

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FOURTH ESTATE PUBLIC)
BENEFIT CORPORATION,)
Petitioner,)
v.) No. 17-571
WALL-STREET.COM, LLC, ET AL.,)
Respondents.)

Pages: 1 through 68

Place: Washington, D.C.

Date: January 8, 2019

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3 FOURTH ESTATE PUBLIC)
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7 WALL-STREET.COM, LLC, ET AL.,)
8)
9 - - - - -
10 Washington, D.C.

11 Tuesday, January 8, 2019

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:15 a.m.

16

17 APPEARANCES:

18 AARON M. PANNER, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.

20 PETER K. STRIS, ESQ., Los Angeles, California; on
21 behalf of the Respondents.

22 JONATHAN Y. ELLIS, Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.;
24 for the United States, as amicus curiae,
25 supporting the Respondents.

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1 PROCEEDINGS

(11:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next this morning in Case 17-571,
5 Fourth Estate Public Benefit Corporation versus
6 Wall-Street.com.

7 Mr. Panner.

8 ORAL ARGUMENT OF AARON M. PANNER

9 ON BEHALF OF THE PETITIONER

10 MR. PANNER: Mr. Chief Justice, may it
11 please the Court:

12 The Copyright Act provides strong
13 textual evidence that the phrase "registration
14 has been made" in Section 411(a) refers to the
15 copyright owner's compliance with the
16 registration requirement of Section 408(a).

That reading is confirmed by the legislative history, the statute overruled cases that made the Register a gatekeeper to the courthouse, and the policy of the statute, which grants exclusive rights upon fixation of an original work, not by virtue of any administrative action.

24 And as a matter of ordinary language,
25 and in the Copyright Act's lexicon,

1 registration can refer to the copyright owner's
2 effort to secure recordation of a claim and to
3 the Copyright Office's recordation of the claim
4 after examination.

5 CHIEF JUSTICE ROBERTS: Well, but as
6 to that, it seems to me one reason the case is
7 a little confusing is that I think you're
8 right, registration could mean either. But, in
9 a situation where you've got a registrar, it
10 seems to me that the most likely understanding
11 of "registration" is what that person does.

12 MR. PANNER: But, Your Honor, that's
13 not the way the statute uses the language. And
14 in Section 411(c), the -- Section 411(c)
15 expressly says the copyright owner makes
16 registration. In Section 412(2), there's
17 agreement that when it says "registration is
18 made," it's referring to the action of the
19 copyright owner. In Section 408(c), it refers
20 to registration has been made in a context that
21 -- that necessarily refers to the action of the
22 copyright owner. It says that registration may
23 be made upon the filing of a single application
24 and fee. And Section 405(a) refers to
25 registration for the work has been made within

1 five years, which again strongly suggests that
2 it's by the copyright owner. In Section
3 405(b), again, registration for the work has
4 been made under Section 408.

5 So there's no question, I think --

6 CHIEF JUSTICE ROBERTS: Well, but you
7 forgot the second sentence of 411(a), which
8 speaks of registration cannot mean when the
9 applicant applies because it -- it talks about
10 the applicant being able to take action when
11 registration has been refused or, I would say,
12 when registration has not been made.

13 MR. PANNER: Well, Your Honor, I -- I
14 wouldn't say when registration has not been
15 made. It's when registration has been refused.
16 And that -- and that language is important.
17 And I think it's important to stress that our
18 position is that registration refers flexibly
19 to both but that the phrase "registration has
20 been made" consistently refers to the action of
21 the copyright owner, and it makes sense in
22 Section 411(a) itself.

23 And if you look at the parallelism in
24 the structure, it talks about registration
25 having been made in accordance with the title,

1 and then it says if the required deposit, fee,
2 and application have been delivered, so, again,
3 the action of the copyright owner, but
4 registration has been refused, i.e., the
5 registrar has taken an action that calls into
6 question whether the registration has been made
7 in accordance with the title, the case can
8 still proceed.

9 And so --

10 CHIEF JUSTICE ROBERTS: So you just
11 dismiss 410(d) as superfluous?

12 MR. PANNER: Not at all.

13 Section 410(d) provides that the effective date
14 of registration is when the -- the application,
15 fee and deposit have been received in a form
16 that is acceptable for registration as later
17 determined, and this is key, by the office or
18 by a court.

19 So Section 410(d), I think, strongly
20 supports our position because it makes clear
21 that in a case where there may be a doubt about
22 -- perhaps because the Register has not yet
23 acted, if there's some question about whether
24 registration has been made in accordance with
25 the title, the court can determine that

1 question. It can also determine that question
2 in a case in which the --

3 CHIEF JUSTICE ROBERTS: But you've
4 already said registration has been made in the
5 terms of the registrar's action when the -- the
6 applicant applies.

7 MR. PANNER: Not -- not in -- to be
8 clear, Your Honor, "registration has been made"
9 in the statute refers to the copyright owner's
10 compliance with Section 408(a), which says that
11 registration may be obtained upon the
12 submission of the required application,
13 deposit, and fee.

14 JUSTICE BREYER: Do you drive without
15 a driver's license when yours has expired
16 because you wrote in to the registry of motor
17 vehicles but they haven't yet licensed you?

18 MR. PANNER: Well, Your Honor --

19 JUSTICE BREYER: Can you change your
20 sewer in the house with a man who has not
21 gotten the approval from the local public
22 health authority under a statute that says you
23 have to have a registered -- you have to have a
24 -- an approved plumber because he wrote in and
25 asked for one?

1 I mean, I can't think of examples --
2 I'm trying to -- where -- where -- where
3 there's something roughly comparable and the
4 statute is interpreted the way you want. Maybe
5 you've been able to think of some, which you
6 probably have.

7 MR. PANNER: Well, I think that, Your
8 Honor, there's a couple of cases, there's a
9 couple of statutes that were cited in the
10 amicus brief of the music publishers that refer
11 to the fact that registration is upon the --
12 that registration is made when the -- the --

13 JUSTICE BREYER: They say that
14 specifically?

15 MR. PANNER: But, Your Honor, the
16 point here is that the text of the statute
17 likewise makes clear that registration is made
18 upon the submission of the materials. And we
19 gave the -- we gave the analogy to a -- a
20 college student who registers for a class. One
21 would say that he has made his registration,
22 he's registered for the class, but,
23 nevertheless, the registrar might say the class
24 is full, you're not going to be admitted to it,
25 and now the registration has been refused.

1 And this Court has repeatedly referred
2 to the fact that a copyright owner makes
3 registration in the case --

4 JUSTICE BREYER: Have you registered
5 for the class when you've mailed it in, but the
6 professor hasn't gotten it?

7 MR. PANNER: Well, Your Honor, this --
8 in this statute, it says that registration is
9 made if -- and this is in Section 410(d). It
10 answers the question. It says when they've
11 been received by the Copyright Office. So the
12 question about whether it's the mailbox rule or
13 received by the Copyright Office is actually
14 addressed in the statute. But, again, the --
15 the term "registration" has that flexibility
16 built into it.

17 And I think it's important to
18 understand the context in which Congress was
19 acting when it adopted Section 411(a) in 1976.
20 It was aware of the Vacheron decision, and it
21 was aware of Chief Judge Clark's dissent in
22 which he made this very point, which is that it
23 doesn't make sense to read "registration" as
24 requiring affirmative administrative action
25 when the rights that exist, the exclusive right

1 does not depend -- it's not like the Patent
2 Office. It's not a situation in which the
3 administrative body has the authority to grant
4 exclusive rights and that the exclusive rights
5 don't exist until there's that action.

