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

Mose Bracey
University of Georgia School of Law

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl
Part of the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol14/iss1/3
NOTES

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

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 113

II. BACKGROUND ............................................ 118
   A. NATURE AND ORIGIN OF COPYRIGHT ....................... 118
      1. Nature of Copyright .................................... 118
      2. Positivist Right Concept ................................ 118
      3. Natural Right Concept ................................... 119
   B. PURPOSES OF AMERICAN COPYRIGHT LAW ................... 119
   C. COPYRIGHT REGISTRATION GENERALLY .................... 120
      1. The Registration Procedure ............................ 120
      2. Purposes of Registration ............................... 121
      3. Beyond Jurisdiction: Other Incentives to Register .... 122
         a. Prima Facie Validity of Copyright .................... 122
         b. Statutory Damages and Attorney's Fees ............... 122
   D. HISTORICAL DEVELOPMENT OF COPYRIGHT REGISTRATION AS A CONDITION TO THE EXERCISE OF SUBJECT-MATTER JURISDICTION ........................... 123
      1. Copyright Act of 1790 .................................. 124
      2. Copyright Act of 1909 .................................. 124
      3. Copyright Act of 1976 .................................. 125
      5. Digital Millennium Copyright Act ....................... 126

III. JUDICIAL HANDLING: THE ISSUANCE APPROACH V. THE APPLICATION APPROACH ............................ 127
A. THE ISSUANCE APPROACH ................................................................. 127
   1. Text of the Copyright Act .......................................................... 127
      a. Section 411 ............................................................................. 127
      b. Section 410 ............................................................................. 128
      c. Section 408 ............................................................................. 130
   2. Underlying Policy Considerations ............................................... 131
      a. Judicial Restraint .................................................................... 131
      b. Judicial Economy .................................................................... 132

B. THE APPLICATION APPROACH ......................................................... 133
   1. Text of Copyright Act .................................................................. 133
      a. Section 408 ............................................................................. 133
      b. Section 410 ............................................................................. 134
      c. Section 411 ............................................................................. 136
   2. Underlying Policy Considerations ............................................... 136
      a. Equity ..................................................................................... 137
      b. Judicial Economy .................................................................... 138

IV. DISCUSSION .................................................................................... 138
   A. LITTLE WILL BE LOST BY ABANDONING THE STATUS QUO AND EVEN LESS WOULD BE GAINED BY RETAINING IT ................................................................. 139
   B. THE APPLICATION APPROACH IS JUSTIFIED BY STATUTE AND UNDERLYING POLICY CONSIDERATIONS ................................................................. 141
   C. THE APPLICATION APPROACH IS JUSTIFIED BY CONSIDERATIONS OF FAIRNESS, PRACTICALITY, AND LOGICAL CONSISTENCY ................................................................. 141

V. CONCLUSION .................................................................................... 143
I. INTRODUCTION

In response to members of Congress receiving letters containing the bacteria causing anthrax, all mailings to the Copyright Office were irradiated between October 2001 and May 2002. Consequently, although Strategy Source, Inc. (SSI) submitted an application to register its copyright in certain advertising materials to the Copyright Office, the Copyright Office’s processing of SSI’s application was “delayed by up to six months.” At the time, SSI was engaged in a lawsuit before the United States District Court for the District of Columbia.

In their complaint, SSI alleged that their copyright had been infringed—that the defendants had copied, displayed, and distributed SSI’s advertising materials without permission. The court held that “a certificate of registration is a jurisdictional prerequisite to filing an infringement suit in this Court, the only exception being where the Copyright Office has refused to issue the certificate of registration.” In applying that standard to the case at bar, the court refused to “authorize[e] suit before registration is achieved,” although it acknowledged that “the plaintiff’s attempt to obtain the certificates of registration has been delayed by the anthrax situation.” Accordingly, the court dismissed the case without considering the merits of SSI’s complaint.

What are the potential consequences of dismissal to copyright owners in SSI’s position? At best, they recover their actual damages and the defendants’ marginal profits some six-plus months later after achieving registration. Having to sit idly while aware of, but powerless to stop, infringement of their copyrights would be frustrating, especially if the defendants were intentional infringers who were willing to risk the chance of later litigation in exchange for immediate gain. Nonetheless, such copyright owners could take comfort in the fact that, once they achieved registration, their second suit could potentially address infringement that occurred before registration. On the other end of the spectrum, the worst case
scenario for copyright owners in SSI’s position would arise if the alleged infringement took place over two-and-a-half years prior to the filing of suit. As suits brought under the Copyright Act must be commenced within three years of infringement in order to satisfy the statute of limitations, a six-month delay would normally result in such owners losing the right to bring suit for relief based on that infringement.

In SSI’s case, the court’s decision to dismiss their complaint may seem odd and perhaps unfair. Even so, it is more accurately characterized as the norm rather than the exception among federal courts that confront analogous facts. Nonetheless, there is no readily discernible majority approach among federal courts in this context because many other such courts would allow suit to proceed in circumstances similar to those of SSI.

Confused as to what events must normally occur in order for copyright registration to be achieved under federal law? So are the federal courts. A copyright “automatically inheres in a work the moment it is ‘created.’” Complementing this concept, the Copyright Act explicitly provides that “registration is not a condition of copyright protection.” Accordingly, certain requirements of the Copyright Act can accurately be described as “inducements

action occurs within the terms set in the statute of limitations.”).

10 See 17 U.S.C. § 507 (2000) (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”).

11 See BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER’S GUIDE § 11:3.1[B] (5th ed. 2001) (“[T]he plaintiff can register the claim after dismissal and bring a subsequent action . . . . [H]owever, the plaintiff faces risks that the statute of limitations has run . . . .”). But see 2 NIMMER, supra note 9, § 7.16[B][1][a][i] (stating that “some authority” allows a plaintiff to amend the initial complaint after achieving registration, and that “one court held that a newly filed complaint would . . . relate back to the original filing date for purposes of the statute of limitations”).

12 See infra note 14.

13 See infra note 14.

14 See, e.g., Leora Herrmann, It’s Never Too Late: Copyright Registration as a Jurisdictional Prerequisite to Suit, IP LITIGATOR, July-Aug. 2005, at 28 (2005) (listing various circuit and district courts that disagree on the issue of what requirements a copyright owner must meet for a federal court to be competent to hear an infringement claim—including at least two circuits in which the respective district courts are at odds); 2 NIMMER, supra note 9, § 7.16[B][1][a][i] nn.38.21–.22 (listing splits among, as well as within, various circuits); see also Ryan v. Carl Corp., No. C 97-3873 FMA, 1998 U.S. Dist. LEXIS 9012, at *4–5 (N.D. Cal. 1998) (acknowledging that district courts within the Tenth Circuit were split on this issue). Recently, the Tenth Circuit Court of Appeals addressed that circuit’s respective split in La Resolana Architects, P.A. v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005).

15 2 NIMMER, supra note 9, § 7.16[A][1]. “Creation” occurs once a work “is fixed in a copy or phonorecord for the first time.” Id.

to registration which do not necessarily compromise protection afforded by copyright."\(^\text{17}\)

 Nonetheless, the Copyright Act also states that "no action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made" with the Copyright Office.\(^\text{18}\) The effect of this provision is "unequivocal."\(^\text{19}\) Congress has broad authority to determine the terms on which federal courts may exercise jurisdiction\(^\text{20}\) over certain subject matter.\(^\text{21}\) Therefore, copyright registration is a condition precedent to the exercise of subject-matter jurisdiction by federal courts over copyright infringement claims.\(^\text{22}\) Accordingly, in contrast to ownership of a copyright, the ability to enforce a copyright is conditioned on the achievement of registration.\(^\text{23}\)

 With respect to differing views among federal courts as to the satisfaction of that condition, "[t]he dispute boils down to the issue of when a work is considered 'registered' for purposes of copyright law."\(^\text{24}\) In other words, a split exists among federal courts as to what acts by a copyright owner are sufficient for copyright registration to be achieved and, thus, for a court to be competent to adjudicate a copyright infringement suit.\(^\text{25}\) Unfortunately, the Act provides little direct assistance in interpreting this term as it simply states that "'[r]egistration' . . . means a registration of a claim in the original or the renewed and extended term of copyright."\(^\text{26}\) Furthermore, the Supreme Court has not directly addressed the issue of what events constitute "registration" sufficient to allow a federal court to exercise subject-matter jurisdiction over a copyright.

