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INTRODUCTION

It is no secret: a conflict exists between idealism and reality.[1] The conflict, raging throughout millennia, permeates almost every aspect of human interaction.[2] The effects, in fact, of over-striking one perspective at the expense of the other cause unbalance, confusion, and profligacy.[3] Unrestrained idealism, for example, breeds naive pragmatism, unnecessary change, and wasteful inefficiency.[4] Overshadowing reality bordering on formalism, however, precipitates dogmatic rigor, hesitancy to evolve, and stifled growth.[5] Formalism, as one legal scholar postulated, "[t]ends to straitjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure."[6]

The United States Congress struck the appropriate balance between idealism and reality when enacting the Copyright Act of 1976 because the Act proscribes inefficiency while simultaneously securing copyright fortification.[7] The Act proscribes inefficiency by codifying a procedure whereby the United States Register of Copyrights must first determine the copyrightability of a submitted work instead of forcing federal courts to do so.[8] Conversely, the Act fortifies copyright protections through, *inter alia*, predicating prima facie copyright validity subsequent to registration,

1. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450-51 (1991).
2. *See id.* at 449, 454.
3. *See* W. Julian Korab-Karpowicz, *Political Realism in International Relations*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1.1.2 (Winter 2011), http://plato.stanford.edu/archives/win2011/entries/realism-intl-relations/.
4. *See id*.
5. *See id*.
6. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1526 (1991).
7. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (2006)).
8. 17 U.S.C. § 410(a) (2006).

providing for statutory damages and attorney's fees when copyright infringement occurs, and by maintaining a copyright registry.[9]

Indeed, issue lies with late applicants subjugating the congressionally mandated registration process by selfishly carving out a perceived ambiguity from within the Act itself where, in fact, none exists.[10] These applicants, beguilingly cloaked under terms such as "pragmatic," "practical," and "idealistic" refer to their created ambiguity as "legal limbo."[11] "Legal limbo," paraphrasing *Nimmer on Copyright*, is the time in space between delivering a validly compiled copyright application with the Copyright Office and the Register of Copyrights issuing, or refusing to issue, a certificate of registration.[12]

Legal limbo, a term unfounded in jurisprudence, is the cornerstone concept supporting the idealist argument because section 411(a) of the Act proscribes a copyright applicant from bringing forth an infringement action absent a certificate of copyright registration, or a refusal of registration, from the Register of Copyrights.[13] Therefore, because registration, idealists argue, attaches retroactively to a submitted work at the moment a validly compiled application is deposited with the Copyright Office, the wait for a registration certificate is "just the type of needless formality Congress generally worked to eliminate in the 1976 Act."[14]

Conceded, "there is something uneconomic about dismissing a complaint simply because the plaintiff does not have a certificate of registration, especially when the plaintiff, under Section 411(a), will be allowed to sue even if the Copyright Office denies the registration and refuses to issue the certificate."[15] However,

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9. *See* 17 U.S.C. §§ 408(a), 502-05 (2006); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 7 (2012), *available at* http://www.copyright.gov/circs/circ01.pdf.

10. The term "late applicant" refers to those creators who file an application for registration with the Copyright Office greater than three months subsequent to publishing their work or after alleged infringement of the work occurs. *See, e.g.*, Stuart Weitzman, LLC v. Microcomputer Res., Inc., 542 F.3d 859, 863 (11th Cir. 2008) (holding that anticipatory copyright infringement suits are governed by the same prerequisite of registration as if the defendant had asserted a claim of copyright infringement and that none of the parties can institute an infringement action until the relevant materials have been duly registered pursuant to Section 411(a) of the Copyright Act).

11. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][3][b][ii] (May 2011); *see also* La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1203-04 (10th Cir. 2005).

12. 2 NIMMER & NIMMER, *supra* note 11, at § 7.16[B][3][b][ii]-[iv].

13. 17 U.S.C. § 411(a) (2006).

14. *See id*; Cosmetic Ideas, Inc. v. IAC/InterActiveCorp., 606 F.3d 612, 620 (9th Cir. 2010). The Court's assertion here is unfounded, however, because it contradicts Congress' express intent that "registration should be attempted and granted or denied by the Copyright Office before suit for copyright infringement can be maintained." 134 CONG. REC. 30,105, 30,108 (statement of Rep. Kastenmeier).

15. Specific Software Solutions, LLC v. Inst. of WorkComp Advisors, LLC, 615 F. Supp. 2d 708, 715-16 (M.D. Tenn. 2009).

> to read the [Act] to mean that registration occurs when the applicant files his materials would be to misread and render superfluous numerous provisions of the Copyright Act, perhaps most notably Section 411(a), which provides the procedure for how a lawsuit may still be filed even if registration is refused by the Copyright Office.[16]

Therefore, because copyright registration, after examination, attaches retroactively to the time of deposit,[17] it does not necessarily follow that copyright registration automatically attaches to a work immediately on deposit because the retroactivity and effectuation of copyright registration occurs only *after* the Register of Copyrights first examines the work and determines its validity.[18] Findings to the contrary, as a result, render other provisions of the Act superfluous and unnecessary.[19]

Idealists, however, ignoring superfluous implications imposed upon the Act, instead argue that the determinations of a submitted work by the Register of Copyrights are a senseless formality and should not impede suit because one may, regardless of the Register's findings, commence an infringement action.[20] On this basis, idealists proclaim that the requisite standing necessary to bring forth an infringement action attaches at the precise moment a copyright applicant deposits an application and fee with the Copyright Office.[21] The Tenth Circuit refers to this modality as the "application approach."[22]

Alternatively, ardent readers of the Act illustrate that registration effectuates, indeed retroactively, to the time of deposit only after the Copyright Office receives the application, determines its validity, and issues a registration certificate.[23] These readers, moreover, note that although one may commence an infringement action despite the Register's findings, the law authorizes commencement only after the Register of Copyrights makes

16. *Id.* at 716 (citing Ripple Junction Design Co. v. Olaes Enters., Inc., No. 1:05-CV-43, 2005 WL 2206220, at *4 (S.D. Ohio Sept. 8, 2005)).

17. 17 U.S.C. § 410(d).

18. *Id.* § 410(a).

