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Approval versus Application: How to Interpret the Registration Requirement under the Copyright Act of 1976

APPROVAL VERSUS APPLICATION: HOW TO INTERPRET THE REGISTRATION REQUIREMENT UNDER THE COPYRIGHT ACT OF 1976

If I were required to guess off-hand, and without collusion with higher minds, what is the bottom cause of the amazing material and intellectual advancement of the last fifty years, I should guess that it was the modern-born and previously non-existent disposition on the part of men to believe that a new idea can have value.

- Mark Twain¹

INTRODUCTION

While Mark Twain identified the significance of innovation in the intellectual and social progress of man, perhaps equally important is the value an innovation has to its creator. American copyright law has recognized and struggled with this dichotomy between progress and ownership from the time the first copyright statute was enacted in 1790.² In an effort to balance private incentives and public resources from which future innovators could draw, Congress implemented a system of procedural formalities.³ Individuals were permitted to exert control over their creations only if they complied with the registration, notice, and renewal requirements of the Copyright Act.⁴ While the current federal system has relaxed many of these requirements, procedural formalities continue to play an important role in copyright law. Although an original work is protected the moment it is fixed in a tangible form,⁵ certain rights and benefits accrue only upon copyright registration. These rights and benefits include: the ability to initiate an infringement action in federal court,⁶ and to recover statutory damages and attorney's fees.⁷ Therefore, while an author may *own* the copyright in his work as soon as his work is created, his ability to *enforce* the copyright depends on compliance with registration procedures.

1. Jone Johnson Lewis, *Wisdom Quotes: Quotations to Inspire and Challenge*, http://www.wisdomquotes.com/cat_ideas.html (last visited Jan. 27, 2006).

2. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 486-87 (2004).

3. *Id.* at 487.

4. *Id.*

5. 17 U.S.C.A. § 102(a) (West 2005) (“*Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*”) (emphasis added).

6. 17 U.S.C.A. § 411(a) (West 2005).

7. 17 U.S.C.A. § 412 (West 2005).

In *La Resolana Architects v. Clay Realtors Angel Fire*,⁸ the United States Court of Appeals for the Tenth Circuit addressed two conflicting interpretations of the registration requirement under the Copyright Act of 1976.⁹ The determination of whether a copyright has been properly registered is the preliminary step to initiating an infringement action in federal court.¹⁰ In a case of first impression for the Tenth Circuit, the court was faced with the task of determining whether a creator had sufficiently complied with the Copyright Act's registration requirements, thus providing the court with proper jurisdiction over the case.¹¹ Copyright claimants may register their copyright claims by submitting a registration application.¹² The court held that registration under the Act required the Copyright Office's review of a registration application rather than just the successful submission of an application.¹³ Because the plaintiff in *La Resolana* initiated suit after successfully submitting an application but prior to receiving approval, the court dismissed the claim for lack of subject matter jurisdiction.¹⁴

This article examines the Tenth Circuit's interpretation of the registration requirement under the Copyright Act in *La Resolana*. Part I discusses the origins and evolution of copyright law, the federal registration system, and recent amendments to the Copyright Act. It also provides an overview of the disparate application of registration formalities under current federal law. Part II addresses the circuit split regarding the prerequisites of copyright registration and outlines the two competing interpretations of Title 17: (1) the "Application approach"—a policy based interpretation where registration is satisfied upon the successful submission of a copyright application; and (2) the "Approval approach"—a plain language interpretation where an application must either be approved or rejected to satisfy the Act's registration requirement.¹⁵ Part III provides a detailed view of the *La Resolana* decision and the Tenth Circuit's reliance on the Approval approach. Part IV analyzes this decision and proposes that the United States Court of Appeals for the Tenth Cir-

8. 416 F.3d 1195 (10th Cir. 2005).

9. *La Resolana*, 416 F.3d at 1197.

10. *See id.* at 1199.

11. *See id.* at 1197.

12. 17 U.S.C.A. § 408(a) (West 2005) states:

At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, 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 by sections 409 and 708. Such registration is not a condition of copyright protection.

