

Addition Through Subtraction: The Resolution of Copyright Registration Uncertainty Through the Repeal of §§ 411(a) and 412

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I. INTRODUCTION

“I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”

—Ulysses S. Grant¹

Pursuant to the “copyright clause” of the United States Constitution, Congress not only has the authority to promote, but also to limit, copyright protection in the United States.² In accordance with this power, Congress enacted § 411(a), which requires the registration of artistic works prior to the institution of a copyright infringement action (“pre-suit registration requirement”), and § 412, which limits the recovery of statutory damages and attorney’s fees if a work is not registered prior to infringement.³

Federal courts have developed divergent viewpoints as to when “registration” actually occurs, and thus, when a copyright owner may institute an infringement action under § 411(a). Courts adopting the “application approach” hold that registration occurs when the copyright owner’s application is sent or received by the United States Copyright Office (Copyright Office).⁴ Conversely, courts adopting the “registration approach” hold that registration does not occur until the Copyright Office acts on the application and issues a certificate of registration.⁵ The application approach is arguably contrary to general principles of statutory interpretation by disregarding the seemingly plain and unambiguous text of the Copyright Act, while the registration approach is inconsistent with the public policy behind the Act.⁶ As it is not foreseeable that the uncertainty caused by both approaches will be resolved judicially, congressional intervention is necessary.⁷

This Comment argues that Congress must repeal §§ 411(a) and 412 of the Copyright Act not only to resolve the split regarding the pre-suit registration requirement under § 411(a), but also to advance the interests of copyright owners. Part II outlines the history and development of the registration requirement in the United States, summarizes current

1. Ulysses S. Grant, Eighteenth President of the U.S., First Inaugural Address (Mar. 4, 1869), available at <http://millercenter.org/scripps/archive/speeches/detail/3556>.

2. U.S. CONST. art. I, § 8, cl. 8.

3. 17 U.S.C. §§ 411(a), 412 (2006).

4. See *infra* note 134 and accompanying text for discussion of application and registration approaches.

5. See *infra* note 134 and accompanying text for discussion of application and registration approaches.

6. See *infra* Part III.B for discussion of each approach and their deficiencies.

7. See *infra* Part III.A for discussion of unlikelihood that split will be resolved in foreseeable future.

registration procedures, and discusses the rationales behind both the application and registration approaches to registration. Specifically, Part II.A describes the early development of the registration requirement up to 1976. Part II.B summarizes the Copyright Act of 1976, with particular focus on §§ 411(a) and 412. Part II.C outlines amendments and reforms to the 1976 Act, including the Berne Convention, the Berne Implementation Act of 1988, the Copyright Reform Bill of 1993, and the Family Entertainment and Copyright Act of 2005. Part II.D discusses the U.S. Copyright Office, the Library of Congress, and the current procedures relating to registration under the Copyright Act. Part II.E discusses both the application and registration approaches to pre-suit registration, and notes § 411(a)'s current status as a precondition to filing suit.

Part III evaluates both the application and registration approaches, notes their deficiencies, and argues for a solution to the split that also advances the rights and interests of copyright owners as a whole. Part III.A discusses why the divergent approaches to the pre-suit registration requirement have current significance and deserve legislative remedial action. Part III.B discusses how the application approach ignores general principles of statutory interpretation by disregarding the seemingly plain and unambiguous text of the Copyright Act, while Part III.C details how the registration approach is inconsistent with the public policy behind the Act. Part III.D argues that the deficiencies within each approach can only be remedied by congressional repeal of §§ 411(a) and 412. Part III.D also discusses the implications and concerns surrounding such a repeal and why these concerns are unfounded or minimal.

II. OVERVIEW

To understand the current split in federal courts concerning the § 411(a) pre-suit registration requirement and comprehend the minimal effect that the repeal of §§ 411(a) and 412 would have, the historical development of the registration requirement in the United States and its rationales should be discussed. By discussing the historical development of the registration requirement chronologically—specifically highlighting the development of the requirement up until 1976, the Copyright Act of 1976, subsequent reforms and amendments to the Copyright Act, and the current procedures within the Copyright Office—the foundations of, and rationales behind, the registration requirement become clear. This background also provides an appropriate foundation for a discussion of the application and registration approaches to the pre-suit registration requirement under § 411(a).

A. *Early History and Development of Copyright Registration and § 411(a) in the United States*

The U.S. Constitution allows Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸ Pursuant to this power, Congress enacted the Copyright Act of 1790 (1790 Act), which granted U.S. authors the exclusive right to print, reprint, publish, and vend their maps, charts, and books.⁹ Congress declared that an author could not benefit from the Act unless they (1) first deposited a printed copy of their work in the clerk’s office in the district in which they resided and (2) delivered a copy of their work to the Secretary of State within six months.¹⁰ In essence, compliance with the registration requirements of the 1790 Act was a prerequisite to obtaining initial copyright protection.¹¹

In the Copyright Act of 1831 (1831 Act), Congress permitted authors of musical compositions, prints, cuts, and engravings to obtain copyright protection and extended the fourteen year term of copyright protection to twenty-eight years¹² while retaining the registration, deposit, and notice requirements enacted in the 1790 Act.¹³ Despite amending or revising the 1831 Act on numerous occasions before 1870,¹⁴ authors were still required to comply with Congress’s registration and deposit requirements to obtain any copyright protection for their works.¹⁵

Perhaps in response to “discrepancies” and “contradictory provisions” in copyright legislation throughout the 1800s,¹⁶ Congress “enacted its first comprehensive copyright legislation,” encompassing

8. U.S. CONST. art. I, § 8, cl. 8.

9. 1790 Copyright Act (Act of May 31, 1790), ch. 15, § 1, 1 Stat. 124 (repealed 1831); see Christopher Springman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491 (2004).

10. Act of May 31, 1790, ch. 15, §§ 3-4, 1 Stat. at 125. The 1790 Act also required the author to pay sixty cents per copy of work deposited and to publish the work in the newspaper for at least four weeks. *Id.* § 3.

11. John B. Koegel, *Bamboozlement: The Repeal of Copyright Registration Incentives*, 13 CARDOZO ARTS & ENT. L.J. 529, 533 (1995).

12. 1831 Copyright Act (Act of Feb. 3, 1831), ch. 16, § 1, 4 Stat. 436 (repealed 1870).

13. Springman, *supra* note 9, at 493. The 1831 Act also maintained the publication and fee-payment requirements of the 1790 Act. Act of Feb. 3, 1831, ch. 16, §§ 3-4, 4 Stat. at 437.

14. 1870 Copyright Act (Act of July 8, 1870), ch. 230, 16 Stat. 198, 216-17 (noting revisions or amendments in 1834, 1859, 1861, 1865, and 1867).

15. *Id.* §§ 90, 93. The 1870 Act also mandated that “all records . . . relating to copyrights and required by law to be preserved, shall be under the control of the librarian of Congress, and kept and preserved in the library of Congress.” *Id.* § 85.

16. THORVALD SOLBERG, LIBRARY OF CONG., REPORT ON COPYRIGHT LEGISLATION 3 (1904).

prior copyright acts and amendments, in 1909.¹⁷ The Copyright Act of 1909¹⁸ (1909 Act) explicitly defined an author's exclusive rights,¹⁹ outlined works of authorship that were eligible for copyright protection,²⁰ and introduced the principle of reciprocity in protecting the works of foreign authors.²¹ Although initial federal copyright protection was no longer predicated on registration,²² a protected author could not institute a copyright infringement action under the 1909 Act unless he complied with the registration and deposit requirements of the Act.²³ In addition to actual damages and equitable relief, the 1909 Act allowed authors to²⁴ unconditionally obtain attorney's fees and statutory damages if their copyright infringement action was successful.²⁵ The 1909 Act also declared that the documentation of deposited and registered works would

17. Emio F. Zizza, *Eliminating the Preferential Treatment of Foreign Works Under United States Copyright Law: Possible Impacts of the Copyright Reform Bill of 1993*, 19 SETON HALL LEGIS. J. 681, 687 (1995).

18. 1909 Copyright Act (Act of Mar. 4, 1909), ch. 320, 35 Stat. 1075 (repealed 1976).

19. The 1909 Act recognized an author's exclusive right to reproduce, translate, perform, and "deliver" their work in public. *Id.* § 1.

20. The 1909 Act recognized books, periodicals, lectures, dramatic and musical compositions, maps, works of art and their reproductions, drawings, photographs, and prints and pictorial illustrations as works of authorship eligible for copyright protection. *Id.* § 5.

21. Under reciprocity, foreign authors could obtain U.S. federal copyright protection provided those authors resided in a nation that, through treaty or agreement, provided copyright protection to U.S. authors on the same footing as their own nationals. *Id.* § 8.

22. See Mose Bracey, *Searching for Substance in the Midst of Formality: Copyright Registration as a Condition Precedent to the Exercise of Subject-Matter Jurisdiction by Federal Courts over Copyright Infringement Claims*, 14 J. INTELL. PROP. L. 111, 124 (2006) (noting that under 1909 Act, "the existence of a copyright was no longer conditioned on compliance with formalities"); see also Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 331 (2010) ("Under the 1909 Act, registration was not a prerequisite to federal protection during the initial 28-year term of copyright.").

23. Act of Mar. 4, 1909, ch. 320, § 12 ("No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."); see Koegel, *supra* note 11, at 533 (noting that after 1909 Act, "registration was still mandatory and *acceptance* of registration by the Copyright Office was required before a lawsuit for infringement could proceed"); see also 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16(B)(6)(a) (2010) (stating that the 1909 Act introduced registration as "a condition precedent to the filing of an infringement action [and] that [the] requirement applied whether the infringement predated or followed the registration").

24. Compare Act of Mar. 4, 1909, ch. 320, § 25 (allowing attorney's fees and statutory damages), with 17 U.S.C. § 412 (2006) (prohibiting attorney's fees and statutory damages as remedy if copyright owner does not register their work with Copyright Office prior to infringement).

25. Act of Mar. 4, 1909, ch. 320, § 25; Arthur Levine, *The End of Formalities: No More Second-Class Copyright Owners*, 13 CARDOZO ARTS & ENT. L.J. 553, 555 (1993) ("[C]opyright owners were entitled to statutory damages and attorney's fees even if the copyrighted work was not registered at the time of the infringement.").

constitute prima facie evidence of the facts contained within them if their validity was ever questioned in court.²⁶

B. The Copyright Act of 1976

In 1976, Congress enacted the Copyright Act of 1976 (1976 Act).²⁷ The 1976 Act created “a single, centralized, federal registration system”²⁸ where any work of authorship fixed in a tangible medium of expression would be exclusively protected by the Act²⁹ and the importance of meeting statutory formalities to obtain copyright protection would be diminished.³⁰ The changes enumerated within the 1976 Act signified the transition from a regime where the existence of copyright was conditioned on adhering to formalities to a regime in which formalities were voluntary and would only play a supplemental role to the existence and exercise of copyright privileges.³¹ Sections 407 and 408 provide examples of this transition.³² While each outlines the various procedures and requirements for depositing copies of or registering a work respectively, neither provision conditions copyright protection on satisfactory compliance by the author.³³ In essence, the “deposit of copies . . . for the Library of Congress is mandatory” with exceptions for works that the Library does not need or want, while “copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement.”³⁴ The changes made to the deposit and registration provisions in the Act were also designed to draw the United States closer to admission into the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).³⁵

As authors were no longer required to register their works to obtain copyright protection under the 1976 Act, Congress sought to incentivize

26. Act of Mar. 4, 1909, ch. 320, § 55.

27. See Copyright Act of 1976, 17 U.S.C. §§ 101-810.

28. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1198 (10th Cir. 2005).

29. See 17 U.S.C. § 301(a). As initial federal copyright protection vested at fixation, publication of the work became irrelevant for the purposes of protection. Ginsburg, *supra* note 22, at 333.

30. See *La Resolana*, 416 F.3d at 1198.

31. See Springman, *supra* note 9, at 488.

32. See 17 U.S.C. §§ 407, 408 (1976).

33. *Id.*

34. H.R. REP. NO. 94-1476, at 150 (1976).

35. Leonard D. DuBoff, Harvey J. Winter, Lewis Flacks & Michael Keplinger, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?*, 4 CARDOZO ARTS & ENT. L.J. 203, 209 (1985).

registration by enacting §§ 407 through 412.³⁶ These incentives were meant to ensure that registrations remained sufficient to benefit the registration system itself and to supplement the Library of Congress.³⁷ In § 410(c),³⁸ Congress built upon the incentive first adopted in the 1909 Act³⁹ in that a certificate of registration would not only constitute prima facie evidence of the facts stated therein, but also prima facie evidence of the validity of the copyright, provided the registration occurred within five years of publication.⁴⁰

The 1976 Act maintained the 1909 Act requirement that authors—domestic or foreign—register their work before they instituted copyright infringement litigation.⁴¹ Provided the author delivered the deposit, application, and registration fee to the Copyright Office, an author could now institute an infringement action regardless of whether registration had been granted or refused under the 1976 Act.⁴² Considering that a work was now protected under the Copyright Act at fixation, the owner of a work had a valid cause of action against an alleged infringer even if the work was not registered; however, the owner could not enforce his rights in court until the work was registered pursuant to § 411(a).⁴³

Congress also enacted § 412, which conditioned the award of statutory damages and attorney’s fees upon copyright registration prior to the date of the alleged infringement.⁴⁴ If a copyright owner’s unpublished

36. Ginsburg, *supra* note 22, at 336; see Erin Hogan, *Approval Versus Application: How To Interpret the Registration Requirement Under the Copyright Act of 1976*, 83 DENV. U.L. REV. 843, 843 (2006) (“Although an original work is protected the moment it is fixed in a tangible form, certain rights and benefits accrue only upon copyright registration.”).

37. Koegel, *supra* note 11, at 534.

38. 17 U.S.C. § 410(c).