---

18 17 U.S.C. § 411(a) (emphasis added).
19 Levine & Squires, supra note 17, at 1262.
20 Jurisdiction is defined as a "court's power to decide a case or issue a decree." BLACK'S LAW DICTIONARY 867 (8th ed. 2004).
21 See Daniel J. Meltzer, The History and Structure of Article III, 138 U. PA. L. REV. 1569, 1569 (1990) ("According to [the traditional view of Article III], Congress may deprive the lower federal courts, the Supreme Court, or all federal courts of jurisdiction over any cases within the federal judicial power, excepting only those few that fall within the Supreme Court's original jurisdiction.").
22 2 NIMMER, supra note 9, § 7.16[B][1][a].
23 See Levine & Squires, supra note 17, at 1262 ("A statement that, under the provisions of chapter 4 [of Title 17], registration is not a condition of copyright is defensible; the statement that registration is not a condition of copyright protection is not.").
25 See supra note 14.
26 17 U.S.C. § 101 (2000); see also La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1200 n.4 (10th Cir. 2005) (setting the Copyright Act's definition of registration and concluding that the Act "gives little guidance on how to construe the term").
infringement claim. Thus, no binding authority exists to provide the system of federal courts with a standard approach to this question.

Notwithstanding an apparent lack of guidance from a source of higher authority, the boundaries of the issue on which federal courts are split can be defined with some certainty. On one hand, these courts generally agree that possession of a registration certificate or letter explaining why an application has been rejected is sufficient for achieving registration. On the other hand, most federal courts also agree that submission to the Copyright Office of the requisite materials—application for copyright registration, deposit, and fee—is necessary for achieving registration. Thus, in practical terms, the essence of the dispute concerns "what happens [when] suit is filed during the interval after the copyright owner has duly submitted all the necessary ingredients to the Copyright Office, but before that Office has issued the certificate or denied its issuance." When confronted with this scenario, federal courts disagree as to whether application to register, though necessary, is also sufficient (application approach) or, to the

28 Nonetheless, persuasive secondary authority, particularly Nimmer on Copyright, has had a profound effect on courts favoring the application approach, which the treatise itself advocates. See 2 NIMMER, supra note 9, § 7.16[B][1][a][ii] (discussing the practice of allowing suits to proceed when a copyright owner has submitted all of the required materials to the Copyright Office but has yet to receive a reply and opining that such a practice "represents the better point of view").
29 See 2 NIMMER, supra note 9, § 7.16[B][1][a][ii] (stating that, in the case of a copyright owner who registers his work before infringement occurs, "filing suit later based on the registration certificate is straightforward"); see also 17 U.S.C. § 411(a) (2000) ("In any case... 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 if notice thereof... is served on the Register of Copyrights.").
30 See 17 U.S.C. § 408(a) (2000) ("[T]he owner of [a] copyright... 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 specified by sections 409 and 708.").
31 See 2 NIMMER, supra note 9, § 7.16[B][1][a][ii] ("Absent issuance of a certificate and in the absence of the copyright owner even having sent the requisite application (together with deposit and fee) to the Copyright Office, there is plainly a jurisdictional defect... ").
32 Id.
33 As an evidentiary matter, courts that favor the application approach require proof that the Copyright Office has received the necessary application, deposit, and fee. See Apple Barrel Prods. v. Beard, 730 F.2d 384, 386-87 (5th Cir. 1984) (declaring that "to bring suit for copyright infringement... [o]ne need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application"). Logistically, this standard has been satisfied by introducing into the record copies of the copyright application and deposits submitted to the Copyright Office, as well as a receipt from the Copyright Office indicating that the copyright owner's application, fee, and deposit had been received. E.g., Wilson v. Mr. Tee's, 855 F.
contrary, issuance of a Copyright Office response is not only sufficient, but also necessary (issuance approach).34

As federal courts have exclusive jurisdiction over copyright claims,35 the split among the federal courts over the dictates of the Copyright Act is significant to every copyright owner who, though not in possession of a certificate of registration (or letter denying such) at the moment they become aware of infringement, nonetheless acts to “simultaneously register the[ir] work and seek judicial redress.”36 Such copyright owners often seek to enforce their copyrights in various circuits and districts where the alleged infringer operates37 and would benefit from knowing the approach adopted by the court in which the owners intend to assert their claims.38 With that knowledge, these copyright owners can determine the events that must occur in order to achieve registration, confer competency, and, thus, give substantive effect to their copyrights.39 However, as the split among and within circuits is widespread and arbitrary,40 copyright owners are afforded little notice as to whether their efforts to register a copyright will be sufficient to allow them to immediately seek relief in a court of law for infringement of that right.

With both individual copyright owners and society-at-large in mind, this Note will analyze the repercussions of the status quo in which both the issuance and


34 See Elke Flores Suber, Handling Pretrial Matters in a Copyright Case, 13 PRAC. LITIGATOR 19, 21 (2002) (“There is a split of authority in the courts regarding whether the Copyright Act requires an actual registration certificate or merely filing an application.”); see also 2 NIMMER, supra note 9, § 7.16[B][1][a][i] (contrasting “application for registration” with “issuance of a registration certificate”).

35 See KELLER & CUNARD, supra note 11, § 11:3.1 (“Two provisions create a federal jurisdictional monopoly over copyright claims: (1) 28 U.S.C. § 1338(a), which provides for exclusive federal jurisdiction over all claims ‘arising under’ the Copyright Act, and (2) 17 U.S.C. § 301, which preempts any state law claim that seeks to vindicate rights equivalent to the exclusive rights secured by the Copyright Act.”). But see La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1199 n.2 (10th Cir. 2005) (declaring that “if a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim” (quoting Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823, 847 (10th Cir. 1993))).

36 2 NIMMER, supra note 9, § 7.16[B][1][a][i].

37 See Suber, supra note 34, at 23 (“Generally, an action for copyright infringement may be instituted in the district where the defendant or his agent resides or may be found.”).

38 See id. at 21 (“[C]opyright registration is an important consideration because copyright actions are subject to exclusive federal jurisdiction . . . . [L]itigants must consider the requirements established in their respective jurisdictions before instituting a copyright case in federal court.”).

39 See supra text accompanying notes 33–34; see also Rebecca S. Stroder, Copyright Registration: Get It Before You Need It, LICENSING J., Mar. 2003, at 17 (“Even though a copyright ‘springs to life’ at the moment a work is created, that [copyright] has no teeth until the owner has registered the claim with the Copyright Office.”).

40 See supra notes 12–14 and accompanying text.
application approaches are employed contemporaneously and haphazardly. This Note will then seek to determine whether the federal courts should adopt one approach over the other.

To reach this determination, this Note will begin by summarizing contrasting concepts of the origin and nature of copyright and examining copyright law's purposes, which are greatly influenced by the origins of copyright. It will then consider the formality of copyright registration, focusing in particular on the registration procedure, the ends furthered by that procedure, and current incentives to pursue registration. Finally, this Note will consider legislative handling of registration as a prerequisite to infringement actions as well as justifications for the divergent judicial approaches as to when registration has been achieved.

Based on that analysis, this Note will find that, under both approaches as presently applied, the general purposes of copyright law are furthered—authors retain incentives to create and society continues to reap benefits as a result. Nonetheless, it will argue that little is to be gained by maintaining the status quo and even less is to be lost by abandoning it. Furthermore, this Note will assert that the application approach is justified by both the text of the Copyright Act and underlying policy considerations. Finally, it will argue that considerations of fairness, practicality, and logical consistency weigh in favor of the application approach. Accordingly, this Note will conclude that federal courts should consider registration achieved and, thus, regard themselves competent to adjudicate copyright infringement claims upon submission of the necessary materials to the Copyright Office by the copyright owner.

II. BACKGROUND

A. NATURE AND ORIGIN OF COPYRIGHT

1. Nature of Copyright. A copyright is "a bundle of exclusive rights given to an author for a limited time that are designed to protect his 'original work of authorship [that is] fixed in any tangible medium of expression now known or later developed' from infringing use by others." \(^{41}\)

2. Positivist Right Concept. According to the positivist right concept, a copyright is exclusively a "product of positive constitutional and legislative authority." \(^{42}\) Thus, a copyright exists only if the legislature decides to grant one. \(^{43}\) As the

\(^{41}\) Elise M. Stubbe, Copyright Registration Practice for the Non-Copyright Attorney, 52 LA. B.J. 448, 448 (2005) (quoting 17 U.S.C. § 102(a) (2000)).

\(^{42}\) Levine & Squires, supra note 17, at 1232.

\(^{43}\) See White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J.,
legislature represents the citizens, society effectively submits itself to an individual's right to exclude in this situation and expects some benefit in return. Under this view, a copyright "may be conditioned upon the imposition of whatever formal requirements Congress deems appropriate to notify the world of the precise limits of an author's monopoly."\textsuperscript{34} 

3. Natural Right Concept. In contrast to the positivist right concept, the natural right concept supposes that a copyright is the "inherent or natural right of an author to the product of his creative genius."\textsuperscript{45} Thus, even in the face of legislative inaction, an author secures a copyright in his own creation.\textsuperscript{46} Accordingly, this view asserts that "authors ought to have benefit from their creations free of cumbersome formalities."\textsuperscript{47} 

B. PURPOSES OF AMERICAN COPYRIGHT LAW

The Copyright Clause grants the power to Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."\textsuperscript{48} On its face, the text indicates that "the public's interest [is] equal, if not superior, to the author's."\textsuperscript{49} In fact, the Supreme Court has declared that although the "immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor . . . the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."\textsuperscript{50}

In light of both the Constitutional text as well as the Supreme Court's explication of the purpose of copyright law, copyrights in the United States are properly characterized as products of positive constitutional authority.\textsuperscript{51} Thus,
Congress would appear free to impose formalities, or "state-imposed conditions on the existence or exercise of copyright." As an example, dictating that a copyright owner "register and deposit copies of the work with a government agency, before the right will be . . . enforced is fully consistent with a public-benefit [or positivist right] view of copyright." Nonetheless, such formalities may, among other effects, reduce an author's incentive to create. Accordingly, the willingness of courts to enforce certain copyright formalities may be tempered by countervailing considerations, particularly of fairness to authors.