17 U.S.C.A. § 408(a) (West 2005) (emphasis added). For purposes of this survey, "successful submission" of a registration application covers submission of the deposit, fee, and application, as well as receipt by the Copyright Office.

13. *La Resolana*, 416 F.3d at 1197.

14. *Id.* at 1197-98.

15. *Id.* at 1202-03.

cuit incorrectly decided *La Resolana* by misinterpreting the registration requirement and improperly relying on a 2005 amendment to support its statutory interpretation. This article suggests that the statutory scheme is inconsistent and requires deference to public policy. This article also suggests that the United States Supreme Court grant certiorari and adopt the Application approach in order to ensure that the application of copyright law comports with the purpose of the Copyright Act—to unify copyright law and relax procedural formalities.

I. BACKGROUND

A. *The Copyright Act of 1976*

Before the Copyright Act of 1976, a range of common law and statutory schemes governed infringement actions throughout the country.¹⁶ Copyright law varied from state to state as did the conditions necessary for its enforcement.¹⁷ Although the Constitution vested copyright protection in the federal government under the Copyright Clause,¹⁸ copyright protection was not the exclusive province of the federal government.¹⁹ For nearly one hundred and fifty years, copyright protection developed under a dual system of both state and federal law,²⁰ creating an inconsistent and confusing set of rules.²¹ After the implementation of the current Act on January 1, 1978, state and federal copyright law converged.²² Congress created a uniform federal copyright system “governed exclusively” by Title 17 of the United States Code, thus preempting most State copyright law.²³

16. *Id.* at 1198 (citing H.R. REP. NO. 94-1476, at 219 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5744).

17. *Id.* See also, Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858 (1987) (arguing that the ambiguity of the 1909 Copyright Act forced courts to stretch statutory boundaries and develop a significant amount of common law interpretation; “[l]ike many bodies of judge-made law, the common law doctrines were often inconsistent and contradictory, not only among courts but within courts; not only among lines of cases, but within lines of cases.”) (citing B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 79-97 (1967)).

18. U.S. CONST., art. 1, § 8 cl. 8 (providing that Congress shall have power “to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.”).

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

20. I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, at OV-3 (2005).

21. *La Resolana* 416 F.3d at 1198.

22. NIMMER, *supra* note 20, at OV-3.

23. Title 17 states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C.A. § 301(a) (West 2005) (emphasis added); *La Resolana*, 416 F.3d at 1198 (citing H. Rep. No. 94-1476 at 130, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746 (“The intention of section 301 is to

In addition to streamlining copyright law, the 1976 Act eliminated a number of statutory formalities that served as prerequisites to the existence of copyrights and recognized a creator's automatic copyright in an "original work of authorship fixed in a tangible medium."²⁴ Federal statutory protection was to continue for fifty years²⁵ after the death of the author regardless of whether the work had been published, registered, or renewed.²⁶ The Act also established a "single, centralized, federal registration system."²⁷ Under the new system, the existence and maintenance of copyrights were not dependent upon acquiescence to procedural registration requirements.²⁸ Copyright registration was no longer mandatory, but voluntary.²⁹

Through the Act, Congress moved from a "conditional" system to an "unconditional" system and broke with nearly two hundred years of practice.³⁰ Because authors were no longer required to register their creations in order to receive copyright protection, Congress implemented certain registration incentives so as to ensure the continued vitality of an expansive public record.³¹ Under the current system, only those authors who register their copyright may initiate an infringement action in federal court.³² It is through infringement suits that Title 17's additional incentives, such as statutory damages, the recovery of attorney's fees, and injunctive relief function.³³ Absent copyright registration, federal courts shall not exercise jurisdiction and award these remedies. Thus, authors who have failed to comply with the registration requirement under the Act may have copyrights to their work without any meaningful way to enforce them.³⁴ Although the Act replaced required formalities with voluntary formalities, procedural mechanisms remained an integral part of the American copyright system. In fact, American copyright law

preempt and abolish any rights under common law or statutes of a state that are equivalent to copyright.")).