6 JUSTICE SOTOMAYOR: Could you tell me
7 as a matter of fact when is the copyright
8 registration published?

9 MR. PANNER: The copyright, under
10 current -- under the current procedure, the
11 copyright application becomes publicly
12 available when it's -- after it's granted.

13 JUSTICE SOTOMAYOR: And so it seems
14 illogical to think that you're going to get
15 rights against the third-party who's not on
16 notice that your copyright has been registered
17 because it's not public.

18 MR. PANNER: Right. I just want to --

19 JUSTICE SOTOMAYOR: There's --

20 MR. PANNER: -- I want to address that
21 as strongly as I can. It's just not right.
22 The -- the right to exclude exists by virtue of
23 the creation of an original work and its
24 fixation in a medium from which it can be
25 perceived. That gives the author the right,

1 the copyright owner the right to exclude.
2 There's no question about that. That has
3 nothing to do with notice. Notice is not
4 required under the current statute.

5 JUSTICE SOTOMAYOR: But it is in terms
6 of -- well, that begs the question.

7 MR. PANNER: And on --

8 JUSTICE SOTOMAYOR: But you can't --
9 you -- you --

10 MR. PANNER: If I may.

11 JUSTICE SOTOMAYOR: -- you can't
12 pursue a suit unless the registration is
13 accepted?

14 MR. PANNER: But -- no. No, Your
15 Honor. Section 4 -- in fact, there's no
16 question that you can pursue a suit, whether or
17 not the registration is accepted. Under
18 Section 4 --

19 JUSTICE SOTOMAYOR: Yes, you're right.

20 MR. PANNER: Okay. So --

21 JUSTICE SOTOMAYOR: Because the --

22 MR. PANNER: And the other thing
23 that's -- that's important to understand, and
24 this is, I think, critical, the government
25 concedes that the enhanced statutory remedies

1 that are available for infringement after a
2 work has been registered are available if the
3 registration, the application, deposit, and fee
4 have been submitted. If the applicant has made
5 registration, that is enough to satisfy 412(2).

6 And they say that that's true because
7 the effective date of registration is the date
8 on which those -- Section 408(a) has been
9 complied with.

10 CHIEF JUSTICE ROBERTS: Well, that's
11 enough assuming that the registrar has
12 registered the mark. It's just a question of
13 whether you go back to start counting the
14 damages.

15 MR. PANNER: Again, the registrar does
16 not have to register the mark. The -- the --
17 not the mark, the copyright.

18 CHIEF JUSTICE ROBERTS: Well, you're
19 not entitled to the special benefits under the
20 Act until the registrar has, right?

21 MR. PANNER: No.

22 CHIEF JUSTICE ROBERTS: It just goes
23 -- it goes back -- in terms of when you start
24 calculating it, it may go back.

25 MR. PANNER: No, Your Honor. Section

1 410 --

2 CHIEF JUSTICE ROBERTS: So you could
3 go back, the registrar hasn't even registered
4 the mark, and you can go into court and say,
5 hey, I get the benefits of having registered my
6 mark?

7 MR. PANNER: The copyright claim, yes,
8 Your Honor. That's what Section 410(d) says.
9 Section 410(d) says the effective date of
10 registration is the date on which the required
11 application, deposit, and fee have been
12 received in a form acceptable for registration.

13 CHIEF JUSTICE ROBERTS: Yeah, but
14 maybe I'm just missing the point, or one of us.
15 I mean, you have to at least had it registered,
16 accepted by the registrar. Otherwise, how do
17 you know that you're entitled to those
18 benefits?

19 MR. PANNER: Your Honor, because the
20 question of registrability can be determined by
21 a court in that litigation. That's what
22 Section 410(d) says.

23 And, again, in the vast majority, as a
24 practical matter, in the vast majority of
25 cases, registration is -- is essentially a

1 ministerial question of submission of the
2 application, deposit, and fee.

3 Think about if you have a magazine
4 article or a book or a piece of music, you
5 know, a piece of sheet music that is being
6 registered. Those things are submitted. They
7 are registered as a matter of course.

8 Under the -- under current procedures,
9 it can take many months, but it's going to be
10 registered as a matter of course. And, again,
11 the right to exclude -- everybody agrees, Your
12 Honor, that when those materials are submitted
13 in a form acceptable for registration, that is
14 the effective date of registration, even if the
15 registrar acts a year later.

16 And so precisely --

17 CHIEF JUSTICE ROBERTS: Well, that's
18 just 410(d) that says that?

19 MR. PANNER: And -- but everybody
20 agrees that that's what 412(2), which refers to
21 -- which preserves certain statutory remedies,
22 if registration is made within three months
23 after publication, that's -- everyone agrees
24 that that's what 412(2) means as well. It's
25 clearly what Section 411(c), which, for what

1 it's worth, was adopted as Section 411(b)
2 immediately after 411(a), everybody agrees that
3 -- I -- I shouldn't say the Respondent agrees
4 with that.

5 The government agrees that that's what
6 Section 411(c) means. And so I do think that
7 what -- that when you're thinking about what
8 has to happen, the Copyright Office is not the
9 Patent Office. It does not grant exclusive
10 rights that don't exist before the Copyright
11 Office acts.

12 The exclusive rights exist. There is
13 a requirement to register. The copyright owner
14 has to register before suing. But there's no
15 requirement, and the statute doesn't say, that
16 the Copyright Office has to act first.

17 And there's no reason that it should.
18 It's a -- again, the right to exclude in the
19 statute is built around the fact that an author
20 has fixed an expression in a tangible medium.

21 And once they have submitted the
22 required application, deposit, and fee under
23 Section 408(a), they have registered. They
24 have taken care of that procedural hurdle so
25 that they can then bring their lawsuit and get

1 relief.

2 Now, in many cases, the Copyright
3 Office may grant the registration while that is
4 pending, and -- but, in any event, if there's a
5 question about that, it can be dealt with.

6 As a practical matter, that's almost
7 never going to happen, and that's very
8 important to recognize, is that if the Court
9 rules -- if the Court affirms the Eleventh
10 Circuit, it will create major problems for
11 copyright owners. That's why the copyright
12 community has unanimously come in to say that
13 this Court should --

14 JUSTICE KAVANAUGH: Mr. Panner,
15 describe --

16 JUSTICE KAGAN: Mr. Panner, I -- I --
17 I understand some of the policy arguments that
18 you have on your side, but, I mean, the
19 question is whether the text can -- can -- can
20 be looked at that way.

21 And I'll just go back to where the
22 Chief Justice started, which is this passage in
23 411(a). And you have these two sentences, and
24 the first sentence is registration has been
25 made, and the second sentence is registration

1 has been refused, and they're connected by a
2 "however."

3 So, you know, to me, you have these
4 two sentences, they're in total proximity.
5 They're both framed in the passive voice.

6 "Registration has been refused" is clearly
7 registration has been refused by the Register,
8 not by the holder.

9 And so it seems, you know, the only
10 way to read this is that the "registration has
11 been made" is by the Register too.

12 MR. PANNER: Well, Your Honor,
13 obviously, we don't agree with that. And --
14 and let me try to say why I think, again,
15 getting back to the textual evidence from the
16 statute, the -- the issue is not granted or
17 refused, and -- the issue is whether
18 registration is made by the copyright owner.

19 And the -- the text uses the phrase to
20 mean that all the time, including in the
21 immediate succeeding --

22 JUSTICE KAGAN: Well -- well, I'm kind
23 of with you that the word "register" has some
24 flexibility to it. So you've got -- you've
25 convinced me of that.

1 The question is whether it has
2 flexibility to it in 411(a). And -- and given
3 the -- the juxtaposition between the first
4 sentence and the second sentence, the identical
5 grammar, the way they're connected with the
6 "however," it would just seem extremely strange
7 to change the person who's the subject of this
8 action.