C. COPYRIGHT REGISTRATION GENERALLY

1. The Registration Procedure. To register a copyright, the copyright owner must submit three items: a completed application, a deposit of the work itself, and a fee, which currently stands at thirty dollars. The applications are available online and may be completed in PDF form. Since the Copyright Office receives more than 600,000 applications a year, approximately four to five months usually pass before the evaluation is completed. Once the Copyright Office approves an application, the registration is effective as of the date on which the Copyright Office received the last of the requisite materials.

The Copyright Office does offer an expedited procedure known as "special handling." For applicants with "truly compelling reasons for expedited issuance of a certificate of registration"—including when registration bears on prospective or pending litigation, the option of special handling is available by request. However, assuming the Copyright Office grants such a request, a special handling fee, currently set at $580, must be paid.

---

52 See supra text accompanying note 44.
54 Id.
55 Id.
56 See Levine & Squires, supra note 17, at 1236 n.21 ("In many instances the courts have protected rights creators asserted in their works against claims of forfeiture for failure to comply with the precise letter of statutory formalities.").
57 KELLER & CUNARD, supra note 11, § 5:3.2[A]; see also supra note 30 (quoting 17 U.S.C. § 408(a) (2000)).
58 Stubbe, supra note 41, at 449.
59 KELLER & CUNARD, supra note 11, § 5:3.3.
61 KELLER & CUNARD, supra note 11, § 5:3.2[E].
62 Id.
63 Id.
Although "copyright registrations are issued in response to approximately 96.4% of the applications submitted each year," an applicant's fate is not sealed if the Copyright Office ultimately refuses to register his copyright. Generally, two procedures of review are available: suits against the Register of Copyrights under the Administrative Procedure Act (APA) or infringement suits under the Copyright Act. With respect to the latter, the Copyright Act allows the Register to intervene in copyright suits concerning registration.

2. Purposes of Registration. Copyright registration enables the Copyright Office "to enforce compliance with the law as a condition of obtaining the grant of exclusivity in works subject to copyright." Consequently, information contained in both the application and deposit is "generally considered to be of reasonably high quality." Nonetheless, the Copyright Office examination normally "involves no assessment of entitlement beyond the contents of the application form and the deposit." Thus, the gatekeeper role of the Copyright Office is limited.

Copyright registration also allows the Copyright Office to serve as a "clearinghouse for copyright information on works in circulation." Consequently, market transactions concerning copyrights are made more efficient because sellers have a public record of their property right and buyers have access to information that can be utilized to identify and contact potential sellers. Additionally, the exploitation of copyrighted works is encouraged not only

---

64 Laurie A. Haynie, So the Copyright Office has Refused to Register Your Claim to Copyright—What Does it Mean and What Can You Do About It?, 21 AIPLA Q.J. 70, 71 (1993).
65 Id. at 74.
66 Id.
67 See 17 U.S.C. § 411(a) (2000) ("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 . . . service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.").
68 Levine & Squires, supra note 17, at 1254.
70 Levine & Squires, supra note 17, at 1254; see also KELLER & CUNARD, supra note 11, § 5:3.3[C] (declaring that the Copyright Office "does not conduct an exhaustive search of its records in an effort to thwart plagiarists").
71 See Levine & Squires, supra note 17, at 1254 ("The enforcement of the substantive provisions of Copyright law by the Copyright Office is . . . limited.").
72 KELLER & CUNARD, supra note 11, § 5:1.
73 See Levine & Squires, supra note 17, at 1254 ("The maintenance of a complete public record is vital to a functioning marketplace for the transfer of rights in copyrighted works and, concomitantly, their exploitation in both original and derivative forms.").
because users have notice of registered works not to copy,\textsuperscript{74} but also because their potential financial liability for use of unregistered works is kept in check.\textsuperscript{75}

Lastly, copyright registration "facilitate[s] the growth of the Library of Congress's collection of published and unpublished works."\textsuperscript{76} This expansion, in turn, allows for the "development and growth of a national collection of the country's creative product and culture."\textsuperscript{77} Obtained without significant expense to taxpayers, such a collection benefits the government, the public, and future generations.\textsuperscript{78}

3. Beyond Jurisdiction: Other Incentives to Register. The Copyright Act affirmatively establishes that the arising and continued existence of a copyright is not dependent upon its registration.\textsuperscript{79} In fact, § 408(a) is titled, "Registration Permissive."\textsuperscript{80} Nonetheless, beyond providing that a court's competency depends on registration, the Copyright Act provides ample incentive for authors to register their copyrights.\textsuperscript{81}

a. Prima Facie Validity of Copyright. First, the Copyright Act provides that a registration certificate "shall constitute prima facie evidence of the validity of the copyright."\textsuperscript{82} Possession of a registration certificate also serves as prima facie evidence of the truth of the facts asserted within the certificate itself.\textsuperscript{83} Thus, registration secures an "evidentiary advantage."\textsuperscript{84}

b. Statutory Damages and Attorney's Fees. The Copyright Act also conditions the award of attorney's fees and statutory damages upon the registration of a copyright prior to commencement of the infringement at issue.\textsuperscript{85} As "typically the
Copyright owner cannot prove actual damages ... and provable, substantial profits are the exception rather than the rule, \( ^{186} \) statutory damages "may often constitute the only meaningful remedy available to a copyright owner for infringement of his work." \( ^{187} \) With regard to attorney's fees, a copyright owner hoping to bring an infringement suit may need "tens of thousands of dollars in disposable income to cover legal fees ... [and a] contingency fee arrangement will rarely be satisfactory." \( ^{188} \) Accordingly, conditioning the award of attorney's fees and statutory damages on registration prior to infringement serves as a major incentive for owners to register their copyright. \( ^{189} \)

D. HISTORICAL DEVELOPMENT OF COPYRIGHT REGISTRATION AS A CONDITION TO THE EXERCISE OF SUBJECT-MATTER JURISDICTION

Copyright registration has served as a "prerequisite to the commencement of an action for infringement ... essentially ... since 1790." \( ^{190} \) Over 200 years later, "this procedural requirement survives as an integral aspect of U.S. copyright law." \( ^{191} \) Nonetheless, when examined in light of the treatment of other formalities, both domestically and abroad, the subtle evolution of the registration requirement as traced through the major revisions of American copyright law is especially informative. \( ^{92} \)

exceptions] ... no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, 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."); see also Koegel, supra note 69, at 534 ("Section 412 limits the availability of awards of statutory damages and attorney's fees to those copyright holders who register their work prior to the particular infringement that is the subject of the lawsuit.").

\( ^{86} \) Perlmutter, supra note 75, at 574.
\( ^{87} \) 2 NIMMER, supra note 9, § 7.16[C][1].
\( ^{88} \) Perlmutter, supra note 75, at 573–74.
\( ^{89} \) See 2 NIMMER, supra note 9, § 7.16[C][1] ("Section 412 represents a powerful incentive to register, even though nonregistration does not result in invalidation of the copyright.").
\( ^{90} \) Koegel, supra note 69, at 529.
\( ^{91} \) Id.
\( ^{92} \) See 1 NIMMER, supra note 9, ch. OV ("The ages of American copyright law are accordingly four: 1. Before July 1, 1909, the effective date of the 1909 Act ... 2. From July 1, 1909 until January 1, 1978, the effective date of the 1976 Act ... 3. From January 1, 1978 until March 1, 1989, the effective date of the [Berne Convention Implementation Act] ... 4. From March 1, 1989 through the present."); see generally id. ch. TL (laying out a timeline of dates that are significant to U.S. copyright law, beginning with the 1909 Act and including October 28, 1998, the effective date of the Digital Millennium Copyright Act).
1. Copyright Act of 1790. Drawing on the enumerated authority granted to them by the Constitution, the first Congress enacted the Copyright Act of 1790.93 This initial Copyright Act "was similar in significant respects to the English law that preceded it."94 Although its scope was expanded throughout the nineteenth century,95 this initial copyright statute maintained its essential effect for over a century.96 Throughout that period, "recording of a claim to copyright and deposit of a copy [was] a prerequisite to having copyright protection in the first place."97 Thus, along with the ability to enforce a copyright, the initial arising of a copyright was conditioned upon compliance with formalities.98

