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CORBIS CORP. V. AMAZON.COM, INC. – NEEDLESSLY ENDORSING OVERLY STRICT U.S. REGISTRATION REQUIREMENTS IN COPYRIGHT INFRINGEMENT LITIGATION

SARA GOLDFARB*

INTRODUCTION

United States Copyright Law is primarily “a creature of statute.”¹ Though there have only been two chief statutory schemes of Copyright Law since its inception in 1790, Congress has enacted countless bills and amendments between each evolutionary leap.² Of the many notable advancements realized with each iteration of the law, one of the most pervasive is the enduring effort to free the law from overly-burdensome formalities, and to allow the “authors” of the copyrightable works greater freedom to protect their creations.³ The ever-swelling

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¹ MELVILLE B. NIMMER, PAUL MARCUS, DAVID A. MYERS & DAVID NIMMER, *CASES AND MATERIALS ON COPYRIGHT 1* (6th ed. 2000) [hereinafter NIMMER, CASES AND MATERIALS] (discussing chronological periods of statutory development).

² See *id.* at 1–3 (discussing 1909 Copyright Act and 1976 Copyright Act); see also Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC’Y U.S.A. 549, 550 (2002) (noting 50 bills have been enacted since 1976 Act); Michael J. Remington, *The Ever-Whirling Cycle of Change: Copyright and Cyberspace*, 3 N.C. J.L. & TECH. 213, 214 (2002) (reviewing that few areas of law have experienced such dramatic change as Copyright Law).

³ See 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 7.16 [B][1][b][i], at 9–15 (2004) [hereinafter NIMMER, NIMMER ON COPYRIGHT] (noting binding registration requirements for published works prior to 1976 Act); see also Michael Jones, Note, *Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act*, 19 BERKELEY TECH. L.J. 85, 89 (2004) (describing how 1909 Act greatly expanded length of copyright term from original Copyright Act of 1790); Crews, *supra* note 2, at 551 (reviewing relaxation of “formalities” throughout Copyright Law development).

internationalization of Copyright Law has operated as a powerful influence, shaping United States Copyright Law and pressuring Congress to temper historically rigid requirements.⁴ The current Act, promulgated in 1976, contained a number of ameliorative features intended to rescue copyright authors from the dire and fatal forfeitures of the previous 1909 Act.⁵ Though registration has remained a resolute prerequisite to bringing an action for copyright infringement, courts are deeply divided on the details entailed in the registration procedure.⁶

17 U.S.C. § 411(a) prohibits a party from bringing suit in federal court for copyright infringement “until registration of the copyright claim has been made in accordance with this title.”⁷ As demonstrated by the profound rift that divides courts on this issue, even on the intra-district level,⁸ this section can be interpreted in either of two ways. Some courts hold that there is no federal subject matter jurisdiction until the Copyright Office grants the application and issues a certificate of registration, or, conversely, denies the application, essentially barring from litigation any plaintiff whose work is *pending* registration.⁹

⁴ See NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 1–46 (reviewing amendments required to comply with Berne Convention); see also BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 1:3.3 (Nov. 2004) (noting impact on formal requirements in light of the Berne Convention Implementation Act); NIMMER, CASES AND MATERIALS, *supra* note 1, at 2 (discussing numerous amendments enacted to comport with international harmonization).

⁵ See KELLER, *supra* note 4, § 1:3.2 (discussing how 1976 Act minimizes previously drastic consequences of failing to include copyright notice); see also NIMMER, CASES AND MATERIALS, *supra* note 1, at 1 (noting that 1976 Act superseded 1909 Act “in toto”); Crews, *supra* note 2, at 551 (explaining that 1976 Act initiated a “trajectory” which culminated in grant of copyrights without many formalities).

⁶ See 17 U.S.C. § 411(a) (2005) (stating no action may be instituted until the copyright claim is registered); see also NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][a][i], at 1–29 (discussing registration as necessity for statutory damages); Crews, *supra* note 2, at 571 (stating statutory damages and attorney's fees are incentives to register copyright claim).

⁷ 17 U.S.C. § 411(a) (2005).

⁸ See *Corbis Corp. v. UGO Networks, Inc.* 322 F. Supp. 2d 520, 521 (S.D.N.Y. 2004) (holding approval or refusal of registration is prerequisite to jurisdiction); *Well-Made Toy Mfg. Corp. v. King Kullen Grocery Co. Inc.* 210 F. Supp. 2d 147, 157 (E.D.N.Y. 2002) (finding that infringement action may commence upon application); *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 283 (E.D.N.Y. 2002) (requiring registration certification or denial prior to conferring subject matter jurisdiction); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 356 (S.D.N.Y. 2001) (concluding that application submission is sufficient to confer jurisdiction).

⁹ See *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283 (4th Cir. 2003) (holding registration as jurisdictional prerequisite); *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3–4 (D.D.C. 2002) (finding that certificate is jurisdictional prerequisite to filing infringement suit); *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994)

Other courts find that a pending registration is sufficient to confer federal jurisdiction for an infringement claim; all that is required is filing an application, fee, and a copy of the work with the Copyright Office.¹⁰

The domestic implications of such judicial discord manifest primarily in a lack of uniformity, certainty and efficiency. Potential litigants cannot be confident that they will be accorded subject matter jurisdiction without a thorough examination of any given District Court's prior holding on the issue.¹¹ Further, depending on the court, the litigant may have the opportunity to amend her complaint, or her case may be simply dismissed.¹² Even more troubling are the potential international repercussions of a stringent reading of the registration requirement. Given the United States accession to international copyright treaties which frown on procedural formalities, the reading of a strict registration requirement into Title 17 creates a danger of running afoul of such agreements.¹³ Moreover, in light of the comparably lax requirements imposed on foreign authors, strict domestic regulations prejudicially confine United States authors into a narrower realm of statutory regulation.¹⁴

Recently in *Corbis Corp. v. Amazon.Com, Inc.*,¹⁵ the District Court for the Western District of Washington was asked to rule on this issue and declined to follow the registration-on-

(noting timing of registration determines whether statutory or actual damages can be recovered).

¹⁰ See *Positive Black Talk, Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (5th Cir. 2004) (noting Fifth Circuit precedent that requires only receipt of application); *Iconbazaar, L.L.C. v. American Online, Inc.*, 308 F. Supp. 2d 630, 633–34 (M.D.N.C. 2004) (stating filing of completed application is sufficient to enable suit); *International Kitchen Exhaust Cleaning Ass'n v. Power Washers of North America*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (holding, as a question of first impression for the circuit, that an author may sue once the Copyright Office has received her application).

¹¹ See *supra* note 8; *KELLER, supra* note 4, at § 5:3.1 (noting courts have split on whether filing application for registration is enough to confer jurisdiction).

¹² See *infra* note 120; *Oyster Software Inc. v. Forms Processing Inc.*, No. C-00-0724(JCS), 2001 U.S. Dist. LEXIS 22520, *32–33 (Dec. 6, 2001) (allowing amendment of complaint to allege that copyright had been registered).