19. *See Specific Software Solutions*, 615 F. Supp. 2d at 715-16.

20. *See La Resolana Architects*, 416 F.3d at 1203, *abrogated in part on other grounds by* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) (holding that the Copyright Act's registration requirement does not restrict a federal court's subject matter jurisdiction with respect to infringement suits involving unregistered works).

21. Apple Barrel Prods., Inc. v. Beard, 730 F.2d 384, 386-87 (10th Cir. 1984).

22. *La Resolana Architects*, 416 F.3d at 1203.

23. *Id.* at 1200.

its determinations.[24] This perspective is deemed the "registration approach."[25]

The Supreme Court has yet to decide on the issue of whether registration effectuates upon deposit of the work with the Copyright Office or after the Register of Copyrights examines the submission and issues or denies a certificate of registration.[26] Consequently, a split exists among the Circuits since the inception of both the application and registration approaches.[27] The Tenth and Eleventh Circuits, adhering to the plain language of the Act, hold that a work is registered once the Copyright Office examines the validity of an application and issues a certificate of registration.[28] Moreover, although the "Second Circuit has not addressed this specific question," cases emerging from various district courts within the Second Circuit seem to advocate the registration approach as well.[29] The Fifth, Seventh, and Ninth Circuits, conversely, collectively hold that registration occurs by merely delivering an application and required fee with the Copyright Office.[30]

Copyright aspirants advocating the application approach proclaim legal limbo is a sufficient basis to avoid awaiting a determination from the Copyright Office as to the copyrightability of a submitted work because it "avoids unnecessary delay in copyright infringement litigation, which could permit an infringing party to continue to profit from its wrongful acts."[31] Instead, these applicants simply deliver an application to the Copyright Office and proceed directly toward an infringement action in federal district court prior to the Register of Copyrights determining the validity of the

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24. *Id*. at 1202.

25. *Id.*

26. *See Reed Elsevier, Inc.*, 130 S. Ct. at 1249 (declining to "address whether § 411(a)'s registration requirement is a mandatory precondition to suit . . . .").

27. *See* Lezica v. Cumulus Media, Inc., No. 3:09-cv-912, 2010 U.S. Dist. LEXIS 16108, at *5-6 (M.D. Tenn. Feb. 23, 2010) (recognizing that "there is a split of opinion among the Circuit Courts" between the application and registration approaches).

28. *See La Resolana Architects*, 416 F.3d at 1207-8; M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1488-89 & n.4 (11th Cir. 1990), *abrogated in part on other grounds by Reed Elsevier, Inc.*, 130 S. Ct. 1237.

29. *See* K-Beech, Inc. v. Doe, No. CV 11-3331 (JTB) (ETB), 2010 U.S. Dist. LEXIS 143728, at *4-5 (E.D.N.Y. Sept. 19, 2010) (observing that "the emerging consensus among courts in this district is that the mere filing of applications and payment of the associated fees is insufficient, as a matter of law, to meet the statutory requirement that a copyright be registered prior to the initiation of an infringement action" (quoting Silver v. Lavandeira, No. 08 Civ. 6522(JSR)(DF), 2009 WL 513031, at *5 (S.D.N.Y. Feb. 26, 2009))).

30. *See Cosmetic Ideas*, 606 F.3d at 621 ("receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a)."); Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631 (7th Cir. 2003); *Apple Barrel Prods.*, 730 F.2d at 386-87.

31. *Cosmetic Ideas*, 606 F.3d at 619.

claim, thus forcing the judiciary to assume the role of a copyright registration clerk.[32]

This approach is manifestly unjust because it rewards procrastination, abrogates the authority of Congress, and causes wasteful inefficiency.[33] Moreover, and regardless of any other reason, if either a federal court or the Register of Copyrights determines a work is indeed copyrightable, damages for infringement remain viable.[34] So again, what's the problem money can't solve?

This Article analyzes one segment of the Copyright Act: the determination of whether a plaintiff satisfies the condition precedent by merely filing an application for registration with the Copyright Office or whether the Copyright Office must examine the application and issue or deny a certificate of registration before the plaintiff may commence a lawsuit for copyright infringement. The author recognizes that "any call for a return to formalism . . . expose[s] one to the barrage of ridicule . . . traditionally reserved by modern scholars for what is almost universally deemed . . . naïve methodology."[35] The reader is reminded that this Article does not advocate strict formalism but instead a type of "street-smart mode of interpretation" recognizing the dangers that an "idealist" or "balancing" perspective of the Act precipitates.[36] Consequently, this Article advocates the position of practicality and fairness, the same position that Congress intended when enacting the Copyright Act of 1976—that copyright registration attaches after the Register of Copyrights examines the work.[37]

Part I deconstructs and analyzes the plain language meaning of the Copyright Act of 1976 and sets forth the current legal framework by which

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32. *Id.* at 619-20.

33. *See id.* at 619 (noting that many choose to register a copyright solely for the purpose of initiating infringement litigation).

34. 17 U.S.C. § 504(a) (2006) ("an infringer of copyright is liable for either . . . actual damages . . . or . . . statutory damages . . .").

35. Redish & Cisar, *supra* note 1, at 453-54.

> Any call for a return to "formalism" in constitutional interpretation naturally will expose one to the barrage of ridicule and disdain traditionally reserved by modern scholars for what is almost universally deemed to be an epistemologically naïve methodology. It is important, however, to distinguish "epistemological" formalism from what we call, perhaps oxymoronically, "pragmatic" formalism. The former represents a commitment to a rigidity and level of abstraction that is quite probably not possible, and that is certainly unwise. "Pragmatic formalism," on the other hand, is a "street-smart" mode of interpretation, growing out of a recognition of the dangers to which a more "functional" or "balancing" analysis of the separation of powers context may create.

Id.

36. *Id*. at 454.

37. 17 U.S.C. § 410(a).

registration is effectuated. It also contrasts jurisprudential interpretations regarding statutory analysis as it relates to copyright registration. Part II underscores the legislative intent behind the Copyright Act of 1976. In particular, Part II illustrates intrinsic inconsistencies embedded within the reasoning deployed to circumvent Congressional intent substantiating the Act. Part III concludes by highlighting two significant policy considerations regarding the mechanism of copyright registration that Congress enacted.