2. Copyright Act of 1909. Following the turn of the century, the formative copyright statute was altered extensively by the Copyright Act of 1909.99 As a result, the existence of a copyright was no longer conditioned on compliance with formalities.100 Nonetheless, "registration was still mandatory and acceptance of registration by the Copyright Office was required before a lawsuit for infringement could proceed."101 Thus, "failure to obtain a registration certificate from the Copyright Office was fatal."102 Therefore, the ability to enforce a

93 See id. ch. OV ("The Copyright Clause of the United States Constitution authorizes Congress to enact copyright legislation. Acting on that power, the very first Congress began federal copyright protection in 1790."). For the original statute's text, see Act of May 31, 1790, ch. 15, 1 Stat. 124.
94 ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 321 (3d ed. 2003). For example, the Copyright Act of 1790, "like the Statute of Anne, granted protection for authors for 14 years, and allowed renewal for 14 more years." Id.
95 See id. at 321 (explaining that this expansion took place through both statutory amendments and court decisions and encompassed the addition of prints, musical compositions, plays, photographs, artistic works, and sculpture).
96 See id. at 322 ("The most significant overhaul of the Copyright Act since its founding occurred in 1909.").
97 Koegel, supra note 69, at 533 (emphasis added).
98 See Levine & Squires, supra note 17, at 1253 ("[E]arly American copyright statutes apparently envisaged registration and deposit concurrent with initial publication as a true condition to a valid copyright....").
99 See supra note 96.
100 See Levine & Squires, supra note 17, at 1253–54 ("Registration and deposit were under [the 1909 Act]... conditions only to the institution of suit for enforcement of copyright.").
101 Koegel, supra note 69, at 533. The relevant provision declared that "[n]o 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." Copyright Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078; see also 2 NIMMER, supra note 9, § 7.16[B][1][b][i] (stating that "maintained" was construed "to prevent institution as well as maintenance of an infringement action in the absence of such procedural preliminaries" (citation omitted)).
102 2 NIMMER, supra note 9, § 7.16[B][1][b][i]. But see Levine & Squires, supra note 17, at 1261 n.196 ("Under [the 1909 Act], one seeking to enforce a copyright for which registration had been refused must successfully bring a mandamus action against the Register of Copyrights to compel
copyright was conditioned on compliance with the necessary formalities, as determined by the Copyright Office.\textsuperscript{103}

The 1909 Act also introduced the special remedies of attorney's fees and statutory damages.\textsuperscript{104} However, registration of one's copyright prior to infringement was not a condition of invoking those remedies.\textsuperscript{105} Finally, as the 1909 Act retained earlier formalities, it placed the United States in conflict with the increasing number of countries adhering to the Berne Convention.\textsuperscript{106}

3. Copyright Act of 1976. After multiple attempts to reform the 1909 Act, Congress finally succeeded with the Copyright Act of 1976.\textsuperscript{107} With regard to registration as a prerequisite to jurisdiction, the 1976 Act “was designed such that Section 411(a) ‘restates’ the law as it existed under the 1909 Act.”\textsuperscript{108} However, one modification was made in this context, as under the 1976 Act, the Copyright Office's refusal to register a copyright no longer deprived a court of jurisdiction over an infringement claim related to the rejected copyright.\textsuperscript{109}

Additionally, under the 1976 Act, “the system of registration [was] made voluntary.”\textsuperscript{110} To encourage participation in this voluntary scheme, “Congress determined that copyright holders should receive the unusual remedies of statutory damages and attorney’s fees only if their works were registered before they were infringed.”\textsuperscript{111} Ultimately, “[t]he overall goal of the changes in the law [under the 1976 Act] was to make registration an optional rather than mandatory system, encouraged by the carrot of ‘special remedies’ rather than impelled by the stick of loss of rights.”\textsuperscript{112} Notwithstanding such a purpose, although “[r]egistration and deposit requirements under the 1976 Act var[ied] technically

\textsuperscript{103} See supra text accompanying note 101.

\textsuperscript{104} See Koegel, supra note 69, at 534 (discussing the “availability of awards of statutory damages and attorney’s fees” and noting that “these special remedies were introduced into the copyright law in 1909”).

\textsuperscript{105} See Perlmutter, supra note 75, at 568 (discussing the effects of the 1976 Copyright Act and noting that “the availability of [statutory damages and attorney’s fees] was for the first time conditioned on registration before the infringement took place” (emphasis added)).

\textsuperscript{106} See MERGES ET AL., supra note 94, at 322 (“The 1909 Act kept the formalities that the 1790 Act had established, placing the United States at odds with the growing number of countries that had adopted the Berne Convention and abandoned formality—notice and registration—in copyright protection.”).

\textsuperscript{107} Id.

\textsuperscript{108} 2 NIMMER, supra note 9, § 7.16[B][1][b][ii].

\textsuperscript{109} See supra note 29 (quoting 17 U.S.C. § 411(a)).

\textsuperscript{110} Koegel, supra note 69, at 533.

\textsuperscript{111} Id. at 534.

\textsuperscript{112} Perlmutter, supra note 75, at 569.
from those under the old law... [t]he substance of the requirements... [was] largely unchanged.”

4. **Berne Convention Implementation Act.** Enacted in 1988, the Berne Convention Implementation Act (BCIA) amended the Copyright Act of 1976 in order to bring U.S. copyright law in line with the requirements of the Berne Convention, “an international copyright agreement signed by numerous countries.” On one hand, the Berne Convention declared that “the enjoyment and the exercise of [copyright] shall not be subject to any formality.” On the other, the Berne Convention provided that “loss of copyright” is the standard for gauging whether a prohibited formality exists. Thus, deciding whether to retain the requirement of registration as a prerequisite to an infringement action was difficult.

Initially, the Senate favored abolishing the registration prerequisite to infringement actions. However, the House objected due to a belief “that registration ‘promotes efficient litigation,’ ‘narrows the issues that must be litigated,’ ensures that there is a ‘central, public record of copyright claims’ and forestalls efforts to ‘exert control over... public domain’ materials.” As a compromise, the BCIA established a two-tier system in which works that originated in Berne member countries (other than the United States) were exempted from the registration prerequisite while works that were created in the United States (or “nations that have treaty relations with the United States but do not adhere to the Berne Convention”) remained subject to that requirement.

5. **Digital Millennium Copyright Act.** In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA). Although the DMCA provided that all works by United States citizens were subject to the registration requirement, regardless of country of publication, it provided that all non-citizens (Berne members or not) were exempt from that requirement. Thus, the DMCA
“expanded the no-registration-required zone.”\(^\text{125}\) In the process, Congress “lost sight of the goal” of subjecting all copyright owners to the jurisdictional prerequisite of registration, “relax[ing] that requirement solely with respect to Berne claimants.”\(^\text{126}\)

### III. JUDICIAL HANDLING: THE ISSUANCE APPROACH V. THE APPLICATION APPROACH

#### A. THE ISSUANCE APPROACH

Some federal courts of appeals have favored the issuance approach.\(^\text{127}\) In addition, numerous federal trial courts have reached the same conclusion.\(^\text{128}\) Justification for the issuance approach is based on construing the text of the Copyright Act and complementing the product of such statutory construction with underlying policy considerations.

1. **Text of the Copyright Act.** The “plain meaning” drawn from the text of the Copyright Act provides the primary support for the issuance approach.\(^\text{129}\) Utilizing this fundamental precept of statutory construction along with others—particularly, the resolution of ambiguities in favor of internal consistency—courts favoring the issuance approach (issuance-approach courts) construct a logical argument in support of their conclusion. In the process, the main focus rests on three statutory provisions: §§411, 410, and 408.

   a. **Section 411.** The second clause of §411(a) states in part: “[W]here 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 if notice... is served on the...

\(^{125}\) 2 NIMMER, supra note 9, § 7.16[B][1][c].

\(^{126}\) Id.


\(^{129}\) See, e.g., Mays & Assoc., 370 F. Supp. 2d at 370 (“This Court finds that the plain language of the Copyright Act, reflecting sound public policy, requires registration of a copyright or denial of same as jurisdictional prerequisites to instituting an action for copyright infringement.”); Loree Rodkin Mgmt., Corp. v. Ross-Simons, Inc., 315 F. Supp. 2d 1053, 1055 (C.D. Cal. 2004) (“[T]he court agrees... that the plain language of the Copyright Act unambiguously mandates the actual issuance of a registration certificate before a copyright action is brought.”).
Register of Copyrights.” As this provision employs “application” alongside “registration,” one issuance-approach court reasoned that “the term application . . . is clearly something separate and apart from registration.” In addition, that court emphasized that the clause outlines “the process of seeking registration . . . without labeling this process as registration for purposes of Section 411(a).”

Another issuance-approach court concluded that § 411(a) necessarily distinguishes “the act of delivering the deposit, application and fee . . . [from] the determination of refusal of copyright registration.” As further support for this distinction, the court noted that an application can be delivered and yet registration can still be refused. Furthermore, another issuance-approach court noted that “[i]nterpreting the Act to require a certificate prior to bringing an infringement action gives effect to the requirements for bringing a claim upon rejection of the copyright application.” Thus, for § 411(a) to remain internally consistent, issuance-approach courts conclude that application and registration are distinct events.