9 MR. PANNER: I -- I -- I don't think
10 so, Your Honor. And -- and -- and let me --
11 and bear with me. If you look at the structure
12 of the sentence, the first sentence says if --
13 registration has been made in accordance with
14 this title. And as we've shown, that
15 phraseology, the "registration has been made"
16 construction is used all the time to refer to
17 what the copyright owner does.

18 The next sentence says: "Where the
19 deposit, application, and fee required for
20 registration have been delivered." Again, the
21 action of the copyright owner. So that is
22 parallel to the beginning of that first
23 sentence.

24 Then the second -- the second piece of
25 it says "in accordance with the title." And

1 this one then says "in the proper form and
2 registration has been refused." So this is
3 distinguishing a situation where registration
4 has been made and it is or going to be granted
5 because the Register agrees.

6 But this is a situation in which the
7 -- the registrar, notwithstanding the
8 compliance with Section 408(a), has refused it.

9 And that -- so -- so the -- the
10 reference to the registration has been refused
11 corresponds to the question of -- is intended
12 to clarify the question of what happens if
13 there's a dispute because the Register has --
14 has -- has refused the application, refused to
15 register the claim, about whether it's in
16 accordance with this title.

17 And so -- and if you look at the --
18 the -- the language, if you look at the
19 context, and if you think about what Congress
20 was attempting to -- was dealing with in terms
21 of the litigation rights, it makes no sense to
22 read the first sentence as suggesting that
23 Congress wanted to recreate the very result
24 that it sought to overrule in Vacheron.

25 JUSTICE KAVANAUGH: And you -- you

1 alluded to major problems and then didn't
2 describe them. It seems to me you're trying to
3 create enough doubt about the statutory
4 language to suggest we shouldn't stick with the
5 reading that Justice Kagan asked about, and the
6 doubt you're trying to sow is created because
7 you say it would make no sense and there would
8 be major problems.

9 What -- can you describe what those
10 are?

11 MR. PANNER: Sure. And I think that
12 the amici speak to this, is that the -- the
13 most significant problem is that when there is
14 -- when there is infringement that begins and
15 the claim has not yet been registered, that the
16 copyright owner cannot bring any civil action,
17 including an action for injunctive relief,
18 until the Copyright Office has acted, and under
19 the -- under the view of the Respondent and the
20 government, until the Copyright Office has
21 either granted or refused registration.

22 JUSTICE SOTOMAYOR: All right. What
23 happens in a case where you do bring -- and I'm
24 going to ask the government about the
25 pre-registration intent which permits a --

1 permits a pre-registration injunction.

2 What does a court do? Let's assume
3 that the registration hasn't been made.
4 There's an injunctive suit before that. Does
5 the court just automatically grant the
6 injunction? Does it wait for the registration?
7 Does it have a hearing on who's right about the
8 copyright? What -- what occurs?

9 MR. PANNER: In a --

10 JUSTICE SOTOMAYOR: And what would
11 happen if the court grants the injunction and
12 the registrar refuses registration?

13 MR. PANNER: Well, Your Honor, are --
14 are you talking about in a -- in a situation in
15 which there --

16 JUSTICE SOTOMAYOR: Your reading is
17 given effect. Your reading is given effect.
18 The copyright owner comes in and says, I want
19 an injunction. The Copyright Office hasn't
20 acted yet.

21 MR. PANNER: Yes. Well --

22 JUSTICE SOTOMAYOR: What does the
23 court do?

24 MR. PANNER: The -- as in any other
25 civil action, the -- the plaintiff would have

1 the obligation to provide prima facie evidence
2 to carry the burden to show that they --
3 they're entitled to relief. That would include
4 showing at the preliminary -- you know, at the
5 TRO or preliminary injunction stage, that they
6 have complied with Section 408(a) and thus
7 that --

8 JUSTICE SOTOMAYOR: Let's assume they
9 have.

10 MR. PANNER: Well, then --

11 JUSTICE SOTOMAYOR: What do they do
12 about the registrar not acting? Can final
13 judgment be entered before the registrar acts?

14 MR. PANER: Certainly. Section
15 410(d) provides for that. It says that the --
16 and, you know, it would depend on the context,
17 but, yes, in a circumstance in which there --
18 we're not talking about anymore a preliminary
19 injunction but some final judgment, the court
20 could certainly enter a judgment under
21 Section 410(d).

22 JUSTICE SOTOMAYOR: And what happens
23 if the registrar refuses after the judgment is
24 entered?

25 MR. PANER: Well, in any case in

1 which there's a -- in any civil suit, the
2 registrar will receive notice of the suit, and
3 the suit can be -- the -- you know, the -- the
4 registrar could either expedite examination of
5 the application or could potentially --

6 JUSTICE SOTOMAYOR: But, eventually,
7 if -- if --

8 MR. PANNER: But --

9 JUSTICE SOTOMAYOR: -- judgment is
10 entered --

11 MR. PANNER: Yeah.

12 JUSTICE SOTOMAYOR: -- and the
13 registrar refuses, it's sort of a moot question
14 to be told that the suit has already started,
15 isn't it?

16 MR. PANNER: Well --

17 JUSTICE SOTOMAYOR: Because 411 --

18 MR. PANNER: -- again, they have to be
19 notified within 30 days of the filing of the
20 suit. I think it's very unlikely there would
21 be a final judgment before that. But the point
22 is that, under Section 508 of the statute, Your
23 Honor, they -- the -- the Register is entitled
24 to be notified within 30 days.

25 But the point is that I think that

1 these are really questions that just don't
2 arise as a practical matter. If there were a
3 situation in which there was genuinely a doubt
4 about the registrability of the claim, if the
5 court wanted to do so, the district court can
6 manage the litigation to get the views of the
7 Register.

8 And, you know, there's something
9 similar actually, Your Honor, in Section
10 411(b), which talks about the -- the
11 consequences of false -- incorrect information
12 in a certificate of registration. If there's
13 incorrect information in a certificate of
14 registration, it doesn't matter. The
15 litigation proceeds, unless there's a claim
16 that the registration would not have issued at
17 all. And then -- then the Register may be
18 called upon to give their views.

19 That happens approximately never. It
20 happened in three cases out of 3500 in 2017.
21 The Register never intervened in a case in
22 2017, as far as we were able to determine, in a
23 copyright infringement action.

24 It's important to understand the
25 practicalities of this. This is not patent

1 litigation. This is not a suit -- this is not
2 a case --

3 JUSTICE KAVANAUGH: What are the
4 practical problems? I think the message of
5 your argument is, if you really understood how
6 this works in the real world, we would agree
7 with your reading. And -- and you're saying
8 practical problems. I want to hear the
9 practical problems.

10 MR. PANNER: And -- and the practical
11 problems are those that are described in our
12 briefs and in the briefs of the amici, which
13 are the major problems --

14 JUSTICE KAVANAUGH: And what are the
15 -- what are the most -- what are the most
16 severe practical problems? Delay, I
17 understand.

18 MR. PANNER: I think the most severe
19 practical problem is the inability to receive
20 prompt injunctive relief --

21 JUSTICE KAVANAUGH: Okay.

22 MR. PANNER: -- in a circumstance
23 where the claim has not yet --

24 JUSTICE KAVANAUGH: And that's a
25 problem because? Just spell it out.

1 MR. PANNER: Sure. Because the value
2 of the copyright depends on the ability to
3 exclude from -- exclude the -- the unauthorized
4 copying, unauthorized reproduction of the work.