I. THE PLAIN LANGUAGE OF THE ACT EXPRESSLY MANDATES THE REGISTER OF COPYRIGHTS MUST FIRST EXAMINE AN APPLICATION AS A CONDITION PRECEDENT TO AN INFRINGEMENT ACTION

The plain language of the Act is clear. A copyright is registered only after the Copyright Office first determines the validity of an application and issues a certificate of registration.[38] Additionally, Congress demonstrated that registration is not completed solely by submitting a copyright application because it places affirmative burdens of both examination and registration on the Copyright Office subsequent to deposit of the compiled application.[39]

The genesis supporting this conclusion must originate with the plain language itself.[40] Moreover, when "the terms of a statute are unambiguous, then judicial inquiry is complete."[41] Here, the statute is unambiguous and manifestly clear, the plain language of the Act mandates the predetermination of whether a work is copyrightable or not prior to a plaintiff bringing forth an infringement action in federal court.[42]

The United States Constitution vests Congress with the authority to regulate copyright protection.[43] Congress validly exercised their authority when enacting the Copyright Act.[44] The Act, thereafter, provides a procedural process toward securing copyright protections over a submitted work.

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38. *Id*.

39. *Id*.

40. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (holding that "[o]ur first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

41. Rubin v. United States, 449 U.S. 424, 430 (1981).

42. 17 U.S.C. §§ 410(a), 411(a).

43. U.S. CONST. art. I, § 8, cl. 8.

44. *See Reed Elsevier, Inc.*, 130 S. Ct. at 1241 (finding that "[e]xercising [its Constitutional] power, Congress has crafted a comprehensive statutory scheme governing the existence and scope of '[c]opyright protection' for 'original works of authorship fixed in any tangible medium of expression'" (quoting 17 U.S.C. § 102(a) (2006))).

Section 101 of the Act defines "registration" as "[the] registration of a claim in the original or the renewed and extended term of copyright."[45] The language, therefore, simply defines registration as the "registration of a claim."[46]

The next procedural statute, section 408, instructs the applicant of the process to "obtain [the] registration of a copyright claim."[47] In particular, "the owner of 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 . . . ."[48]

Again, the language is patently clear. The owner of a copyright "may obtain registration . . . by delivering . . . the deposit . . . application and fee" with the Copyright Office.[49] This section, therefore, instructs the applicant that in order to obtain the registration of a claim, as defined in section 101, the applicant must first deliver to the Copyright Office: (1) the work, (2) an application, and (3) the appropriate fee.[50] However, neither section 408 nor any other section in the Act instructs the applicant that copyright registration attaches to a submitted work immediately upon deposit of the application and requisite materials with the Copyright Office.[51]

Section 410(a), however, continues by clearly defining the moment at which "the registration of a claim" occurs.[52] The registration of a claim occurs:

> When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, 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 under the seal of the Copyright Office.[53]

A clear reading of section 410(a) precipitates clarity that the Copyright Office shall register a claim only after its examination is complete.[54] Section 410(a), therefore, presents manifest inconsistency with any contrary finding that merely depositing an application with the Copyright Office

45. 17 U.S.C. § 101 (2006).
46. *Id.*
47. *Id.* § 408(a).
48. *Id.*
49. *Id.*
50. *See* 17 U.S.C. § 408(a).
51. *See id.* §§ 408(a), 410(a), (d).
52. *See id.* § 410(a).
53. *Id.*
54. *See id.*

constitutes registration because the statute itself mandates an examination of the deposited materials prior to registering the copyright.[55] Additionally, registration or refusal of copyright registration after examination is a mandatory precondition to an infringement action.[56]

The language is unambiguous: "[w]hen, *after examination* . . . the Register shall register . . . and issue . . . a certificate of registration."[57] Therefore, the "after examination" clause in the preceding sentence, and not "upon deposit," is the precise affirmative act that must be satisfied prior to granting registration.[58] Only afterward does registration effectuate retroactively to when the application was first deposited with the Copyright Office.[59]

Holdings to the contrary, therefore, abrogate the plain meaning of the clause "after examination" because it robs the Copyright Office of its statutory mandate to first determine whether "the material deposited constitutes copyrightable subject matter . . . ."[60] Consequently, unless the Copyright Office issues or denies a certificate of registration after examination, the ensuing registration of a claim is ineffective and the applicant is enjoined from pursuing infringement action.

A. Wailing and Gnashing of Teeth! Section 411(a) Implements a Condition Precedent Requiring Either a Copyright Registration, or the Refusal of Registration, Prior to Commencing an Infringement Action

To claim copyright infringement, an owner must demonstrate "(1) ownership of a valid copyright in a work, and (2) the copying of elements of the work that are original."[61] Additionally, section 411(a) of the Act requires "copyright holders to register their works before suing for copyright infringement."[62] Specifically, "no 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."[63]

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55. *See* 17 U.S.C. § 410(a).
56. *See id.*
57. *Id.* (emphasis added).
58. *See id.*
59. *See* 17 U.S.C. § 410(d), which provides 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 of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office."
60. *See* 17 U.S.C. § 410(a).
61. *K-Beech*, 2010 U.S. Dist. LEXIS 143728, at *3 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).
62. *Reed Elsevier*, 130 S. Ct. at 1241 (citing 17 U.S.C. § 411(a) (Supp. 2009)).
63. 17 U.S.C. § 411(a).

A plain reading of the first sentence of section 411(a) clearly states that a copyright infringement action shall not be brought for any United States work "until registration of the copyright claim has been made . . . ."[64] Moreover, registration occurs after examination of the submitted work by the Copyright Office.[65] Therefore, the Act clearly predicates some degree of affirmative action on the part of the Copyright Office as a mandatory precondition that must be satisfied prior to initiating a copyright infringement claim.