39. See *supra* note 26 and accompanying text for discussion of 1909 Act and prima facie validity of facts contained within registered work.

40. 17 U.S.C. § 410(c); see Ginsburg, *supra* note 22, at 347 (noting that the Copyright Office’s examination of copyright applications for registration justifies benefit conferred by § 410(c)).

41. 17 U.S.C. § 411(a).

[N]o action for infringement . . . shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement

Id.; see H.R. REP. NO. 94-1476, at 157 (1976) (noting that an author “cannot enforce his rights in the courts until he has made registration”). See also *supra* note 23 and accompanying text for discussion of 1909 Act and requirement to register prior to instituting infringement action.

42. 17 U.S.C. § 411(a).

43. H.R. REP. NO. 94-1476, at 157.

44. 17 U.S.C. § 412 (“[N]o award of statutory damages or of attorney’s fees . . . shall be made for- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first

work was infringed prior to registration, the owner could still obtain an injunction, actual damages, and any applicable profits in an infringement action similar to the available remedies under the 1909 Act.⁴⁵ The award of the “special or ‘extraordinary’ remedies” of statutory damages and attorney’s fees, however, would now be prohibited if the work was unregistered.⁴⁶ In regard to published works, the statutory damages and attorney’s fees would be barred if the alleged infringement occurred after publication but prior to registration, unless registration was made within three months of publication.⁴⁷ Congress noted that § 412 was enacted to induce registration for published works, and to provide additional statutory protection for unpublished works that were traditionally protected under the common law of the states.⁴⁸ Section 412 was designed to apply equally to both domestic and foreign authors.⁴⁹

C. *Registration Reforms Following the 1976 Act*

While Congress diminished the importance of formalities and took steps closer towards adherence to the Berne Convention with the 1976 Act, there were still imperfections within the Act. Furthermore, additional reforms to the Act’s text, including § 411(a), were necessary for the United States to gain admittance into the Berne Convention.⁵⁰ In 1988, Congress enacted the Berne Convention Implementation Act of 1988 (BCIA) to amend § 411(a).⁵¹ Although unsuccessful, Congress attempted to enact the Copyright Reform Bill (1993 Reform Bill) to

publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.”); see Charles Ossola, *Registration and Remedies: Recovery of Attorney’s Fees and Statutory Damages Under the Copyright Reform Act*, 13 CARDOZO ARTS & ENT. L.J. 559, 560 (1995) (highlighting importance of unavailability of attorney’s fees and statutory damages with unregistered works because statutory damages and attorney’s fees had previously been unconditionally available to plaintiffs in copyright infringement actions under the 1909 Act). See also *supra* notes 24-25 and accompanying text for discussion of unconditional right to recover attorney’s fees and statutory damages under 1909 Act.

45. See *supra* notes 24-25 and accompanying text for discussion of remedies under 1909 Act.

46. See H.R. REP. NO. 94-1476, at 158. Currently, § 505 stipulates that only the prevailing party may recover attorney’s fees. 17 U.S.C. § 505 (2006).

47. 17 U.S.C. § 412. The three month exception for published works was “needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, [but] before the copyright owner has had a reasonable opportunity to register his claim.” H.R. REP. NO. 94-1476, at 158.

48. H.R. REP. NO. 94-1476, at 158.

49. *Id.*

50. See *infra* Part II.C.1 for discussion of Berne Convention.

51. See *infra* Part II.C.2 for discussion of Berne Convention Implementation Act of 1988.

repeal §§ 411(a) and 412 in 1993.⁵² Finally, Congress enacted the Family Entertainment and Copyright Act of 2005 (FECA), which allowed copyright owners to “preregister” their works.⁵³

1. The Berne Convention for the Protection of Literary and Artistic Works

Although compliance with the registration requirement was no longer a prerequisite to copyright protection following the 1909⁵⁴ and 1976⁵⁵ acts, formalities—like §§ 411(a) and 412—were not entirely removed from U.S. copyright law and continued to interfere with the exercise and enjoyment of copyright authors’ privileges.⁵⁶ These formalities continued to place the United States in contention with the Berne Convention,⁵⁷ an international treaty with rules and regulations to protect intellectual property,⁵⁸ and the rights of copyright owners over their works.⁵⁹ The Berne Convention eliminated most of the formalities required to acquire copyright protection or to enforce it, and is supported by most of the global community.⁶⁰

Admission to the original Berne Convention,⁶¹ which was enacted in 1886, was conditioned on the prescription of conditions and formalities in the country of origin of the work.⁶² By 1908, the Berne Convention focused on promoting several objectives and advances within international copyright law, including “the abolition of formalities for the recognition and protection of copyright in foreign works.”⁶³ Member

52. See *infra* Part II.C.3 for discussion of Copyright Reform Bill of 1993.

53. See *infra* Part II.C.4 for discussion of Family Entertainment and Copyright Act of 2005.

54. See *supra* note 22 and accompanying text for discussion of existence of copyright protection under 1909 Act.

55. See *supra* notes 27-30 and accompanying text for discussion of existence of copyright protection under 1976 Act.

56. See *infra* notes 67-69 and accompanying text (discussing various definitions of “formalities”).

57. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 (amended Sept. 28, 1979), *available at* http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf [hereinafter Berne Convention].

58. See *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1205 (10th Cir. 2005).

59. Berne Convention, *supra* note 57, art. 1.

60. See *La Resolana*, 416 F.3d at 1205.

61. Berne Convention for the Protection of the Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 943 U.S.T.S. 178 (1886) (amended July 24, 1971).

62. See Springman, *supra* note 9, at 541.

63. H.R. REP. NO. 100-609, at 12 (1988). The Convention was also designed to promote:

[T]he development of copyright laws in favor of authors in all civilized countries; . . . the elimination over time of basing rights upon reciprocity; . . . the end of

nations specifically were prohibited from conditioning “the acquisition, exercise, or enjoyment of copyright protection for the works of foreign authors on the observance of any formality.”⁶⁴ Formalities were disfavored because they prevented copyright protection from being a “self-executing event” that occurred automatically once a work was created.⁶⁵

Although the Berne Convention was amended on several occasions, the current version, adopted in Paris in 1971, continued to prohibit member nations from subjecting the enjoyment and exercise of a foreign author’s copyright privileges on a formality.⁶⁶ Various commentary and treatises define the “formalities” prohibited by the Berne Convention as requirements that result in the “loss of copyright,”⁶⁷ requirements that must be followed for initial copyright protection to come into existence,⁶⁸ or administrative obligations that are required for an author’s copyright “to continue or to be practically available.”⁶⁹ The mandate placed on authors to register their copyright as a prerequisite to initiating infringement litigation is regarded as a formality impeding an author’s enjoyment or exercise of copyright.⁷⁰ Considering the United States maintained this requirement for both domestic and foreign authors following the 1976 Act through § 411(a), the United States would continue to be barred from the Berne Convention until this section, at a minimum, was repealed or amended.⁷¹

discrimination in rights between domestic and foreign authors in all countries; [and] the promotion of uniform international legislation for the protection of literary and artistic works.

Id.

64. Springman, *supra* note 9, at 541.

65. Zizza, *supra* note 17, at 696.

66. Berne Convention, *supra* note 57, art. 5(2). The current version of the Berne Convention notes, “The enjoyment and exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.” *Id.* The Berne Convention was amended in 1896, 1908, 1914, 1928, 1948, 1967, and 1979. *See id.*

67. *See* NIMMER & NIMMER, *supra* note 23, § 7.16(B)(1)(b)(iii) (quoting H.R. REP. NO. 100-609, at 41).

68. *See* Ginsburg, *supra* note 22, at 315.

69. *See* Springman, *supra* note 9, at 541.

70. *Id.*

71. *See* Bracey, *supra* note 22, at 125 (noting that because “the 1909 Act retained earlier formalities, it placed the United States in conflict with the increasing number of countries adhering to the Berne Convention”).

2. The Berne Implementation Act of 1988

Although the United States was a member of the Universal Copyright Convention with seventy-eight other nations, the Universal Copyright Convention had low standards for copyright protection and did not require that member nations guarantee a minimum threshold of rights for works originating in other member nations.⁷² By 1988, Congress observed that adherence and membership to the Berne Convention could secure: (1) the highest level of international copyright protection for U.S. authors, (2) U.S. participation in the creation and maintenance of international copyright policy, (3) enhanced U.S. credibility in the global economy, (4) a chance to reduce the impact of piracy, and (5) an immediate copyright relationship with twenty-four nations in which the United States had no current relationship.⁷³ Accordingly, Congress took steps to implement the Berne Convention Implementation Act of 1988 (BCIA), which amended the 1976 Act to comply with the Berne Convention.⁷⁴

Although Congress agreed that the 1976 Act should be amended to comply with the Berne Convention, the Senate and House disagreed about the amendments necessary to accomplish that goal. To address the conflict between the Berne Convention and the 1976 Act, the House opted to employ a “minimalist approach” whereby the 1976 Act would only be changed to the extent necessary to comply with the Berne Convention.⁷⁵ The House believed that this approach was appropriate because it allowed the United States to join the Berne Convention without diminishing contributions to the Library of Congress by maintaining §§ 411(a) and 412.⁷⁶ Applying this approach, the House deemed that incentives outlined in §§ 410(c) and 412—relating to the presumption of validity, statutory damages, and attorney’s fees—were compatible with the Berne Convention as they only affected the “ordering of proof” and remedies, and not the exercise and enjoyment of copyright.⁷⁷ The House also argued that § 411(a) was procedural in nature—and not a formality—because the owner could institute an

72. S. REP. NO. 100-352, at 2 (1988).

73. *Id.* at 2-4.

74. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C. §§ 101-810 (1976)) [hereinafter BCIA].

75. H.R. REP. NO. 100-609, at 1 (1988).

76. *Id.*

77. *Id.* at 20. Section 412 was also deemed compatible with the Berne Convention because all “American nationals [were] subjected to the same requirement,” and thus, there was no violation of the “national treatment” requirement. NIMMER & NIMMER, *supra* note 23, § 7.16(C)(1)(a)(iv).

infringement action even if registration was denied, and thus, there was no resulting “loss of copyright.”⁷⁸ The House supplemented this position by highlighting various benefits that the pre-suit registration requirement provided.⁷⁹ While the House legislation ultimately maintained § 411(a) of the 1976 Act in its then-current form, it recognized that the special treatment within § 411(a) for works created in a Berne member country outside of the United States could make the Copyright Act incompatible with the Berne Convention.⁸⁰

Even though the Senate agreed that §§ 410(c) and 412 were not inconsistent with the Berne Convention, the Senate concluded that § 411(a) was incompatible with article 5(2) of the Convention because it conditioned all of a copyright owner’s meaningful relief on registration and therefore, should be repealed.⁸¹ The Senate recognized that registration provided a useful public record and the Library of Congress with an efficient method of obtaining copyrighted works, without the need to enforce the statutory deposit provisions of the Act.⁸² The Senate, however, argued that incentives enumerated in §§ 410(c) and 412 would still be sufficient to induce registration.⁸³ Further, the Senate believed that the elimination of § 411(a) would not make copyright litigation less efficient or expeditious, and would not have a harmful effect on federal copyright jurisprudence.⁸⁴

After debating the fate of § 411(a), the House and Senate realized that Berne Convention nations were permitted to exclude foreign works

78. H.R. REP. NO. 100-609, at 20.

79. The House argued that copyright registration, particularly as a prerequisite to filing suit, promoted “efficient litigation practices” as it narrowed the applicable issues in litigation and assisted the courts in resolving disputes by providing proof of ownership. *Id.* The House also noted that registration was “an important source of acquisitions for the Library of Congress” and that it helped “ensure the existence of a central, public record of copyright claims.” *Id.* at 21. Finally, the House noted that repealing the pre-suit registration requirement would increase the volume of suits brought in federal courts. *Id.*

80. 134 CONG. REC. H10096 (daily ed. Oct. 12, 1988).

81. S. REP. NO. 100-352, at 14-15 (1988). The Senate conceded that § 411(a) did not condition the existence of copyright upon registration, but noted that article 5(2) prohibited interference with the enjoyment and exercise of copyright. *Id.* at 15. Registration as a prerequisite to filing suit, it was argued, prevented authors from exercising the remedies attached to copyright protection. *Id.*

82. *Id.* at 19.

83. *Id.* The Senate also proposed additional incentives to induce registrations, including “a registration requirement for criminal enforcement of a copyright,” prohibiting the recovery of attorney’s fees and statutory damages for published works if not registered within five years of publication, doubling statutory damages, and increasing the penalty for failing to deposit a copy of a work. *Id.* at 22.

84. *Id.* at 25.

from their own registration requirements,⁸⁵ and therefore a compromise between both bills was possible.⁸⁶ Congress agreed to adopt a “two-tier solution” whereby “Berne Convention works whose country of origin is not the United States”⁸⁷ would be exempted from the pre-suit registration requirement, while domestic authors would still have to register their works prior to filing suit.⁸⁸ Congress also agreed to leave §§ 410(c) and 412 intact to maintain a precise and effective public record, and deposits to benefit the Library of Congress.⁸⁹

3. The Copyright Reform Bill of 1993

Despite this compromise and admission to the Berne Convention through the BCIA, satisfaction with U.S. copyright law and its formalities was relatively short-lived. By 1993, Congress acknowledged that the United States was the only nation in the world with the requirements enumerated in §§ 411(a) and 412.⁹⁰ With the Berne Convention in mind,⁹¹ delegates in the House and Senate⁹² sought to take “the next logical step along the path of harmonizing . . . copyright registration with the worldwide standard of formality-free copyright protection”⁹³ by removing the last significant vestiges of formalities in our copyright law.

Accordingly, identical versions of the 1993 Reform Bill were introduced on February 16, 1993 in both the House and Senate.⁹⁴ The 1993 Reform Bill was intended to repeal both §§ 411(a) and 412 while

85. *Id.* at 19.