24. 17 U.S.C.A. § 102(a) (West 2005).

25. Today protection continues for seventy years after the death of the author. 17 U.S.C.A. 302(a) (West 2005) ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.").

26. NIMMER, *supra* note 20, at OV-3.

27. *La Resolana*, 416 F.3d at 1198.

28. Sprigman, *supra* note 2, at 488.

29. *Id.*

30. *Id.*

31. See John B. Koegel, *Bamboozlement: The Repeal of Copyright Registration Incentives*, 13 CARDOZO ARTS & ENT. L.J. 529, 534 (1993).

32. *Id.* at 529.

33. *La Resolana*, 416 F.3d at 1199-1200.

34. *But see id.* at 1199 n.2 ("Although the Act preempts state copyright law, it does not eliminate all state law actions. For example, conduct that may give rise to a federal suit for copyright infringement may also give rise to a state law claim in tort for unfair competition, tortious interference, or breach of contract.").

continued to be characterized by its ministerial focus until the approval of an important 1988 amendment.³⁵

B. *The Berne Convention Implementation Act of 1988*

On March 1, 1989, the Berne Convention Implementation Act of 1988 (BCIA) took effect³⁶ and further relaxed the procedural requirements of American copyright law.³⁷ The BCIA was enacted in order to “ally the United States with a set of international rules and regulations, known as the Berne Convention, that protects intellectual property in the global marketplace and is adhered to by much of the global community.”³⁸ Adherence to the Berne Convention required United States federal copyright law to focus on the importance of moral rights, self-execution, and retroactivity, and forced the country to “sacrifice its obsession with copyright formalities.”³⁹ In particular, the Berne Convention forbid registration as a pre-requisite for copyright protection.⁴⁰ Congress, however, was reluctant to eliminate registration provisions and endorse an expansive approach to the amendment’s enactment. Instead, Congress opted for a “minimalist” philosophy, whereby it could retain the current registration system without violating international regulations.⁴¹

After a substantial legislative debate between the House of Representatives, which fought to maintain the registration requirement, and the Senate, which argued to eliminate it, delegates agreed upon a statutory revision of the Act’s registration provision.⁴² Registration would remain a condition precedent to the initiation of an infringement action for domestic authors only.⁴³ Because registration is a condition of copyright enforcement rather than copyright existence, and “loss of copyright,” the destruction of an otherwise existent copyright due to ministerial requirements, is the standard for determining the existence of a formality in contravention of Berne,⁴⁴ the United States could avoid offending the Berne Convention with respect to its own authors.⁴⁵ But because the ability to bring a claim or obtain any kind of relief for copyright infringement is dependent upon a procedural mechanism, “the enjoyment” of copyright mandated by Berne, which “shall not be subject to any for-

35. 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 701[A], at 7-8 (2005).

36. NIMMER, *supra* note 20, at OV-3, 4; Public Notice 1086, Department of State, 53 Fed. Reg. 48, 748 (Nov. 22 1988).

37. *Id.* at OV-5.

38. *La Resolana*, 416 F.3d at 1205.

39. NIMMER, *supra* note 20, at OV-5.

40. NIMMER, *supra* note 35, at 7-163.

41. *Id.*

42. *Id.* at 7-164.

43. 17 U.S.C.A. § 411(a) (West 2005) (“[N]o 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.”) (emphasis added).

44. NIMMER, *supra* note 35, at 7-163.

45. *Id.* at 7-163 to -65.

mality,⁴⁶ is severely compromised and therefore inapplicable to foreign works. The United States had appeared to gain accession at the expense of its domestic authors. The delegates' compromise created two classes of works: Berne works of foreign origin which were not subject to any registration formalities, and all other works which were subject to registration before obtaining infringement action initiation rights.⁴⁷

Although charged with "hypertechnical casuistry,"⁴⁸ the voluntary registration system for domestic authors did not invoke proscribed formalities. Even upon the Copyright Office's refusal to approve a copyright registration application, the Act's registration provision allows a claimant to file suit.⁴⁹ Furthermore, the registration provision has been characterized as a "court filing requirement, much like the fees that must be paid to file a complaint in a United States district court."⁵⁰ Sending an application and diminutive registration fee is a small imposition upon an international claimant who is already required to pay a much larger filing fee.⁵¹ In this respect, eliminating the registration requirement is a supererogatory action. The analogy between the court filing requirement and the registration requirement will be significant later in this analysis. The comparison not only illustrates the small burden imposed by the provision, but infers that which should satisfy its conditions.