A reverse analysis of each step represented in the Act preceding section 411(a) substantiates the conclusion that examination precipitates the mandatory issuance or refusal of a registration certificate.[66] Section 408(a) directs the applicant to obtain registration of a claim by delivering the application and fee with the Copyright Office.[67] Moreover, section 101 defines registration as the "registration of a claim . . . ."[68] The Act, therefore, provides a clearly defined procedure for obtaining copyright registration of a submitted work and, subsequent to registration, the requisite capacity to bring an infringement action in federal court.[69]

The process of registration is clearly and sequentially delineated in the Act. Copyright registration simply means the "registration of a claim."[70] To obtain the "registration of a claim," an applicant must deposit the work, the application, and fee with the Copyright Office.[71] The registration of a claim effectuates after examination of the requisite materials and a determination by the Copyright Office.[72] Thereafter, the registration date of a claim affixes retroactively to the date of deposit, after an acceptable determination by the Copyright Office.[73] Finally, the Act enjoins infringement action until "registration of the copyright claim has been made . . . ."[74]

Arguments, therefore, positing that registration predicates the standing necessary to bring an infringement action by merely depositing an application with the Copyright Office ignore the plain language meaning of the Act because the Copyright Office must first determine, in some

64. *Id.*
65. *See id.* § 410(a).
66. *See id.*
67. *Id.* § 408(a).
68. 17 U.S.C. § 101.
69. *See id.* §§ 408(a), 410(a), 411(a).
70. *Id.* § 101.
71. *Id.* § 408(a).
72. *See id.* § 410(a).
73. *See* 17 U.S.C. § 410(d).
74. *Id.* § 411(a).

capacity, the copyrightability of a submitted work.[75] Additionally, the capacity of a copyright applicant to bring an infringement action in federal court fails without a certificate of registration, or refusal thereof, from the Copyright Office.[76]

Admittedly, registration is not a condition of copyright protection.[77] Works automatically receive copyright protection created on or after January 1, 1978.[78] Moreover, to protect a work outside of federal court, copyright holders remain unbound to pursue "state law claim[s] in tort for unfair competition, tortuous interference, or breach of contract."[79] However, a continuing analysis of section 411(a), particularly the second sentence of the statute, confirms an additional affirmative act on the Register of Copyrights prior to entitling an applicant to institute an infringement action.[80]

Section 411(a) continues:

> 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.[81]

Therefore, in addition to a certificate of registration, the *refusal* of copyright registration also satisfies the condition precedent necessary to initiate an infringement action. Hence, this sentence would be redundant if merely depositing an application with the Copyright Office automatically conferred copyright registration on a submitted work.

As the court in *Specific Software Solutions, LLC v. Institute of WorkComp Advisors, LLC*[82] correctly noted, "if a party could file an infringement suit merely upon filing his application for registration, there would be no need to include a provision [in the Act] stating that suit could

75. *See id.* § 410(a).

76. *See* Corbis Corp. v. UGO Networks, Inc., 322 F. Supp. 2d 520, 521-22 (S.D.N.Y. 2004) (holding that a work is not registered within the meaning of Section 411(a) unless and until "the Copyright Office has either approved or refused the pending application for registration"), *abrogated in part on other grounds by Reed Elsevier*, 130 S. Ct. 1237.

77. *See* LEE WILSON, THE COPYRIGHT GUIDE: A FRIENDLY HANDBOOK TO PROTECTING AND PROFITING FROM COPYRIGHTS 74 (3d ed. 2003).

78. *Id*.

79. *See La Resolana Architects*, 416 F.3d at 1199 n.2.

80. *See* 17 U.S.C. § 411(a).

81. *Id.* (emphasis added).

82. 615 F. Supp. 2d 708 (M.D. Tenn. 2009).

be maintained after the application is refused."[83] Therefore, if simply depositing an application satisfied the condition precedent, the second clause of section 411(a) would be unnecessary and superfluous. As a result, a plaintiff is enjoined from bringing an infringement action without the Copyright Register taking some affirmative action, either by first determining the validity of an application or by refusing the registration completely.

B. Verb Confusion: "May" Is Permissive, "Shall" Is Definitive, and Independently They Are Conspicuously Clear

The verb "may" is permissive.[84] It denotes capacity to file or not file a claim.[85] The verb "shall," however, is restrictive.[86] It predicates a mandatory or affirmative duty.[87] Section 408(a) of the Act provides "the owner of copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office the deposit . . . together with the application and fee . . . ."[88] Section 410(a) continues stating that "[w]hen, after examination . . . the material deposited constitutes copyrightable subject matter . . . the Register shall register the claim . . . ."[89] These two verbs—may and shall—are mutually exclusive and independent within the context of the Act because although a copyright applicant *may* permissively obtain registration of a claim by depositing a valid application with the Copyright Office, the Register *shall*, after examination, register the claim.[90]

Idealists advocating the application approach argue that the verb "may" is confusing because it seeds an expectation in the applicant's mind that merely depositing a valid application is the sole statutory requirement

83. *See Specific Software Solutions*, 615 F. Supp. 2d at 713 (quoting *Ripple Junction Design*, 2005 U.S. Dist. LEXIS 32866, at *12 (S.D. Ohio Sept. 8, 2005)). The court also notes that section 411(a) provides that an infringement suit may be initiated after the application for registration is refused. *See id.* If a party could file an infringement suit merely upon filing his application for registration, there would be no need to include a provision stating that a suit can be maintained after the application is refused. A party could simply file suit when he filed his application for registration and it would make no difference whether the application was granted or refused in terms of satisfying the condition precedent.

84. *See* United States v. Bankers Ins. Co., 245 F.3d 315, 320-21 (4th Cir. 2001) (holding that the phrase "may" is permissive and "refer[s] to . . . giving 'an aggrieved party the choice between arbitration and abandonment of his claim . . . .'" (quoting Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996))).

85. *See id.* at 320.

86. *See* TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C., 557 S.E.2d 199, 201 (Va. 2002) (holding that "'shall' is primarily mandatory in effect . . . ." (citing Pettus v. Hendricks, 74 S.E. 191, 193 (1912))).

87. *See id.*

88. 17 U.S.C. § 408(a).

89. *Id.* § 410(a).