86. 134 CONG. REC. H10096 (daily ed. Oct. 12, 1988). The House recognized that imposing the pre-suit registration requirement on foreign works would be a formality interfering with the enjoyment and exercise of copyright, and therefore in violation of the Berne Convention. See *supra* notes 54-71 and accompanying text for discussion of Berne Convention and its requirements.

87. BCIA, *supra* note 74, § 9.

88. 134 CONG. REC. H10096 (daily ed. Oct. 12, 1988). Accordingly, the 1976 Act was edited by amending § 101 to reflect a definition of “country of origin” exempting certain foreign works and § 411(a) to exempt foreign works from the pre-suit registration requirement. See BCIA, *supra* note 74, §§ 4, 9, 102 Stat. at 2855, 2859; see also Sara Goldfarb, Corbis Corp. v. Amazon.com, Inc.—*Needlessly Endorsing Overly Strict U.S. Registration Requirements in Copyright Infringement Litigation*, 20 ST. JOHN’S J.L. COMMENT. 419, 440 (2006) (noting that § 411(a) “provided that only ‘United States works’ must be registered before suit may be instituted,” instead of simply exempting works that did not have U.S. origin).

89. 134 CONG. REC. H10096 (daily ed. Oct. 12, 1988).

90. 139 CONG. REC. 2736 (1993).

91. 139 CONG. REC. 2819 (1993).

92. Those delegates being William Hughes and Dennis DeConcini, respectively.

93. 139 CONG. REC. 51617-01, at 51622 (1993).

94. H.R. REP. NO. 103-388, at 9 (1993). The House bill was referred to as H.R. 897, while the Senate bill was dubbed S. 373. *Id.*

providing additional incentives for registration and a stronger mandatory deposit requirement to ensure continued support of the Library of Congress.⁹⁵ Mandatory deposits enumerated in § 407, deposits accompanying voluntary registration under § 408,⁹⁶ and the prima facie status of registration certificates under § 410(c) would be maintained under the Bill.⁹⁷ While the legislation was passed through the House in 1993, the 1993 Reform Bill was discarded when the Senate failed to enact it.⁹⁸

4. The Family Entertainment and Copyright Act of 2005

Congress made a final amendment to the pre-suit registration requirement under FECA.⁹⁹ If a class of work was historically infringed prior to its authorized commercial distribution,¹⁰⁰ authors could “preregister” their work as long as they submitted an application, deposit, and fee¹⁰¹ within the earlier of three months after the work’s publication or one month after the author learned of an infringement.¹⁰² The only works

95. *Id.* at 10. The 1993 Reform Act would induce additional registrations by creating: (1) a new short form application; (2) a more liberal examination standard; (3) alternative forms of deposit for copyright registration; (4) a formal appeals process for refusals to register a claim to copyright; (5) provisions clarifying when pre-existing works have to be disclosed on the copyright application form in order to limit sharply the fraud on the Copyright Office defense; and, (6) expansion of the group registration provisions.

Id. at 14. As the importance of deposits under § 407 would be increased with the repeal of §§ 411(a) and 412, Congress would assist the Library of Congress by

clarifying that the obligation to deposit arises without any need for prior notification or demand; giving the Librarian rather than the Register of Copyrights authority over enforcement of the provision; permitting the government to recover an amount equivalent to its attorney’s fees if it has to bring suit to enforce its right to receive deposit copies; and, permitting [s]ection 407 mandatory Library of Congress deposits to be used to satisfy the deposit requirement of copyright registration under [s]ection 408.

Id. at 20.

96. *Id.* at 10.

97. *See* 139 CONG. REC. 2819 (1993). The decision to retain some incentives, while eliminating §§ 411(a) and 412, was supported by the Advisory Committee on Copyright Registration and Deposit, which noted that “there is no empirical proof that these sections induce registration.” Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit—Letter and Report of the Co-Chairs*, 17 COLUM.-VLA J.L. & ARTS 271, 272 (1993).

98. Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 572 (1995).

99. Family Entertainment and Copyright Act of 2005, 109 Pub. L. No. 9, 119 Stat. 218 (2005).

100. *See* 17 U.S.C. § 408 (f)(2) (2006); *see also* 37 C.F.R. § 202.16(b)(1) (2008).

101. The preregistration fee is currently \$115. 37 C.F.R. § 201.3(c).

102. 17 U.S.C. § 408(f)(3),(4).

deemed eligible under this standard were unpublished motion pictures, sound recordings, musical compositions, literary works being prepared for book publication, computer programs, or videogames, and advertising or marketing photographs.¹⁰³ Further, these works needed to be prepared for commercial distribution to be included.¹⁰⁴ A work would not be preregistered unless the Copyright Office was assured that the work fit into one of the aforementioned categories of works and the applicant provided all of the information requested on the application.¹⁰⁵ The addition of preregistration to § 408 offered advantages to copyright owners due to corresponding amendments to §§ 411(a) and 412, but preregistration did not “constitute prima facie evidence of the validity of the copyright or of the facts stated” within it¹⁰⁶ and was not a substitute for actual registration.¹⁰⁷

D. Current Registration Procedures

The “registration” process and its requirements should be mentioned¹⁰⁸ because the current versions of §§ 411(a) and 412 maintain that registration is a prerequisite to filing an infringement action¹⁰⁹ and obtaining attorney’s fees or statutory damages.¹¹⁰ The 1976 Act deemed that a copyright owner “may obtain registration” by delivering or depositing a copy of his work to the Copyright Office along with a

103. 37 C.F.R. § 202.16(b)(1),(3).

104. *Id.*

105. *See id.* § 202.16(c)(7).

106. *Id.* § 202.16(c)(13).

107. U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 12 (2007) [hereinafter ANNUAL REPORT], available at <http://www.copyright.gov/reports/annual/2007/ar2007.pdf>.

108. The term “registration,” for the purposes of §§ 411 and 412, means a “registration of a claim in the original or the renewed and extended term of copyright.” 17 U.S.C. § 101 (2006). As the definition of “registration” includes the word “registration,” the definition is not particularly helpful in determining when registration occurs.

109. *Id.* § 411(a) (“[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.”).

110. *Id.* § 412 (“[N]o award of statutory damages or of attorney’s fees . . . shall be made for—(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.”).

completed application and fee.¹¹¹ The deposit required by § 407¹¹² can also be used to satisfy the deposit needed for registration.¹¹³ A standard copyright registration form issued by the Register of Copyrights requires that the applicant list any information “bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.”¹¹⁴ The registration fee ranges from \$35 for electronic filings to \$65 for paper applications.¹¹⁵

The Copyright Office is the institution primarily responsible for administering the registration and deposit requirements.¹¹⁶ The Copyright Office maintains an index of copyright registrations for approximately forty-five million works registered from 1870 through 1977, and an index of automated files from 1977 to today.¹¹⁷ Individuals are permitted to research these records and may copy original applications and documents for a fee.¹¹⁸

The Copyright Office has registered an average of 556,605 works every year¹¹⁹ and has also registered approximately thirty-three million works since 1870.¹²⁰ The Copyright Office will typically register ninety-four percent of all the copyright applications or claims that it receives in any given year.¹²¹ In 2007, the Copyright Office registered 526,378 works and preregistered 496 works, receiving \$24,728,996 in registration

111. *Id.* § 408(a); see 37 C.F.R. § 202.3(c)(2) (2008) (stating that application for registration may be submitted in print or electronically, and must be accompanied by appropriate filing fee and deposit of copies and materials).

112. 17 U.S.C. § 407. Section 407(a) currently requires copyright owners to deposit two copies or phonorecords of their work within three months after the date of publication. *Id.* § 407(a).

113. *Id.* § 408(b).

114. *Id.* § 409. For example, the form requires the applicant to list his or her name, address and nationality, the title of the work, the year in which the work was completed, and the date and nation of publication if the work was published. *Id.* § 409(10).

115. See 37 C.F.R. § 201.3(c)(1).

116. See U.S. Copyright Office, *A Brief Introduction and History*, COPYRIGHT.GOV, <http://www.copyright.gov/circs/circ1a.html> (last updated Aug. 2009) [hereinafter *Brief Introduction*].

117. *Id.*; see 17 U.S.C. § 707(a) (“The Register of Copyrights shall compile and publish at periodic intervals catalogs of all copyright registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part.”).

118. See *Brief Introduction*, *supra* note 116; see also 17 U.S.C. § 705(a)-(c) (noting that Copyright Office must index registrations and deposits, make these indexes available for public inspection, and furnish reports regarding information within indexes if requested and requisite fee is paid).

119. ANNUAL REPORT, *supra* note 107, at 58. The figure represents the average annual registrations from 1998 through 2007.

120. *Id.*

121. *Id.* at 11. The percentage of registrations reflects registrations from 2003 through 2007.

fees.¹²² To obtain registration, an author must submit an application to the Copyright Office. “When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter . . . , the Register shall register the claim and issue to the applicant a certificate of registration.”¹²³ If the Register determines that “the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register [will] refuse registration.”¹²⁴ The “effective date” of registration is the date on which the Copyright Office receives the applicant’s application, deposit, and fee.¹²⁵

While the average “processing time” for a registration application is eighty-two days,¹²⁶ applicants typically receive their certificates of registration within six months of submission for electronic applications, or twenty-two months of submission for paper applications.¹²⁷ The Copyright Office also offers “special handling”—an expedited processing of registration applications—that is permitted when a compelling need is demonstrated due to pending or prospective litigation that mandates an expedited issuance of the registration certificate.¹²⁸ The fee for “special handling” is \$760.¹²⁹

The Copyright Office works closely with the Library of Congress by transferring copies of registered or deposited works to the Library for their archives. In 2007, the Copyright Office transferred more than one million works to the Library.¹³⁰ Of the works transferred, 523,934 works

122. *Id.* at 59-60.

123. 17 U.S.C. § 410(a). It has been noted that the Copyright Office’s examination of registration applications “generally involves no assessment of entitlement beyond the contents of the application form and the deposit copy of the work for which registration is sought.” Arthur J. Levine & Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 UCLA L. REV. 1232, 1254 (1977).

124. 17 U.S.C. § 410(b).

125. *Id.*

126. ANNUAL REPORT, *supra* note 107, at 9. The average reflects the average registration processing time from 2004 through 2007. *Id.*

127. U.S. Copyright Office, *I’ve Mailed My Application, Fee, and Copy of My Work to the Copyright Office. Now What?*, COPYRIGHT.GOV, <http://www.copyright.gov/help/faq/faq-what.html#certificate> (last updated Sept. 26, 2010).

128. 37 C.F.R. § 201.15(a) (2008).

129. *Id.* § 201.3(d)(7). If the Copyright Office does not take any action on a registration application for six months after they receive the deposit, fee, and deposit, the Copyright Office “may” waive the special handling fee if “the applicant satisfies the Copyright Office that the applicant is about to file suit for infringement of the copyright in a work that is the subject of the application.” *Id.* § 201.15(c).

130. ANNUAL REPORT, *supra* note 107, at 3; *see* 17 U.S.C. § 704(b),(d) (discussing Copyright Office’s duty to retain works and Library of Congress’s right to select works for transfer).

were registered with the Copyright Office, and 553,218 were not registered, but submitted pursuant to the mandatory deposit provision in § 407.¹³¹ The Library of Congress is the largest library in the world, with nearly 145 million items, and continues to grow due to approximately 32,000 daily submissions, many of which come from the Copyright Office.¹³²

E. Circuit and District Split Regarding “Registration”

Although copyright registration, in one form or another, has been in effect in the United States since 1790, federal courts have developed divergent viewpoints on what constitutes “registration.” The pre-suit registration requirement outlined in § 411(a)¹³³ has presented a dilemma for federal courts: “is a copyright registered at the time the copyright holder’s application is received by the Copyright Office . . . or at the time that the Office acts on the application and issues a certificate of registration?”¹³⁴ These two interpretations have been dubbed the “application approach” and “registration approach,” respectively.¹³⁵

Under either approach, the § 411(a) pre-suit registration requirement acts as a mere precondition, or “element,” of establishing a copyright infringement claim, rather than a jurisdictional requirement.¹³⁶ Traditionally, this requirement was regarded as a prerequisite to a federal court obtaining subject-matter jurisdiction over a copyright infringement action.¹³⁷ In *Muchnick v. Thomson Corp.*, the United States Court of Appeals for the Second Circuit held that the § 411(a) pre-suit registration requirement limited “a district court’s subject matter jurisdiction to

131. ANNUAL REPORT, *supra* note 107, at 61.

132. *About the Library*, LIBRARY OF CONGRESS, <http://www.loc.gov/about/facts.html> (last updated Apr. 8, 2010).

133. The pre-suit registration requirement outlined in § 411(a) was introduced in the 1909 Act and maintained through the 1976 Act and its amendments. See *supra* note 36 and Part B and accompanying text for a discussion of the changes to section 411(a) pre-suit registration requirement.

134. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 615 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010). The divergent interpretations have been framed in a variety of fashions. See, e.g., *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1197 (10th Cir. 2005) (“[R]egistration occurs when the copyright owner submits an application for registration to the copyright office, or conversely . . . registration occurs when the copyright office actually approves or rejects the application.”).

135. *Cosmetic Ideas*, 606 F.3d at 616 n.3.

136. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010).