¹³ See *infra* note 110–14; see also Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 131 (2005) (noting courts must often remind litigants that changes made by the Berne Convention are “meant to be taken seriously”); *Crews, supra* note 2, at 571–72 (noting formalities are “heretical” in the Berne era).

¹⁴ See *infra* note 123; see also MATTHEW BENDER & CO., 2-USA INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 5 [3] [a] (2004) (noting registration requirements as prerequisite to bringing infringement actions applies only to U.S. authors).

¹⁵ 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

application approach.¹⁶ In dismissing a large portion of the case for lack of subject matter jurisdiction, the court employed a plain language approach to the statute and held that “§ 411(a) gives those who have applied and obtained registration and those who have applied and failed to obtain registration the right to file suit in federal court.”¹⁷ The Ninth Circuit Court of Appeals has not yet ruled on the issue, leaving the courts in that district to parse together rationales from the deeply divided district and circuit courts around the country.¹⁸

This Comment criticizes the reasoning and outcome of the District Court in light of its effects on American copyright applicants, the judicial system and the internationalization of Copyright Law. The court’s conclusion that litigants are not conferred with federal subject matter jurisdiction for copyright infringement claims is flawed in three crucial respects. First, it is based on an erroneous plain language reading of § 411 of the Copyright Act. Second, it fails to take into account all of the relevant satellite sections that bear on the issue of registration. And third, it inaccurately concludes that the statutory language is unambiguous, thereby ignoring pertinent extrinsic statutory construction tools. Part I of this Comment examines the reasoning the District Court employed in reaching its decision. Part II exposes the defects in the court’s approach in its failure to properly apply well-established methods of statutory analyses. Finally, Part III raises concerns with the overly strict United States registration requirements when viewed against the international background of Copyright Law.

¹⁶ See *id.* at 1111–14 (holding that 17 U.S.C. § 411(a) preserves right to file suit in federal court only for those who have applied and have either been granted or denied certificate of registration).

¹⁷ *Id.* at 1113 (holding that all other parties are dismissed for lack of subject matter jurisdiction).

¹⁸ See *Loree Rodkin Management Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1054–57 (C.D. Cal. 2004) (relying on various circuits to hold that “registration” refers to issuance of certificate); *Zito v. Steeplechase Films*, 267 F. Supp. 2d 1022, 1025 (N.D. Cal. 2003) (citing three circuits, in addition to Ninth Circuit precedent, to conclude that plaintiff can cure a jurisdictional defect with amended complaint upon registration); *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491(EDL), 2002 WL 1906620, *2–4 (N.D. Cal. Aug. 19, 2002) (relying, primarily, on Ninth Circuit precedent to hold that certificate is a prerequisite).

I. THE DISTRICT COURT'S DECISION

A. *Statement of the Facts*

Corbis Corporation is in the business of representing and distributing photographers' works, and is paid a fee for licensing those photographs.¹⁹ In addition to licensing art images, Corbis enters into contracts for photographs of celebrities.²⁰ Amazon is a corporation engaged in the electronic commerce industry.²¹ In addition to operating the IMDb.com website (an informative database concerning actors, movies and the entertainment industry),²² Amazon also maintains the Amazon.com website which not only sells its own products, but also hosts third-party vendors ("zShops") who showcase additional products.²³ Corbis alleged that it held copyright interests in two photographs that Amazon placed on its website IMDb.com, and in 230 additional images that were allegedly copied, displayed, and sold by zShops vendors through the Amazon.com website.²⁴ The parties stipulated that some of the images that Corbis claimed had been infringed were submitted to the Copyright Office, but had not yet received a certificate of registration by the Register of Copyrights.²⁵ Amazon contended that, per § 411(a), the court had subject matter jurisdiction with regard only to those images which had been approved for copyright registration.²⁶

B. *The District Court's Opinion*

The District Court first summarized the two sides on the contested issue and inventoried the District and Circuit Courts

¹⁹ See *Corbis*, 351 F. Supp. 2d at 1096–97 (discussing corporation's practice).

²⁰ See *id.* (reviewing Corbis corporation's contracts).

²¹ See *Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090, 1094–96 (W.D. Wash. 2004) (discussing Amazon's various internet platforms).

²² See <http://www.imdb.com/> (last visited October 24, 2005).

²³ See *Corbis*, 351 F. Supp. 2d at 1094 (discussing how zShops "listings" are operated); see also <http://www.amazon.com/> (last visited October 10, 2005).

²⁴ See *Corbis*, 351 F. Supp. 2d at 1093 (noting that Corbis provided both Amazon and vendors with notice of infringement when it filed suit).

²⁵ *Id.* at 1111 (noting Amazon agrees that subject matter jurisdiction is conferred for those images that have been granted copyright registration).

²⁶ *Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (discussing Amazon's argument that jurisdiction must be denied to those images for which registration is still pending).

which have fallen on either side of the divide.²⁷ In the absence of Ninth Circuit precedent on the effectiveness of copyright registration upon the filing of the application, and faced with an intra-circuit split on the issue,²⁸ the District Court agreed with those courts that hold the issuance, or denial, of a certificate of registration an absolute prerequisite to federal subject matter jurisdiction.²⁹

The District Court assembled an opinion based on an analysis of only a few of the relevant statutory sections regarding “registration” in the Copyright Act, and similar interpretations in both the Ninth and Second Circuit courts.³⁰ The court relied, primarily, on a strict “plain meaning” construction of 17 U.S.C. § 410(a)³¹ and § 411(a).³² § 411(a) states, in relevant part, that jurisdiction is not conferred “until registration of the copyright claim has been made in accordance with [the Copyright Act].”³³ § 410(a), according to the court, elucidates that a claim must be approved by the Register of Copyrights before it is “registered” to grant jurisdiction.³⁴ § 411(a) provides an important exception such that those applicants who have been *denied* registration are

²⁷ *Id.* at 1111–12 (referencing, primarily, other Ninth Circuit decisions).

²⁸ For Ninth Circuit courts which have held that a potential infringement plaintiff need only prove payment of the application fee, deposit of the work in question, and receipt by the Copyright Office of the application, see *Gable-Leigh, Inc. v. North American Miss*, No. CV 01-01019 MMM(SHX), 2001 WL 521695, *4 (C.D. Cal. April 13, 2001) and *Dielsi v. Falk*, 916 F. Supp. 985, 993–94 (C.D. Cal. 1996). But for Ninth Circuit courts holding that a certificate of copyright registration from the Copyright Office is a prerequisite to bringing a copyright infringement claim, see *Oyster Software, Inc. v. Forms Processing, Inc.*, No. C-00-0724(JCS), 2001 WL 1736382, *10–11 (N.D. Cal. Dec. 6, 2001) and *Ryan v. Carl Corp*, No. C 97-3873(FMS), 1998 WL 320817, *2–3 (N.D. Cal. July 15, 1998).