90. *See id.* §§ 408(a), 410(a).

necessary for obtaining copyright registration.[91] The Ninth Circuit, in *Cosmetic Ideas, Inc. v. IAC/InterActiveCorp.*,[92] specifically found that the wording of section 408 confuses the distinction between the application and registration approach because the statute implies the sole requirement for obtaining registration is delivery of the appropriate documents and fee.[93]

It is true. The sole requirement imposed upon an applicant to register a work is to deposit an application and fee with the Copyright Office.[94] Moreover, section 408(b) specifies the material that must accompany the application.[95] However, it does not inevitably follow that merely depositing a completed application and fee with the Copyright Office is the sole requirement necessary to confer copyright registration on a submitted work because the Act imposes *two* affirmative duties on *two* distinct entities prior to the registration of a work.[96]

First, an applicant desiring copyright registration has the responsibility of depositing an application and fee with the Copyright Office.[97] Afterward, the Copyright Office has an affirmative duty to examine the application prior to registering the work.[98] It is only after this examination that the Copyright Office shall issue a certificate of registration if it first determines the application is valid and the work is indeed copyrightable.[99] Moreover, copyright applicants are enjoined from bringing an infringement action without the Register of Copyrights first examining an application and passing on its vitality.[100] Therefore, although an applicant may obtain

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91. *See Cosmetic Ideas*, 606 F. 3d at 620 (holding that section 408 "blurs the line between application and registration and favors the application approach . . . , [because the term "may register"] implies that the sole requirement for obtaining registration is delivery of the appropriate documents and fee").

92. 606 F.3d 612 (9th Cir. 2010).

93. *See id.* at 617.

94. *See* 17 U.S.C. § 408(a).

95. *See id.* § 408(b).

> Deposit for copyright registration -- Except as provided by subsection (c), the material deposited shall include --
> (1) in the case of an unpublished work, one complete copy or phonorecord;
> (2) in the case of published work, two complete copies or phonorecords of the best edition;
> (3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;
> (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Id.

96. *See id.* §§ 408(a), 410(a).

97. *Id.* § 408(a).

98. 17 U.S.C. § 410(a).

99. *Id.*

100. *Id.* § 411(a)-(b).

copyright registration by depositing the requisite materials with the Copyright Office, the Copyright Office shall, after examination, issue a certificate of registration.[101] Consequently, these two conditions must be met prior to conferring registration on a copyrightable work.

The court in *TreadmillDoctor.com, Inc., v. Don Johnson*[102] correctly clarified the applicability of these conditions.[103] Following the plain language of the Act, the court in *TreadmillDoctor.com* found that:

> [T]he registration requirement does not divest federal courts of subject-matter jurisdiction over copyright infringement claims where the copyright holder has failed to comply with the registration requirement. (citation omitted) Instead, the "registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." (citation omitted) A "precondition" is "something that must exist before something else can come about." *Webster's Third New International Dictionary* 1785 (1986).
>
> [Therefore,] [w]hen a plaintiff files a copyright infringement action before preregistration or registration of the copyright claim has occurred, the 'precondition' required by § 411(a) is not satisfied.[104]

Based on the plain language of the Act, simply depositing a valid application with the Copyright Office is not the sole requirement predicating copyright registration because it does not satisfy the precondition imposed by section 411(a) requiring the Register of Copyrights to first examine the application itself.[105] Moreover, depositing a work and immediately filing an infringement action abrogates the duty of the Copyright Office to examine the work prior to issuing a certificate of registration.

Although the copyright applicant *may* register a claim by depositing an application, appropriate fee, and copy of the work with the Copyright Office, it is only *after examination* that the Register of Copyrights *shall*

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101. *See id.* §§ 408(a), 410(a).

102. No. 08-2877, 2011 U.S. Dist. LEXIS 34652 (W.D. Tenn. March 31, 2011).

103. *Id.* at *10-12.

104. *Id.* at *10-11 (internal citations omitted) (quoting and citing *Reed Elsevier*, 130 S. Ct. at 1241, 1249).

105. *See* 17 U.S.C. § 410(a).

issue a certificate of registration.[106] The applicant may bring suit for infringement then or, alternatively, after a refusal of copyright registration.[107]

C. The Act, Read in Its Entirety, Distinguishes Between Application and Registration

The Supreme Court held that when interpreting the meaning of statutory text, courts first look to the plain meaning of the language.[108] However, if the text remains ambiguous, courts then consider the statute as a whole to interpret the ambiguity.[109] When considering the Act in its entirety, it becomes manifestly clear that mere application for copyright does not automatically confer registration upon the work because other sections of the Act require the Register of Copyrights to act in some capacity prior to issuing a certificate of registration retroactively effective to the date of deposit.

Pursuant to section 410(a) of the Act, "[w]hen, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject . . . the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office."[110]

The term "shall register" imposes an affirmative role on the Copyright Office in the registration process. Additionally, section 408(a) levies a duty on the Register of Copyrights to first examine the application prior to

106. *See id.* §§ 408(a), 410(a) (section 408(a) states that the owner of a work "may obtain registration" of their copyright. Section 410 states that once all legal requirements are met the Register "shall register the claim.").

107. *See also* 2 NIMMER & NIMMER, *supra* note 11, at § 7.16[B][3][b][iv]. Some courts have found that § 411(a) permits a party to bring a claim even if the Office refuses the application. *See id.* To the contrary, § 411(a) makes perfect sense because the utility of a plaintiff successfully obtaining a judgment is greatly diminished subsequent to the refusal of copyright registration for a submitted work and that, as a result, precious judicial resources are not otherwise wasted. *See id.* § 7.16[B][3][b][iii]-[iv]. Ironically, however, courts relying on *Nimmer on Copyright*, a secondary source, to substantiate the application approach fail to engage in the necessary canons of statutory interpretation. *See id.*; Latin Am. Music Co. v. Archdiocese of San Juan of Roman Catholic & Apostolic Church, 194 F. Supp. 2d 30, 38 (D.P.R. 2001) (an example of a court's use of *Nimmer on Copyright* as it pertains to the effects of registration).

108. *See* Roberts v. Sea-Land Svcs. Inc., 132 S. Ct. 1350, 1356 (2012); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

109. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004) ("'[A] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.'" (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988))); *see, e.g.*, Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (an example the Court's application of this interpretation principle).