5 JUSTICE KAVANAUGH: And in that period
6 of delay, what may happen?

7 MR. PANNER: In -- in that period --
8 thank you, Your Honor. In that period of
9 delay --

10 JUSTICE KAVANAUGH: I mean, just --
11 just spell it out.

12 MR. PANNER: -- it could be -- it
13 could be distributed over the Internet. In the
14 case of a song, for example, you know, it could
15 be very widely distributed over the Internet.
16 In the case of even an article, and this is
17 discussed in -- in some of the -- in some of
18 the amicus briefs, that within days, the -- an
19 article can be so widely disseminated that its
20 value for the author has been lost.

21 CHIEF JUSTICE ROBERTS: Now did you
22 get --

23 JUSTICE KAGAN: And are damages never
24 going to be sufficient to compensate for that?
25 And why would that be?

1 MR. PANNER: Well, for many -- in many
2 cases, it may be impossible to identify who has
3 -- who has done all of the subsequent --
4 subsequent distribution. I mean, the -- the
5 point is that Congress authorized injunctive
6 remedies precisely because it may often be
7 difficult to determine what the damages are.

8 And it does not -- it does not make
9 sense, once the copyright owner has complied
10 with the registration obligation under
11 Section 408(a), to prevent that -- the
12 copyright owner from pursuing the remedy.

13 Everybody agrees that the --

14 JUSTICE KAGAN: How -- how long -- how
15 long are the delays now? And how does that
16 compare with what the delays were when this Act
17 was passed?

18 MR. PANNER: The -- my understanding
19 is that, for electronic submissions, the
20 average is seven months, and for paper, it's
21 nine.

22 CHIEF JUSTICE ROBERTS: But you can --
23 you can pay extra for first class, right?

24 MR. PANNER: You can -- you can, Your
25 Honor. You can pay extra to have expedited

1 consideration, but, first of all, the Copyright
2 Office is under no obligation to grant that.
3 Second of all, even in those circumstances, it
4 can take many weeks, even months, to resolve
5 the application. And that's enough time,
6 especially in -- you know, under current
7 circumstances for a work to be essentially
8 rendered valueless because of its broad
9 distribution.

10 JUSTICE GORSUCH: Counsel --

11 JUSTICE KAGAN: And when -- when the
12 Act was passed, what were the delays then?

13 MR. PANNER: They appear to have been
14 significantly shorter, Your Honor. I didn't
15 see -- I couldn't determine exactly what they
16 were in terms of -- of averages, but they were
17 -- they were significantly shorter.

18 JUSTICE KAGAN: Yeah, I mean,
19 significantly shorter but still a matter of
20 weeks and months?

21 MR. PANNER: I think a matter of weeks
22 in -- in any event. But there was -- there was
23 some suggestion that at an earlier time it was
24 -- it was quite fast. The Washingtonian case,
25 which is back in the '30s, but I happened to

1 notice that in that one, the application -- the
2 case was -- was evidently filed after a
3 certificate had been granted, and that was two
4 weeks after the application was submitted.

5 So it may be that -- you know, but --
6 but what's interesting is, in Chief Judge
7 Clark's dissent in Vacheron, he does talk about
8 the fact that delay could lead to the loss of
9 substantive rights and that that doesn't make
10 any sense.

11 I do think that Congress was
12 influenced by that dissent or I think it's --
13 it makes sense to read Congress's enactment as
14 being consistent with the views expressed in
15 that dissent, which indicate that once the
16 copyright owner has complied with the
17 obligations under Section 408(a), it does not
18 make sense to prevent the copyright owner from
19 pursuing a remedy.

20 May I reserve the remainder of my
21 time?

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Stris.

25

1 ORAL ARGUMENT OF PETER K. STRIS

2 ON BEHALF OF THE RESPONDENTS

3 MR. STRIS: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 Section 411 of the Copyright Act

6 provides that no civil infringement suit shall

7 be instituted until registration has been made

8 or registration has been refused.

9 The statutory text is plain. The
10 Register of Copyrights must make a registration
11 determination before an applicant can sue for
12 infringement.

13 And I'd like to start with the
14 operative sentence of Section 411(a). This is
15 on page 30a of the petition appendix. And that
16 sentence prohibits suit "until pre-
17 registration or registration of the copyright
18 claim has been made in accordance with this
19 title."

20 So the natural question is, where in
21 this title do we look? The immediately
22 preceding provision in the title happens to be
23 called Registration of Claim. This is
24 Section 410. It's on page 29a of the petition
25 appendix.

1 The (a) subsection says that after the
2 Register examines the claim, if the criteria is
3 met, "the Register shall register the claim."
4 And the (b) section says that if the Register
5 determines the criteria is not met, "the
6 Register shall refuse registration."

7 So, in either case, it's patently
8 obvious that it is the Register who is acting.

9 CHIEF JUSTICE ROBERTS: Well, but, I
10 mean, your friend on the other side makes the
11 point -- and I think there's a lot to it --
12 that there are a lot of other sections and
13 provisions where it only makes sense to read
14 "register" as if you were registering for, you
15 know, for the draft or something.

16 MR. STRIS: So a few responses, Mr.
17 Chief Justice.

18 The first is I'm happy to do a close
19 reading of any of the provisions that my friend
20 cites. We don't actually think any of them
21 stand for the proposition that an application
22 alone is enough. But even if some did,
23 Section 411(a) is surely not one of them. This
24 is kind of the -- the point you made earlier,
25 Justice Kagan. We -- we look to how it's used

1 in 411(a).

2 I don't deny that the word
3 "registration," "make registration," in some
4 context could refer to something different, but
5 my friend's core -- core proposition in this
6 case is that there's something special about
7 the use of "made" or the -- or the passive
8 construct. And that's fundamentally what we
9 disagree with.

10 JUSTICE BREYER: What about 410(d)?

11 In 410(d), it says the effective date of a
12 copyright registration is the day on which an
13 application, deposit, and fee, which are later
14 determined to be registered, have all been
15 received by the Copyright Office.

16 So maybe the registration is when it's
17 received, if there's later approval.

18 MR. STRIS: So, Justice Breyer, let me
19 give a textual response and then a more
20 fundamental one.

21 My textual response is that the
22 effective date provision requires a
23 determination by someone. This is what the
24 Chief Justice -- Mr. Chief Justice, I believe
25 you were getting at earlier.

1 If you look at the text of 410(d), it
2 says after the Register or a court of competent
3 jurisdiction has determined that the criteria
4 is satisfied, then you get the effective date.
5 411(a), Justice Breyer, is a precondition to
6 suit. No one disputes that.

7 And at the time of filing, no one,
8 neither the --

9 JUSTICE BREYER: It says registration.
10 But, you see, if you look at 410(d), I guess in
11 English, if you ever read like property law,
12 there's such a thing as having a piece of
13 property subject to defeasance.

14 And so noting that, and it is a piece
15 of property, you could read 410(d) as saying
16 the effective date of copyright registration,
17 i.e., you have it, is the date on which all
18 those things are received, though they are
19 subject to later defeasance if, in fact, the
20 registrar disapproves.

21 Okay. That's consistent with the
22 language, I think. Is it?

23 MR. STRIS: I don't think so. So I'm
24 going to continue with the textual point, but I
25 -- and I do want to get to the more fundamental

1 one. The reason why I don't think it's
2 consistent with the language is 411(a) says
3 that you can't do anything until registration
4 is made.

5 Now I understand you're trying to have
6 410(d) do the work, and I think probably the
7 best phrase in that for my friend is the
8 inclusion of a court of competent jurisdiction.
9 But it's clear that a court of competent
10 jurisdiction is in there because the court can
11 act when the Register has refused the
12 registration.

13 And, in fact, for those who have a
14 particular view of legislative history, if you
15 look at the House Report, it specifically says
16 that. It says that 410(d) "also recognizes the
17 possibility that a court might later find the
18 Register wrong in refusing registration."