²⁹ See *Corbis*, 351 F. Supp. 2d at 1112–13 (dismissing copyright claims related to non-registered images for lack of subject matter jurisdiction).

³⁰ See *id.* at 1112 (acknowledging that the Court agrees with “the second group of decisions”).

³¹ [w]hen, 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 under the seal of the Copyright Office. For the *Corbis* court’s reasoning that the “plain meaning” of the language dictates that the register’s approval triggers “registration.”

³² 17 U.S.C. § 410(a) (2005); see *Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090, 1112 (W.D. Wash. 2004).

³³ 17 U.S.C. § 411(a) (2005) (codifying regulations for “Registration and infringement actions”); see *Corbis*, 351 F. Supp.2d at 1112 (reasoning that court will not insert language into section that is not there).

³⁴ 17 U.S.C. § 411(a) (indicating exceptions to general rule for categories under § 411(b)).

³⁴ See *Corbis*, 351 F. Supp. 2d at 1112 (citing to § 410(a)).

also entitled to institute an action in federal court.³⁵ Utilizing a plain meaning approach to interpreting the two statutory sections, the court found, therefore, that only the Register's approval or denial can trigger a court's jurisdiction.³⁶ The court found the language to exact this result because the effect of § 411(a) is to confer the right to sue on specific parties (those who have obtained a certificate of registration and those who have been denied registration), therefore necessarily excluding all others.³⁷

The court also relied, in part, on the persuasive authority of other district courts, in both the Ninth and Second Circuits, which have likewise found issuance of the registration certificate to be a prerequisite to federal subject matter jurisdiction.³⁸ Though the court glossed over these cases, and did not review their analyses in any detail, these courts essentially reasoned, similar to the District Court here, that the plain reading of the statutory language mandates the stated result.³⁹

³⁵ [i]n any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

17 U.S.C. § 411(a); *see also* *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71, 77 n.10 (D.R.I. 2003) (reiterating wording of statute); *Dielsi v. Falk*, 916 F. Supp. 985, 994 n.6 (C.D. Cal. 1996) (noting plaintiff can bring infringement claim once the Copyright Office receives his application); *Gable-Leigh, Inc. v. North American Miss*, No. CV 01-01019 MMM(SHX), 2001 WL 521695, *4 (C.D. Cal. April 13, 2001) (stating evidence that Copyright Office received a registration application satisfies jurisdictional requirement, even if application is denied).

³⁶ *See Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090, 1112 (W.D. Wash. 2004) (asserting to hold otherwise would require Court to "overstep its interpretive bounds").

³⁷ *See id.* at 1112–13 (reasoning where a statute designates particular parties, it is not appropriate to presume non-exclusivity); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6–7 (2000) (stating when a statute names parties who are empowered to act, only those parties may act).

³⁸ *See Corbis*, 351 F. Supp. 2d at 1112 (listing courts with similar holdings); *see also* *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1055 (C.D. Cal. 2004) (rejecting registration-on-application approach); *Corbis Corp. v. UGO Networks, Inc.*, 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004) (requiring issuance of a certificate); *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284 (E.D.N.Y. 2002) (holding certification a jurisdictional prerequisite); *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 169 (S.D.N.Y. 2001) (concluding that registration occurs upon conveyance of certificate).

³⁹ *See Corbis*, 351 F. Supp. 2d at 1112 (reasoning that "review of the plain language of the Copyright Act supports this conclusion"); *see also* *Loree Rodkin*, 315 F. Supp. 2d at 1055 (stating "plain language unambiguously" requires issuance of a certificate); *UGO Networks*, 322 F. Supp. 2d at 522 n.1 (reasoning courts that find to the contrary ignore statute's plain language).

II. FLAWS IN THE COURT'S STATUTORY ANALYSIS OF § 411(A) OF THE COPYRIGHT ACT

A. *Erroneous Application of Statutory Analysis*

The Corbis court's examination, at the first, fails to adhere to the well-established canons of statutory analysis and the step-by-step procedure promulgated by the United States Supreme Court over the years. The time-honored primary step in ascertaining statutory meaning is to look at the words of the statute and to enforce the common meaning of the language.⁴⁰ If the language is unambiguous, the analysis is complete and the inquiry need not progress further.⁴¹ As dictated by the Supreme Court, the ambiguous nature of the statutory language is established through "reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole."⁴² Some judges, like Justice Scalia, would "consider the text, the whole text, and nothing but the text. Period."⁴³ Others agree, however, that if the language is ambiguous, the court should look beyond the statutory language to the legislative history for additional guidance.⁴⁴ Finally, if the legislative history does not clearly illuminate Congressional intent, courts are free to employ traditional principles of statutory construction.⁴⁵

⁴⁰ See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (discussing search for plain meaning); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (reaffirming first step in analysis); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (noting if language is plain, the court's sole function is to enforce it as such).

⁴¹ See *Barnhart*, 534 U.S. at 450 (discussing that inquiry ends with a "coherent" statutory scheme); *Robinson*, 519 U.S. at 340 (citing criteria for cessation of the inquiry); Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 229-30 (2004) (reviewing assumption that absent contrary legislative intent, plain language must be viewed as conclusive).

⁴² *Robinson*, 519 U.S. at 341 (reiterating principle firmly established by prior Supreme Court decisions).

⁴³ William N. Eskridge, Jr., *Textualism, the Unknown Ideal? A Matter of Interpretation: Federal Courts and the Law*, 96 MICH. L. REV. 1509, 1514 (1998) (reviewing Justice Scalia's rendering of plain language rule); see Goodman, *supra* note 41, at 235-36 (discussing Justice Scalia's "textualist" approach).

⁴⁴ See *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (noting reference to legislative history is unnecessary where language is plain); *Church of The Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (discussing that considerations surrounding a statute's enactment can be a relevant inquiry); *Adams v. Dole*, 927 F.2d 771, 774 (4th Cir. 1991) (explaining that legislative history perusal follows plain language analysis).

⁴⁵ See *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (noting that construction principles must yield to clear legislative intent);

B. Flawed Reading of the Statute's Plain Language

The Corbis court admittedly anchored its overall conclusions solely upon the first step: a “plain language” analysis of select satellite sections of the Copyright Act.⁴⁶ A review of other courts’ analyses clearly indicates that the language can be read in various ways and is, therefore, “ambiguous.” Yet even if the statutory interpretation did cease with the plain language of the statute, the reading of the Corbis court is not as competent, or thorough, as those of other courts. § 411(a) states, in relevant part, that any action based on copyright infringement lacks subject matter jurisdiction until such time as “registration of the copyright claim has been made in accordance with this title.”⁴⁷ As discussed above, the court construed this language, in conjunction with a neighboring section, to determine that “registration” is complete, and subject matter jurisdiction granted, only to those who have received a final determination on their application from the Copyright Office.⁴⁸ However, despite acknowledging the array of authorities that have provided a contrary assessment of the relevant sections,⁴⁹ the court confined its analysis to a stifflingly narrow, and ultimately fatal, reading. In so doing, the court failed to account for more logical plain meaning interpretations which support the “registration-on-application” approach, as illustrated below.