110. 17 U.S.C. § 410(a).

issuing a certificate of registration.[111] This conveys the notion that registration is not simply accomplished by merely depositing an application alone.[112]

Moreover, section 410(b) corroborates the distinction between application and registration.[113] In particular:

> In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.[114]

Again, the Act imposes an affirmative duty on the Register of Copyrights to first make a determination and then "register the claim" or "refuse registration."[115] This fact is the *sine qua non* of registration because the capacity of "the Register's discretion to refuse copyright registration drives an iron wedge between mere application and actual registration."[116]

Next, supporting the distinction between application and registration, section 410(d) illustrates 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 of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received . . . ."[117]

Section 410(d) does not read that "the registration date" is the date on which an application, deposit, and fee are delivered to the Copyright Office.[118] Instead, this section reads that "the effective date" is the date of receipt.[119] Registration, therefore, is the condition that occurs after the

111. *Id.* § 408(a).

112. *See Cosmetic Ideas*, 606 F.3d at 617 (holding that Section 410(a) "places an active burden of examination and registration upon the Register, suggesting that registration is not accomplished by application alone" (citing Loree Rodkin Mgmt. v. Ross-Simmons, 315 F. Supp. 2d 1053, 1055 (C.D. Cal. 2004))).

113. *See* 17 U.S.C. § 410 (a)-(b).

114. *Id.* § 410(b).

115. *Id.* § 410(a)-(b).

116. *La Resolana Architects*, 416 F. 3d at 1202 (quoting *Loree Rodkin Mgmt*., 315 F. Supp. 2d at 1056), *abrogated in part on other grounds by Reed Elsevier*, 559 U.S. 154.

117. 17 U.S.C. § 410(d).

118. *Contra id.* (specifically using the language "effective date" not "registration date").

119. *Id.*

Register of Copyrights examines the application and subsequently "the registration is backdated to the time the application was received."[120]

Backdating the registration to the date of deposit provides the Register of Copyrights with the opportunity to, *inter alia*, examine the validity of the application, determine whether the work is copyrightable, and catalogue the work as mandated by Congress.[121] As the court in *TreadmillDoctor.com, Inc*. correctly noted "[t]he plain language of the statute thus requires a series of affirmative steps by both the applicant and the Copyright Office."[122]

As a result of the plain language of the Act, the following steps are required to register a work and to confer standing to bring an infringement action in federal court. First, one must file the application and requisite fee.[123] Second, one must deposit a copy of the work with the Register of Copyrights.[124] Third, the Register of Copyrights must examine the deposited materials to determine whether the work constitutes copyrightable materials and that the work complies with other legal and formal requirements.[125] Lastly, the Register of Copyrights must register or refuse to register the work.[126] No implication exists anywhere in the plain language of the Act reflecting that copyright registration occurs immediately upon deposit of an application with the Copyright Office.

II. CONGRESS INTENDED FOR THE COPYRIGHT OFFICE TO FIRST DETERMINE THE COPYRIGHTABILITY OF A SUBMITTED WORK PRIOR TO THE INITIATION OF AN INFRINGEMENT ACTION

Congressional intent, substantiating the plain language of the Act, imposes a series of affirmative duties on the Copyright Office to first examine a submitted work prior to registration and after examination issue or refuse to issue a certificate of registration.[127] Moreover, this examination

120. *La Resolana Architects*, 416 F.3d at 1203, *abrogated in part on other grounds by Reed Elsevier*, 559 U.S. 154; Ryan v. Carl Corp., No. C 97-3873 FMS, 1998 WL 320817 (N.D. Cal. June 15, 1998).

121. *See generally* U.S. COPYRIGHT OFFICE, *supra* note 9.

122. *TreadmillDoctor.com, Inc*., 2011 U.S. Dist. LEXIS 34652, at *12 (quoting *La Resolana Architects*, 416 F.3d at 1200, *abrogated in part on other grounds by Reed Elsevier*, 559 U.S. 154).

123. 17 U.S.C. § 408(a).

124. *Id.* § 408(b).

125. *Id.* § 410 (a).

126. *Id.* § 410 (a)-(b).

127. *See Specific Software Solutions*, 615 F. Supp. 2d at 716.

> Plainly, Congress intended a scheme in which, before an entity could sue on a claim of copyright infringement, the Copyright Office would be entitled to pass, in an essentially non-binding manner, on the vitality of the copyright. Obviously such a system will cause some inevitable delays in litigation, but Congress apparently felt those delays were worth the benefit of the Copyright Office having an initial chance to pass judgment.

is a mandatory precondition that must occur prior to a plaintiff filing an infringement action.[128] To understand this assertion, courts should not "operate under an artificially induced sense of amnesia and ignore the Congressional intent of a statute," but must instead consistently look to Congressional intent each time they interpret the plain meaning of a statute.[129] Therefore, whenever a court interprets a statute—the Act in this case—it is compelled to look at the underlying Congressional intent to interpret its meaning.[130]

Here Congressional intent is manifestly clear and consistent with the plain language of the Act.[131] First, Congress expressed a specific desire for the Register of Copyrights to predetermine the validity of a copyright claim prior to a plaintiff commencing an infringement action.[132] Second, supporting the first conclusion, Congress created incentives for applicants to voluntarily register their works prior to bringing infringement actions.[133]

A. Congress Expressed Their Desire that Copyright Registration, or the Refusal of Registration, Precede an Infringement Action

Congress, in 1988, amended the Copyright Act of 1976 by enacting the Berne Convention Implementation Act.[134] The Berne Convention sought to standardize international copyright by "eliminat[ing] most, if not all, formalities that are required to obtain and enforce copyrights."[135] To comply with the Berne Convention, the Act exempted "certain foreign works from the registration requirement . . . ."[136] In response, a Senate bill attempted to eliminate registration formalities by entirely removing the registration statute from the Act, which failed.[137] Disagreeing with the

Id.

128. 17 U.S.C. § 411(a).

129. Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1093 (9th Cir. 2006); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1336 (1990).

130. *See* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 215 (1962) ("Where congressional intent is discernible . . . . [the Court] must give effect to that intent.").

131. *See* 17 U.S.C. §§ 408(f)(4), 410(d) (the text of the act itself as it pertains to court action).

132. *See id.* § 408(f)(4).

133. *See id.* §§ 408(f)(4), 410(d); *see also* U.S. COPYRIGHT OFFICE, *supra* note 9, at 7, 10 (discussing the advantages of registration and the role of registration in infringement actions).

134. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

135. *La Resolana Architects*, 416 F.3d at 1205.