C. The Federal Registration System and Its Purpose

Copyright functions were centralized in the Library of Congress in 1870.⁵² In 1897, the first Register of Copyrights was appointed and the Copyright Office became a separate department of the Library of Congress.⁵³ The Copyright Office is now one of the Library's foremost service units, employing over 500 people and receiving approximately

46. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris text 1971), art. 5(2).

47. NIMMER, *supra* note 35, at 7-165 to -66.

48. *Id.* at 7-164. See also *La Resolana*, 416 F.3d at 1205-06 ("[R]egistration . . . [while] not, technically speaking, a condition for the existence of copyright, . . . is, however a precondition for the exercise of any of the . . . rights conferred by copyright . . . This metaphysical distinction between the existence of a right . . . and the exercise of that right [is not] maintainable under . . . our legal tradition which disfavors . . . rights without remedies." (citing S. Rep. No. 100-352, at 18, *reprinted in* 1988 U.S.C.A.A.N. 3723).

49. 17 U.S.C.A. § 411(b) (West 2005).

50. NIMMER, *supra* note 35, at 7-164.

51. For an international claimant:

Given that even under the Senate bill, a Danish author who wished to sue for infringement of her copyright in Los Angeles, in 1988, for instance, had to pay \$120 to the Clerk for the Central District of California for the privilege of instituting suit, the question arises why the Senate bill believed it necessary to relieve that Danish author of the further small burden of spending an additional \$[3]0 and sending a form to the Copyright Office in Washington, D.C.

Id.

52. U.S. Copyright Office, A Brief History and Overview (January 2005), <http://www.copyright.gov/circs/circl1a.html>.

53. *Id.*

600,000 applications annually.⁵⁴ Fifty percent of the Copyright Office's budget and over sixty percent of its employees are committed to the registration process, making it the Office's single largest business activity.⁵⁵

The placement of the Office was the result of a strategic decision on the part of Congress to facilitate the quick and efficient selection of deposited works for the Library's collections.⁵⁶ The Library, which is "recognized as the national library of the United States" is essential to the research practices of Congress.⁵⁷ Containing "more than 130 million items on approximately 530 miles of bookshelves," the Library of Congress is the world's largest library.⁵⁸ Its expansive stature is the result of the Copyright registration process through which the Library receives the majority of its collections.⁵⁹ Copyright registration has been and continues to be vital to the existence of the Library, and consequently, to the efficiency of Congress. Without a federal registration system whereby creative works are deposited and recorded, both the national government and the American people would be deprived of "a comprehensive record of human creativity and knowledge."⁶⁰ Therefore, when registration became voluntary in 1976, Congress found it essential to implement statutory incentives to ensure that authors continued to register their copyrights.

D. Registration Requirements

The conditions necessary for copyright registration⁶¹ and the benefits conferred upon those in compliance are codified in chapter 4 of Title 17.⁶² To register a work, three elements must be sent together to the Library of Congress: a properly completed application form, a nonrefundable filing fee (currently \$30) and a nonreturnable deposit of the work being registered.⁶³ Once these items are received, the Copyright Office reviews the application and determines if the work is copyrightable.⁶⁴ Processing time varies depending on the number of applications the Office is receiving, but an applicant can expect to receive either a certificate

54. *Id.*

55. UNITED STATES COPYRIGHT OFFICE, STRATEGIC PLAN 2004-2008 12 (2004), <http://www.copyright.gov/reports/strategic2004-2008.pdf>.

56. *Id.* at 5.