137. The Supreme Court has noted that there are over two hundred decisions that characterize § 411(a) as a jurisdictional prerequisite to maintaining a copyright infringement action in federal court. *Id.* at 1251 (Ginsburg, J., concurring). See, e.g., *Xoom, Inc. v. Imageline*, 323 F.3d 279, 283 (2d Cir. 2003) (“Copyright registration is a jurisdictional prerequisite to bringing an action for infringement under the Copyright Act.”).

claims arising [only] from registered copyrights.”¹³⁸ The Second Circuit analyzed *sua sponte* the district court’s decision to approve a settlement between a class of freelance writers, many of whom never received copyright registration certificates for their works, and several publishers who electronically reproduced the writers’ works without permission.¹³⁹ The Second Circuit noted that Congress may limit basic jurisdictional provisions¹⁴⁰ with “additional requirements ‘expressed in a separate statutory section from jurisdictional grants’” and that one such additional requirement was § 411(a).¹⁴¹

Notwithstanding prior jurisdictional treatment of § 411(a), in *Reed Elsevier Inc. v. Muchnick*, the United States Supreme Court overruled the Second Circuit and held that § 411(a) is “a precondition to filing a [copyright infringement] claim that does not restrict a federal court’s subject-matter jurisdiction” over that claim.¹⁴² To explain its holding, the Court stated that, among other rationales, neither of the two primary statutory sources for federal jurisdiction over copyright claims¹⁴³ conditioned their jurisdictional grants on registration prior to suit.¹⁴⁴ The Court supported its holding by noting that § 411(a) expressly allows a federal court to hear infringement claims over unregistered works in three circumstances: (1) when the work is not a “U.S. work,” (2) where the claim concerns “rights of attribution and integrity under [section] 106A,” or (3) when the copyright owner attempts to register their work and registration is refused.¹⁴⁵

Despite holding that registration under § 411(a) is not a federal jurisdictional requirement, the Court did not address whether the requirement is “a mandatory precondition to suit that . . . district courts may or should enforce *sua sponte*” or if the issue must be raised in pre-trial litigation by the parties.¹⁴⁶ Additionally, the Court did not address whether the writers who had registration applications pending in the Copyright Office prior to the initiation of the litigation were barred by § 411(a) from participating in the settlement.¹⁴⁷ In other words, the Court

138. *Literary Works in Elec. Databases Copyright Litig. v. Thomson*, 509 F.3d 116, 122 (2d Cir. 2007).

139. *Id.* at 118.

140. *See generally* 28 U.S.C. §§ 1331, 1338 (2006).

141. *Thomson*, 509 F.3d at 121 (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159-60 n.6 (2003)).

142. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010).

143. *See generally* 28 U.S.C. §§ 1331, 1338.

144. *Reed Elsevier*, 130 S. Ct. at 1246.

145. *Id.*

146. *Id.* at 1249.

147. *Id.* at 1237-51.

did not decide “whether an action may be maintained if the copyright application is pending, but not yet approved.”¹⁴⁸

In the wake of the Supreme Court’s decision in *Reed Elsevier*, federal courts must apply the § 411(a) pre-suit registration requirement as an administrative—not jurisdictional—precondition to copyright infringement claims.¹⁴⁹ Although many cases interpreting the pre-suit registration requirement have been abrogated, in part, by the Court’s decision in *Reed Elsevier*,¹⁵⁰ federal courts still apply these decisions to determine whether the application or registration approach should apply in determining when a work is registered for the purposes of § 411(a).¹⁵¹ A discussion of these decisions and the rationales supporting each approach illustrates the dilemma confronting U.S. district and circuit courts.

1. The Registration Approach

In circuit¹⁵² and district¹⁵³ courts adopting the “registration approach” (registration courts), registration occurs and a copyright infringement

148. *Degginger v. Houghton Mifflin Harcourt Publ’g Co.*, No. 10-3069, 2010 U.S. Dist. LEXIS 91357, at *2 (E.D. Pa. Sept. 2, 2010).

149. *See, e.g., Mktg. Tech. Solutions, Inc. v. Medizine L.L.C.*, No. 09 Cib 8122 (LMM), 2010 U.S. Dist. LEXIS 50027, at *16 (S.D.N.Y. May 18, 2010) (dismissing infringement claim under § 411(a) because author’s work was not registered); *see also NIMMER & NIMMER, supra* note 23, § 7.16(B)(6)(c) (“Section 411(a) can be viewed along the lines of a court filing requirement, much like the fees that must be paid to file a complaint in a United States district court.”).

150. *See, e.g., Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 616 n.4 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010).

151. *See, e.g., Cosmetic Ideas*, 606 F.3d at 617 (discussing interpretation of § 410(a) in *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053 (C.D. Cal. 2004)).

152. *See, e.g., La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990).

153. *See, e.g., Specific Software Solutions, L.L.C. v. Inst. of Workcomp Advisors, L.L.C.*, 615 F. Supp. 2d 708 (M.D. Tenn. 2009); *Do Denim, L.L.C. v. Fried Denim, Inc.*, 634 F. Supp. 2d 403 (S.D.N.Y. 2009); *Hawaiian Vill. Computer, Inc. v. Print Mgmt. Partners, Inc.*, 501 F. Supp. 2d 951 (E.D. Mich. 2007); *Teevee Toons, Inc. v. Overture Records*, 501 F. Supp. 2d 964 (E.D. Mich. 2007); *Just Water Heaters, Inc. v. Affordable Water Heaters & Plumbing, Inc.*, No. C-05-4996 SC, 2006 U.S. Dist. LEXIS 9006 (N.D. Cal. Feb. 23, 2006); *Ripple Junction Design Co. v. Olaes Enters.*, Case No. 1:05-CV-43, 2005 U.S. Dist. LEXIS 32866 (S.D. Ohio Sept. 8, 2005); *Mays & Assocs. v. Euler*, 370 F. Supp. 2d 362 (D. Md. 2005); *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053 (C.D. Cal. 2004); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *Corbis v. UGO Networks, Inc.*, 322 F. Supp. 2d 520 (S.D.N.Y. 2004); *Stanislowski v. Jordan*, 337 F. Supp. 2d 1103 (E.D. Wis. 2004); *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1 (D.D.C. 2002); *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491 EDL, 2002 U.S. Dist. LEXIS 15321 (N.D. Cal. Aug. 19, 2002); *Gerig v. Krause Publ’ns, Inc.*, 33 F. Supp. 2d 1304 (D. Kan. 1999); *Goebel v. Manis*, 39 F. Supp. 2d 1318 (D. Kan. 1999); *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012 (N.D. Cal. June 15, 1998); *Robinson v. Princeton Review, Inc.*, No. 96 Civ. 4859 LAK, 1996 U.S. Dist. LEXIS 16932 (S.D.N.Y. 1996);

action can be brought when either the Copyright Office actually approves or rejects the application¹⁵⁴ for registration or when the Copyright Office issues, or refuses to issue, the tangible certificate of registration.¹⁵⁵ These courts apply the plain language of the Copyright Act,¹⁵⁶ particularly the language contained within §§ 408, 410, and 411, to justify the registration approach.¹⁵⁷

Section 408(a) states, “[T]he owner of copyright . . . in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee.”¹⁵⁸ Registration courts have held that this section mandates a substantive review of the deposit and application by the Register of Copyrights before actual registration occurs.¹⁵⁹ These courts hold that if substantive review is not required, § 408(a) would read “shall obtain” rather than “may obtain.”¹⁶⁰ Courts also note that because § 410(a) suggests examinations by the Copyright Office as a prerequisite to registration, § 408(a) must merely mean that “the delivery of the application is a step the applicant must take, not that delivery is sufficient by itself to obtain a registration.”¹⁶¹

Section 410(a) of the Act states, “When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter . . . , the Register shall register the claim and issue to the applicant a certificate of registration.”¹⁶² Registration courts point out that because this section requires a series of affirmative acts by the Copyright Office—“to ‘examine,’ to ‘register,’ and then to ‘issue’ the certificate of registration”—there is nothing to suggest that simply filing an application could constitute effective registration.¹⁶³

Miller v. CP Chems., Inc., 808 F. Supp. 1238 (D.S.C. 1992); *Demetriades v. Kaufman*, 680 F. Supp. 658 (S.D.N.Y. 1988); *Int’l Trade Mgmt., Inc. v. United States*, 553 F. Supp. 402 (Cl. Ct. 1982).

154. *See, e.g., La Resolana*, 416 F.3d at 1197, 1207-08 (“The Copyright Office must approve or reject the application before registration occurs or a copyright infringement action can be brought” but “[e]ven if the copyright owner cannot present a certificate, the owner can still attempt to prove registration through other means, such as testimony or other evidence from the copyright office.”).

155. *See, e.g., Just Water Heaters*, 2006 U.S. Dist. LEXIS 9006, at *10 (“[R]egistration occurs when the Copyright Office issues a certificate of registration.”).

156. *See, e.g., La Resolana*, 416 F.3d at 1202.

157. *See, e.g., Loree Rodkin*, 315 F. Supp. 2d at 1056.

158. 17 U.S.C. § 408(a) (2006).

159. *La Resolana*, 416 F.3d at 1201.

160. *Id.* (citing *Corbis v. UGO Networks, Inc.*, 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004)).

161. *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *7 (N.D. Cal. June 15, 1998).

162. 17 U.S.C. § 410(a).

163. *See, e.g., La Resolana*, 416 F.3d at 1201.

In other words, § 410(a) indicates that the Copyright Office registers a work—not the applicant—and that the examination is a prerequisite to registration, precluding automatic registration through application.¹⁶⁴ These courts also note that the requirement of “examination” within § 410(a) would be pointless “if filing and registration were synonymous.”¹⁶⁵

Registration courts interpret § 410(b), which states that if “the Register of Copyrights determines that . . . the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration,”¹⁶⁶ in a similar manner. If this section allows the Copyright Office to either register the work or to refuse registration, registration cannot occur until the Register examines the work and makes a decision.¹⁶⁷

Finally, registration courts state that the plain meaning of § 411(a) mandates the adoption of the registration approach. In its current form, § 411(a) states:

[N]o civil action for infringement . . . shall be instituted until preregistration or registration of the copyright claim has been made . . . [H]owever, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement.¹⁶⁸

Registration courts note that if a suit can be maintained merely upon application, “there would be no need to include a provision stating that a suit can be maintained after the application is refused.”¹⁶⁹ Further, because “application” and “registration” are used in the same section, it is clear that “application” is “something separate and apart from registration.”¹⁷⁰ Finally, these courts note that Congress wanted the Copyright Office to have discretion to approve or deny registration before suit because they wanted input on the validity of the copyright prior to litigation.¹⁷¹

164. *Ryan*, 1998 U.S. Dist. LEXIS 9012, at *5-6.

165. *Robinson v. Princeton Review, Inc.*, No. 96 Civ. 4859 LAK, 1996 U.S. Dist. LEXIS 16932, at *21 (S.D.N.Y. 1996).

166. 17 U.S.C. § 410(b).

167. *La Resolana*, 416 F.3d at 1201.

168. 17 U.S.C. § 411(a).

169. *Ripple Junction Design Co. v. Olaes Enters.*, No. 1:05-CV-43, 2005 U.S. Dist. LEXIS 32866, at *12 (S.D. Ohio Sept. 8, 2005); see *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056 (C.D. Cal. 2004) (arguing that because registration can be refused, “[t]he argument that ‘registration’ is complete upon delivery is thus undermined”).

170. *Mays & Assocs. v. Euler*, 370 F. Supp. 2d 362, 368 (D. Md. 2005).

171. See *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 4 (D.D.C. 2002).

2. The Application Approach

In the circuit¹⁷² and district¹⁷³ courts adopting the “application approach” (application courts), registration occurs when the Copyright Office receives the author’s complete application.¹⁷⁴ These courts note that the statutory language, specifically in §§ 408(a) and 410(d), is ambiguous and does not clearly support either the application or registration approaches.¹⁷⁵ Accordingly, application courts “go beyond the Act’s plain language to determine which approach better carries out the purpose of the statute.”¹⁷⁶

To demonstrate the aforementioned ambiguity, application courts first focus on the words “may obtain registration . . . by delivering” within § 408(a).¹⁷⁷ They state that this language suggests that the only requirement for registration is the delivery of the requisite deposit, application, and fee.¹⁷⁸ These courts also note that “may” simply indicates that registration is permissive, and that terminology more indicative of registration upon application—like “shall obtain”—would create a mandatory registration requirement.¹⁷⁹

172. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010); *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5th Cir. 2004); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Lakedreams v. Taylor*, 932 F.2d 1103 (5th Cir. 1991); *Apple Barrel Prod., Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984).

173. *Design Furnishings, Inc. v. Zen Path L.L.C.*, NO. CIV. 2:10-02765 WBS GGH, 2010 U.S. Dist. LEXIS 112314 (E.D. Cal. Oct. 20, 2010); *DocMagic, Inc. v. Ellie Mae, Inc.*, No. C 09-04017 MHP, 2010 U.S. Dist. LEXIS 108628 (N.D. Cal. Oct. 12, 2010); *Degginger v. Houghton Mifflin Harcourt Publ’g Co.*, No. 10-3069, 2010 U.S. Dist. LEXIS 91357 (E.D. Pa. Sept. 2, 2010); *Kruska v. Perverted Justice Found. Inc.*, No. CV 08-0054-PHX-SMM, 2010 U.S. Dist. LEXIS 80956 (D. Ariz. Aug. 9, 2010); *Tri-Marketing, Inc. v. Mainstream Mktg. Servs., Inc.*, No. 09-13 (DWF/RLE), 2009 U.S. Dist. LEXIS 42694 (D. Minn. May 19, 2009); *Precision Automation, Inc. v. Technical Servs., Inc.*, 628 F. Supp. 2d 1244, 1248 (D. Or. 2008); *Prunte v. Universal Music Group*, 484 F. Supp. 2d 32 (D.D.C. 2007); *Phx. Renovation Corp. v. Rodriguez*, 403 F. Supp. 2d 510 (E.D. Va. 2005); *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630 (M.D.N.C. 2004); *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71 (D.R.I. 2003); *Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.*, 210 F. Supp. 2d 147 (E.D.N.Y. 2002); *Mist-On Systems, Inc. v. Gilley’s European Tan Spa*, 303 F. Supp. 2d 974 (W.D. Wisc. 2002); *Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70 (D.D.C. 2000); *Lennon v. Seaman*, 63 F. Supp. 2d 428 (S.D.N.Y. 1999); *Dielsi v. Falk*, 916 F. Supp. 985 (C.D. Cal. 1996); *Havens v. Time Warner, Inc.*, 896 F. Supp. 141 (S.D.N.Y. 1995); *Wilson v. Mr. Tee’s*, 855 F. Supp. 679 (D.N.J. 1994); *Tang v. Hwang*, 799 F. Supp. 499 (E.D. Pa. 1992); *Secure Servs. Tech., Inc. v. Time and Space Processing, Inc.*, 722 F. Supp. 1354 (E.D. Va. 1989); *Sebastian Int’l, Inc. v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909 (D.N.J. 1987).