19 So I think the text doesn't -- it
20 would do great violence to the text to
21 interpret it that way. But, Justice Breyer, I
22 want to make the more fundamental point because
23 this addresses some of the policy issues, kind
24 of the elephant in the room.

25 The whole point of a registration

1 decision, whether it's a grant or a refusal, we
2 submit, is a belief that there is value to the
3 registration process itself.

4 In some ways, it's analogous to
5 administrative exhaustion requirements that we
6 find in a number of statutes. So, if you look
7 at copyrights specifically, 30 percent of all
8 copyright registration applications result in
9 correspondence.

10 And this is essential because,
11 occasionally, it's correspondence like in this
12 case where you get a letter saying your check
13 bounced, please pay the money. But far more
14 often, the correspondence is the -- the agency
15 saying, well, we looked at your application, we
16 need you to change things. We need you to
17 limit your claim. It's an interactive process.

18 And so my friend wants to focus
19 entirely on the fact that most of the
20 applications are ultimately granted.

21 JUSTICE KAGAN: I mean, not just most.
22 Ninety-seven percent, right?

23 MR. STRIS: Well, so I think it may be
24 even more than that. But I want to press --
25 before I get to that, I want to press this

1 point. Many of those applications are granted
2 after changes have been made by the applicants
3 because of the interact --

4 JUSTICE KAGAN: How often does that
5 happen?

6 MR. STRIS: I don't know as -- as a
7 percentage, but I can tell you not a de minimis
8 -- de minimis amount, a significant number of
9 times. And so you may not like this policy,
10 but what I'm trying to do is not argue as a
11 policy matter that I'm right.

12 I'm trying to explain why there's no
13 -- you shouldn't have any heartburn holding
14 that Congress meant what it clearly said in the
15 provision because one could certainly believe
16 that it's more efficient.

17 JUSTICE GORSUCH: Well, maybe the
18 bigger heartburn, if we have any, about the
19 policy here is that if I'm persuaded of one
20 thing, it's that Congress pretty much assumed
21 that registration decisions would happen
22 promptly when it enacted the statute and that
23 there's at least some evidence that that --
24 that that hope or expectation has not exactly
25 materialized.

1 And -- and I take that to be the
2 underlying plea from the other side really.
3 What do you say to that?

4 MR. STRIS: So I would say a few
5 things.

6 First, I would say that, to be
7 perfectly frank, this is largely a solution in
8 search of a problem. And I want to address the
9 injunctive issue first and then -- and then
10 come back to damages.

11 With regard to injunctions, I don't
12 think it's -- I don't think I can overstate the
13 point that this argument has been made to
14 Congress repeatedly, and Congress has added two
15 critical exceptions where the need for an ex
16 parte TRO is most acute. And I'm talking about
17 the live broadcast exception in 411(c), and I'm
18 talking about pre-registration in 408(f).

19 And so, in the mine-run of cases where
20 there's an issue with regard to needing an
21 injunction quickly, those address the problem.

22 It --

23 JUSTICE SOTOMAYOR: But your solution
24 undermines that solution. Your -- your
25 proposed reading means that the people who are

1 pre-registering are not getting the benefit of
2 it until the registrar acts.

3 MR. STRIS: No, no, that's -- Justice
4 Sotomayor, that's -- Sotomayor, that's a very
5 important point. If you look at 411(a), it
6 says you can't --

7 JUSTICE SOTOMAYOR: All right. I am.

8 MR. STRIS: Yeah. It says you can't
9 bring suit until pre-registration or
10 registration of the claim has been made.

11 JUSTICE SOTOMAYOR: All right. But
12 the pre-registration has to be accepted, no?

13 MR. STRIS: Of course. And the way
14 pre-registration --

15 JUSTICE SOTOMAYOR: And so isn't
16 pre-registration being accepted slowly as well?

17 MR. STRIS: No. No, no, no.

18 Pre-registration is an entirely different
19 process. You -- you can pre-register a work
20 that isn't even finished. You don't have to
21 deposit the work. You just have to describe it
22 and explain to the office why it falls within a
23 category of works that have historically been
24 infringed before first commercialization.

25 So, if you're HBO and you have Game of

1 Thrones and you're working on it and you know a
2 lot of people, the -- the -- the people on the
3 set, the key grips, they're going to have
4 access to the materials, you have a streamlined
5 application that you file with the office, and
6 all you have to do is explain that it fits
7 within the regulatory definition. You get
8 pre-registration.

9 You can sue immediately. You can get
10 an injunction. And this is critical. If you
11 look at 408(f)(3), Congress said you then must
12 submit an application, deposit, and fee within
13 three months of your first commercialization.

14 So it just goes to show that Congress
15 knew how to make clear that they wanted to peg
16 something to an application.

17 Now, Justice Gorsuch, back to my
18 solution in search of a problem.

19 So the first answer is I think there
20 are these two critical exceptions that deal
21 with the problem quite well.

22 My second answer is that in the rare
23 case -- and I think, frankly, it is rare --
24 where you would have the imminence and
25 irreparable injury that would warrant a TRO,

1 and you don't fall within one of those
2 exceptions, you can apply for special handling.

3 And I understand that special handling
4 was not required. It's something that the
5 office decided to offer. But, as a practical
6 matter, the reality is it is offered, and the
7 office does everything it can to resolve issues
8 within five days.

9 And, obviously, you can ask my -- my
10 -- my friend from the government about -- more
11 detail about how it works, but my understanding
12 is that they honor that and that particularly,
13 if you notify the government that there's
14 litigation, there's no reason to believe that
15 you don't get a determination within a certain
16 number of days.

17 So I -- I really think it's not an
18 issue. And then I would conclude by saying to
19 the extent that some hypothetical copyright
20 plaintiff with a pending application can't get
21 a TRO for -- it doesn't fit within one of those
22 two things -- our core submission is that
23 that's a cost that Congress thought was worth
24 the benefits of the specific rule that they
25 chose.

1 Now, with regard to damages, just a
2 few words on this. The statute of limitations
3 in Section 507(b), it's a three-year rolling
4 statute that runs from discovery of
5 infringement.

6 Now I think it was Justice Kagan who
7 asked a question about the processing times.
8 As of now, according to the Copyright Office
9 website, the average processing time for all
10 claims is seven months. Ninety-four percent of
11 all applications right now are resolved within
12 two to 15 months.

13 So I think the most telling answer as
14 a practical matter that I would give is that
15 it's not surprising that the Petitioner does
16 not identify a single case where the statute of
17 limitations has somehow expired while an
18 applicant --

19 CHIEF JUSTICE ROBERTS: Well, it
20 doesn't -- well, as you said, it's a rolling
21 statute administration. So the idea of it
22 expiring doesn't really fit.

23 And the argument, I guess, on the
24 other side is that seven months doesn't mean
25 that much if it's the first two weeks where all

1 the damage is done because somebody puts it
2 online and then everybody, you know, has the
3 benefit of it, and it's very hard to go back
4 and undo that.

5 MR. STRIS: So two responses.

6 So, with regard to irreparable injury,
7 I think that's what injunctions are for, and I
8 feel like I addressed that a bit earlier.

9 With regard to damages and your point
10 which I take that it's rolling, and there are
11 separate accruals, and we're not just talking
12 about whether you lose your entire claim but
13 whether you lose some of the damages, I'm
14 making a much stronger point.

15 I'm saying Petitioner doesn't cite a
16 single case where some chunk of the damages
17 fell outside of the three-year window because
18 the applicant was waiting.

19 The only --

20 CHIEF JUSTICE ROBERTS: Well, I don't
21 know, you know, whether he cites a particular
22 case or not, but as a matter of logic, it makes
23 sense, doesn't it?