57. The Library of Congress, Frequently Asked Questions, <http://www.loc.gov/about/faqs> (last visited Jan. 27, 2006).

58. The Library of Congress, Fascinating Facts, <http://www.loc.gov/about/facts.html> (last visited Jan. 27, 2006).

59. *Id.*

60. The Library of Congress, Frequently Asked Questions, *supra* note 57.

61. The debate as to what these conditions entail is the primary subject of this analysis. See discussion *infra* Parts III & IV.

62. See 17 U.S.C.A. §§ 408-12 (West 2005).

63. U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS, REGISTRATION PROCEDURES 7 (Dec. 2004), <http://www.copyright.gov/circs/circ01.pdf>.

64. U.S. Copyright Office, I've Mailed My Application, Fee, and Copy of My Work to the Copyright Office. Now What?, <http://www.copyright.gov/help/faq/faq-what.html#certificate> (last visited Jan. 27, 2006).

of registration or a rejection letter within approximately four to five months.⁶⁵

Copyright registration has been regarded as a relatively simple process.⁶⁶ However, complications arise when courts are forced to determine when the benefits of registration are to be conferred. Section 410(d) of Title 17 explicitly 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 or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.”⁶⁷ However, § 410, neither directly confirms nor invalidates “whether this ‘effective date’ is indeed effective upon filing or only once the filer has the copyright certification (or denial) in hand.”⁶⁸ Under § 411, authors may only initiate an infringement suit after “preregistration⁶⁹ or registration of the copyright claim has been made in accordance with th[e] title” or “where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused[.]”⁷⁰ Keeping in mind that the purpose of statutory remedies and the grant of federal standing is to encourage copyright owners to register their work, it is important to ask: Just what exactly satisfies registration “in accordance” with Title 17? If copyright claimants can file copyright infringement actions regardless of whether their applications are approved or rejected, is it really necessary to condition satisfaction of § 411’s registration requirements on the Copyright Office’s review of an application, or are these requirements satisfied more efficiently upon the successful submission of a registration application?

E. Preregistration

On April 27, 2005 the Artists’ Rights and Theft Prevention Act of 2005 (ART), Title I of the Family Entertainment and Copyright Act of 2005 (FECA), took effect, and amended §§ 408, 410, and 411 of Title 17.⁷¹ The amendment created a “class of works pending registration

65. *Id.*

66. Miriam Claire Beezy & Reese A. Pecot, *Caveat Emptor or “Let the Buyer Beware”:* Applying Diligent Investor Principles to Trademark and Copyright Issues in Mergers and Acquisitions, 17 INTELL. PROP. & TECH. L.J. 14, 21 (2005) (recommending copyright registration as a “simple, inexpensive process”); Gordon U. Sanford, III, *An Intellectual Property Roadmap: The Business Lawyer’s Role in the Realm of Intellectual Property*, 19 MISS. C. L. REV. 177, 192 (1998) (“Copyright registration is also simple and provides many benefits.”).

67. 17 U.S.C. § 410(d).

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

69. See discussion *infra* Parts II.E & IV.C.

70. 17 U.S.C. § 411(b).

71. Family Entertainment and Copyright Act, Pub. L. No. 109-9, 119 Stat. 218 (2005); Interim Regulation for Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 61,905 (Oct. 27, 2005) (to be codified at 37 C.F.R. Pt. 202) available at

[that] will support an infringement action.”⁷² As amended, § 411 allows copyright owners to sue for infringement of preregistered works in addition to registered works.⁷³ Preregistration, however, is not a proxy for registration.⁷⁴ Preregistered work “must be registered within one month after the copyright owner becomes aware of infringement but in no case later than three months after first publication.”⁷⁵ ART’s amendment to § 408 requires that the Register of Copyrights define and create procedures for preregistration.⁷⁶ At the time *La Resolana* was decided, the Copyright Office had not yet issued its preregistration regulations.⁷⁷ Yet despite the absence of guidance from the Copyright Office, the Tenth Circuit relied on the amendment and the new preregistration scheme to support its statutory interpretation.⁷⁸ It wasn’t until October 27, 2005 that the Copyright Office’s interim regulations were issued.⁷⁹