**b. Section 410.** In addition to § 411, various provisions of § 410 provide textual support for the issuance approach. Subsection (a) states in relevant part: “When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration.” Consequently, three “affirmative acts by the Register—to ‘examine,’ to ‘register,’ and then to ‘issue’ the certificate of registration”—are required.

---

131 *Mays & Assocs.*, 370 F. Supp. 2d at 368.
132 Id. at 368.
133 *Lorre Rodkin*, 315 F. Supp. 2d at 1056.
134 See id. (proclaiming that § 411(a) “drives an iron wedge between the act of delivering the deposit, application and fee to the Copyright Office and the determination of refusal of copyright registration by the Register of Copyrights”).
135 *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491 (EDL), 2002 U.S. Dist. LEXIS 15321, at *4 (N.D. Cal. Aug. 19, 2002); see also *Mays & Assocs.*, 370 F. Supp. 2d at 368–69 (implying that a distinction between registration and application is necessary to justify Congress’ explicit “provision for a course of action to allow suit when the Copyright Office takes action and denies an applicant’s registration”). See 17 U.S.C. § 411(a) for the full text of the provision authorizing such a course of action.
136 See, e.g., *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 4 (D.D.C. 2002) (“[T]he Court is in agreement with those courts that take the view that a certificate of registration is a jurisdictional prerequisite . . . . The language of section 411(a) is clear and unambiguous. So to [sic] is the language of subsections 410(a) and (b).”).
138 *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005).

---

https://digitalcommons.law.uga.edu/jipl/vol14/iss1/3
In light of such distinctions, one issuance-approach court concluded that "the Copyright Office, not the applicant, registers a claim." Furthermore, as another issuance-approach court noted, the Copyright Office is "expressly require[d] . . . [to] register a claim . . . after examining the deposited material and determining that it constitutes copyrightable subject matter." In light of this necessary sequence, "examination is a prerequisite to registration." Accordingly, some issuance-approach courts conclude that "the phrase ‘register a claim’ cannot possibly refer to the pre-examination receipt by the Copyright Office of the applicant’s fee, deposit, and application."

Progressing through § 410, subsection (b) states: "In any case in which 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." As "the flip side to the requirement that the material be examined before registration," this provision requires that, in order to refuse registration (as to allow registration), "an affirmative act by the Copyright Office disallowing registration" is necessary.

If registration was effected upon receipt of an application, then no opportunity would exist for the Copyright Office to affirmatively act to refuse registration. Thus, issuance-approach courts conclude that registration must be affected at some point following receipt of the application and corresponding materials.

Lastly with regard to § 410, subsection (d) states that "[t]he effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register . . . to be acceptable for registration, have all been received in the Copyright Office." Some issuance-approach courts interpret this provision of a "relation-back effect of registration" to serve purposes other than "mak[ing] application the jurisdictionally critical event."

142 Loree Rodkin, 315 F. Supp. 2d at 1055; see also Robinson v. Princeton Review, Inc., No. 96 Civ. 4849, 1996 WL 663880, at *7 (S.D.N.Y. Nov. 15, 1996) ("Section 410(a)’s requirement of ‘examination’ would be meaningless if filing and registration were synonymous.").
144 La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1201 (10th Cir. 2005).
145 Id.
146 See, e.g., Strategy Source, Inc. v. Lee, 233 F. Supp. 2d 1, 3 (D.D.C. 2002) (concluding that the "language of section 410(b) is further reason to reject plaintiff's position" that registration was effected upon application).
148 La Resolana Architects, 416 F.3d at 1204 n.9; see also Loree Rodkin Mgmt. Corp. v. Ross-Simons,
Among others, such purposes include: the term of copyright registration,\textsuperscript{149} the statute of limitations,\textsuperscript{150} and the possibility of receiving “certain remedies . . . available to a plaintiff only if the infringement occurred after the effective date of registration.”\textsuperscript{151} Accordingly, these courts view § 410(d) as serving purposes other than simply requiring that a copyright be registered upon receipt of an application.

c. Section 408. Some courts have also drawn support for the issuance approach from the first clause of § 408(a), which states: “[T]he owner of a copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office the deposit . . . application and fee.”\textsuperscript{152} In light of examination being a precondition to registration according to § 410(a), one issuance-approach court concluded that § 408(a) “envisions substantive review of the material by the Register of Copyrights.”\textsuperscript{153} For the contrary to be true, another issuance-approach court reasoned that “the verb would be ‘shall obtain’” rather than the conditional “may obtain.”\textsuperscript{154} Accordingly, “section 408(a) must be read to mean merely that the delivery of the application is a step the applicant must take, not that delivery is sufficient by itself to obtain a registration.”\textsuperscript{155}

In the view of issuance-approach courts, the Copyright Act distinguishes, as a matter of both grammar and logic, between the act of applying for registration of a copyright and the occurrence of copyright registration. Consequently, the performance of the former does not affect the same result as the accomplishment of the latter.\textsuperscript{156} As copyright registration is a condition precedent for the exercise of subject-matter jurisdiction, issuance-approach courts find that competency to hear an infringement case is conditioned on more than merely applying for copyright registration. Accordingly, they conclude that the issuance of a

\textsuperscript{149} La Resolana Architects, 416 F.3d at 1204 n.9.

\textsuperscript{150} See Mays & Assocs., Inc. v. Euler, 370 F. Supp. 2d 362, 369 (D. Ma. 2005) (stating that § 410(d) “essentially ‘backdates’ registration to the day when the Copyright Office received a complete application for purposes of the statute of limitations”).

\textsuperscript{151} Ryan v. Carl Corp., No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *6 (N.D. Cal. June 15, 1998); see also Strategy Source, 233 F. Supp. 2d at 4 (dismissing the complaint, but stating that the defendants continue to act “at their peril” because, assuming later registration, the plaintiff’s remedies “will relate back to the date when the application was filed”).

\textsuperscript{152} 17 U.S.C. 408(a) (2000) (emphasis added).

\textsuperscript{153} La Resolana Architects, 416 F.3d at 1201.


\textsuperscript{156} Although applying for copyright registration, in and of itself, is insufficient to confer subject-matter jurisdiction according to issuance-approach courts, general agreement exists that such is a necessary step in the process. See supra note 31 and accompanying text.
registration certificate or denial of the same is necessary for the presence of subject-matter jurisdiction.157

2. Underlying Policy Considerations. Although the statutory text is the principal justification for the issuance approach, courts favoring this approach reinforce their construction of the Copyright Act with policy considerations underlying the statute.158 Regarding the judicial branch’s respective role in “managing” the registration of copyrights, a basis of reasoning in support of the issuance approach is provided by the intersection of two fundamental doctrines: judicial restraint and judicial economy.

a. Judicial Restraint. In general terms, the Constitution grants the judicial and legislative branches of the federal government defined roles to play in the management of public affairs—the former to interpret and apply laws, the latter to enact and amend laws.159 The exercise of judicial restraint involves courts fulfilling their respective function without encroaching upon the role of the legislature.160 Consequently, issuance-approach courts buttress their “plain language” construction of the Copyright Act by embracing the principle that courts should defer to the legislature.

Issuance-approach courts defer to the legislature by applying their statutory construction of the Copyright Act while leaving the resolution of questionable secondary effects to Congress. Despite “recogniz[ing] that construing the statute [in favor of the issuance approach] leads to an inefficient and peculiar result,” one issuance-approach court declared that “[e]ven if Congress were to enact an illogical or ill-advised law, where Congress’ intent is clear, the Court is not free to redraft statutes to make them more sensible or just.”161 Another of these courts concluded that “[i]f extraordinary circumstances can be a vehicle for bypassing the

157 See Techniques, Inc. v. Rohn, 592 F. Supp. 1195, 1197 (S.D.N.Y. 1984) ("Pursuant to 17 U.S.C. § 411(a) . . . it has been held repeatedly that ownership of a copyright Registration is a jurisdictional prerequisite to an action for infringement.").
158 Policy is defined as "[t]he general principles by which a government is guided in its management of public affairs." BLACK'S LAW DICTIONARY 1196 (8th ed. 2004).
159 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 343 (15th ed. 2004).
160 See BLACK'S LAW DICTIONARY 864 (8th ed. 2004) (defining judicial restraint as a "philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent").
161 Ryan v. Carl Corp., No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *7–8 (N.D. Cal. June 15, 1998); see also Strategy Source, Inc. v. Lee, 233 F. Supp. 2d 1, 4 (D.D.C. 2002) ("To conclude that registration or the refusal of registration by the Copyright Office are not jurisdictional prerequisites is to disregard the plain language of these statutes and to in effect re-write them, which as a judge, this Court cannot do.").
registration requirement before filing suit, it is Congress that must address the situation, not the courts."\textsuperscript{162}

