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Supreme Court Rules Copyright Owners Must Obtain Registration Before Suing

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On March 4, 2019, the Supreme Court held that copyright owners must wait to file an infringement suit until the Copyright Office has registered the work at issue. The decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com LLC et al.*, Case No. 17-571 (2019), resolved a long-standing circuit split on the question of whether copyright owners can bring an infringement suit upon filing an application to register their copyrights or whether they must wait until the registration is actually issued.

Fourth Estate Public Benefit Corp. sued a website called Wall-Street.com, claiming that Wall-Street had reposted Fourth Estate's articles without permission. The district court judge dismissed the case on the grounds that Fourth Estate filed its lawsuit before it had obtained registration of the copyrights for the articles at issue. The Eleventh Circuit affirmed that decision, and Fourth Estate asked the Supreme Court to decide on the issue.

The Copyright Act's registration requirement

Section 411(a) of the Copyright Act requires that a work be "registered" before an infringement lawsuit is filed. Prior to the *Fourth Estate* decision, some courts, including the Fifth and Ninth Circuits, had adopted an "application approach," holding that this requirement is met when the copyright owner simply files completed application paperwork with the Copyright Office and pays the registration fee. Others, including the Tenth and Eleventh Circuits, had adopted a "registration approach," holding that owners cannot sue until the Copyright Office actually takes action on the application, either granting or refusing registration. The Supreme Court granted certiorari.

The Supreme Court's decision

The Court agreed with the Tenth and Eleventh Circuits, and held that "registration" under the statute requires action on the part of the Copyright Office.

In ruling that the "registration approach" is the correct application of the statute, the Court rejected Fourth Estate's argument that waiting for the Copyright Office to register a work runs the risk that the Copyright Act's three-year statute of limitations may expire before the Copyright Office takes action on an application. While the Court acknowledged that processing times for copyright applications have increased to several months, it noted that these delays are largely the result of staffing and budgetary shortages within Congress's power to alleviate, but not within the power of courts to cure. The Court further noted that, notwithstanding the administrative lag, the average processing time is currently seven months, leaving "ample time to sue after the Register's decision."

The Court also pointed out that the Copyright Act provides exceptions to the registration requirement. One example is Section 408(f)(2) of the Copyright Act, which allows preregistration of works being prepared for commercial distribution, such as a movie or musical composition. Another example is Section 411(c) of the act, which allows for an infringement suit to be brought for live broadcasts before they are registered. Moreover, for an additional $800 fee, the Copyright Office allows copyright claimants to seek expedited processing of a claim for special situations, including "pending or prospective litigation." Upon receiving an expedited application, the Copyright Office will "make every attempt to examine the application … within five working days."

Key takeaways

In making a decision to commence an infringement action, copyright owners should factor in sufficient time – several months – for the Copyright Office to process their applications and register their copyrights. In time-

sensitive situations, copyright owners typically opt to pay an additional $800 fee to expedite the process, which takes about a week to complete.

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