The procedures established by the Register of Copyrights under § 408 pertain to unpublished works “being prepared for commercial distribution.”⁸⁰ Similar to the registration process, the preregistration process requires that three elements be sent together to the Library of Congress: a properly completed application form, a nonrefundable filing fee (currently \$100), and a description of the work being registered.⁸¹ Once these items are received, the Copyright Office conducts a limited review to “ascertain whether the application describes a work that is in a class of works that the Register of Copyrights has determined has had a history of infringement prior to authorized commercial release.”⁸² After reviewing the application, “the Copyright Office will provide the claimant official notification by email of the preregistration.”⁸³

Much like registration, “[t]he effective date of preregistration is the day on which an application and fee for preregistration of a work, which the Copyright Office later notifies the claimant has been preregistered or which a court of competent jurisdiction has concluded was acceptable for

<http://www.copyright.gov/fedreg/2005/70fr61905.html> [hereinafter *Preregistration of Unpublished—Interim*].

72. *La Resolana*, 416 F.3d at 1207.

73. 17 U.S.C.A. § 411(b).

74. See Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42,286, 42,287 (proposed July 22, 2005) available at <http://www.copyright.gov/fedreg/2005/70fr42286.html> [hereinafter *Preregistration of Unpublished—Proposed*].

75. *Id.* at 42,290.

76. 17 U.S.C.A. § 408(f)(1) (“Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.”).

77. *La Resolana*, 416 F.3d at 1207.

78. *Id.* (“Whatever the Register of Copyrights eventually determines . . . the adoption of FECA further confirms our statutory analysis”).

79. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,905. See discussion *infra* Part I.V.(C).

80. *Id.* at 1207 n.12.

81. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,907.

82. *Id.* at 61,908.

83. *Id.*

preregistration, have been received in the Copyright Office.”⁸⁴ Unlike the registration process, however, the preregistration process is electronic.⁸⁵ Hence, preregistrants are spared the registrants’ burden of having to wait four to five months before their applications are processed and quite possibly, before they are afforded the right to enforce their copyright in federal court. Quick or immediate preregistration processing may very well eliminate the need to ask whether the submission of an application or the approval of an application satisfies the jurisdictional prerequisites of preregistration. However, the determination of what constitutes registration for purposes of federal standing is not yet inconsequential. Furthermore, allocating rights based on the practices of businesses rather than the rule of law seems an unwise approach to interpreting either registration or preregistration requirements under the Copyright Act.

II. CIRCUIT SPLIT

Federal circuits are split as to whether it is necessary for the Copyright Office to review a copyright application in order for an individual to satisfy the registration requirement and bring an infringement action, or if an individual can bring an infringement suit upon the successful *submission* of a registration application. Whether the split occurred prior to the *La Resolana Architects v. Clay Realtors Angel Fire*⁸⁶ decision or as a result of the decision, is subject to debate and will be discussed at the end of this Part. The Tenth Circuit in *La Resolana* has claimed that the Fifth and Eleventh circuits have developed two different approaches to interpreting Title 17 in response to this issue.⁸⁷ The *La Resolana* court identified the Fifth Circuit’s approach as the “Application approach” and the Eleventh Circuit’s approach as the “Registration approach.”⁸⁸ For purposes of this analysis and for reasons explained in Part IV, the “Registration approach” shall be renamed the “Approval approach.”

A. The Application Approach

Courts employing the Application approach have analyzed Title 17 using a “policy-based methodology.”⁸⁹ The Fifth Circuit and district courts in Rhode Island, New York, California, Delaware, and the District of Columbia have adopted this approach and granted standing to individuals initiating infringement actions prior to the approval or rejection of their copyright applications.⁹⁰ That is, these courts have concluded that the Act’s registration requirement is satisfied once an application has

84. *Id.*

85. *Id.* at 61907.

86. 416 F.3d 1195 (10th Cir. 2005).

87. *La Resolana*, 416 F.3d at 1201-05.