The court’s analysis commenced with a straightforward recitation of § 410(a) which states in full:

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject

Neuberger v. Comm’r. of Internal Revenue, 311 U.S. 83, 88 (1940) (expressing that maxims can never override clear Congressional intent); *Adams*, 927 F.2d at 774 (noting final step in analysis).

⁴⁶ See *Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090, 1112 (W.D. Wash. 2004) (noting “plain language” review of the Copyright Act supports its final conclusion).

⁴⁷ [e]xcept for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title.

17 U.S.C. § 411(a) (2005).

⁴⁸ See *Corbis*, 351 F. Supp. 2d at 1112 (holding only those who have applied and obtained registration and those who have applied and failed to obtain registration have right to sue in federal court).

⁴⁹ See *id.* at 1111 (acknowledging courts and leading treatise that have promoted “application-on-registration” approach).

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.⁵⁰

The court acknowledged that the registration process is commenced with the submission of a claim. However, the court spent negligible time reviewing its analysis of this particular section, and purporting to rely upon a plain meaning approach, concluded that the Register's examination and approval necessarily antedate the registration of a claim.⁵¹

Courts from other jurisdictions, however, have declined to adopt this particular construction, and have alternatively opted for a different, though equally straightforward, plain language approach. These courts read this section to apply merely to the formalities for *issuance* of a registration *certificate*, and not to the requirements for obtaining subject matter jurisdiction.⁵² In *Iconbazaar v. America Online, Inc.*,⁵³ the court reasoned that the language could just as easily support the "issuance of certificate" reading, and therefore refused to rely solely on the plain language to ascertain Congressional intent.⁵⁴ This latter interpretation seems most plausible given the title of § 410: "Registration of claim and issuance of certificate."⁵⁵ Moreover, the legislative history of § 410, as discussed in the House Report, noted that subsection (a) is intended to set forth basic duties of the Register with respect to registration; it does not even *intimate* a link to federal jurisdiction prerequisites.⁵⁶

The second and, tellingly, final section of Title 17 analyzed by the Corbis court was repeatedly referred to as "§ 412(a)," which

⁵⁰ 17 U.S.C. § 410(a) (2005).

⁵¹ See *Corbis*, 351 F. Supp. 2d at 1112 (discussing § 410(a) as precluding registration in absence of examination and approval).

⁵² See *Iconbazaar, L.L.C. v. American Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (noting various ways section can and has been read); see also *Ryan v. Carl Corp.*, No. C 97-3873(FMS), 1998 U.S. Dist. Lexis 9012 at *5 (N.D. Cal. July 15, 1998) (asserting "[a] close reading of the Act indicates that registration does not occur until after the Copyright Office issues a certificate of registration").

⁵³ 308 F. Supp. 2d 630 (M.D.N.C. 2004).

⁵⁴ See *Iconbazaar*, 308 F. Supp. 2d at 634. It is important to note that the court, like many other courts which rule on this issue, did not provide a detailed rationale for reaching this conclusion. For a general discussion of the various ways the registration provisions can be read see *Iconbazaar*, 308 F. Supp. 2d at 633-34.

⁵⁵ 17 U.S.C. § 410 (2005).

⁵⁶ See H.R. Rep. No. 94-1476 (1976) (discussing revision to § 410 and purpose of each subsection).

was cited as providing an important exception to the rules of registration.⁵⁷ It is significant to note that the court was mistaken in its designation; the section it intended to reference was merely the second sentence of § 411(a). In pertinent part, § 411(a) instructs that “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,” (emphasis added).⁵⁸ Employing the logic of the legal maxim *expressio unius est exclusio alterius*, the Corbis court read this sentence of § 411(a), in combination with § 410(a), to parse out a specific group which may invoke federal jurisdiction (to wit, those who have received a final determination).⁵⁹ Thus, in the court’s view, by implication, all others (i.e., those whose registrations are currently pending or those who have not registered at all) are excluded.⁶⁰

Firstly, as noted above, with regards to the chronological steps of statutory interpretation, the court should not have applied the logic of a legal maxim if it were truly ceasing its analysis upon the primary “plain language” step. The court repeatedly avowed that the inquiry was determined by the clarity of the plain language.⁶¹ More importantly, numerous courts prefer an undeniably more logical, and straightforward, application of this exception; they reason that this section necessarily indicates that parties who *apply* for registration, regardless of the Register’s “later decision,”⁶² are conferred with the standing to bring suit.⁶³

⁵⁷ See *Corbis Corp. v. Amazon.Com, Inc.*, 351 F. Supp. 2d 1090, 1112 (W.D. Wash. 2004) (discussing courts’ reliance on this “important exception” to reach “application-on-registration” conclusion).

⁵⁸ 17 U.S.C. § 411(a) (2005); see also *Corbis*, 351 F. Supp. 2d at 1112. (noting exception to reach “application-on-registration” conclusion).

⁵⁹ See *Corbis*, 351 F. Supp. 2d at 1112 (noting that “final determination” reading is the most straightforward way to read § 411(a), taking all noted sections in consideration).

⁶⁰ See *id.* at 1112–13 (reasoning that totality of § 411(a) essentially names those groups who may invoke jurisdiction).

⁶¹ See *id.* (stating court’s conclusion is supported by statute’s plain language).

⁶² 17 U.S.C. § 408(a) (2005) (specifying “the owner of a copyright . . . may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section”); H.R. Rep. No. 94-1476 (1976) (commenting that “[s]uch registration is not a condition of copyright protection”).

⁶³ See *Eltra Corp. v. Ringer*, 579 F.2d 294, 296 (4th Cir. 1978) (noting suit for infringement can be brought so long as Register is notified of litigation); see also *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71, 77 (D.R.I. 2003) (stating submission of application, deposit, and fee triggers registration for purposes of standing); *Dielsi v. Falk*, 916 F. Supp. 985, 994 (C.D. Cal. 1996) (discussing similarity of jurisdictional outcome regardless of

These courts reason that because the language confers litigants with standing regardless of the Register's decision, the application alone is sufficient to confer standing.

