*, 114 F.3d at 963. But in doing so, courts made clear that the mental-state requirement they applied was actual knowledge of a material error—*i.e.*, that a registrant actually knew there was an inaccuracy in her application for registration but submitted it anyway, and that the error was material to the Copyright Office issuing the registration. See, e.g., *Eckes v. Card Prices Update*, 736 F.2d 859, 861-862 (2d Cir. 1984) (stating that registration-invalidation requires a "knowing failure to advise the Cop-

yright Office of” material facts, and noting that the defendant in that case could not make that showing because it failed to show “fraud”); *Lenert*, 1996 WL 595691, at *3 (“[T]he registration may be found ‘invalid and incapable of supporting an infringement action’ when an applicant knowingly fails ‘to advise the Copyright Office of facts which might have led to the rejection of a registration application.’” (quoting *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 667 (3d Cir. 1990), and citing *Eckes*, 736 F.2d at 861-862)); *LZT/Filliung P’ship, LLP v. Cody/Braun & Assocs., Inc.*, 117 F. Supp. 2d 745, 750-751 (N.D. Ill. 2000) (stating that a “‘knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application’” is a prerequisite to registration invalidation, and noting that “[t]he facts here simply do not show that [the plaintiff] set out to defraud the Copyright Office” (quoting *Balsamo/Olson Group Inc. v. Bradley Place Limited Partnership*, 966 F. Supp. 757, 761 (C.D. Ill. 1996))).

Nothing in the text or structure of Section 411(b) indicates that Congress meant to *lower* the mental-state requirement standard codified in these cases. On the contrary, the PRO IP Act codified the then-existing standard of actual knowledge of the error. Under Section 411(b), a defendant seeking to invalidate a registration must prove, first, that the registrant actually knew that there was an inaccuracy in the registration, and, second, that the knowing inaccuracy was material. See 17 U.S.C. 411(b)(1). In other words, there must be a “knowing failure to advise the Copyright Office” of material facts—the very standard of knowledge that courts applied for decades before Congress passed the PRO IP Act. *Eckes*, 736 F.2d at 861-862. As this Court has repeatedly held, “[w]hen Congress codifies a

judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989); see *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 761 (2011) (“[f]inding no definitive answer in the statutory text” as to whether inducement liability for patent infringement actually requires that the inducer know that the induced conduct is infringing, “we turn to the case law that predates the enactment of § 271 as part of the Patent Act of 1952”).

The legislative history of the PRO IP Act bolsters that conclusion. The relevant House Report acknowledges earlier authority requiring knowing misrepresentations to invalidate a copyright registration and specifically expresses concern with defendants pressing for a lowering of the required mental state in order to use registration challenges as a tactic for delaying or denying relief to copyright holders. See H.R. Rep. No. 110-617, at 24 & n.15 (2008) (discussing fact that defendant-infringers had “argued in litigation that a mistake in the registration documents, such as checking the wrong box on the registration form, renders a registration invalid and thus forecloses the availability of statutory damages” (citing *In re Napster*, 191 F. Supp. 2d at 1099)). Having identified that problem, the House Report suggested that the PRO IP Act would fix it, serving “[t]o prevent intellectual property thieves from exploiting this potential loophole” by ensuring that no registration could be invalidated on the basis of an error in that registration “unless the mistake was knowingly made and the inaccuracy, if known, would have caused the Register of Copyrights to refuse the registration.” *Ibid.*

Every court of appeals but the Ninth Circuit to address the knowledge requirement under Section 411(b)(1)(A) has held that the text codified the earlier common-law standard. See *Roberts*, 877 F.3d at 1030; *DeliverMed Holdings*, 734 F.3d at 622-623; *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1201-1202 (11th Cir. 2009). Indeed, *before* it held that the PRO IP Act lowered the required mental state, the Ninth Circuit had held the opposite. See *L.A. Printex Indus.*, 676 F.3d at 852-853 (quoting the full text of Section 411(b)(1) and then noting that “we have held that ‘inadvertent mistakes on registration certificates do not invalidate a copyright’” (quoting *Urantia Found.*, 114 F.3d at 963)).