24 MR. STRIS: I don't think so. And --
25 and let me -- let me kind of walk through why I

1 don't think it makes sense.

2 So you have three years from
3 discovery, three years from, oh, okay, I see
4 that there's an infringement, I have three
5 years to wait. If you're not being dilatory,
6 you immediately file your application. Three
7 years, you need.

8 If the average processing time is
9 seven months, and if 94 percent of applications
10 are being resolved within 15 months, then on
11 the -- on the outside, you're talking about a
12 tiny percentage of situations that even come
13 close. If you look at those, they tend to be
14 mail applications, which the office
15 discourages, that involve correspondence.

16 Where the -- if -- if there's any way
17 to get from 15 months to three years, it's
18 overwhelmingly likely that it's because of
19 dilatory behavior on the part of the applicant,
20 and let me give you a warrant for that.

21 The only case that we have ever seen
22 where this has been an issue was found by the
23 American Bar Association, an amici to -- to my
24 friend, who cites a 25-year-old case called
25 Kregos from the Southern District of New York.

1 Well, the court described the problem as
2 "self-induced" because, in fact, the plaintiff
3 sat on his hands.

4 So I can't come here and tell you that
5 there's never been a situation where this has
6 been an issue, but I think the fact that, you
7 know, my friend and a host of amici haven't
8 been -- been able to unearth one of them is
9 probably strong --

10 JUSTICE KAVANAUGH: What --

11 MR. STRIS: -- indication that this is
12 not that serious a problem.

13 JUSTICE KAVANAUGH: You have a -- a
14 good argument on the text, obviously. But
15 you're also trying to say there's no real
16 problem here, a solution in search of a
17 problem. I'm just questioning that, given the
18 amici say things like the rule adopted here
19 would have a devastating impact and would cause
20 severe hardship. And these are the industry
21 representatives.

22 Again, you could win on the text, but
23 the idea that there's no problem seems a
24 stretch to me.

25 MR. STRIS: Well, so, Justice

1 Kavanaugh, let me address that head on.

2 So I -- I will concede that, for
3 decades, there's been vigorous disagreement
4 over whether and to what extent formalities
5 should be removed from the Copyright Act. And
6 many stakeholders, including several of
7 Petitioner's amici, have long been
8 dissatisfied. They prefer --

9 JUSTICE KAVANAUGH: Right. There's a
10 problem.

11 MR. STRIS: But -- but -- so let me --
12 let me finish.

13 JUSTICE KAVANAUGH: Okay.

14 MR. STRIS: There are many people who
15 subscribe to that view. Whether you
16 characterize it as a problem is kind of a
17 normative judgment. There are also many people
18 who subscribe to the alternative view. We
19 happen to be among them. Our amici happen to
20 be among them.

21 So I would resist the -- the -- the
22 characterization of your question and say that
23 the -- the -- there's not ambiguity in the
24 statute but, rather, a profound dissatisfaction
25 on the part of some stakeholders. And the way

1 we address that is we look at the text and we
2 try and determine what it indicates Congress
3 decided.

4 JUSTICE KAVANAUGH: Okay.

5 MR. STRIS: And on this one, I don't
6 think just we have an okay argument on the
7 text; I think that it's overwhelmingly the case
8 that you -- you have to interpret it to mean a
9 registration decision.

10 So, going back to the text just for --
11 for a moment, I've only talked about the first
12 sentence, which I think --

13 JUSTICE GORSUCH: Before we leave that
14 subject, I'm sorry -- I'm sorry to interrupt --

15 MR. STRIS: Please.

16 JUSTICE GORSUCH: -- but what do you
17 say to the objection that it puts American
18 copyright holders at a disadvantage because
19 formalities aren't required under our
20 international obligations?

21 MR. STRIS: So what -- Justice
22 Gorsuch, what you just asked was the core
23 debate, and it was a vigorous one in 1988 when
24 the House and the Senate split in determining
25 how to deal with Berne. One said, okay, we

1 should get rid of the registration requirement
2 entirely; the other said no, it's fine, keep it
3 the way it is. They reached a compromise, and
4 they added the words "U.S. works."

5 So, again, I -- I certainly don't want
6 to suggest that the policy arguments for the
7 alternative are terrible. They could be
8 defended. Many people in this room may think
9 that they're right. But they're beside the
10 point when the case is about what Congress
11 meant in enacting this particular statutory
12 language.

13 JUSTICE KAVANAUGH: You -- you made an
14 analogy to exhaustion of administrative
15 remedies. I just want to test that --

16 MR. STRIS: Uh-huh.

17 JUSTICE KAVANAUGH: -- analogy. Is
18 that really what's going on here? Is this --
19 resolving it going to eliminate the need for a
20 suit --

21 MR. STRIS: So I think it's -- I --

22 JUSTICE KAVANAUGH: -- in many cases?

23 MR. STRIS: -- I used the word
24 "analogy" on purpose. It's not exactly the
25 same. But there are some striking --

1 JUSTICE KAVANAUGH: Well, is it -- is
2 it even within the ZIP code?

3 MR. STRIS: Oh, definitely.
4 Definitely.

5 JUSTICE KAVANAUGH: Okay, how?

6 MR. STRIS: I think there are striking
7 similarities. So the first is, although as a
8 percentage most claims, 97 percent, 99 percent,
9 ultimately get registered, last year there were
10 18,000 refusals, and that doesn't take into
11 account the tens of thousands of applications
12 that were abandoned or withdrawn in the
13 process.

14 So it may be a small percentage, but
15 there are still tens of thousands of instances
16 where you would have different incentives and
17 different conduct based upon the rule that you
18 pick. That's number one.

19 Number two, even for the claims that
20 are granted, you can't sweep away the fact that
21 there is interaction between the applicant and
22 the office. And so whether you allow people to
23 sue immediately or whether you require that
24 they go through the examination process
25 irrespective of the result clearly is similar

1 to an exhaustion regime and that you think that
2 there's something beneficial about the process.

3 And then my final answer is I think
4 perhaps the most important one, which is the
5 reason it's a loose analogue, the reason why
6 it's in the same ballpark, is it may not be
7 like ERISA, for example, where the point of the
8 administrative process is to see if you can
9 resolve this -- the dispute beforehand. But it
10 -- but it is similar in the sense that you
11 believe that a completion of the process has
12 value.

13 And I think the authors' and
14 educators' amicus brief does a great job of
15 describing that requiring that people go
16 through the process enhances copyright value.

17 It creates a public registry of correspondence
18 -- publicly available information about the
19 correspondence. It ensures that the claims
20 that are being registered are the best claims
21 possible. It has the incentive that people act
22 earlier and register claims or, rather, apply
23 to register claims not just when there's
24 infringement but get works into the Library of
25 Congress and into the registry because they

1 think, well, I want to get ahead of the game
2 and be in a position where I can vindicate my
3 rights.

4 That's not exactly the same as an
5 administrative exhaustion requirement before
6 litigation, but there -- it's certainly in the
7 same ZIP code. There's a number of, I think,
8 very strong parallels.

9 So I guess the final thing that I
10 would say is that I've only talked briefly
11 about the first sentence. But, if you turn to
12 the second sentence of Section 411(a), I think
13 it -- it -- it really kind of seals the deal
14 because that sentence is naturally read as an
15 exception to the first.

16 And in order to avoid that reading, my
17 friend is forced to argue that exactly the same
18 phrase, "registration has been," means two
19 completely different things in the first and
20 the second sentence.

21 And kind of in the interest of kind of
22 not burying the lead, what I would say about
23 this is that the -- the problem -- if I could
24 just finish that thought?