88. *Id.*

89. *Id.* at 1203.

90. *Id.* at 1203-04.

been successfully submitted. The courts have supported their conclusions by referring to the leading treatises on copyright law written by Melville B. Nimmer,⁹¹ and the language of § 410(d), which states, “[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.”⁹² Courts embracing the Application approach have argued that “because a copyright owner can sue regardless of whether an application for registration is ultimately granted or rejected, delaying the date on which a copyright owner can sue is a senseless formality.”⁹³ By allowing a claimant to initiate suit while her application is pending approval, the courts using the Application approach prevent infringers from diluting the copied work during the five to six months it takes to process the claimant’s registration application.

In *Apple Barrel Productions, Inc. v. Beard*,⁹⁴ an infringement suit involving two country music programs, the Fifth Circuit held that the only elements necessary to confer federal court jurisdiction were proof of payment of the required registration fee, deposit of the work in question, and the receipt of a registration application by the Copyright Office.⁹⁵ In *Lakedreams v. Taylor*,⁹⁶ the same court held that receipt of materials sufficient to satisfy § 410’s statutory formalities could be “inferred from the testimony of one of Lakedreams’ partners that the Copyright Office cashed the fee check.”⁹⁷ By construing the registration requirement more leniently and adopting the Application approach, the Fifth Circuit adhered to the view endorsed by Nimmer, that “in resolving issues of first impression as to the formalities required under the 1976 and 1909 Acts, the courts should refrain from overtechnical constructions.”⁹⁸

In *Foraste v. Brown University*,⁹⁹ a case involving the copyright infringement of a number of photographs, the district court of Rhode Island held that pending registration applications for ninety-seven of the images in question were sufficient to satisfy the federal jurisdictional requirements of § 411.¹⁰⁰ Because § 411 entitles a claimant to bring an infringement suit even upon the rejection of her application, and because § 410 “mandate[s] that the merits of the application materials are ‘later

91. *Id.* at 1203.

92. *Id.*; see 17 U.S.C. § 410(d).

93. *La Resolana*, 416 F.3d at 1203.

94. 730 F.2d 384 (5th Cir. 1984).

95. *Apple Barrel Productions*, 730 F.2d at 386-87.

96. 932 F.2d 1103 (5th Cir. 1991).

97. *Foraste*, 932 F.2d at 1108.

98. NIMMER, *supra* note 35, at 7-9.

99. 248 F. Supp. 2d 71 (D. R.I. 2003).

100. *Id.* at 76-78. The court further noted that § 411(a) “confirms that it is the submission of an application, deposit, and fee (rather than the issuance *vel non* of a registration certificate) that triggers registration for purposes of conferring standing to sue.” *Id.* at 77 n.10.

determined,' that is, determined at some time after the right to sue comes into being," the court reasoned that application submission was sufficient to confer federal jurisdiction.¹⁰¹ The court, however, also held that the plaintiff would not be entitled to damages "until such time as the images [were] fully registered."¹⁰² While application was sufficient to enable the initiation of a suit, it did not sufficiently grant a claimant the right to obtain damages under § 412.¹⁰³ By allowing copyright owners to keep their case in federal court, yet still maintaining the requirement that an owner obtain a certificate before acquiring Title 17 remedies, the Application approach encourages both author protection and statutory compliance.

B. The Approval Approach

Courts applying the Approval approach have analyzed the Act using the plain language of Title 17 and have determined that a successful application submission does not constitute registration for purposes of federal jurisdiction under § 411.¹⁰⁴ The Tenth Circuit adopted the Approval approach in *La Resolana*.¹⁰⁵ Before that opinion, no circuit court had either expressly or clearly championed such an interpretation. However, in *La Resolana*, the court concluded that the Eleventh Circuit and district courts in New York, Maryland, California, Kansas, and South Carolina had adopted the Approval approach and denied standing to individuals initiating copyright infringement actions prior to the approval or rejection of their registration applications.¹⁰⁶ Using §§ 410 and 411 of the Act, the district courts based their opinions on the fact that the "term application is used in the same section [as the term registration] and is clearly something separate and apart from registration"¹⁰⁷ and the "requirement of 'examination' would be meaningless if filing and registration were synonymous."¹⁰⁸ The Eleventh Circuit, however, neglected to engage in a similar analysis.