136. *Id.* at 1206.

137. 132 CONG. REC. 27,686 (1986) (introduced by Sen. Mathias); *see also Bill Summary & Status: 99th Congress (1985 - 1986) S.2904 All Information*, THOMAS, http://thomas.loc.gov/cgibin/bdquery/z?d099:SN02904:@@@L&summ2=m&#amendments (last visited Mar. 3, 2013) (showing bill is still in committee).

Senate bill, Congress mused "[t]he House would have preferred to make no change in section 411."[138] Congress, however, compromised by creating an exception for foreign works while leaving untouched the copyright registration requirement for United States derived works.[139]

Congress justified upholding within the Act the registration requirement over United States works by expressly stating that "*registration should be attempted and granted or denied by the Copyright Office before suit for copyright infringement can be maintained*."[140] The Senate, corroborating the same sentiment, said "[t]he fact remains that . . . a review by the Register of Copyrights of the validity of a [copyright] claim is a *necessary precondition* for enforcement of copyright protection . . . ."[141] The Supreme Court, moreover, held that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[142]

Indeed, no more persuasive evidence of Congressional intent exists than their own words which expressly requires the Copyright Office to first pass on the vitality of an application prior to the initiation of an infringement action.[143] When implementing provisions of the Berne Convention, Congress could have vitiated the registration requirement entirely from the 1976 Copyright Act, but it did not.[144] Instead, Congress chose to leave the registration requirement of section 411(a) intact and, moreover, particularly amplified an expression of its intent behind section 410(a).[145] Congressional verbiage specifically expressing their intent is, therefore, manifest. The question then arises as to how those advocating the application approach reconcile their position with Congress's express intent that "registration should be attempted and granted or denied by the Copyright Office before suit for copyright infringement can be maintained."[146] Indeed, a high and difficult—this Article submits, an irreconcilable—hurdle to overcome.

Undeniably, idealists advocating the application approach seek to vitiate the registration precondition expressly mandated by Congress by citing

138. 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).
139. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).
140. 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier) (emphasis added).
141. S. REP. NO. 100-352, at 14 & n.2 (1988) (emphasis added).
142. United States v. Am. Trucking Ass'ns., 310 U.S. 534, 543 (1940).
143. *See* 17 U.S.C. § 411(a).
144. *See id.*
145. *See id.* §§ 410(a), 411(a).
146. 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).

inefficiency, needless formality, and loss of the ability to sue.[147] However, in light of express Congressional intent to the contrary, these advocates are unable to reconcile the fact that although "such a system will cause some inevitable delays in litigation, Congress apparently felt those delays were worth the benefit of the Copyright Office having an initial chance to pass judgment."[148] Therefore, despite inevitable delays, Congress clearly intended for the Copyright Office to first examine an application prior to issuing or denying a certificate of registration, and that this examination is a mandatory precondition to a plaintiff bringing forth an infringement action.[149]

B. Congressional Intent, Demonstrating that Registration Is a Condition Precedent to Infringement Action, Is Evidenced by Incentives Embedded within the Act

If Congress intended to permit applicants to file infringement claims while their applications were pending, it would have expressed such intention. Instead, Congress codified its desire requiring the Register of Copyrights to first examine an application prior to a plaintiff commencing an infringement suit.[150] Moreover, Congress afterward expressly galvanized its desire by implementing the Berne Convention.[151] Supporting this conclusion, in addition to Congress's express intent, are the statutory incentives the Legislature embedded within the Act to motivate applicants to voluntarily register their claims prior to filing an infringement action.[152]

First, registering a work with the Copyright Office establishes a public record of a copyright claim.[153] Registration, therefore, provides the requisite public notice necessary to defeat an innocent infringement

147. *Cosmetic Ideas*, 606 F.3d at 620.
148. *Specific Software Solutions*, 615 F. Supp. 2d at 716.
149. *See* 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).
150. 17 U.S.C. §§ 410(a), 411(a).
151. *See* 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).
152. *See* 17 U.S.C. §§ 401(d), 410(c), 412.
153. *See Id.* § 401(d).

> If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages . . . .

Id.

claim.[154] This is important because statutorily no weight is granted to innocent infringement defenses of a previously registered work.[155]

Second, registration confers prima facie evidence of the validity of the claim and the facts contained in the registration certificate.[156] This is important because it alleviates courts from having to determine facts previously ascertained by the Register of Copyrights.[157] Additionally, prima facie evidence of registration creates a presumption, of validity shifting the burden to the defendant of the infringement claim.[158]

Lastly, and most significantly, both statutory damages and attorney's fees are made available to those copyright owners who obtain registration within three months of publication or prior to an infringement action.[159] In fact, Congress increased the statutory damages incentive when implementing the Berne Convention.[160] Specifically, "[i]n order to promote voluntary registration [Congress] doubles [the] statutory penalties (which were last set in the Copyright Reform Act of 1976)."[161] Statutory penalties alone range from $750 to $150,000 per infringement.[162] This is important because absent a statutory damage award, plaintiffs must prove actual

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154. *See id.*
155. *See id.*
156. *See* 17 U.S.C. § 410(c).

> In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

Id.

157. *See id.*
158. *See Id.*
159. *See id.* § 412.

> In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), 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.

Id.

160. *See* 134 CONG. REC. 30,100, 30,102, 30,105 (1988) (statement of Rep. Kastenmeier).
161. *Id.* at 30,100, 30,105 (statement of Rep. Kastenmeier).
162. 17 U.S.C. § 504(c).

damages to recover harms flowing from infringement.[163] Proving actual damages is difficult at best because compiling the requisite proof is time consuming, resource intensive, and retrospective in nature.[164] However, copyright registration makes statutory damages available as a remedy for infringement thereby eliminating the need to prove actual damages.[165] Therefore, Congressional intent to register a work prior to bringing an infringement action is substantiated by the fact that special incentives are embedded within the Act. Moreover, supporting this argument is the fact that Congress *doubled* the statutory award for infringement of registered works when implementing the Berne Convention.[166]

III. PUBLIC POLICY DEMANDS THE COPYRIGHT OFFICE MUST FIRST DETERMINE THE VITALITY OF AN APPLICATION PRIOR TO THE COMMENCEMENT OF A COPYRIGHT INFRINGEMENT ACTION