Additionally, these courts defer to the legislature by hypothesizing possible relationships between the purpose of certain provisions of the Copyright Act and the means adopted to accomplish such. One issuance-approach court stated: \textquotedblleft Apparently, Congress concluded when it enacted section 411(a) that vetting by the Copyright Office of claims . . . to copyright protection was a necessary prerequisite to federal courts exercising jurisdiction."\textsuperscript{163} Another such court found it \textquotedblleft not illogical for Congress to condition the remedies of the Act to those who register . . . Congress could very reasonably have concluded that these rights and remedies are the 'carrot' to induce registration and the 'stick' is the lack of federal court jurisdiction until registration is accomplished."\textsuperscript{164}

b. Judicial Economy. In addition to its compatibility with the federal government's overall system of checks and balances, the issuance approach also draws support from its effect within the judicial branch of furthering the efficient use of judicial resources. One issuance-approach court concluded that, if the issuance approach was not employed, a great deal of uncertainty would be generated by \textquotedblleft shifting legal entitlements\textquotedblright—in particular, the presumption of validity which accompanies a registered copyright.\textsuperscript{165} That court reasoned that if \textquotedblleft an applicant could obtain the advantage of the presumption that the copyright is valid upon application, but then, after examination the Register of Copyrights determined the material is not copyrightable, the presumption of validity would swing back and forth."\textsuperscript{166}

By refusing to exercise jurisdiction until the Copyright Office has registered or rejected a party's application, issuance-approach courts view themselves as providing parties with a more dependable view of the merits of their legal positions.\textsuperscript{167} Consequently, litigants are better able to evaluate their odds of

\textsuperscript{162} \textit{Strategy Source}, 233 F. Supp. 2d, at 4. \textit{But see} Foraste v. Brown Univ., 248 F. Supp. 2d 71, 78 (D.R.I. 2003) (declaring that \textquoteleft it would be wholly inequitable to require that [the plaintiff], prior to proceeding with this action, register a copyright in images to which [the defendant] presently denies him access\textquoteright).

\textsuperscript{163} \textit{Strategy Source}, 233 F. Supp. 2d at 4.

\textsuperscript{164} La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1204–05 (10th Cir. 2005).

\textsuperscript{165} La Resolana Architects, 416 F.3d at 1205; \textit{see also} 2 Nimmer, supra note 9, § 7.16[B][1][a][i] n.38.19a (discussing a court's ruling that \textquoteleft application alone suffices for a presumption of validity\textquoteright to arise,” declaring that such \textquoteleft accord[s] a presumption that could later evaporate,” and concluding that it would be “[b]etter . . . to deny that a presumption arises until such time as the certificate issues\textquoteright).

\textsuperscript{166} La Resolana Architects, 416 F.3d at 1205 (citation omitted).

\textsuperscript{167} \textit{See id.} at 1205 (stating that the effects of the application approach \textquoteleft would generate uncertainty in copyright litigation that the Act was designed to moderate\textquoteright immediately prior to holding that the
success at trial and, thus, less likely to consume judicial resources in a losing effort. Accordingly, these resources are preserved for more valuable use in instances where a clear legal dispute exists.

Ultimately, a substantial number of federal courts have held that the Copyright Act requires a decision by the Copyright Office to either register or refuse to register a copyright prior to a court determining itself competent to hear an infringement claim. Although the level of detail in which issuance-approach courts explain their reasoning varies from one to the other, virtually all rely primarily on the text of the Copyright Act. Complementing their interpretation with underlying policy considerations, issuance-approach courts find that the legislative intent underlying the Copyright Act is both clear and justifiable. Thus, such courts conclude that the issuance approach is the most appropriate course to follow.

B. THE APPLICATION APPROACH

Some federal appellate courts adhere to the application approach. Many trial courts at the federal level also favor this conclusion. Generally, support for the application approach is drawn from construing the text of the Copyright Act with underlying policy considerations in mind.

1. Text of Copyright Act. In similar fashion to issuance-approach courts, courts favoring registration upon application (application-approach courts) claim to interpret the Copyright Act based on its “plain meaning.” To “discern congressional intent,” these courts look to various provisions of the Copyright Act, including §§ 408, 410, and 411.

a. Section 408. A number of application-approach courts “rely on the language of [the second clause of] § 408, that registration is not a condition of

---

Tenth Circuit adheres to the issuance approach).  
168 See supra notes 127–28 and accompanying text.  
171 See Foraste v. Brown Univ., 248 F. Supp. 2d 71, 77 (D.R.I. 2003) (focusing on the “plain language” of § 410 of the Copyright Act); see also Iconbazaar, 308 F. Supp. 2d at 633 (“[C]ourts should begin with the words of the statute and give the words their common meaning.”).  
172 Iconbazaar, 308 F. Supp. at 634.
copyright protection.” Implicitly, these courts appear to take “copyright protection” at its face value, as they construe that term to encompass the ability to prevent injury to a copyright rather than to merely convey legal recognition of the validity of a copyright. Since the only means, plausibly considered by issuance-approach courts, of preventing such injury would be judicial enforcement of a copyright, these courts must infer from § 408(a) that the issuance of a certificate of registration or a denial of the same is not needed in order for a court to be competent to enforce a party’s copyright.

Courts favoring the application approach also draw support from the first clause of § 408(a). In contrast to the tacit interpretation of the first clause of § 408 by issuance-approach courts, some application-approach courts interpret “may” as a permissive command rather than as a conditional command. In other words, these latter courts conclude that, by delivering the appropriate deposit, application, and fee, copyright owners effect registration.

b. Section 410. Although § 410(a) is focused on by issuance-approach courts, some application-approach courts have concluded that this provision

173 La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1203 (10th Cir. 2005). Before ultimately holding in favor of the issuance approach, the La Resolana court laid out the competing “[i]nterpretations of the [p]lain [l]anguage of the [s]tatutes.” Id. at 1201–05. The second and final clause of § 408(a) states that “registration is not a condition of copyright protection.” 17 U.S.C. § 408(a) (2000).

174 Protection is defined as “[t]he condition of being protected.” THE AMERICAN HERITAGE DICTIONARY 995 (2d College ed. 1991). Protect, in turn, is defined as “[t]o keep from harm, attack, or injury; guard.” Id.

175 See, e.g., Datatel, Inc. v. Rose & Tuck, L.L.C., No. Civ. A. 05-495, 2005 WL 1668020, at *9 (E.D. Va. June 17, 2005) (finding that the plaintiff “has standing to raise copyright claims even if [the plaintiff] has not yet received certificate of registration from the Copyright Office” immediately prior to quoting § 408(a) and declaring that “[s]uch registration [as addressed in § 408(a)] is not a condition of copyright protection”).

176 See, e.g., id.; see also Foraste, 248 F. Supp. 2d at 76, 77 n.10 (noting the plaintiff’s reliance on 408(a) before rejecting the “statutory reading” offered by issuance-approach courts).

177 See supra text accompanying note 152 (quoting the relevant portion of 17 U.S.C. § 408(a)).

178 See supra notes 153–55 and accompanying text.

179 See Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (stating that “statutory evidence supporting registration-on-application interpretation is found in 17 U.S.C. § 408(a)); see also Datatel, 2005 WL 1668020, at *9 (concluding that receipt of a response from the Copyright Office was not necessary for the court to entertain the plaintiff’s claim immediately prior to quoting § 408(a)).

180 See Secure Servs. Tech., Inc. v. Time & Space Processing, Inc., 722 F. Supp. 1354, 1364 (E.D. Va. 1989) (“Under the copyright laws, copyright registration is presumed to have occurred from the moment the owner of the copyrightable material delivers his application and filing fee [and deposit] to the copyright office. 17 U.S.C. § 408(a).”)

181 See supra text accompanying note 137 (quoting the relevant portion of § 410(a)).

182 See supra notes 138–42 and accompanying text.
"could be read to apply only to the requirements for issuance of a registration certificate, not to the requirements for instituting an action for infringement." Thus, although these courts find review by the Copyright Office necessary for the issuance of a registration certificate, they conclude that such review is not a precondition to the accomplishment of registration sufficient to confer subject-matter jurisdiction.