This reading is likewise vehemently supported by the leading treatise on Copyright, Nimmer, which proffers that “[b]y virtue of that language, 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.”⁶⁴ Nimmer reasons that this is the “better point of view” because the applicant, at the time she has submitted the application, can take no further steps and will eventually be able to proceed regardless of the final determination of her application.⁶⁵ Hence, in his learned view, it is merely the “application for registration” that is a pre-condition to the grant of federal standing.⁶⁶

C. *Failure to Consider the Copyright Act in its Entirety*

1. Neglect in Analyzing All Relevant Contexts in Which the Language is Used

As discussed, the court purported to rely upon a strict statutorily-based examination in order to reach its conclusion on the requisite timing of “registration.”⁶⁷ The court was willing, as indicated above, to look at both § 410 and § 411 to ascertain Congressional intent. Its second chief flaw, however, was failing to incorporate *all* of the relevant Title 17 “registration” sections into its analysis, once it conceded to look beyond just one. As previously outlined, the methods of determining statutory “ambiguity” are grounded not only in the language itself, but also

whether application is granted or denied); *Gable-Leigh, Inc. v. North Am. Miss*, No. CV 01-01019 MMM(SHX), 2001 U.S. Dist. LEXIS 25614, at *13 (C.D. Cal. April 9, 2001) (citing *Dielsi* court).

⁶⁴ NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][a][i], at 18–20 (supporting proposition that party who seeks to register may proceed to litigate claim, regardless of whether Copyright Office has made final determination).

⁶⁵ *Id.* at 23–29 (adding that allowing suits to proceed without “final determination” is better point of view because it comports with statutory structure).

⁶⁶ *Id.* at 18–29 (proposing “application for registration” is requirement for federal standing).

⁶⁷ See *Corbis*, 351 F. Supp. 2d at 1112 (noting court will not expand statutory language).

in the specific context in which the language is used.⁶⁸ Courts that champion the registration-on-application approach have relied on other relevant satellite sections of the Copyright Act, and the way in which they shed an informative light on § 411(a).

In the first instance, § 408(a), which deals with “copyright registration in general,” states that “the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified.”⁶⁹ It further states, as is supported by the subsequent historical congressional notation, that “[s]uch registration is not a condition of copyright protection.”⁷⁰ The Corbis court neglected to even acknowledge this section, let alone accede to any particular reading of it, perhaps finding it outside the scope of relevancy. A number of courts have interpreted this section to indicate that injunctive, rather than legal, relief is available in the absence of a certificate of registration.⁷¹ This approach is sound given the discussion, *infra*, on the historical progression of copyright registration. Other courts, however, have taken a broader stance, and regarded the section as determinative support for the registration-on-application approach.⁷² Proponents of this reading posture, without detailed examination, that, at a minimum, this section renders § 411 more problematic, if it does not completely contradict it.⁷³

⁶⁸ See *Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004) (noting “fundamental canon” of statutory construction that words of statute must be read in context of statutory scheme as a whole); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (elaborating on notion of looking at spirit of statute in accordance with intention of statute’s drafters).

⁶⁹ 14 U.S.C. § 408(a) (2005).

⁷⁰ 14 U.S.C. § 408(a) (2005); H.R. Rep. No. 94-1476 (1976).

⁷¹ See *Olan Mills Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (holding that injunctive relief is not limited to registered copyrights); see also *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71, 76 (D.R.I. 2003) (discussing support for registration-on-application approach).

⁷² See *Iconbazaar, L.L.C. v. American Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (noting section’s support for registration-on-application approach). But see *Corbis Corp. v. UGO Networks Inc.*, 322 F. Supp. 2d 520, 522 (S.D.N.Y. 2004) (stating that “may” indicates application is preliminary, and any other reading would require replacing “may” with “shall”).

⁷³ See *UGO Networks*, 322 F. Supp. 2d at 522 (discussing plaintiff’s reliance on § 408(a)); see also *Morgan, Inc. v. White Rock Distilleries, Inc.*, 230 F. Supp. 2d 104, 107 (D. Me. 2002) (demonstrating copyright registration is “jurisdictional prerequisite” to copyright holder’s right to enforce that copyright in federal court).

Last, but certainly not least, § 410(d) of the Copyright Act similarly escaped the Corbis court's review. This section 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 of Copyrights . . . to be acceptable for registration, have all been received in the Copyright Office."⁷⁴ Numerous courts understand this section to reveal that registration is in fact *complete* upon submission of an application, i.e., when the Office has received all of the application materials.⁷⁵ The advocates of this position defend their interpretation on the ground that the statute mandates that the merits of the application are "later determined" at some point after the right to bring suit is conferred.⁷⁶ It is worth noting, although the argument was not raised by the Corbis court, that several courts which support the "final determination" approach merely read this section to suggest that *if* the application is approved, the registration will be "backdated" to the date the application was received.⁷⁷ However, this approach, ironically, runs contrary to the plain language of the provision, the step preferred by the Corbis court, which indicates that "registration occurs *on the day* the Copyright Office receives all of the necessary application materials."⁷⁸

2. Disregard of the Broader Statutory Scheme

As previously asserted, the Supreme Court dictates that a court must attempt to clarify the "ambiguity" of the statutory language not just through the language of the statute, but through the specific contexts in which the language is used, and,

⁷⁴ 17 U.S.C. § 410(d) (2005) (emphasis added).

⁷⁵ See *Iconbazaar*, 308 F. Supp. 2d at 634 (holding copyright registration is effective on day in which application, deposit, and fee have all been received); see also *Foraste*, 248 F. Supp. 2d at 77 (noting effective date of copyright registration is day on which application, deposit, and fee have been received by Copyright Office); *International Kitchen Exhaust Cleaning Ass'n v. Power Washers of North America*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (discussing day in which application materials are received by Copyright Office constitutes effective date of copyright registration).

⁷⁶ See *Foraste*, 248 F. Supp. 2d at 77 (discussing why section most aptly supports registration-on-application).

⁷⁷ See *Brush Creek Media Inc. v. Boujaklian*, No. C-02-3491(EDL), 2002 WL 1906620, *3 (N.D. Cal. Aug. 19, 2002) (discussing argument that Copyright Office must register after examination); see also *Ryan v. Carl Corp.*, No. C 97-3873(FMS), 1998 WL 320817, *2 (N.D. Cal. July 15, 1998) (holding section does not indicate that an application is considered registered while it is pending).

⁷⁸ *Foraste*, 248 F. Supp. 2d at 77.

finally, through the broader context of the statute as a whole.⁷⁹ In addition to its failure to analyze all of the relevant “registration” sections, the court also fell short of a thorough analysis when it chose not to review the overall statutory purpose and scheme of the Copyright Act. The overall statutory design, and the purposes governing registration requirements, pointedly supports the registration-on-application approach.⁸⁰

Firstly, 17 U.S.C. § 507(b) provides for a three-year statute of limitations for copyright infringement actions.⁸¹ Because the process of “evaluating a copyright application could be a lengthy one,” it is illogical to permit the infringing use to “continue unchallenged if the owner is not allowed to begin suit.”⁸² Furthermore, endorsing such a delay in copyright protection is against the Copyright Office’s own example: in reaction to the Anthrax scare of 2001-2002, during which the postal service experienced understandable delays, the Copyright Office adopted regulations requiring, in periods of postal service interruption, “backdating the date of receipt of applications to the date on which they otherwise would have been received.”⁸³

Secondly, in reviewing the historical progression of the registration requirements in the United States, Nimmer explains that the amendments to the Copyright Act have been crafted so as to preserve the ultimate benefits of registration: useful public records (specifically to give notice to those who search for current registrations), and to “ensure an efficient acquisition program for

⁷⁹ See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (stating interpretation method firmly established by prior Supreme Court decisions); see also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 13 (1981) (explaining courts first look to statutory language, then proceed to review legislative history and other statutory aids to determine congressional intent); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (elaborating on notion of spirit of statute in accordance with intention of statute’s drafters); *Adams v. Dole*, 927 F.2d 771, 774 (4th Cir. 1991) (outlining interpretive progression taken by court when there is issue of statutory construction and/or ambiguity).