174. *See Cosmetic Ideas*, 606 F.3d at 621.

175. *Id.* at 618.

176. *Id.*

177. 17 U.S.C. § 408(a) (2006).

178. *Cosmetic Ideas*, 606 F.3d at 617; *Prunte*, 484 F. Supp. 2d at 40.

179. *Cosmetic Ideas*, 606 F.3d at 617 n.7.

Application courts also state that § 410(d) can be read as supporting either the application or registration approach.¹⁸⁰ Section 410(d) states, “The effective date of a copyright registration is the day on which an application, deposit, and fee . . . have all been received in the Copyright Office.”¹⁸¹ As this section backdates “a later-approved registration as of the date of its application,” the section suggests that application is the critical event for registration.¹⁸² Other courts state that § 410(d) does not relate to backdating at all as its plain language implies that registration occurs when the Copyright Office receives all the requisite materials.¹⁸³ Application courts also note that § 410(a), which mandates that the Copyright Office issue a certificate of registration after examining the work, only applies to the requirements for issuing the certificate and not the requirements for instituting an infringement action.¹⁸⁴

When application courts compare these interpretations with the interpretations advanced by registration courts, they hold that the statutory scheme regarding registration is ambiguous, and thus, use policy considerations to support the application approach.¹⁸⁵

The primary policy argument advanced to support the application approach is based on the language within § 411(a) that allows a copyright owner to file suit even if registration is denied by the Copyright Office.¹⁸⁶ Considering the copyright owner “will ultimately be allowed to proceed regardless of how the Copyright Office treats [the] application, it makes little sense to create a period of ‘legal limbo’ in which suit is barred,”¹⁸⁷ especially when the suit can be refiled after the Copyright Office acts upon the application.¹⁸⁸ The application approach avoids this unnecessary delay and corresponding prolonged period of infringement by permitting a suit as soon as the copyright owner submits the requisite

180. *Id.* at 618.

181. 17 U.S.C. § 410(d).

182. *Cosmetic Ideas*, 606 F.3d at 618.

183. *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71, 77 (D.R.I. 2003).

184. *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004).

185. *Cosmetic Ideas*, 606 F.3d at 618.

186. 17 U.S.C. § 411(a).

187. NIMMER & NIMMER, *supra* note 23, § 7.16(B)(3)(b)(ii). See *Iconbazaar*, 308 F. Supp. 2d at 634 (“[D]elaying the institution of a civil action in order to determine whether the copyright will be approved is unnecessary because the owner of the work may bring suit even if his copyright application is denied.”); *Secure Servs. Tech., Inc. v. Time and Space Processing, Inc.*, 722 F. Supp. 1354, 1364 (E.D. Va. 1989) (noting that if application approach was not adopted, “the owner of a copyright would be left in legal limbo while the Copyright Office considers whether he qualifies for a certificate of registration”).

188. *Cosmetic Ideas*, 606 F.3d at 620.

materials for registration.¹⁸⁹ Accordingly, application courts state that the application approach is best to “effectuate the interests of justice and promote judicial economy.”¹⁹⁰

Aside from avoiding delay, application courts state that the application approach promotes the primary function of pre-suit registration requirement, to act “as an incentive to help Congress maintain a robust national register of copyrights.”¹⁹¹ As this function is achieved through both the registration or application approaches, requiring the Copyright Office to approve or reject registration prior to litigation is a “needless formality” that Congress sought to eliminate in the BCIA and 1976 Act.¹⁹²

The recovery of damages caused by infringement has a three-year statute of limitations.¹⁹³ Therefore, application courts also state that the registration approach can potentially cause a party to lose the ability to obtain meaningful damages.¹⁹⁴ If the effective date of registration occurs after the three-year statute of limitations on damages expires—or three years after the infringement—the copyright owner will be denied damages for that infringement.¹⁹⁵ While the registration approach can cause this result in certain situations, the application approach, combined with backdating under § 410(d), avoids any forfeiture of the right to damages.¹⁹⁶

Application courts state that § 411(a)’s provision relating to the Copyright Office’s right to participate in copyright litigation¹⁹⁷ does not require the court to postpone litigation until the Copyright Office acts upon an application.¹⁹⁸ These courts state that an infringement suit and the Copyright Office registration approval process can occur simultaneously without prejudice to the litigants because the Copyright

189. *Id.* at 619; see *Iconbazaar*, 308 F. Supp. 2d at 634 (“The process of processing and evaluating a copyright application could be a lengthy one, during which time an infringing use may continue unchallenged if the owner is not allowed to begin suit.”).

190. *Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000).

191. *Cosmetic Ideas*, 606 F.3d at 620.

192. *Id.*

193. NIMMER & NIMMER, *supra* note 23, § 7.16(B)(3)(b)(iii).

194. *Cosmetic Ideas*, 606 F.3d at 620.

195. NIMMER & NIMMER, *supra* note 23, § 7.16(B)(3)(b)(iii).

196. See *infra* notes 260-263 and accompanying discussion of potential effects of registration approach and three-year statute of limitations on damages.

197. 17 U.S.C. § 411(a) (2006) (“The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register’s failure to become a party shall not deprive the court of jurisdiction to determine that issue.”).

198. *Cosmetic Ideas*, 606 F.3d at 621.

Office maintains the right to appear in the proceedings to reject an application already in litigation, and because the Copyright Office's decision regarding registration is ultimately reviewable by the courts.¹⁹⁹ In essence, there is little reason to postpone litigation until after the Copyright Office approves or rejects registration because the court is not bound by that decision in regard to copyrightability and in any event, the Copyright Office can appear to defend their decision.

Finally, application courts conclude that the application approach is more suited to fulfill "Congress's purpose of providing broad copyright protection while maintaining a robust federal register" and avoiding "unfairness and waste of judicial resources."²⁰⁰

III. DISCUSSION

Federal circuit and district courts currently have differing interpretations of the pre-suit registration requirement within § 411(a) of the 1976 Act—the "registration" and "application" approaches.²⁰¹ It is clear that the registration approach follows an unambiguous statutory mandate that is arguably contrary to Congress's intent and the public policy behind the Copyright Act, while the application approach rejects the statutory mandate to effectuate that intent and public policy.²⁰² Accordingly, it is not apparent that either approach should be advocated. As it is unlikely that this split will be resolved judicially or through traditional means in the foreseeable future, congressional intervention may be necessary to remedy the split.²⁰³ While there are potential implications of repealing § 411(a), and also § 412, the uncertainty created by these sections and the prejudicial effect they have on U.S. copyright owners justifies congressional repeal of both sections.²⁰⁴

A. *Current Significance of the Circuit and District Split*

While there is certainly a circuit and district split regarding the § 411(a) pre-suit registration requirement, it is not particularly apparent

199. *Id.*; NIMMER & NIMMER, *supra* note 23, § 7.16(B)(3)(b)(vi).

200. *Cosmetic Ideas*, 606 F.3d at 620.

201. See *supra* Part II.E for discussion of split regarding § 411(a) pre-suit registration requirement.

202. See *infra* Part III.B and III.C for discussion of each approach and their deficiencies.

203. See *infra* Part III.A for discussion of current significance of split and how it is unlikely to resolve without congressional action.

204. See *infra* Part III.D for discussion of implications of repealing §§ 411(a) and 412, and arguments as to why these sections should be repealed.

why this split should be resolved, and even if it should, why it should be resolved by congressional action rather than through traditional avenues.

The simplest resolution to the current split among the courts would be the Supreme Court's adoption of either the registration or application approach. While a Supreme Court ruling on the issue would be the most practical solution, the Supreme Court is unlikely to address the split. The United States Court of Appeals for the Ninth Circuit, for example, recently adopted the application approach and held that the plaintiff's infringement claim would not be barred for failure to state a claim.²⁰⁵ Despite this holding and the split, the Supreme Court denied certiorari in November 2010.²⁰⁶ In *Reed Elsevier*, the Court had an opportunity to hold that the freelance writers who had applied for, but not yet received, a registration certificate could be included in the class settlement.²⁰⁷ The Court held that § 411(a) was not a jurisdictional requirement, but declined to hold whether it was a mandatory precondition to be raised *sua sponte* or by the parties, or if the writers who applied for registration could be included in the settlement.²⁰⁸ The Court has also declined to resolve the split on other occasions.²⁰⁹ While these decisions do not guarantee that the Court will never consider the split, it is apparent that the Court will not consider it in the near future.

Even if the Supreme Court wishes to consider the split, the issue rarely comes before trial courts as the split is "an issue capable of repetition yet evading review."²¹⁰ The split can evade review due to actions taken by either the Copyright Office or the litigants and courts during litigation.²¹¹ If the Copyright Office issues a registration certificate during litigation, the registration date will relate back to the date of application.²¹² Accordingly, the litigant could become compliant with the "pre-suit" registration requirement during litigation "irrespective

205. See generally *Cosmetic Ideas*, 606 F.3d at 616.

206. *Id.*

207. See *supra* note 139 and accompanying text for discussion of circumstances presented in *Reed Elsevier*.

208. See *supra* notes 142-148 and accompanying text for discussion of *Reed Elsevier* holding; see also Brad Newberg, *2010 Marks Missed Copyright Opportunities for Supreme Court*, REED SMITH (Dec. 15, 2010), http://www.reedsmith.com/library/search_library.cfm?FaArea1=CustomWidgets.content_view_1&cit_id=29881 (noting that Supreme Court missed opportunity to make progress within copyright law in 2010 because they did not address whether the application or registration approach should apply in *Reed Elsevier*, and that resolution of this question is essential in making litigation decisions).

209. See, e.g., *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003).

210. *Cosmetic Ideas*, 606 F.3d at 616 (citation omitted) (internal quotation marks omitted).

211. *Id.*

212. *Id.* (citing 17 U.S.C. § 410(d) (2006)).

of whether registration accrues at application” or registration.²¹³ As many dismissals pursuant to § 411(a) are without prejudice, litigants may also refile their lawsuit once they receive a registration certificate.²¹⁴ Additionally, the litigants may simply amend their complaint after their application is approved or denied, rather than file an eventual appeal.²¹⁵ Some courts, while adopting the registration approach, have stated that a litigant may bring an infringement claim even without a registration certificate, provided they can still prove registration through “testimony or other evidence from the copyright office.”²¹⁶ Further, federal courts occasionally grant injunctions to stop infringement even though the relevant work is not registered and the plaintiff is barred from instituting an infringement suit.²¹⁷

Finally, FECA amended § 411(a) to allow copyright owners to institute an infringement action after their work was preregistered.²¹⁸ This amendment potentially diminishes the importance of the split because a suit can be instituted before actual registration.²¹⁹ Preregistration, however, still leaves unresolved the issue of whether preregistration occurs when the application, fee, and deposit are submitted or when they are processed because the work cannot be preregistered until the Copyright Office verifies that the work is within one of the required categories and that the applicant provided the requisite information.²²⁰ If

213. *Id.*

214. *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990).

215. Goldfarb, *supra* note 88, at 441. In addition to amending their complaint, circuit courts also recognize that a litigant may supplement their complaint once their copyright is registered. *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365 (5th Cir. 2004); see *Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 71 (D.D.C. 2000) (allowing plaintiff to amend complaint to demonstrate proper registration).

216. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1207-08 (10th Cir. 2005).

217. *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); see Susan J. Ray, *Copyright Law—The Protection of Photograph Copyright Owners Under the Copyright Act—Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345 (8th Cir. 1994), 68 TEMP. L. REV. 491, 506 (1995) (analyzing the *Olan Mills* decision and arguing that courts should adopt its holding and provide injunctions to protect unregistered works, or alternatively, Congress should amend Copyright Act to provide that registration is not required for injunctive relief).

218. See *supra* notes 99-107 and accompanying text for discussion of FECA and preregistration.

219. See *supra* notes 99-107 and accompanying text for discussion of FECA and preregistration.

220. See *supra* note 105 and accompanying text for discussion of Copyright Office's duties concerning preregistration; see also Hogan, *supra* note 36, at 865 (“Instead of indicating what might satisfy registration requirements under the Act, the preregistration scheme adds another formality in need of interpretation. The new scheme poses a problem identical to that of registration; what exactly satisfies preregistration, application submission or application approval?”).

the work does not fit an appropriate category, the work will not be preregistered, and compliance with § 411(a) will be in doubt. Even if the timing of preregistration was clear, only unpublished motion pictures, sound recordings, musical compositions, literary works being prepared for book publication, computer programs or videogames, and advertising or marketing photographs—all of which are being prepared for commercial distribution—can initiate suit based upon it.²²¹ A plethora of works outside of these entertainment categories still must register to initiate suit.²²² The preregistration of only 496 works in 2007 illustrates the minor impact of preregistration on the split and the difficulty of preregistering.²²³

Finally, because the Supreme Court has declined to address the split and is unlikely to do so in the future, litigants must unnecessarily address procedural hurdles as the split continues to arise in litigation.²²⁴ Further, as federal courts have exclusive jurisdiction over copyright infringement suits and plaintiffs can choose to bring suit where the defendant or his agent resides, copyright owners “would benefit from knowing the approach adopted by the court in which [they] intend to assert their claims.”²²⁵

The merits and rationales of both the “registration” and “application” approaches should be addressed because a resolution to the split regarding “registration” within § 411(a) seems unlikely, there is no binding authority for federal courts on the issue, and therefore, the split continues to affect the rights of copyright owners and those accused of infringing those rights.