Indeed, jurisprudence and legal academia are replete with complex public policy arguments supporting both the application and registration approaches in regard to copyright registration.[167] For example, compliance with Berne, irrationality, inefficiency, and creation of a robust federal register, are but a few of the arguments presupposed.[168] This Article, however, proffers the two most relevant arguments, postulating that public policy mandates the Register of Copyrights must first determine the validity of a claim prior to an infringement action. These two policy arguments, supported by Congressional intent, are judicial efficiency and the judicial inconsistency.[169]

163. *See id.* § 504(a)-(b).
164. *See id.* § 504(b).
165. *See id.* § 504(c).
166. 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).
167. *Compare Cosmetic Ideas*, 606 F.3d at 619 (holding that the application approach best serves public policy considerations such as, inter alia, compliance with the Berne Convention, maintaining a robust federal register, and providing broad copyright protection), *with* Greg Darley-Emerson, *'Registration . . . Means a Registration': A Critique of the Ninth Circuit's Adoption of the 'Application Approach' to Copyright Registration in* Cosmetic Ideas, Inc. v. IAC/Interactive Corp., 79 U. CIN. L. REV. 1547, 1558-59 (2011) (postulating that the registration approach best adheres to public policies of maintaining a robust register, fairness, judicial efficiency, and the formalities and accordance of the Berne Convention).
168. *See Cosmetic Ideas*, 606 F.3d at 619-20.
169. *See* 134 CONG. REC. 30,100, 30,105 (statement of Rep. Kastenmeier).

A. Judicial Efficiency Is Best Served by the Register of Copyrights First Examining a Work Prior to the Initiation of an Infringement Action

Federal courts are overburdened.[170] Annually, a greater percentage of cases persist unresolved on a court's docket than are closed.[171] Senator Feinstein, recognizing the scarcity of judicial resources, introduced the Emergency Judicial Relief Act of 2011 and observed "[w]hen our courts become overburdened, we leave criminal matters in limbo and civil litigants without resolution to their disputes."[172] Consistent with her observation, courts possess few resources to hear motions, pleadings, and other stipulations establishing copyright registration, which could otherwise be resolved by the Copyright Office first making preliminary determinations, holding prima facie weight, regarding the validity of a submitted work.[173]

Public policy, therefore, supports the position that the Register of Copyrights must first examine an application prior to the initiation of an infringement action because it relieves the judiciary of making these routine clerical determinations and, as a consequence, vacates its dockets. Moreover, Congress expressed support for this policy when stating that "these provisions [in the Act] are *designed* to relieve evidentiary burdens placed on Federal judges who must adjudicate copyright controversies."[174]

B. Mandating the Register of Copyrights to First Examine a Work Prior to a Plaintiff Initiating an Infringement Action Curtails Judicial Inconsistencies in Copyright Infringement Cases

Congress sought to centralize copyright registration when enacting the Copyright Act of 1976.[175] Moreover, by centralizing copyright registration "Congress intended for the Copyright Office to have a full opportunity to review the merits of a copyright application . . . ."[176] However, consider for a moment the application approach where an applicant gains the advantage of immediate presumptive copyright validity upon application but after

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170. *See, e.g.*, *Federal Judicial Caseload Statistics 2011*, U.S. COURTS, 40 tbl.C (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/ C00Mar11.pdf (showing U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2010 and 2011).

171. *See, e.g.*, *id.*

172. 157 CONG. REC. S3054, S3058 (daily ed. May 17, 2011) (statement of Sen. Feinstein).

173. *See* 134 CONG. REC. 30,100, 30,105 (1988) (statement of Rep. Kastenmeier).

174. *Id.* (statement of Rep. Kastenmeier) (emphasis added).

175. *See La Resolana Architects*, 416 F.3d at 1198 ("'instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works, [Congress] adopted [in 1976] a single system of Federal statutory copyright from creation'" (quoting H.R. REP. NO. 94-1476 at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5744)).

176. *Specific Software Solutions*, 615 F. Supp. 2d at 713.

examination the material is later deemed not copyrightable.[177] The presumption of validity would, therefore, modulate and unjustly enrich the applicant.[178] As one court observed, "[i]n order for a copyright owner to sue for infringement, it must register the copyright or file an application for registration, depending on the circuit in which the suit was filed."[179] This is the type of modulation in copyright litigation that the Act was designed to curtail.[180] Therefore, a policy holding that the Copyright Office first determine the copyrightability of a work prior to an infringement suit would preclude judicial inconsistencies because it would curtail differing opinions modulating between the courts.

CONCLUSION

Courts should follow the law and adhere to the plain language of the Copyright Act of 1976 finding, as a matter of practice, that the capacity to commence an infringement action vests with an applicant only after the Register of Copyrights first examines the work and issues, or refuses to issue, a certificate of copyright registration. Moreover, courts should uniformly recognize that the time between depositing an application with the Copyright Office and obtaining a certificate of registration is the precise time that Congress intended the vetting process of an application to occur and, therefore, enjoin infringement action.

"There are three ways to argue a case:" "[y]ou can argue emotion[,]" "[y]ou can argue the facts[,]" "[o]r you can argue the law."[181] The emotional argument, in this instance, considers fairness. The factual argument considers copyright infringement. However, the purely legal argument, devoid of all emotion, presents manifest clarity and irreconcilable interpretation consistent with the Register of Copyrights first examining an application as a condition precedent to a plaintiff commencing an infringement action. Absent a certificate of copyright registration, or a refusal thereof, the action fails.

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177. *See La Resolana Architects*, 416 F.3d at 1205 (holding "the [a]pplication approach allows for shifting legal entitlements . . . [where] 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.") (citation omitted).

178. *Id.*

179. *Specific Software Solutions*, 615 F. Supp. 2d at 710 (citation omitted).

180. *See La Resolana Architects*, 416 F.3d at 1205; *see also* 157 CONG. REC. S3054, S3058 (daily ed. May 17, 2011) (statement of Sen. Feinstein).

181. Omar Saleem, Prof., Fla. A&M U. C. of Law Lecture, Criminal Procedure: Arrest and Investigation (Apr. 2011).