⁸⁰ See *Iconbazaar, L.L.C. v. American Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (noting support from overall statutory scheme simply buttresses already adequate direct statutory support); see also *Secure Services Tech., Inc. v. Time & Space Processing, Inc.*, 722 F. Supp. 1354, 1364 (E.D. Va. 1989) (positing any other approach would leave plaintiff “in legal limbo” while Copyright Office processed applications).

⁸¹ 17 U.S.C. § 507(b) (2005) (stating “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued”).

⁸² *Iconbazaar*, 308 F. Supp. 2d at 634 (discussing how § 507(b) supports registration-on-application approach).

⁸³ *Id.* at 634 n.4 (noting Copyright Office’s sensitivity to length of application process).

the Library of Congress.”⁸⁴ Additionally, one of the central objectives of the Copyright Act is to protect “any original work of authorship.”⁸⁵ One cannot legitimately posit that any of these registration functions, or the aim of copyright protection generally, is furthered by barring court access to litigants because the party has not yet received the certificate, or denial, in hand. Quite to the contrary, as protection of authors is a central tenet of Copyright Law, the courts should construe the statute to further that aim.⁸⁶

D. Deficiencies in Application of Outside Interpretive Tools

As repeatedly referenced, the Corbis court was content to cease its analysis upon what it considered to be an unambiguous “plain reading” of the explicit statutory language. As is commonly held, a court is required to look beyond the plain language of the statute to other principles of construction if the statute is at all ambiguous as to Congressional intent.⁸⁷ Because the relevant provisions here can, and have been, read in more than one way, an examination of legislative history and public policy rationales are necessary subsequent steps in ascertaining Congressional intent.⁸⁸ The Corbis court failed to account for either of these readily accessible external sources in its final analysis.

⁸⁴ NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][c], at 33–35 and § 7.16[H], at 1–5.

⁸⁵ *Walton v. General Services Admin.*, No. 02-3272-CM, 2004 U.S. Dist. LEXIS 7900, *1 (D. Kan. Jan. 15, 2004); Randy S. Kravis, Comment, *Does A Song By Any Other Name Still Sound As Sweet?: Digital Sampling And Its Copyright Implications*, 43 AM. U.L. REV. 231, 240 (1993) (citing purpose of 1976 Copyright Act).

⁸⁶ *See State v. Keawe*, 108 P.3d 304, 307 (Haw. 2005) (reviewing established rules of statutory construction); *see also Hayden Lake Fire Prot. Dist. v. Alcorn*, 111 P.3d 73, 84 (Idaho 2005) (noting that public policy behind statute is important tool); *State v. Schwartz*, 79 P.3d 719, 721 (Idaho 2003) (highlighting importance of not only literal words but also public policy behind statute when determining legislative intent).

⁸⁷ *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (noting reference to legislative history is unnecessary where language is plain); *see also Adams v. Dole*, 927 F.2d 771, 774 (4th Cir. 1991) (explaining that legislative history perusal follows plain language analysis).

⁸⁸ *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (stating if statute is ambiguous, i.e., subject to more than one interpretation, its meaning should be determined from context in which it exists); *see also Iconbazaar, L.L.C. v. American Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004) (explaining when court must look beyond statutory language); *Lopez v. State*, 30 P.3d 952, 957 (Idaho 2001) (explaining reasonableness of proposed interpretations is a factor in determining ambiguity of a statute).

1. Legislative History as Support for the Registration-on-Application Approach

The canons of statutory interpretation make clear that an examination of legislative history is imperative if Congressional intent is not apparent from the statutory language; and only after reviewing the history can we resort to other tools of construction.⁸⁹ In the case of copyright registrations, an analysis of legislative history makes clear that Congress has, over the years, made significant attempts to provide greater protection to “authors” and to loosen the procedural restraints in securing that protection. While copyright registration was once required as a precondition to securing any protection for a work, Congress eradicated the requirement with the first revision of the Copyright Act in 1802.⁹⁰ (It is clear that a failure to register is not fatal to the applicant’s *substantive* interest in the copyright, as courts have almost unanimously held that failure to obtain a registration certificate does not bar a claim for *equitable* relief.)⁹¹ Moreover, in a later attempt to relax the stringent registration standards, Congress, in 1989, eliminated the 1909 Act’s provision which required notice on published works as a prerequisite to protection.⁹² Further, failure to obtain approval from the Register was fatal to an applicant under the 1909 Act, whereas

⁸⁹ See *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (noting order of statutory interpretative steps); see also *Stupy v. United States Postal Serv.*, 951 F.2d 1079, 1081 (9th Cir. 1991) (discussing that search for legislative intent begins with language, followed by historical analysis); *Adams*, 927 F.2d at 774 (4th Cir. 1991) (explaining analysis of legislative history precedes use of tools of statutory construction).

⁹⁰ See John Presper, *Copyright Restoration Under § 104A: Rethinking Copyright Law’s First Amendment Immunity*, 18 CONN. J. INT’L L. 431, 434 (2002) (stating although registration requirements were made more stringent in 1802, publication requirement of registration was eliminated in 1831); see also Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 493 (2004) (noting while 1909 Act retained many 1831 Act registration requirements, it “softened” them); Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565, 568 (1995) (asserting 1972 Act’s purpose was to eliminate formalities in copyright law and it eliminated “the need to register as a condition to the validity of a copyright”).

⁹¹ See *Olan Mills Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (reiterating that injunctive relief is not bound by registration); see also *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984) (noting statute does not impose a registration requirement for injunctive relief); *Foraste v. Brown Univ.*, 248 F.Supp.2d 71, 77 (D.R.I. 2003) (citing numerous cases which held equitable interests as not tied to registration).

⁹² See *Crews*, *supra* note 2, at 571 (noting notice was required on published works prior to 1989); see also NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[A][2][b] at 1–5 (discussing how pre-1978 works obtained copyright protection).

the current Act permits “a court of competent jurisdiction to hold that the refusal of the copyright Office to issue such a certificate was erroneous,”⁹³ greatly expanding the potential arena for protection.

Finally, direct reference to the language of House Report 1476, and the manner in which Congress itself used the term “registration,” provides further support for the registration-on-application approach. While it can be argued that Congress used the term “registration” to apply to the *certificate* granted or denied after an applicant’s *application*, this is not the most accurate reading. House Report 1476, in discussing § 411(a), indicates that one who has “sought registration and has been refused” and, in other language, “a rejected claimant who has properly applied for registration,” may bring suit for infringement.⁹⁴ However, this is neither the most common nor illuminating use of the phrase “registration” in the House Report.