Section 410(d) is also focused on by application-approach courts. One application-approach court declared that the "plain language of this statutory provision suggests that the registration occurs on the day the Copyright Office receives all of the necessary application materials." Regarding "the metaphysical debate over the time of a registration's 'conception,'" that court disagreed with "the statutory reading [of § 410(d)] propounded in" a pair of issuance-approach court opinions. In support of its view, the court noted that the contrary "gloss ignores the statute's mandate that the merits of the application materials are 'later determined,' that is, determined at some time after the right to sue comes into

---

183 Ionbazaar, 308 F. Supp. 2d at 634.
184 See id.; see also Secure Servs. Tech., 722 F. Supp. at 1364 ("Copyright laws make a distinction between copyright registration and receiving from the Copyright Office a certificate of registration.").
185 See supra text accompanying note 147 (quoting § 410(d)).
186 See Dielsi v. Falk, 916 F. Supp. 985, 994 n.6 (C.D. Cal. 1996) (quoting § 410(d) and declaring that "[t]hus, Plaintiff can satisfy the § 411(a) requirement by merely filing an application for registration with the Copyright Office"); see also Tang v. Hwang, 799 F. Supp. 499, 502–03 (E.D. Pa 1992) (citing § 410(d) and declaring that § 411(a) "has been broadly construed to allow for the commencement of an infringement action upon the Copyright Office's receipt of the application, the required numbers of copies of the work, and the filing fee in proper form").
187 Foraste v. Brown Univ., 248 F. Supp. 2d 71, 77 (D.R.I. 2003); see also Sebastian Int'l, Inc. v. Consumer Contact (PTY) Ltd., 664 F. Supp. 909, 912 n.4 (D.N.J. 1987) ("Patry's approach would place the internally created procedures of the Register above the clear statutory language of 17 U.S.C. 410(d).") In the latter case, the Sebastian Int'l court was referring to a critique put forth in Latman's The Copyright Law concerning Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384 (5th Cir. 1984), which was the initial appeals court decision construing the Copyright Act of 1976 in favor of registration upon application. The critique described Apple Barrel as "misconstr[u]ing § 410(d) which is a housekeeping provision" and declared that "the Copyright Office's procedure for special handling, a procedure for expedited processing, would be completely superfluous if the Apple Barrel court's interpretation of § 411(a) were correct." William F. Patry, Latman's THE COPYRIGHT LAW 184 n.44 (6th ed. 1986).
188 Foraste, 248 F. Supp. 2d at 77 n.10.
189 Id. (citations omitted). The Foraste court described the other two courts as "interpreting § 410(d) to mean that registration is consummated only after an application is examined, considered, and accepted by the Copyright Office, and is then 'backdated' to the time the application is received." Id.
Thus, application-approach courts readily construe § 410(d) "to say that registration is complete upon application." 191

c. Section 411. Lastly, some application-approach courts have focused on the second clause of § 411(a). 192 One of those courts concluded that "[t]his statutory language ... suggests that failure to obtain copyright registration [more precisely, a registration certificate or refusal of the same] does not bar an applicant from instituting a copyright infringement action." 193 Accordingly, this court appeared to suggest that the refusal of registration, which is required in order for a copyright owner to be "entitled to institute an action for infringement," 194 can occur as a result of either an affirmative denial following examination or an implicit denial that exists so long as review and an express decision by the Copyright Office is pending. The corresponding result of such an interpretation is that the first clause of § 411(a) "confirms that it is the submission of an application, deposit, and fee (rather than the issuance vel non of a registration certificate) that triggers registration for purposes of conferring standing to sue." 195

With regard to the text of the Copyright Act, application-approach courts distinguish between the occurrence of copyright registration and the issuance of a registration certificate. 196 Although issuance of the latter may be sufficient to indicate copyright registration, it is not necessary in the view of these courts. Instead, the statute is construed as providing for registration upon receipt by the Copyright Office of an application for copyright registration (along with the appropriate deposit and fee). Thus, "application [is] the jurisdictionally critical event." 197 Accordingly, once this act has been accomplished, application-approach courts conclude that they are competent to entertain copyright infringement claims.

2. Underlying Policy Considerations. Although the text of the Copyright Act serves as the touchstone, the application approach is complemented by policy considerations underlying the Copyright Act. 198 As "the foremost treaty on
copyright law” declares, the application approach “better comports with the statutory structure.” Upon examining the broader implications of enforcing the Copyright Act, application-approach courts take note of the relevance of two doctrines: equity and judicial economy.

a. Equity. As an initial matter, advocates of the application approach note that “a party who seeks to register may proceed to litigate the claim, regardless of whether the Copyright Office ultimately issues the certificate, or by contrast denies it.” Additionally, once the application and other necessary materials are submitted to the Copyright Office, “the claimant at that juncture has done all that it can do.” Thus, according to this view, equity would require allowing “a copyright owner . . . into court without being held hostage by the vagaries of the Copyright Office in its ministerial act of issuing the certificate.” As one application-approach court put it, “otherwise, the owner of a copyright would be left in legal limbo while the Copyright Office considers whether he qualifies for a certificate of registration.” Accordingly, even an issuance-approach court admitted that “[c]ourts adopting the Application approach plausibly claim that their approach provides a sort of rough justice because it allows copyright owners to file suit while still maintaining the requirement that an owner obtain a certificate before a court can invoke the remedies contained in Title 17.”

In and of itself, being placed in “legal limbo” is not necessarily unfair. However, as a result of this inability to enforce their rights, copyright owners are subject to harm in two respects. First, this predicament “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.” Additionally, as the statute of limitations for copyright infringement actions is three years and the “process of processing and evaluating a copyright application could be a lengthy one,” a copyright owner may find enforcing his right impossible even on application.”

2006] SEARCHING FOR SUBSTANCE 137

---

on application.”

199 Id. at 633.

200 2 NIMMER, supra note 9, § 7.16[B][1][a][i].

201 Equity is defined as “[f]airness” as well as “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances.” BLACK'S LAW DICTIONARY 579 (8th ed. 2004).

202 2 NIMMER, supra note 9, § 7.16[B][1][a][i].

203 Id.

204 La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1204 (10th Cir. 2005).


206 La Resolana Architects, 416 F.3d at 1204 (emphasis added).

207 Id.

208 See supra note 10.

after he re-emerges from "legal limbo." As a result of these possibilities, application-approach courts find their reading of the Copyright Act reinforced by considerations of equity.

b. Judicial Economy. Once an application and other necessary materials are delivered to the Copyright Office, the owner seeking to bring suit will ultimately be allowed to proceed regardless of the Copyright Office's response. Thus, application-approach courts conclude that "delaying the date on which a copyright owner can sue is a senseless formality." The cost of adherence to this "senseless formality" is often the dismissal of a suit only to require the re-filing of another complaint once the Copyright Office has issued a response to the copyright owner's application. As the application approach avoids this inefficient use of judicial resources by allowing suit to proceed upon application, courts favoring this approach draw support from the principle of judicial economy.

Application-approach courts draw on the "plain language" of the Copyright Act to construct a logical argument in support of their conclusion. Additionally, certain policy considerations underlying the overall statutory scheme strengthen this construction; as one application-approach court stated, the application approach "best effectuate[s] the interests of justice and promote[s] judicial economy." Accordingly, these courts view registration as being effected upon receipt by the Copyright Office of an application for copyright registration (along with a deposit and fee). Thus, in their view, once this event occurs, courts are competent to entertain copyright infringement claims.

IV. DISCUSSION

As the present state of affairs concerning registration as a prerequisite to jurisdiction is a product of historical inertia and offers little in terms of consistency and notice, the most appropriate response to the present circuit split

210 Id.
211 See supra note 202 and accompanying text.
212 La Resolana Architects, 416 F.3d at 1203; see also Iconbazaar, 308 F. Supp. 2d at 633 ("[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.").
213 See, e.g., Ryan v. Carl Corp., No. C 97-3873 FMS, 1998 U.S. Dist. LEXIS 9012, at *8 (N.D. Cal. June 15, 1998) (dismissing certain plaintiffs' complaints, but declaring that "the Court will [later] hear argument on whether it should permit plaintiffs to file a second amended complaint to include [those] plaintiffs . . . whose applications have been approved as of that date").
is the widespread adoption of the application approach by the federal judiciary. The application approach is consistent with the text of the Copyright Act. Furthermore, not only will the adoption of this approach better serve the purposes of copyright law than the status quo, but the most significant costs of abandoning the issuance approach can also be easily remedied.

General considerations of fairness weigh against conditioning copyright protection on registration because the costs of that condition to copyright owners outweigh the benefits to the public arising from the Copyright Office’s review of copyright application materials. Under the application approach, the Register of Copyrights, as a practical matter, will have sufficient time to evaluate an application and intervene in court if desired. Finally, as a copyright owner is entitled to bring suit in court regardless of registration or refusal and the evaluation of an application for copyright by the Copyright Office is a cursory process, logical consistency favors the substantive exercise of rights over the exercise of form devoid of purpose.

A. LITTLE WILL BE LOST BY ABANDONING THE STATUS QUO AND EVEN LESS WOULD BE GAINED BY RETAINING IT

Both the application and issuance approaches essentially satisfy the purposes of copyright law with respect to the general public and individual authors. Regarding the general public, a certificate of registration is the most effective means available for an author to enforce his copyright. However, having to wait four or five extra months for a certificate does not result in a cost sufficient to decrease an author’s incentive to create. Thus, the public continues to reap the benefit of authors’ artistic creations and, consequently, a major purpose of copyright law is fulfilled.

With respect to the benefits flowing from registration, submission of an application and deposit are necessary under both approaches. Thus, the Copyright Office continues to compile a public record, which increases marketplace efficiency. Additionally, deposits continue to be a resource for the Library of Congress. Although the Copyright Office’s gatekeeper function may be negatively impacted, a simple remedy to such involves the notification of the Register of Copyrights of instances in which an application is pending.