221. See *supra* note 103 and accompanying text for a discussion of works within scope of preregistration.

222. See Hogan, *supra* note 36, at 863 (noting that when preregistration is used with registration approach, “preregistration serves as a Band-Aid for specified authors only; an incomplete and inequitable solution that elevates the economic concerns of some over the creative control of all”).

223. See *supra* note 122 and accompanying text for registration and preregistration figures. The preregistration fee of \$115 may play a role in the lack of preregistrations. 37 C.F.R. § 201.3(c) (2008).

224. There are several circuit and district courts that have recently taken a stance on the split. See, e.g., *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010); *Design Furnishings, Inc. v. Zen Path L.L.C.*, NO. CIV. 2:10-02765 WBS GGH, 2010 U.S. Dist. LEXIS 112314 (E.D. Cal. Oct. 20, 2010); *DocMagic, Inc. v. Ellie Mae, Inc.*, No. C 09-04017 MHP, 2010 U.S. Dist. LEXIS 108628 (N.D. Cal. Oct. 12, 2010); *Degginger v. Houghton Mifflin Harcourt Publ’g Co.*, No. 10-3069, 2010 U.S. Dist. LEXIS 91357 (E.D. Pa. Sept. 2, 2010); *Kruska v. Perverted Justice Found. Inc.*, No. CV 08-0054-PHX-SMM, 2010 U.S. Dist. LEXIS 80956 (D. Ariz. Aug. 9, 2010).

225. Bracey, *supra* note 22, at 117.

B. The Application Approach Disregards the Plain Meaning of the Copyright Act

Basic statutory interpretation principles and their application underlie the development of the § 411(a) split. Generally, “the goal of statutory interpretation is . . . to ascertain and implement the intent of Congress.”²²⁶ By giving “words their ordinary, contemporary, and common meaning,” the court first determines “whether the statutory language has a plain and unambiguous meaning. If the statute is unambiguous and if the statutory scheme is coherent and consistent, [the court’s] inquiry ends there.”²²⁷ Further, courts note that “individual sections of a single statute should be construed together.”²²⁸ Finally, “[e]ven if Congress were to enact an illogical or ill-advised law, where Congress’s intent is clear, the [c]ourt is not free to redraft statutes to make them more sensible or just.”²²⁹

When applying these statutory construction principles to § 411(a) and various sections of the Act implicating the registration requirement, Congress’s intent to prohibit infringement suits until the Copyright Office has approved or denied registration is clear. Section 408(a) states that copyright owners “may obtain” registration by delivering their work to the Copyright Office.²³⁰ This language clearly implies that registration is not guaranteed simply by delivering a work to the Copyright Office, and that substantive review of the work is required before registration is effective.²³¹ In § 410(a), the Register of Copyrights must register the work and issue a certificate *if* the material constitutes copyright subject matter “after examination.”²³² Similarly, § 410(b) mandates that the Register “refuse registration” if the work does not constitute copyrightable material.²³³ Again, this statutory language clearly mandates an affirmative act by the Copyright Office before a work is registered.²³⁴

226. *Mays & Assocs. v. Euler*, 370 F. Supp. 2d 362, 368 (D. Md. 2005) (citing *Scott v. United States*, 328 F.3d 132, 138 (4th Cir. 2003)).

227. *Id.* (citing *Scott*, 328 F.3d at 139).

228. *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056 (C.D. Cal. 2004) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

229. *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *7 (N.D. Cal. June 15, 1998).

230. 17 U.S.C. § 408(a) (2006).

231. See *supra* notes 158-161 and accompanying text for discussion of how registration approach courts interpret “may obtain” within § 408(a).

232. 17 U.S.C. § 410(a).

233. *Id.* § 410(b).

234. See *supra* notes 162-165 and accompanying text for discussion of how registration approach courts interpret § 410 to require affirmative act by Copyright Office before registration occurs.

Finally, § 411(a) itself includes the words “application” and “registration,” implying that application is something separate from registration.²³⁵ By giving the language within these sections their ordinary and common meaning, it is evident that the meaning of “registration” in the statutory scheme is far from ambiguous and Congress’s intent in enacting § 411(a) is clear. Even if this result—prohibiting infringement suits until the Copyright Office approves or rejects registration—is illogical or ill-advised, the court is not free to redraft the statute by adopting the application approach.²³⁶

The unambiguous nature of the Copyright Act in regard to registration is also supported by secondary sources aside from the text of the Act itself. When § 411(a) was amended, but not repealed, in 1988, “a review by the Copyright Office of the validity of a copyright claim [was] a necessary precondition for enforcement of copyright protection,” even when considering the new amendments to the Act.²³⁷ Additionally, the Copyright Office’s website states that they “*examine* all applications and deposits presented for the registration . . . *to determine their acceptability for registration* under the provisions of the copyright law and Copyright Office regulations.”²³⁸ This language arguably constitutes an endorsement of the registration approach by the very federal agency responsible for registering works.

Despite the seemingly clear and unambiguous nature of registration under the Copyright Act, numerous federal courts have used their authority to hold otherwise.²³⁹ As application courts hold that the “statutory language proves unclear, [they] work to discern its meaning by looking to ‘the broader context of the statute as a whole’ and the purpose of the statute.”²⁴⁰ These courts state that § 408(a) is a portion of the Act that is ambiguous. Section 408(a) states that a copyright owner “may obtain registration . . . by delivering” the appropriate materials.²⁴¹ Rather

235. See *supra* note 170 and accompanying text for discussion of usage of both “application” and “registration” within § 411(a).

236. Even under the 1909 Act’s pre-suit registration requirement, the honorable Judge Learned Hand concluded that the Act allows “copyright owners to sue for infringement only after a copyright is actually registered by the Copyright Office.” *La Resolana v. Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1202 (10th Cir. 2005) (citing *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 640-41 (2d Cir. 1958)).

237. 134 Cong. Rec. 28302 (1988) (emphasis added).

238. *Brief Introduction*, *supra* note 116 (emphasis added).

239. See *supra* notes 172-173 for examples of federal circuit and district decisions that adopt application approach.

240. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 618 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010) (citing *United States v. Olander*, 572 F.3d 764, 768 (9th Cir. 2009)).

241. 17 U.S.C. § 408(a) (2006).

than indicating that registration is not guaranteed simply by delivering the materials, application courts dismiss “may obtain” as simply indicating that registration is permissive.²⁴² Further, § 410(d) states that the effective date of registration is when the requisite materials have been received, and § 410(a) states that registration occurs only after examination.²⁴³ Application approach courts note that § 410(d) can be interpreted as meaning that registration is complete upon application, or that registration certificates are backdated to the date when the application is received.²⁴⁴ Further, § 410(a) can be interpreted as meaning that registration does not occur until all the materials have been examined, or that the section is limited to the issuance of the registration certificate, but not to the requirements for bringing an infringement action under § 411(a).²⁴⁵

While these interpretations appear to show ambiguity on their face, application courts appear to be stretching the text of the Copyright Act to create ambiguity, especially when considering that other provisions within the Act suggest otherwise.²⁴⁶ If application courts truly construed individual sections of the Copyright Act together as a whole and gave the text of the Act its ordinary, contemporary, and common meaning, any alleged ambiguity within the Act would be far less apparent. While the registration approach seems illogical and ill-advised,²⁴⁷ application courts do not have the authority to redraft the Copyright Act to make it more sensible.

C. The Registration Approach Ignores Policy Preferences Within the Copyright Act

While the ambiguity of the statute is questionable, the policy considerations favoring the application approach are certainly not. Section 411(a) allows copyright owners to file an infringement suit regardless of whether their registration is approved or denied, and it makes little sense to leave the owner in “legal limbo” when they will eventually be able to file an infringement suit even if the Copyright

242. See *supra* notes 177-179 and accompanying text for discussion of how application courts interpret § 408(a).

243. 17 U.S.C. § 410(a), (d).

244. *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004).

245. *Id.*

246. See *supra* notes 230-238 and accompanying text for discussion of portions of Copyright Act suggesting that it is not ambiguous in regard to registration.

247. See *supra* Part IV.C for discussion of registration approach and its ignorance of policy preferences within Copyright Act.

Office considers and denies registration.²⁴⁸ This amounts to a “needless formality [that] Congress generally worked to eliminate in the 1976 Act.”²⁴⁹ Even courts adopting the registration approach have noted this inefficiency.²⁵⁰

As the processing time for a copyright application is approximately eighty-two days and the issuance of a certificate takes anywhere from six to twenty-two months,²⁵¹ an infringement may continue unimpeded if the owner cannot initiate suit immediately,²⁵² allowing an infringer to continue to profit from his unlawful use of the copyright.²⁵³ While copyright owners can file for “special handling” to expedite the processing of their registration and the issuance of the certificate, a \$760 fee should deter most filings.²⁵⁴ Courts adopting the registration approach have also noted the potential for continued infringement under their approach.²⁵⁵

The registration approach also frustrates the primary purpose of § 411(a)’s pre-suit registration requirement “as an incentive to help Congress maintain a robust national register of copyrights” because copyright owners lose control of their right to initiate an infringement suit.²⁵⁶ Although both approaches further this goal, by adopting the registration approach, the court deems that the key event in registration is

248. See *supra* notes 186-190 and accompanying text for discussion of “legal limbo” caused by registration approach and § 411(a)’s allowance of copyright infringement suits even if registration is denied.

249. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 620 (9th Cir. 2010), *cert. denied*, No. 10-268, 2010 U.S. LEXIS 9438 (U.S. Nov. 29, 2010). The Ninth Circuit also noted, “It makes little sense to dismiss a case (which will likely be re-filed in a matter of weeks or months) simply because the Copyright Office has not made a prompt decision that will have no substantive impact on whether or not a litigant can ultimately proceed.” *Id.*

250. See *Specific Software Solutions, L.L.C. v. Inst. of Workcomp Advisors, L.L.C.*, 615 F. Supp. 2d 708, 715-16 (M.D. Tenn. 2009) (“[T]here is something ‘uneconomic’ about dismissing a complaint simply because the plaintiff does not have a certificate of registration, especially when the plaintiff, under [s]ection 411(a), will be allowed to sue even if the Copyright Office denies the registration and refuses to issue the certificate.”).

251. See *supra* notes 126-127 and accompanying text for discussion of processing time for registration applications and certificates.

252. *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004).

253. *Cosmetic Ideas*, 606 F.3d at 619. *But see Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (allowing a copyright owner to obtain injunction to stop infringement while registration was pending).

254. See *supra* notes 128-129 and accompanying text for discussion of special handling and its fees.

255. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1204 (10th Cir. 2005) (“[T]he scheme allows an infringer to dilute a copyright until a government official is able to sift through and approve what is surely a large stack of copyright registration applications.”).

256. See *Cosmetic Ideas*, 606 F.3d at 620 (discussing the primary function of the pre-suit registration requirement).

an act by the Copyright Office rather than the copyright owner.²⁵⁷ If registration incentives are designed to prompt copyright owners to submit their works to the Copyright Office, it makes little sense to “condition remedies on an element over which [owners] have no control.”²⁵⁸ The application approach guarantees copyright owners control over their right to remedies by initiating suit, and thus, owners will have a greater incentive to create new works.²⁵⁹

The three-year statute of limitations on copyright infringement actions and the recovery of all damages caused by infringement can potentially deprive a copyright owner of his right to obtain meaningful remedies, but not to maintain an infringement action.²⁶⁰ The owner cannot lose his right to initiate an infringement action under the registration approach because § 410(d) backdates registration to the date when the Copyright Office received the application for statute of limitation purposes.²⁶¹ The registration approach and backdating are significant, however, because all damages are limited by the three-year statute of limitations. An example from a leading treatise on copyright registration is illustrative.²⁶² Suppose a copyright is infringed from February to June of 2001. If the application approach applies, and the copyright owner applies and files a complaint in January of 2004, the owner can recover actual damages for the entire period of infringement. If the registration approach applies and the Copyright Office does not issue a certificate or deny registration until June 2004 or later, the damages limitation period would lapse and recovery for damages during the infringement period would be barred.²⁶³ Accordingly, the registration approach can potentially prejudice litigants by limiting their remedy in an infringement suit.

The application approach also conserves judicial resources by preventing dismissals of claims that will be refiled a short time later after

257. See Hogan, *supra* note 36, at 862.

258. *Id.*; see *La Resolana*, 416 F.3d at 1204 (“[I]t is odd that one can possess a copyright but be unable to file suit until it is ‘voluntarily’ registered by the copyright holder.”).

259. Bracey, *supra* note 22, at 141; see *Cosmetic Ideas*, 606 F.3d at 619 (“Indeed, because registration is not mandatory under the Act, copyright holders frequently register specifically for the purpose of being able to bring suit.”).

260. See *supra* notes 193-196 and accompanying text for discussion of statute of limitations for copyright damages.

261. 17 U.S.C. § 410(d) (2006); *Mays & Assocs. v. Euler*, 370 F. Supp. 2d 362, 369 (D. Md. 2005).

262. NIMMER & NIMMER, *supra* note 23, § 7.16(B)(3)(b)(iii) & n.213.

263. Under either approach, § 412 will bar the recovery of statutory damages to the owner as registration occurred after the infringement.

the Copyright Office approves or denies registration.²⁶⁴ Further, approval or rejection of registration bears little weight in litigation, as federal courts are not bound by the Copyright Office's decision regarding copyrightability, and the Copyright Office can choose to appear in litigation through § 411(a) if deemed appropriate.²⁶⁵ Courts adopting the registration approach have admitted that their approach "will cause some inevitable delays in litigation"²⁶⁶ and that it "leads to an inefficient and peculiar result," but note that they cannot "redraft statutes to make them more sensible or just" when those statutes are unambiguous.²⁶⁷

D. Congress Should Repeal §§ 411(a) and 412

On one hand, courts applying the registration approach properly adhere to customary doctrines of statutory construction in holding that the Copyright Act mandates that "registration" does not occur until the Copyright Office approves or rejects registration, and thus, a copyright owner cannot institute suit until after this point. On the other hand, courts applying the application approach disregard the seemingly plain and unambiguous meaning of the Copyright Act's text in order to effectuate Congress's intent to provide broad copyright protection and maintain a robust federal register, while avoiding unfairness to copyright owners and conserving judicial resources. The former approach follows an unambiguous statutory mandate that is arguably contrary to Congress's intent. The latter approach rejects the statutory mandate to effectuate that intent and public policy. Considering resolution of these contrary viewpoints is not foreseeable,²⁶⁸ congressional intervention may be necessary to quell the uncertainties surrounding copyright registration and to advance the rights of copyright owners.