More often, the House Report refers to registration as an act performed by the copyright owner. In reference to section § 411(a), prior to the previous quotation, the Report indicates that the owner can have a cause of action though he “has not registered his claim,” but that he cannot enforce his right in court until “he has made registration.”⁹⁵ Further, in discussing § 408 (“Copyright registration in general”), the House Report indicates that under section (a), registration “can be *made voluntarily* by ‘the owner of copyright’ at any time during the copyright term.”⁹⁶ As discussed, *supra*, this section proceeds to state that the claim “may be registered” through deposit of the copies, application and fee.⁹⁷ Finally, in reference to § 412 (“Registration as prerequisite to certain remedies for infringement”), the House Report discusses that statutory remedies should not be provided to an

⁹³ NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 716[B][1][b][i] at 1–9 (discussing historical progression of registration requirements); see Arthur Levine, *The End of Formalities: No More Second-Class Copyright Owners*, 13 CARDOZO ARTS & ENT. L.J. 553 (1993) (arguing “[t]he history of copyright law in the United States reflects the gradual elimination of formalities”).

⁹⁴ H.R. REP. NO. 94–1476, at 157 (1976) (discussing second and third sentence of § 411(a)).

⁹⁵ H.R. REP. NO. 94–1476, at 157 (describing registration as prerequisite to federal subject matter jurisdiction).

⁹⁶ H.R. REP. NO. 94–1476, at 152 (discussing “permissive registration”) (emphasis added).

⁹⁷ See *supra*, note 69.

owner for infringement unless she has “by registration, made a public record of his copyright claim.”⁹⁸ Yet, because we know, per § 411(a) that this “public record” is made regardless of the Register’s final determination, the language persuasively indicates that the certificate merely acts as a *receipt* for the registration which occurs upon “application.”

2. Public Policy as an Extrinsic Interpretive Aid

Yet another extrinsic tool available to help courts discern Congressional intent is the “reasonableness” of the proposed construction.⁹⁹ As summarized by the U.S. Supreme Court, “nothing is better settled than that statutes should receive a sensible construction . . . so as to avoid an unjust or an absurd conclusion.”¹⁰⁰ Moreover, even “[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words.”¹⁰¹ Nevertheless, the courts which hold that issuance of the registration certificate is a jurisdictional prerequisite habitually concede that such an application “leads to an inefficient and peculiar result.”¹⁰² Alternatively, courts that champion the registration-on-application route typically conclude that such a result “best effectuates the interests of justice and [the promotion

⁹⁸ H.R. REP. NO. 94-1476, at 158 (explaining differences in common law protection versus “extraordinary” remedies of statutory damages and attorney’s fees).

⁹⁹ See *Smith v. Baltimore & O.R. Co.*, 48 F.2d 861, 866 (W.D. Pa. 1931) (stating fundamental rule that effects and consequences of construction should be considered); see also *Hayden Lake Fire Prot. Dist. v. Alcon*, 111 P.3d 73, 83 (Idaho 2005) (discussing steps to take when statutory language is ambiguous); *State v. Schwartz*, 79 P.3d 719, 721 (Idaho 2003) (noting that “reasonableness” must be considered when determining intent).

¹⁰⁰ *In re Chapman*, 166 U.S. 661, 667 (1897) (relying on construction which allowed for sensible outcome); see *Church of The Holy Trinity v. United States*, 143 U.S. 457, 461 (1892) (asserting that proposed construction would lead to absurd result); *Herold v. Blair*, 158 F. 804, 806 (3rd Cir. 1908) (rejecting approach that would demonstrate unreasonable congressional intent).

¹⁰¹ *Holy Trinity*, 143 U.S. at 460 (discussing that plain language must be read in light of object of act); see *Carolene Products Co. v. Mahoney*, 294 F. 902, 903 (Mass. Dist. Ct. 1923) (citing to *Holy Trinity* for proposition that, even where a criminal act requires strict construction, plain language is not controlling where result is inconceivable); *Ozawa v. United States*, 260 U.S. 178, 196 (1922) (noting an obvious absurdity requires exception to general rule of adhering to plain language).

¹⁰² *Ryan v. Carl Corp.*, No. C 97-3873(FMS), 1998 U.S. Dist. LEXIS 9012, 7-8 (N.D. Cal. July 15, 1998) (holding application is only first step towards registration despite inefficient outcome); see *Loree Rodkin Management Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056-57 (C.D. Cal. 2004) (agreeing, reluctantly, with Ryan court); *Strategy Source Inc. v. Lee*, 233 F. Supp. 2d. 1, 3 (D.D.C. 2002) (noting inefficient result is required because Congress’ intent is clear).

of] judicial economy.”¹⁰³ Nimmer himself quoted such language in his treatise on Copyright Law and maintained that this “more common practice” [to allow suits to proceed upon application] is, in the simplest terms, the “better point of view.”¹⁰⁴

III. SWEEPING INTERNATIONAL IMPLICATIONS OF THE COURT'S DECISION

A. *International Influences on Copyright Law Development*

As discussed, Copyright Law is essentially a creature of statutory lineage, its original ancestry sprung from the structure of the Constitution.¹⁰⁵ While overhauling the common law, Congress has developed a comprehensive statutory structure.¹⁰⁶ International Copyright treaties, however, are the source of the most significant developments in recent American Copyright Law.¹⁰⁷ One treaty in particular has sparked significant changes in American law, namely, the Berne Convention.¹⁰⁸ The Berne Convention was “the first multilateral copyright treaty in history,” and though it was at first ratified by only ten European nations in 1886, it “quickly became the foremost means of

¹⁰³ *International Kitchen Exhaust Cleaning Ass'n v. Power Washers of North America*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (endorsing registration-on-application approach).

¹⁰⁴ NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][a][i], at 24–30 (contemplating that registration-on-application is optimal interpretation of § 411 on several fronts).

¹⁰⁵ See NIMMER, CASES AND MATERIALS, *supra* note 1, at 1 (discussing general history of Copyright Law); Rashida Y.V. MacMurray, *Trademarks or Copyrights: Which Intellectual Property Right Affords Its Owner the Greatest Protection of Architectural Ingenuity?*, 3 NW. J. TECH. & INTELL. PROP. 111, 112 (2005) (giving brief overview of Copyright Law).

¹⁰⁶ See 17 U.S.C. § 301(a) (2000) (preempting common-law copyright); Crews, *supra* note 2, at 550 (listing various Congressional enactments which have altered Copyright Law over time).

¹⁰⁷ See Crews, *supra* note 2, at 557 (noting Berne Convention, Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization and WIPO Copyright Treaty); Elaine B. Gin, *International Copyright Law: Beyond the WIPO & TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 764 (2004) (discussing that developed countries seek copyright protection through international harmonization).