3. Finally, an actual knowledge standard is the only standard that properly protects the rights of copyright holders and comports with the purposes of the copyright registration system.

Under an actual knowledge standard, innocent copyright holders will not routinely face the grave consequences of invalidation whenever they misunderstand—or even fail to properly predict—the correct application of a complex legal test. Culpable defendants will not be able to routinely delay meritorious copyright suits by alleging technical errors in registrations. And the Copyright Office—which already handles hundreds of thousands of copyright applications per year—will not be inundated with countless referrals asking whether knowing errors in registrations were also, in the Copyright Office’s estimation, material.

In contrast, the Ninth Circuit’s constructive knowledge standard could lead to each of those negative consequences. And that standard is particularly ill suited to the realities of the copyright registration

process. The Ninth Circuit’s rule imputes knowledge of the legal rules that underlie representations in registrations to the person completing the application—regardless of whether there is any basis for believing that the person knew the intricacies of the legal rules or that they were making any type of misrepresentation. See *Unicolors*, 959 F.3d at 1200; *Gold Value Int’l Textile*, 925 F.3d at 1147. Such a rule disserves a system that incentivizes copyright owners of all types—including those without legal training or who cannot afford to hire a lawyer—to submit voluntary registrations. It also risks transforming registration from a streamlined, accessible process into a minefield, which would no doubt lead many copyright owners to decide that they must either hire legal counsel to navigate the application for registration or give up on registration altogether. But there is no way to require copyright holders to hire lawyers to register their copyrights without fundamentally undermining the registration process. The only solution, then, is to have a registration process that accepts the inevitability of errors and does not punish copyright holders for innocently making them.

An actual knowledge standard thus prevents Section 411(b)(1)(A) from becoming a tool to reward culpable defendants and to burden the Copyright Office with endless unnecessary materiality referrals. At the same time, that standard effectuates Congress’s goal of “prevent[ing] plaintiffs from abusing the registration process” through knowing misrepresentations. *DeliverMed Holdings, LLC*, 734 F.3d at 622. An actual knowledge standard does not provide a registrant with a free pass to deliberately avoid learning about facts or legal rules that may undermine factual or legal representations in the application for registration. In fact,

in two of the appellate decisions that construed Section 411(b)(1)(A) to require actual knowledge, the courts affirmed district court findings that the registrants *had* made knowing misrepresentations in their registration applications. See *DeliverMed Holdings*, 734 F.3d at 623 (“The DeliverMed Plaintiffs have not provided any evidence to contradict the court’s determination that Swift knowingly lied about the existence of a written ownership transfer agreement between DeliverMed and Linda Deeter.”); *St. Luke’s Cataract & Laser Inst., P.A.*, 573 F.3d at 1201-1202 (“[T]here was evidence from which the jury could have inferred that St. Luke’s made intentional, material misrepresentations in the First and Second Applications and the deposit copies it submitted to the Copyright Office.”).

That is particularly true given that an actual knowledge standard includes willful blindness. As this Court has held, “persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.” *Global-Tech Appliances*, 563 U.S. at 766; *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law * * * as it is in the law generally.”). To be deemed willfully blind, an individual must (1) “subjectively believe that there is a high probability that a fact exists,” and (2) “take deliberate actions to avoid learning of that fact.” *Global-Tech Appliances*, 563 U.S. at 769. That test is a meaningful one, and it has clear application in the copyright context. For instance, a registrant might believe it highly likely that a given work is not original, or that someone other than the author listed on the registration is actually the work’s author—but choose to avoid taking modest steps that would confirm whether those problems in fact exist. Indeed, that is

precisely what happened in *St. Luke's*: although the Eleventh Circuit there did not use the words “willful blindness,” it affirmed the invalidation of a registration where there were numerous red flags on an originality question, but the plaintiff “did not make any inquiry to determine the source of these questionable items.” *St. Luke's*, 573 F.3d at 1202. In other words, a standard of actual knowledge ensures that copyright registrants who turn a blind eye to accuracy—whether of facts or law—face real consequences, without transforming Section 411(b)(1)(A) into a vehicle to defeat meritorious copyright suits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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