Congress must repeal §§ 411(a) and 412 of the Copyright Act to resolve the split regarding the pre-suit registration requirement and also to eliminate two remaining vestiges of formalities that Congress attempted to eliminate through the 1976 Act, BCIA, and 1993 Reform Bill. If both sections are repealed, "copyright owners will be able, as in

264. Bracey, *supra* note 22, at 141.

265. See *supra* notes 197-199 and accompanying text for discussion of court's ability to review decision of the Copyright Office regarding registration and the Office's right to intervene in litigation.

266. *Specific Software Solutions, L.L.C. v. Inst. of Workcomp Advisors, L.L.C.*, 615 F. Supp. 2d 708, 716 (M.D. Tenn. 2009).

267. *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *7-8 (N.D. Cal. June 15, 1998).

268. See *supra* notes 205-225 and accompanying text for discussion of why the current split regarding registration is not likely to be resolved in the near future.

other civil litigation, to go directly into court, file a complaint, and receive all of the remedies provided [in the Copyright Act] without first receiving a certificate of registration from the Copyright Office” and having to bear uncertainty regarding when their right to initiate suit accrues.²⁶⁹ As this action involves the repeal of two statutory subsections that have been a fixture in U.S. copyright law, in some form, for over a century,²⁷⁰ we must assess the implications of such a congressional action.

1. Arguments Against Repealing §§ 411(a) and 412

Proponents of §§ 411(a) and 412 argue that their repeal would adversely affect the Copyright Office and the Library of Congress’s acquisition of deposits as they act as incentives for registration.²⁷¹ Any reasonable copyright owner would want the right to sue for infringement and the right to recover statutory damages, as well as the right to have the infringing party cover legal fees. Proponents, therefore, argue that these sections incentivize registration.²⁷² If these sections are repealed, proponents argue that there will be no meaningful incentives to register and subsequently, the registration system will become extinct as registrations decrease.²⁷³ The importance of the registration system cannot be understated. The Copyright Office maintains an index of millions of registered works that patrons can research for a fee.²⁷⁴ This record provides owners with proof of their copyright so they can communicate their rights to potential infringers and also puts potential infringers on notice of what is and what is not in the public domain.²⁷⁵ The record of registration also assists in the transfer of copyrights.²⁷⁶ If the repeal of §§ 411(a) and 412 causes this record to deteriorate, there will “be a less usable, less comprehensive, and more costly record of the nation’s cultural and intellectual heritage.”²⁷⁷

Proponents arguing for the retention of §§ 411(a) and 412 also note that the repeal of these sections will adversely affect the Library of Congress. The Copyright Office transfers more than one million works

269. H.R. REP. NO. 103-388, at 24 (1993).

270. See *infra* Part II for discussion of history of the registration requirement.

271. 139 CONG. REC. 2819 (1993). See *supra* notes 37 and 48 and accompanying text for a discussion of §§ 411(a) and 412 and how they were enacted to incentivize registration.

272. See Koegel, *supra* note 11, at 532 (noting that following the repeal of § 411(a) for foreign authors by BCIA, registrations from foreign authors dropped by thirty to forty percent in four years).

273. *Id.* at 540.

274. See *supra* notes 117-118 and accompanying text for discussion of index.

275. Koegel, *supra* note 11, at 539.

276. Bracey, *supra* note 22, at 121.

277. Koegel, *supra* note 11, at 543.

to the Library every year²⁷⁸ and one of the primary purposes of the registration system, along with the deposit requirement, is the continued expansion of the Library's collections.²⁷⁹ It follows that if registrations decrease at the Copyright Office, they will fall at the Library as well.²⁸⁰ Congress has regarded the Library as a precious resource that must be maintained so that all generations of U.S. citizens can utilize "the unique record of creativity [that] the Library documents."²⁸¹ In short, proponents of §§ 411(a) and 412 highlight the importance of both the Copyright Office's record of registrations and the Library's collection of registered works, and argue that the repeal of the sections will adversely affect both collections.

Finally, proponents of § 411(a) argue that the section expedites and simplifies litigation, and that its repeal will impose additional burdens on the federal court system.²⁸² First, if § 411(a) is repealed, federal courts will be required to rule on "an increased number of novel copyright issues, without benefit of an administrative record to expedite their proceedings."²⁸³ Second, § 411(a) is often utilized to weed out frivolous claims²⁸⁴ and proving which claimant owns the rights to a work may be difficult with § 411(a) repealed.²⁸⁵ These claims, when viewed in conjunction with the repeal of § 412, could lead to an influx of litigation or "increased exposure to statutory damages and [attorney's] fees" for defendants.²⁸⁶ Further, proponents argue that repealing the section would

278. See *supra* note 130 and accompanying text for discussion of works transferred from Copyright Office to Library of Congress.

279. Levine, *supra* note 25, at 555.

280. See Brace, *supra* note 22, at 122 ("[C]opyright registration 'facilitate[s] the growth of the Library of Congress's collection of published and unpublished works.'" (second alteration in original)); Zizza, *supra* note 17, at 705 ("[R]epealing [s]ections 411 and 412 would result in a severe depletion in the number of works the Library receives for possible submission into its archives.").

281. H.R. REP. NO. 103-388, at 13 (1993).

282. S. REP. NO. 100-352, at 23 (1988). See *supra* note 75 for House's similar opinion on § 411(a) and pre-suit registration.

283. *Id.*

284. 139 CONG. REC. 2819 (1993). The Register of Copyrights has also noted that if § 411(a) is repealed,

copyright owners with questionable claims will seek to enforce rights by asking the courts . . . to rule directly on their claims without risking the negative implications that would arise from a possible Copyright Office denial of registration. Attorneys with weak cases, or novel cases would have a powerful incentive to bypass the Copyright Office in precisely the kind of case in which the courts want to have the advice of an expert agency.

S. REP. NO. 100-352, at 23-24.

285. Zizza, *supra* note 17, at 709.

286. H.R. REP. NO. 103-388, at 24.

diminish the fees collected by the Copyright Office because fewer works would be registered.²⁸⁷

2. Sections 411(a) and 412 Should Be Repealed

Proponents of §§ 411(a) and 412 argue that without these sections, there will be no incentive to register works. The foundation of this argument rests on the notion that §§ 411(a) and 412 actually incentivize registration. In fact, as “it is unknown why virtually every significant work is registered today,” it is impossible to know exactly how the repeal of §§ 411(a) and 412 will affect registration.²⁸⁸ Additionally, there is a complete lack of empirical evidence that either section actually induces registration.²⁸⁹ Any inducement caused by either section needs to be qualified by the fact that many owners are ignorant of their obligations or may chose to ignore those obligations for other reasons, such as paying fees.²⁹⁰ Other owners may have “no realistic prospect of commercial return from their works and do not foresee infringement litigation” and will disregard any inducement caused by the sections.²⁹¹ Some owner’s decision not to register may be involuntary. Photographers, for example, do not normally register their photos despite an ability to pay a flat fee to register more than one photo.²⁹² The photographer may have too many photos to feasibly register, or may have transferred his photos to a third party for publication, and therefore is without the requisite copy to send to the Copyright Office.²⁹³ The incentive effect of § 411(a) is further limited by the fact that a copyright owner must only comply with it if his copyright is infringed, which may never occur.²⁹⁴ Finally, “to the extent that registrations are motivated by other reasons, such as sound business practices and personal considerations,” the repeal of the sections would have a minimal impact.²⁹⁵

287. *Id.* at 27.

288. S. REP. NO. 100-352, at 20.

289. Wedgeworth, *supra* note 97, at 272. While it cannot be denied that §§ 411(a) and 412 have *some* effect in inducing copyright owners to register their works, this effect and its magnitude is often presumed and has not been established with certainty. *See id.*

290. Ginsburg, *supra* note 22, at 342.

291. Springman, *supra* note 9, at 496.

292. 139 CONG. REC. 2739 (1993).

293. Perlmutter, *supra* note 98, at 573; Ossola, *supra* note 44, at 560, 562.

294. Perlmutter, *supra* note 98, at 578.

295. S. REP. NO. 100-352, at 21 (1988); *see* Perlmutter, *supra* note 98, at 577 (“In buying, selling or pledging assets, a certificate of registration smoothes and hastens transactions; in asserting claims against infringers, a certificate of registration has an immediate impact in communicating the strength of the rights asserted.”).

Even if §§ 411(a) and 412 substantially induce registration, the sections are not the only inducements to register, and there are other components of the Act that can induce registration. The repeal of the sections would leave intact § 407's mandatory deposit requirement, § 408's voluntary registration provisions, and the prima facie treatment of registration certificates under § 410(c).²⁹⁶ If the current incentives within the Act are not enough, the additional, less burdensome incentives proposed by Congress in the past could be enacted.²⁹⁷

Proponents of §§ 411(a) and 412 also argue that their repeal will adversely affect the Library of Congress. The Senate, however, has noted that “the extent to which the Library is dependent upon the submission to the Copyright Office of works sought to be registered, as contrasted with these other means of acquisition,” is uncertain.²⁹⁸ In 2007, for example, more than one million works were transferred from the Copyright Office to the Library, but less than half were actually registered with the Office, with the remainder submitted pursuant to § 407's mandatory deposit provision.²⁹⁹ When considering the requirements of §§ 407 and 408 in conjunction, “the Librarian of Congress . . . testified that [s]ection 411(a) ‘serves little or no purpose in inducing deposit for the collections of the Library.’”³⁰⁰ Under § 407, the Library still “retains the full authority to demand . . . any and all copies of copyrighted works published in the United States, entirely apart from the registration system.”³⁰¹

In specific regard to § 411(a), proponents argue that its repeal will adversely affect litigation and fees collected by the Copyright Office, and also impose increased burdens on the federal court system. The Senate has already noted that the repeal of § 411(a) would not make copyright litigation less efficient or expeditious and would not have a harmful effect on federal copyright jurisprudence.³⁰² While federal courts would be asked to rule on an increased number of novel copyright issues if registration was not required to file suit, the courts—not the Copyright Office—are responsible for interpreting and applying copyright law in infringement lawsuits.³⁰³ Federal courts are not bound by the Copyright

296. 139 CONG. REC. 2819 (1993).

297. See *supra* notes 83 and 95 for discussion of examples of additional provisions proposed by Congress in 1988 and 1993 to induce registration.

298. S. REP. NO. 100-352, at 23.

299. See *supra* note 131 and accompanying text for discussion of works transferred to Library of Congress, but submitted pursuant to § 407.

300. H.R. REP. NO. 103-388, at 10 (1993).

301. 139 CONG. REC. 2819 (1993).

302. See *supra* note 81 and accompanying text for discussion of Senate's attempt to repeal § 411(a) in 1988.

303. S. REP. NO. 100-352, at 24.

Office's decision to approve or reject registration even with § 411(a) in place, and if they deem appropriate, the Copyright Office can still intervene in litigation to defend their decision.³⁰⁴ Section 411(a) allows owners to file suit even if registration is denied and therefore only deters "the assertion of frivolous claims by those who are not sufficiently determined to bring suit after a rejection."³⁰⁵ Further, the mere prospect of frivolous suits should not validate "barring worthy claimants from their day in court."³⁰⁶ A registration denial by the Copyright Office may actually deter plaintiffs with meritorious claims from filing suit based on the "unfavorable light in which a judge might view the refusal to register and the undesirability of having the Copyright Office intervene in opposition."³⁰⁷ Finally, when the repeal of §§ 411(a) and 412 was considered in 1993, the Congressional Budget Office determined that the repeal would only cost \$300,000 over a four-year period and that any decrease in fee revenues would be negligible.³⁰⁸

The exemption of Berne Convention works that originated in a foreign country from the § 411(a) pre-suit registration requirement by the BCIA presents another reason why the section should be repealed.³⁰⁹ This amendment unfairly discriminates against U.S. copyright owners who must bear expenses and opportunity costs in preparing registrations that foreign owners are exempt from.³¹⁰ A U.S. software company, for example, noted that it spent \$400,000 over a three-year period in preparing deposit copies and application forms for registration.³¹¹ U.S. copyright law has put American copyright owners at a competitive disadvantage because a foreign company operating in a Berne Convention signatory nation would not have these expenses.³¹²

Aside from unfairly prejudicing American copyright owners, § 411(a) might still be incompatible with the Berne Convention even after the BCIA. The Senate advanced this very argument when it

304. See *supra* notes 197-199, 265 and accompanying text for discussion of court's ability to review decision of Copyright Office regarding registration and Office's right to intervene in litigation.

305. 139 CONG. REC. 2819 (1993).

306. Perlmutter, *supra* note 98, at 581.

307. H.R. REP. NO. 100-609 (1988). Approximately six percent of all applications for registration are denied. See *supra* note 121 and accompanying text for discussion of percentages of applications approved for registration by Copyright Office.

308. H.R. REP. NO. 103-388, at 27 (1993).

309. See *supra* notes 85-88 and accompanying text for discussion of § 411(a) and exclusion of foreign works.

310. 139 CONG. REC. 2734 (1993).