25 CHIEF JUSTICE ROBERTS: Sure.

1 MR. STRIS: The problem with what my
2 friend does infects many of his arguments,
3 which is he interprets the provision in a way
4 that's not literally impossible but renders
5 many provisions insignificant: 410(d), 408(f),
6 the constructive notice provisions. It just
7 doesn't make sense to do that, and so we ask
8 that you affirm.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Ellis.

13 ORAL ARGUMENT OF JONATHAN Y. ELLIS
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENTS

16 MR. ELLIS: Mr. Chief Justice, and may
17 it please the Court:

18 I'd like to pick up right where my
19 friend left off on the second sentence of
20 Section 411(a) because I do think that that is
21 really the key to this case, and I think there
22 are three pretty -- three textual cues in that
23 sentence that show that registration has been
24 made, and the first sentence must be referring
25 to the act of the Register.

1 The first is the one we just talked
2 about, that it uses the word "registration."
3 And I think it's actually a little bit stronger
4 than what we've said. It says registration has
5 been refused. That obviously is talking about
6 the final act of registration. That's the only
7 -- that's what has been refused in that -- in
8 that scenario.

9 So it's pretty strange to think that
10 "registration," that word in the first
11 sentence, doesn't mean the same thing and the
12 only person who can make registration in that
13 sense is the Register of Copyrights.

14 The second thing to notice is that the
15 second sentence says that when you -- refers to
16 delivering to the Copyright Office your
17 deposit, application, and fee in proper form.
18 You might recognize that sentence. That's what
19 my friend says "registration has been made"
20 means in the first. Again, pretty peculiar for
21 Congress to refer to the exact same conduct in
22 two consecutive sentences and not use a phrase
23 that even resembles each other.

24 And the third thing is what my friend
25 says -- has already raised, that the whole

1 point of the second sentence is to create an
2 exception to the registration requirement in
3 the first. And you don't need an exception to
4 the registration requirement when the Register
5 has refused registration. If all you had to do
6 was submit your application in proper form,
7 what the Register does, inherently is the
8 assumption in that sentence, doesn't change
9 that you've properly applied.

10 JUSTICE KAGAN: Well, I --

11 CHIEF JUSTICE ROBERTS: Well --

12 JUSTICE KAGAN: -- I believe --

13 CHIEF JUSTICE ROBERTS: Go ahead.

14 JUSTICE KAGAN: I believe Mr. Panner
15 says that the function of the second sentence
16 is to require an additional act, that notice be
17 given to the Register.

18 MR. ELLIS: Right, and I think there
19 are two problems with that reading, aside from
20 the fact it's just not the most natural one.

21 The first is that -- I think what he
22 said this morning is that you can -- the case
23 can still proceed when -- after the Register
24 refuses registration.

25 But that's not what it says. It says

1 you're entitled to institute your suit. So it
2 assumes that nothing happens until the Register
3 has acted. That makes sense. The other
4 problem with the second sentence is that it
5 undermines the third sentence of 411(a), which
6 gives the Register a right to intervene in
7 suits and where she has refused registration
8 upon notice within 60 days.

9 And if a suit can be filed before the
10 Register gets a chance to evaluate the
11 application and come to a decision and then get
12 notice of -- of this suit, then the suit can
13 get pretty far down the road before the
14 Register can intervene. And I think that
15 undermines the scheme and is clearly not what
16 Congress intended.

17 The -- the Petitioner talks about --
18 points to obviously a bunch of different
19 provisions in the Act and he says, well,
20 registration has been made or some variant of
21 that, and these other provisions must mean the
22 copyright owner's actions.

23 We disagree, but we don't think the
24 Court has to go that far.

25 I think it's clear, and he agrees,

1 that it doesn't always mean that in the Act.
2 Section 708(a) refers to -- says that the fees
3 you pay for an application have to cover the
4 cost of the application, including the issuance
5 of a certificate if registration is made.

6 Well, the issue -- a certificate is
7 only issued if registration is made by the
8 register.

9 In the constructive notice provisions
10 in Section 60 -- or, excuse me, 205 and in 406,
11 I think those are also places where he
12 disagrees, but I don't think there's any
13 reasonable reading of those provisions that --
14 that -- where -- that can come to the
15 conclusion that registration has been made
16 there or a variant thereof.

17 It doesn't refer to the Register of
18 Copyrights Act. And if I could maybe walk
19 through why that is, I think it's important.

20 205, Section 205 is about recording
21 documents that relate to a copyrighted work.
22 So think about a transfer of ownership. And it
23 says you can record the document and, once you
24 do, the world is on notice of the facts stated
25 therein, with two conditions:

1 The first is that that document
2 contain enough information such that a search
3 in the Copyright Office's records by
4 registration number or by title reveals the
5 document. The second is that registration has
6 been made.

7 And I think the -- the obvious
8 implication there is that that too is going to
9 create a public record of when -- of the work
10 and of the registration of the work. And
11 that's not true of an application.

12 And so it's true that -- that the
13 right attaches right away, but as you were
14 talking about before, Justice Sotomayor, there
15 are circumstances where notice is critically
16 important. This is one of them. And
17 Petitioner -- and Petitioner's reading would --
18 would make a hash of that provision.

19 Section 406 is a similar one. And
20 what it says, if there's an error in the notice
21 on a copyrighted work, so, you know, it says
22 your circle (C) and then it says John. Well,
23 John's not the owner. It turns out that Jack
24 is. That says -- that doesn't invalidate your
25 copyright.

1 But what it does do is preside --
2 excuse me, provide an infringer, an innocent
3 infringer with a complete defense to
4 infringement if -- if -- if he went out and got
5 a license from John, the person who is named in
6 that notice.

7 But, critically, you can't rely on
8 that defense. The innocent infringer defense
9 doesn't work if registration had been made in
10 the correct owner's name at the time of
11 infringement.

12 Again, that makes no sense unless
13 registration having been made creates a public
14 record of the work and the proper owner.

15 So I think what that establishes is
16 that it cannot mean everywhere it shows up to
17 refer to the act of the copyright owner. And
18 so it just points us right back to
19 Section 411(a) and the first two sentences,
20 which we think cannot be read any other way.

21 JUSTICE KAVANAUGH: The textual
22 argument you make is, of course, weighty. I
23 think they're trying to say that there are --
24 it doesn't make sense in terms of, A, what
25 Congress would have been thinking or, B -- and

1 B, how things operate in the real world and the
2 problems that would be created.

3 So can you respond to those?

4 MR. ELLIS: I'd love to address both.

5 On -- on the first, I think, as to what
6 Congress could have thought, it may be hard --
7 harder to say, but, as we discussed, the relays
8 -- the delays at the time of the time the suit
9 was passed or the act was passed weren't so
10 great, so I think that sort of cuts against
11 thinking that Congress couldn't have wanted
12 this.

13 As to the problems, I -- I think
14 they're overstated. Let me start by saying
15 first, though, that the Copyright Office also
16 desires efficient and quick registration. In
17 the last three years, the Copyright Office has
18 sought and received appropriations to increase
19 their examination staff by about 60 percent.

20 As those people are trained and get
21 into the -- into the workforce, I think we're
22 going to see, and we've already seen --

23 JUSTICE KAVANAUGH: You're not denying
24 there are delays and the delays are a problem?

25 MR. ELLIS: Not -- I'm not denying --

1 I'm not denying there are delays, and I'm not
2 denying that there is dissatisfaction with
3 delays.

4 JUSTICE KAVANAUGH: Yes. And the word
5 problem I won't use.

6 MR. ELLIS: I think the second thing
7 you might look at is what Congress has done in
8 response to those concerns. We've already
9 talked about two of those things, the
10 pre-registration regime, which the delay is not
11 the same for that. All you're submitting is an
12 abbreviated description of the work. You don't
13 have to do the examination of the deposit, et
14 cetera.