215 See supra note 59 and accompanying text.
216 See supra notes 30–31 and accompanying text.
217 See supra notes 72–75 and accompanying text.
218 See supra notes 76–78 and accompanying text.
concurrently with an infringement suit.\textsuperscript{219} If the Register desires to expedite his evaluation process or to interfere in the litigation, he is free to do so.\textsuperscript{220}

As for individual authors, they continue to reap a financial profit from their creations. Furthermore, many authors may either be registered prior to infringement in order to avail themselves of statutory damages and attorney fees\textsuperscript{221} or, if not registered prior to the infringement at issue, opt not to bring suit in the first place.\textsuperscript{222} Thus, the choice of approach may be a non-factor in many instances.

Although a copyright is conferred exclusively by the government's constitutional and legislative authority and, thus, its characteristics may be defined by such authority,\textsuperscript{223} the origin and nature of such copyrights do not justify arbitrary products of historical inertia. Nonetheless, the status quo is exactly such a product. Neither approach is a result of calculated government action. Beyond encouraging the Copyright Office's gatekeeper function, the issuance approach serves no other underlying purposes that would be sacrificed under the application approach.

Furthermore, the status quo offers little with regard to consistency or notice. The two respective approaches are applied throughout the country without rhyme or reason.\textsuperscript{224} Thus, no means exist to predict what approach one is likely to encounter. Consequently, litigants presently have little notice concerning what to expect with regard to the prerequisite of registration.\textsuperscript{225} Therefore, the advantage of retaining the status quo for the sake of future notice is insignificant.

Finally, widespread adoption of the application approach will generate uniformity and certainty in the federal court system. Fundamentally, a disagreement among the federal judiciary on the scale of the present split related to copyright registration as a condition to infringement is to be avoided if possible. As adopting the application approach is possible, the present split can be remedied.

\begin{footnotesize}
\textsuperscript{219} See 2 NIMMER, supra note 9, § 7.16[B][1][a][i] n.38.23 ("[A]s a safeguard against the rare case in which the timing might prejudice the Register's right to appear [to contest the registrability of a work], it might be prudent for courts following the [application approach] to require the plaintiff to file notice with the Copyright Office about the concurrent pendency of the application for registration and litigation, so that the Register, if she chooses, could expedite treatment of the former, and, if she denies issuance of a certificate, could appear in the latter.").
\textsuperscript{220} Id.
\textsuperscript{221} See supra note 85 and accompanying text.
\textsuperscript{222} See supra notes 85–89 and accompanying text.
\textsuperscript{223} See supra notes 51–56 and accompanying text.
\textsuperscript{224} See supra notes 12–14 and accompanying text.
\textsuperscript{225} See supra notes 37–40 and accompanying text.
\end{footnotesize}
B. THE APPLICATION APPROACH IS JUSTIFIED BY STATUTE AND UNDERLYING POLICY CONSIDERATIONS

The text of the Copyright Act is consistent with the application approach. As provided in the Act, the occurrence of registration and the issuance of a registration certificate are distinct events. The former is a condition to filing suit, whereas the latter is a condition to certain remedies and evidentiary advantages. Though issuance of a Copyright response may be sufficient to establish the occurrence of registration, it is not necessary.

The application approach also furthers certain policies relevant to copyright law more effectively than the status quo or the issuance approach alone. First, adopting the application approach will increase authors' incentive to create. Though the incentive remains strong at the present, it can only be strengthened by allowing the immediate enforcement of copyright. Also, adopting the application approach will eliminate an advantage for intentional infringers, who are hard to deter. Finally, adoption of the application approach will conserve judicial resources by avoiding the dismissals of copyright infringement claims only to entertain the identical complaint a short time later following the issuance of a response by the Copyright Office.

C. THE APPLICATION APPROACH IS JUSTIFIED BY CONSIDERATIONS OF FAIRNESS, PRACTICALITY, AND LOGICAL CONSISTENCY

Fairness weighs against recognition of a copyright whose effectiveness is conditional unless the satisfaction of that condition materially furthers the public good. In the present situation, the Copyright Office's evaluation does not materially further the public good. The evaluation is cursory and any doubts are construed in favor of the applicant. Thus, allowing the Copyright Office to evaluate an application at the expense of copyright protection is not justified.

Copyright owners are not “sleeping on their rights” by failing to register their copyrights before infringement occurs. Registration as a condition to infringement is more esoteric than the idea-expression dichotomy or the concept that a copyright automatically arises upon creation. As many authors are

---

226 See supra text accompanying notes 183–84.
227 See supra note 9, § 7.16[B][1][a][i] (“It makes sense under the 1976 Act to refer to application for registration as a condition to filing an infringement action, whereas issuance of a registration certificate is a condition to statutory damages, prima facie presumption . . . .”).
228 See supra notes 211–13 and accompanying text.
229 See supra note 50.
230 See supra notes 70–71 and accompanying text.
231 See Perlmutter, supra note 75, at 573 (“Every copyright lawyer has had the experience of
unaware of the latter two, it is understandable that they are also unaware of the registration requirement.\textsuperscript{232} Finally, even issuance courts readily acknowledge the inequity of dismissing a suit in which a litigant plainly has a recognized property interest that is being invaded.\textsuperscript{233}

As far as practical considerations, ninety-six percent of applications are approved by the Copyright Office.\textsuperscript{234} Thus, the majority of disputes over copyrightability are resolved in court regardless of the Copyright Office's evaluation. Additionally, the normal four to five month delay will usually be outlasted by the "languid pace of trial."\textsuperscript{235} Thus, the Copyright Office will often reach its determination before a case is decided.\textsuperscript{236} Consequently, the Copyright Office will be able to interfere in a proceeding in time to allow its determination to be effective.\textsuperscript{237} In cases where the trial progresses quickly, the Register can take advantage of being notified of the concurrent pendency of an application and corresponding application and expedite the evaluation process if desired.\textsuperscript{238}

Regardless of the Copyright Office's determination, an applicant is entitled to bring suit.\textsuperscript{239} Additionally, the application is almost always found to be copyrightable material.\textsuperscript{240} On the other hand, requiring an infringement suit to be delayed for a few months serves no substantive purpose since the Copyright Office's examination is essentially a formality.\textsuperscript{241} Thus, logical consistency favors the substantive exercise of rights over adherence to a formality with no underlying purpose.

Additionally, the distinction between a copyright and copyright protection is without substance. As the Supreme Court bluntly put it, "without [the] right of vindication a copyright is valueless."\textsuperscript{242} This characterization is equally applicable to the distinction between encouraging registration by special remedies rather than by threatening loss of rights. Ultimately, the argument—a copyright can be recognized by law, the ability to legally protect that right conditioned, and the condition justified as it does not involve the taking of legal rights—is circular as advising individuals who do not know the fundamental principles that ideas are not copyrightable and that copyright vests automatically upon creation, let alone the more esoteric rule that registration prior to infringement is a prerequisite . . . .

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} See supra text accompanying note 206.
\textsuperscript{235} See supra note 64 and accompanying text.
\textsuperscript{236} 2 NIMMER, supra note 9, § 7.16[B][1][a][i] n.38.23.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} See supra notes 219–20 and accompanying text.
\textsuperscript{240} See supra note 29 and accompanying text.
\textsuperscript{241} See supra text accompanying note 234.
\textsuperscript{242} Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 40 (1939).
it ends where it begins. Logical consistency dictates that a right that was not
effective in the beginning cannot have its ineffectiveness justified on the grounds
that it was essentially ineffective from creation.

V. CONCLUSION

A copyright originates as a grant of legal recognition by the legislative authority
on behalf of the people. Although this certainly gives the legislature discretion in
establishing that right's characteristics, such freedom is not unlimited.
Nonetheless, this positivistic view of copyright law dominates in the United States
and, consequently, has informed the purposes underlying copyright law.

Although one intended effect of copyright law is to secure a fair return for the
author, the ultimate goal is to benefit the public. The requirement of registration
as a condition to bringing an infringement action is one means of accomplishing
this goal. As a consequence of registration, the public receives access to a
storehouse of useful information. However, as a result of the imposition of this
condition, the question of what events constitute registration takes on added
significance.

At present, that very issue divides federal courts. On one hand, some view
registration as occurring upon submission of the necessary materials to the
Copyright Office. In contrast, others consider the jurisdictionally critical point
to be when the Copyright Office issues a reply. Despite this split's failure to
drastically impact the general purposes of copyright law in a negative fashion,
action should be taken to alter the current situation.

To that end, the application approach should be adopted by the federal courts.
First of all, the status quo is an arbitrary product of historical inertia rather than
calculated policy decisions. Thus, there is little to be gained by maintaining the
status quo and even less to lose by abandoning it.

Apart from the insignificance of the status quo, the application approach is
justified by the text of the Copyright Act. In addition, that approach better serves
the purposes of copyright law than the present situation or the issuance approach
alone. Finally, considerations of fairness, practicality, and logical consistency all
weigh in favor of this approach. Therefore, the federal courts should adopt the
application approach as the standard by which they determine if a copyright
owner has registered his copyright, and, thus, satisfied the condition governing
the courts' exercise of subject-matter jurisdiction over copyright infringement
claims.

Mose Bracey