¹⁰⁸ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter BCLA]; see also NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 1–6 and [B][1][c], at 12–17 (discussing effects of Berne Convention accession on American Copyright Law); Emio F. Zizza, Note, *Eliminating the Preferential Treatment of Foreign Works Under United States Copyright Law: Possible Impacts of the Copyright Reform Bill of 1993*, 19 SETON HALL LEGIS. J. 681, 690–91 (1995) (examining Berne Convention as catalyst for comprehensive changes of 1976 Act).

international copyright protection.”¹⁰⁹ In anticipation of adhering to the Convention, which eventually occurred in 1989,¹¹⁰ Congress began to relax the traditional American formalities which were prerequisite to copyright protection.¹¹¹ Accordingly, a significant portion of copyright law has been “enacted in furtherance of [global] harmonization.”¹¹²

B. Creating Loopholes for International Harmonization

The Berne Convention specifically cautions that “[t]he enjoyment and the exercise of these [copyright] rights shall not be subject to any formality.”¹¹³ Thus, in order to comport with the relatively laissez-faire procedural system promulgated by the Berne Convention, the sharply divided Congress, pursuant to “an extensive legislative debate,”¹¹⁴ fashioned what Nimmer refers to as “the crucial compromise.”¹¹⁵ In effect, the agreed-upon language of the Berne Convention Implementation Act¹¹⁶ created a registration exception “for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States.”¹¹⁷ Thus, though United States citizens were,

¹⁰⁹ Zizza, *supra* note 108, at 686 (discussing long history of Berne Convention prior to United States accession).

¹¹⁰ See NIMMER, CASES AND MATERIALS, *supra* note 1, at 2 (noting United States joined Berne Convention after having joined Universal Copyright Convention in 1955); NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 1–4 (stating date of “inauguration of the Berne era”).

¹¹¹ See NIMMER, CASES AND MATERIALS, *supra* note 1, at 2 (discussing how Congress “jettisoned” copyright note requirements); Crews, *supra* note 2, at 559 (noting restoration of protection to many foreign works that lacked formalities previously required); Zizza, *supra* note 108, at 691 (stating how 1976 Act eliminated a number of formalities).

¹¹² Crews, *supra* note 2, at 561 (discussing international trend of Copyright Law development).

¹¹³ Berne Convention for the Protection of the Literary and Artistic Works, Sept. 9, 1886, revised, Paris, July 24, 1971, art. 5(2), 15 U.S.T. 1341; see NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 28–34 (discussing that it “strains common sense” to maintain ability to bring an action depends on formality, given Berne’s admonition); Crews, *supra* note 2, at 571–72 (noting formalities are “heretical” in the Berne era).

¹¹⁴ NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 4–16 (discussing primary difference between House and Senate bills regarded mandatory registration as prerequisite to suit for infringement).

¹¹⁵ *Id.* § 7.16[B][1][b][iii], at 33–34 (discussing middle ground reached by Congress was “historic compromise”).

¹¹⁶ See BCIA, *supra* note 108.

¹¹⁷ BCIA, *supra* note 108, § 9 (b)(1)(B); see NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 35–37 (discussing exception to general rule that registration is not prerequisite to copyright protection); Zizza, *supra* note 108, at 701–02 (discussing controversial nature of Congressional compromise).

ironically, disadvantaged in the international copyright marketplace, Congress seemingly circumvented an objection for non-compliance with the anti-formal thrust of the treaty.¹¹⁸

C. Disproportionate Burdens on American Authors in the International Copyright Landscape

Congress, however, stacked an additional weight onto this already heavy burden faced by American authors through the Digital Millennium Copyright Act.¹¹⁹ They reversed the language, such that instead of framing an exemption from registration requirements for those whose origin is not the United States, the section affirmatively provided that only “United States works” must be registered before suit may be instituted.¹²⁰ The motivation was to “exempt from U.S. registration requirements ‘works from members of the two *new* international treaties.’”¹²¹ The unfortunate sweeping effect, however, was to release all others in the world, even those who are not Berne members, nor who enjoy any copyright relations with the United States at all, from registration requirements.¹²² What started as a loophole to join the preeminent international Copyright Treaty, the Berne Convention, has swelled into a state of affairs such that the restrictive requirements place a disproportionately heavier burden on United States citizens than

¹¹⁸ See NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][b][iii], at 41–43 (discussing foreign authors could not argue that United States was setting up roadblocks to protection); Crews, *supra* note 2, at 572 (noting United States registration requirements have not been challenged for “non-compliance with Berne”); Zizza, *supra* note 108, at 700 (analyzing compromises made to reach international uniformity).

¹¹⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA] (enacted to execute WIPO Copyright Treaty).

¹²⁰ DMCA, *supra* note 119, at Title I, § 102(d)(1)-(2) (implementing change in U.S.C. Title 17 § 411(a)); 17 U.S.C. § 411(a) (stating no infringement action for any *United States work* shall be instituted without registration) (emphasis added); see NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][c], at 18–23 (discussing revisions to registration requirements).

¹²¹ For a discussion regarding the internationally-conscious purpose behind the amendment, see NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][c], at 24–25. The two new WIPO (World Intellectual Property Organization) treaties at issue were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. (emphasis added).

¹²² See NIMMER, NIMMER ON COPYRIGHT, *supra* note 3, § 7.16[B][1][c], at 25–33 (reviewing that unprotected foreign authors can claim protection without formalities under new language); NIMMER, CASES AND MATERIALS, *supra* note 1, at 2 (noting that 1998 amendments provide protection to “foreign nationals”).

anyone in the ever-growing global marketplace of copyright protection.

CONCLUSION

Faced with the ever-evolving internationalization of Copyright Law, and the burdensome restrictions on United States authors who are bound by 17 U.S.C. § 411, it behooves the judiciary system to refrain from unnecessarily, and illogically, placing yet another saddle on those American parties seeking to protect their infringed works. While the debate on the effective date of registration continues to simmer in District and Circuit Courts, the issue is unlikely to reach the Supreme Court, as parties are prone to continue to find it more efficient to amend a complaint after their application has been approved or denied, rather than appeal the issue to a higher court.¹²³ However, in the interests of litigant certainty, judicial efficiency, international uniformity and evenhanded protection for authors from the United States, it is critical that Congress intervene and implement the registration-on-application approach into the Copyright Act.

¹²³ See *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 365–66 (5th Cir. 2005) (reviewing courts that find jurisdictional defect cured when application was “processed” after party initiated suit); see also *M.G.B. Homes, Inc. v. American Homes, Inc.*, 903 F.2d 1486, 1488–89 (11th Cir. 1990) (holding irrelevant mere technicality between filing new complaint versus amended complaint); *Zito v. Steeplechase Films*, 267 F. Supp. 2d 1022, 1025 (N.D. Cal. 2003) (holding that jurisdictional defect was cured).