15 The second is the live broadcast.

16 The third hasn't been mentioned this
17 morning, and it's actually not mentioned in the
18 brief, so I think it's worth pointing out.

19 There are a lot of hypotheticals about
20 what about this online proliferation of my work
21 and what do I do? Well, Section 512 of the
22 Copyright Act discusses secondary liability for
23 online service providers and it provides
24 immunity in certain circumstances.

25 One of those requirements is that you

1 have a take-down regime such that if -- think
2 about YouTube or something like this -- if a
3 copyright owner comes to you and says there's a
4 work on your site that's infringing my
5 copyrights, you have to take it down.

6 And that's not -- does not turn on
7 whether the work is registered or not. Excuse
8 me. So I think what that shows is that
9 Congress is receptive to these -- to these
10 dissatisfaction.

11 It has weighed in multiple times, at
12 the same time trying to balance these concerns
13 against the real benefits of registration, and
14 the real benefits of having the Copyright
15 Office participate in this -- in this
16 examination, and then have the right to
17 participate and provide their views to the
18 court.

19 CHIEF JUSTICE ROBERTS: I understand
20 your textual argument about the incongruity of
21 the same phrase having two different meanings
22 in 411. But it's -- it's not that much more
23 compelling than your friend's argument listing
24 all the time -- all the other sections where it
25 has -- your reading would require it to mean

1 different things as well.

2 MR. ELLIS: So -- so, again, I don't
3 -- we don't think that's actually true. But I
4 don't want to get into a debate about -- unless
5 you'd like to -- about 10 other provisions of
6 the Act.

7 I think it's enough to say that he
8 admits that 708 uses it in that way, uses
9 "registration has been made" to refer to the
10 act of the copyright owner -- excuse me, the
11 act of the Register. And now he says you
12 shouldn't put any weight on that because it
13 wasn't in the '76 Act, that this Court tries to
14 make sense of a statutory scheme as a whole.

15 And then there's the constructive
16 notice provisions that I tried to walk the
17 Court through where it just can't make sense
18 there to refer to it.

19 And so we're back to saying, well,
20 what makes sense for this provision? And I
21 think because what makes sense for this
22 provision for a host of reasons is that -- is
23 that registration has been made in the first
24 sentence, is using the word "register" in the
25 same way that everybody agrees register --

1 registration is being used in the second
2 sentence.

3 Just to say a word about these --
4 these cases that the other side points to,
5 Vacheron, and I think in the brief they cited a
6 couple others that they didn't do this morning.
7 You know, you can look at those decisions for
8 yourselves and decide what the debate was.

9 But, if you want to sort of get behind
10 the text and figure out what Congress was
11 getting after, I don't think you can do a lot
12 better than looking at the legislative record
13 itself. And I would point you first to the
14 1961 report by the Copyright Office to Congress
15 that addresses this very question in Vacheron
16 and what should be done about it.

17 And what the Copyright Office said is
18 that registration is important. You should
19 maintain that requirement with one
20 modification. You should address this
21 situation in Vacheron where, after the
22 Copyright Office, the register has refused
23 registration, the copyright owner has to file
24 two suits: a mandamus suit against the
25 Register to get -- issue -- issue a

1 certification and, second, your infringement
2 action.

3 What you should do in that case is to
4 combine those suits. That's what the second
5 and third sentence of 411(a) does.

6 Then, when you look at the first act
7 introduced into the House, 1964, written by the
8 Copyright Office, unsurprisingly, it adopts the
9 recommendation. When you look at the 1976 Act,
10 it doesn't change, by the way, between 1964 and
11 enactment in 1976. Then you look at the House
12 report at page 157 and it confirms.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Panner, you have five minutes
16 remaining.

17 REBUTTAL ARGUMENT OF AARON M. PANNE
18 ON BEHALF OF THE PETITIONER

19 MR. PANNER: Thank you, Mr. Chief
20 Justice.

21 I want to emphasize that our argument
22 relies primarily on the text of Section 411(a)
23 and the fact that it uses the phrase
24 "registration has been made" and that in the
25 Act, that phrase and that construction

1 consistently refers to the action of the
2 copyright owner.

3 It's revealing that in the legislative
4 history, which is included in the -- in the
5 codification of the Act, it says that a
6 copyright owner who has not -- who has not
7 registered his claim can have a valid cause of
8 action against someone who has infringed his
9 copyright, but he cannot enforce his rights in
10 the courts until he has made registration.

11 That is -- and, again, in
12 Section 411(b) of the 1976 Act, now 411(c), the
13 copyright owner makes registration.

14 It is a really consistent usage in the
15 statute that when Congress was referring to the
16 action of the copyright owner, it used that
17 phraseology. And I want to -- you know,
18 Section 708(a), as the government has
19 acknowledged, was adopted in 1982. It has
20 nothing to do with litigation rights and
21 remedies and, therefore, really says nothing
22 about how the provision should be properly
23 construed in Section 411(a).

24 And the constructive notice provisions
25 -- there is actually a constructive notice

1 provision that talks about actual notice, but
2 the other constructive notice provisions quite
3 sensibly protect the copyright owner if the
4 copyright owner has done what the copyright
5 owner is required to do to register the claim,
6 namely, submit the required application --
7 application, deposit, and fee.

8 And recall that as -- if the time of
9 examination was quite short at the time of the
10 adoption of the Act, that was unlikely to
11 prejudice anyone because registration would --
12 would come through quickly.

13 And, you know, so it makes perfect
14 sense that the -- in the same way that that is
15 sufficient to protect the rights, to protect
16 the remedies available to the copyright owner,
17 that it is also appropriate to open the court
18 -- the gates of the courthouse.

19 It's surprising to me that the
20 government relies so heavily, by the way, on
21 those constructive notice provisions because
22 copyright -- publication with notice is no
23 longer required under the Act.

24 So this is all -- this is all an issue
25 that would have gone away in 1988 with regard

1 to the notice. But the key point is that it
2 makes sense to protect copyright owners and to
3 give them their rights and remedies. And
4 that's what the -- upon compliance with
5 Section 408(a), the submission of the required
6 application, deposit, and fee, and that's what
7 the statute says. That is what the text says.

8 And I think it's also important to
9 read that in light of the history. And the key
10 issue that was debated between the majority
11 opinion and the dissent in Vacheron is whether
12 the copyright owner should be prevented from
13 gaining access to judicial remedies because the
14 Copyright Office had not yet acted or granted
15 the registration.

16 Now it's true that in that case there
17 had been a refusal, and the question was
18 whether mandamus was required, but the same
19 consequences occur in the case of Copyright
20 Office inaction.

21 If there's a circumstance where the
22 Copyright Office does not act, the question is:
23 Can you go to court? And it's inconceivable
24 that Congress would have said in the case of
25 refusal, you can go to court, you don't need to

1 seek a judicial remedy, but in the case of
2 inaction, you can't go to court, and you have
3 to somehow seek a mandamus to get a decision
4 before going to court.

5 It makes all the sense in the world to
6 understand that language to say what it clearly
7 says within the phraseology of the Act, that if
8 the copyright owner has made registration under
9 Section 408(a), that the copyright owner is
10 then entitled to sue.

11 And the -- the conceit that Congress
12 intended to require administrative exhaustion
13 or was concerned about copyright quality, that
14 is -- there's no basis for that in the text of
15 the statute. There's no basis for it in the
16 history of the -- of -- of what Congress said,
17 what the committee report said about the Act,
18 for what that's worth.

19 The key point is that the registration
20 requirement has its purpose, and that purpose
21 is vindicated if the copyright owner has
22 submitted the required application, deposit,
23 and fee, as Section 408 requires.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 12:16 p.m., the case
2 was submitted.)

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