311. H.R. REP. NO. 103-388, at 10.

312. *Id.*

advocated for the repeal of § 411(a) in 1988.³¹³ It cannot be denied that an owner's "enjoyment and exercise" of his copyright is severely limited or nonexistent if he is prohibited from initiating suit in the only country where his rights may be vindicated.³¹⁴ The owner of "an unregistered work has, if anything, a right without a remedy, a right that 'exists' but that he is unable to fully 'enjoy or exercise.'"³¹⁵ The House argued in 1988 that § 411(a) was not a formality and its retention would not violate the Berne Convention, but ironically and eventually agreed with the Senate that the section needed to be amended for the Copyright Act to become compatible with the Convention.³¹⁶

While § 412 was designed to further encourage copyright owners to register, and thus expand the copyright system and Library of Congress, it has been used as a "shield for infringers" in that it deprives copyright owners of their "only realistic economic relief, statutory damages and attorney's fees."³¹⁷ This section has been a shield for infringers because they continue to infringe copyrights knowing that "it will be economically impossible to pursue a claim of infringement" if statutory damages and attorney's fees are unavailable.³¹⁸ In particular, individuals and small businesses are often deprived from asserting meritorious claims because they are unaware that they will be denied vital remedies if they do not register.³¹⁹ These owners are not "sleeping on their rights" by failing to register, but are mere victims of a concept—registration as a condition to statutory damages or attorney's fees—that can only be understood by those well versed in the Copyright Act.³²⁰

If registration occurs after infringement and statutory damages and attorney's fees are denied to a copyright owner, an average copyright owner will have difficulty sustaining an infringement action. As a practical matter, the recovery of attorney's fees is vital in acquiring legal representation as most attorneys will not accept a potentially drawn-out case if there is no reasonable prospect of payment.³²¹ If statutory damages are potentially recoverable, the copyright owner will be saved

313. See *supra* note 81 and accompanying text for discussion of Senate's argument that § 411(a) was incompatible with article 5(2) of Berne Convention because it conditioned all of copyright owner's meaningful relief on registration.

314. S. REP. NO. 100-352, at 17 (1988).

315. *Id.* at 16.

316. See *supra* notes 78, 87-89 and accompanying text for discussion of House's opinion on § 411(a) and their amendment to that section.

317. 139 CONG. REC. 31240 (1993).

318. H.R. REP. NO. 103-388, at 24 (1993).

319. 139 CONG. REC. 2819 (1993).

320. Bracey, *supra* note 22, at 141.

321. Ossola, *supra* note 44, at 562-63.

the difficulty, time, and expense of proving actual damages.³²² Finally, if attorney's fees are available to the plaintiff, an infringing party may opt to settle a case instead of dragging out litigation and risk paying the attorney's fees for both themselves and the plaintiff.³²³ Thus, the availability of attorney's fees can induce settlement.³²⁴ If plaintiffs cannot recover attorney's fees under § 412, they may also be deterred from bringing a meritorious suit through § 505, which deems that *either* prevailing party can recover a reasonable attorney's fee.³²⁵ In effect, § 412 will bar the plaintiff's recovery of attorney's fees even if he prevails, while the defendant's potential award of attorney's fees from the plaintiff will not be limited.

Section 412 can also limit the rights of U.S. copyright owners in foreign countries who are signatories to the Berne Convention. As long as foreign countries impose the same requirement on their own authors, the Berne Convention permits them to impose restrictions on U.S. authors.³²⁶ A foreign country, therefore, could enact its own version of § 412 and U.S. authors would be forced to register all their works in every nation imposing such restriction in order to obtain effective remedies in those nations.

Statutory damages and attorney's fees were available as a remedy unconditionally under the 1909 Act,³²⁷ and the U.S. registration system still developed and thrived.³²⁸ Section 412 was not enacted for purposes of litigation or based on the theory that these remedies naturally should be predicated on registration, but rather on the unconfirmed notion that it would act as an incentive to induce registrations for the Library of Congress.³²⁹ Despite the importance of the Library, its policies should not determine copyright policy.³³⁰ Even the author of § 412 believes that the provision's enactment was in error and that the section has done more harm than good.³³¹

Finally, the notion that U.S. copyright jurisprudence would benefit from the repeal of §§ 411(a) and 412 is not a novel concept. Congress has recognized that the United States is the only country in the world

322. *Id.* at 563.

323. *Id.*

324. *Id.*

325. 17 U.S.C. § 505 (2006).

326. H.R. REP. NO. 103-388, at 24 (1993).

327. See *supra* notes 24-25 and accompanying text for discussion of attorney's fees and statutory damages under 1909 Act.

328. Perlmutter, *supra* note 98, at 579.

329. H.R. REP. NO. 103-388, at 12.

330. *Id.*

331. Ossola, *supra* note 44, at 559.

imposing the requirements within §§ 411(a) and 412 on copyright owners.³³² The Senate advocated the repeal of § 411(a) in 1988, and both the House and Senate attempted to repeal §§ 411(a) and 412 in 1993.³³³ On both occasions, Congress noted that even without these sections, there would still be adequate incentives to register within the Act, and if deemed necessary, additional, less burdensome incentives could be added.³³⁴ While the repeal of these sections may be drastic, the notion of repealing them is not unprecedented and Congress would likely consider their repeal in the future.

IV. CONCLUSION

The registration requirement has played an integral role in U.S. copyright law since 1790.³³⁵ Since 1790, the registration requirement has been gradually changing. Initially, compliance with the requirement was mandatory in order to obtain copyright protection in the first place.³³⁶ By 1909, registration was no longer required for a work to receive copyright protection.³³⁷ In the 1909 Act, however, Congress mandated that copyright owners register their works before they could institute an infringement action.³³⁸ Additionally, the 1909 Act permitted copyright owners to receive attorney's fees and statutory damages as remedies.³³⁹ These provisions became the foundation for the § 411(a) pre-suit registration requirement and the § 412 limitation on the recovery of attorney's fees and statutory damages within the 1976 Act.³⁴⁰ Congressional satisfaction with these sections was relatively short-lived. In 1988, the Senate realized that the costs and formalities of § 411(a) exceeded its benefits, and secured an amendment of the section after

332. See *supra* note 90 and accompanying text for discussion of legislative debate over 1993 Reform Bill.

333. See *supra* notes 81, 95, and accompanying text for discussion of BCIA and 1993 Reform Bill.

334. See *supra* notes 83, 95-97, 296-297, and accompanying text for discussion of incentives that would be left intact within Copyright Act, or additional incentives that could be enacted.

335. See *supra* Part II.A for discussion of registration requirement under 1790 Act.

336. See *supra* Part II.A for discussion of registration requirement under 1790 Act.

337. See *supra* Part II.A for discussion of registration requirement under 1909 Act.

338. See *supra* Part II.A for discussion of pre-suit registration requirement under 1909 Act.

339. See *supra* Part II.A for discussion of availability of attorney's fees and statutory damages under 1909 Act.

340. See *supra* Part II.B.1 for discussion of §§ 411(a) and 412 within 1976 Act.

unsuccessfully arguing for its repeal.³⁴¹ By 1993, both the House and Senate deliberated bills to repeal both §§ 411(a) and 412 to no avail.³⁴²

As the registration requirement evolved, divergent viewpoints developed concerning the actual meaning of “registration” within the Copyright Act. Specifically, federal courts are currently split regarding the § 411(a) pre-suit registration requirement.³⁴³ Application courts—invoking the public policy behind the Copyright Act—hold that registration occurs when the copyright owner’s application is sent or received by the Copyright Office, while registration courts—interpreting the unambiguous text of the Act—hold that registration does not occur until the Office acts on the application and issues a certificate of registration.³⁴⁴

Unfortunately, it is not foreseeable that the split will be resolved judicially or through traditional means in the near future.³⁴⁵ Despite hearing cases encompassing the split in the past, the Supreme Court has declined to address the issue and has more recently denied certiorari to circuit court decisions adopting the registration or application approaches.³⁴⁶ Judicial resolution of the split is even more unlikely considering the split is an issue capable of repetition that often evades judicial review due to common litigation strategies.³⁴⁷ Finally, avoiding the split through preregistration is an impractical and rare option for copyright owners and litigants.³⁴⁸

As judicial intervention is unlikely, congressional action is necessary to remedy the § 411(a) pre-suit registration split, and also to remedy the inequities created by §§ 411(a) and 412. Congressional adoption of either the application or registration approaches does not advance U.S. copyright law, as there are problems within each approach. The registration approach correctly interprets the text of the Copyright Act while the application approach disregards this seemingly plain and unambiguous text in order to effectuate Congress’s intent to provide

341. See *supra* Part II.B.3 for discussion of Senate’s opinion on § 411(a) when BCIA was enacted.

342. See *supra* Part II.B.4 for discussion of 1993 Reform Bill.

343. See *supra* Part II.E for discussion of split.

344. See *supra* Part II.E.1 and II.E.2 for discussion of application and registration approaches, and rationales behind them.

345. See *supra* Part III.A for discussion of unlikelihood that split will be resolved in foreseeable future.

346. See *supra* notes 205-209 and accompanying text for discussion of unlikelihood that split will be resolved by Supreme Court in foreseeable future.

347. See *supra* notes 210-217 and accompanying text for discussion of litigation devices that prevent district courts from ruling on split.

348. See *supra* notes 218-223 and accompanying text for discussion of preregistration.

broad copyright protection and maintain a robust federal register, while avoiding unfairness to copyright owners and conserving judicial resources.³⁴⁹ The registration approach follows an unambiguous statutory mandate that is arguably contrary to Congress's intent, while the application approach rejects the statutory mandate to effectuate that intent and public policy.³⁵⁰ Accordingly, Congress should not adopt either approach.

Congress must repeal §§ 411(a) and 412 of the Copyright Act to resolve conclusively the split regarding the pre-suit registration requirement and to end the prejudicial effect that these sections have had on U.S. copyright owners. While there are certainly implications of repealing each section due to the benefits they create, the extent of these benefits is exaggerated, and the impact of their repeal would be minimal.³⁵¹

The repeal of §§ 411(a) and 412 would not have the negative impact on U.S. copyright law, jurisprudence, and owners, nor on the registration system or the Library of Congress, that their proponents claim. It is unknown why copyright owners do or do not register their works. There is a lack of evidence suggesting that either section induces registration, and there are additional sections in place that encourage owners to register.³⁵² The extent that the Library of Congress is dependent upon registration is also uncertain and evidence suggests that a majority of works transferred to the Library are submitted through § 407—not § 411(a).³⁵³ Finally, repeal of § 411(a) would not make copyright litigation less efficient or expeditious, would not have a harmful effect on federal copyright jurisprudence, and would result in a negligible impact on registration fees collected by the Copyright Office.³⁵⁴

There are other justifications for repealing §§ 411(a) and 412. The sections discriminate against U.S. copyright owners who must bear the time and cost of registering, while their foreign counterparts are exempt.³⁵⁵ Despite U.S. admission into the Berne Convention, § 411(a) is still at odds with its principles as U.S. copyright owners have a right in

349. See *supra* Part III.B and III.C for discussion of each approach and their deficiencies.

350. See *supra* Part III.B and III.C for discussion of each approach and their deficiencies.

351. See *supra* Part III.D.1 for discussion of implications of repealing §§ 411(a) and 412.

352. See *supra* notes 288-297 and accompanying text for discussion of uncertainty surrounding inducement effect of §§ 411(a) and 412.

353. See *supra* notes 298-301 and accompanying text for discussion of Library of Congress and works submitted through § 407 and not registration system.

354. See *supra* notes 302-308 and accompanying text for discussion of § 411(a) and its role in copyright law jurisprudence.

355. See *supra* notes 309-312 and accompanying text for discussion of impact of § 411(a)'s exemption of foreign works.

their works without an effective remedy, and thus, are unable to fully enjoy or exercise their copyrights.³⁵⁶ Section 412 has been utilized as a shield to protect infringers as many copyright owners cannot afford to file suit without its benefits.³⁵⁷ Even if suit is filed, the availability of attorney's fees and statutory damages during litigation may impact the copyright owner's options.³⁵⁸ If § 412 is not repealed, it may be used against U.S. copyright owners by Berne Convention signatories.³⁵⁹ Further, the remedies of attorney's fees and statutory damages thrived when they were offered unconditionally.³⁶⁰ Finally, Congress has considered repealing both §§ 411(a) and 412 on multiple occasions, and the development of the split between application and registration courts may make a future repeal more likely.³⁶¹

The U.S. copyright system has developed in a manner such that invaluable creative rights are dependent on precise compliance with formalities—most notably §§ 411(a) and 412—that have no relationship to the equitable rights of copyright owners, which has led to “frequent misunderstandings as to the nature and scope of the protection afforded by copyright.”³⁶² The stringent execution of §§ 411(a) and 412 has burdened these rights and has cast doubt on when copyright owners achieve compliance with them. Access to crucial substantive rights and remedies should not depend “on the failure to file a piece of paper in the correct form at the proper time.”³⁶³ Formalities have been gradually eliminated throughout the history of U.S. copyright law,³⁶⁴ and the uncertainty and inequality created by current formalities justify Congress invoking the power granted to them through the Constitution to repeal §§ 411(a) and 412.

356. See *supra* notes 313-316 and accompanying text for discussion of § 411(a) and Berne Convention.

357. See *supra* notes 317-322 and accompanying text for discussion of § 412's unintentional benefit to infringers.

358. See *supra* notes 323-325 and accompanying text for discussion of limits § 412 can impose within litigation.

359. See *supra* note 326 and accompanying text for discussion of Berne Convention and potential that a version of § 412 could be enacted by other nations.

360. See *supra* notes 327-331 and accompanying text for discussion of remedies and policy behind § 412.

361. See *supra* notes 332-334 and accompanying text for discussion of congressional consideration of repealing §§ 411(a) and 412 in 1988 and 1993.

362. Solberg, *supra* note 16, at 3, 25.

363. Perlmutter, *supra* note 98, at 586.

364. Levine, *supra* note 25, at 553. See *supra* Part II for discussion of historical development of copyright formalities.