In *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*,¹⁰⁹ an infringement case involving two competing home builders, the Eleventh Circuit ac-

101. *Id.* at 76-77.

102. *Id.* at 78.

103. As evidenced in *Foraste*, § 412 has posed a particular problem to photographers. Due to the nature of their art, the vast number of works created, and inevitable mistakes made on registration applications, many photographers find it too difficult, expensive, and exhausting to comply with registration provisions by registering every copyrightable image. Consequently, it may be easy for defense attorneys to "abuse the registration process, utilizing it as a weapon in infringement litigation." Charles Ossola, *Registration and Remedies: Recovery of Attorney's Fees and Statutory Damages Under the Copyright Reform Act*, 13 CARDOZO ARTS & ENT. L.J. 559, 560 (1995).

104. *La Resolana*, 416 F.3d at 1202.

105. *Id.* at 1201-02 ("Despite the Act's seemingly plain language, courts construing these provisions are split into two interpretive camps: The "Registration approach," which we have adopted, and the "Application approach.") (emphasis added).

106. *Id.* at 1202.

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

108. *Robinson v. Princeton Review, Inc.*, No. 96 CIV. 4859(LAK), 1996 WL 663880, *7 (S.D.N.Y. 1996).

109. 903 F.2d 1486 (11th Cir. 1990).

knowledgeed that “[t]he registration requirement is a jurisdictional prerequisite to an infringement suit.”¹¹⁰ To support its claim, the court cited eight different district court cases.¹¹¹ In only two of those cases did courts extrapolate from that argument and state that the receipt or denial of a registration certificate was a jurisdictional requirement.¹¹² The Eleventh Circuit in *M.G.B. Homes* never actually addressed what was necessary to satisfy the registration requirement.¹¹³ Furthermore, and contrary to the Tenth Circuit’s claim in *La Resolana*, the Eleventh Circuit did not dismiss the infringement action as premature.¹¹⁴ In *M.G.B. Homes*, the court was faced with the task of determining whether the trial court’s dismissal of a suit for lack of jurisdiction precluded it from entertaining a party’s motion to amend once the party had been issued a registration certificate.¹¹⁵ The Eleventh Circuit held that the “technical distinction between filing a new complaint and filing an amended complaint” neither precluded the trial court’s nor its own jurisdiction.¹¹⁶ The court added that the party “acted within the bounds of an arguably accepted practice” when it filed a complaint asserting copyright registration prior to receiving a certificate.¹¹⁷

Not only did the Eleventh Circuit fail to use the Approval approach by neglecting to address the meaning of registration, it validated the Application approach by affirming the trial court’s jurisdiction in an infringement action initiated prior to copyright application approval. Consequently, it was not until the Tenth Circuit’s decision in *La Resolana* that the federal circuits split and the Approval approach was adopted by an appellate court.

III. *LA RESOLANA ARCHITECTS V. CLAY REALTORS ANGEL FIRE*¹¹⁸

A. Facts

While visiting a building site in Angel Fire, New Mexico in October 2003, a representative of the Santa Fe architecture firm, La Resolana, discovered that a local realtor had infringed upon a La Resolana copyright.¹¹⁹ Architectural drawings created by La Resolana had been used to

110. *Id.* at 1488.

111. *Id.* n.4 (citing cases in Indiana, New York, Arkansas, and Massachusetts).

112. *Id.* (citing *Demetriades v. Kaufmann*, 680 F. Supp. 658, 661 (S.D.N.Y. 1988) (“Receipt of an actual certificate of registration or denial of same is a jurisdictional requirement, and this court cannot prejudge the determination to be made by the Copyright Office.”); and *International Trade Management, Inc. v. United States*, 1 Cl. Ct. 39, 41 (1982) (“A suit for copyright infringement is conditioned on obtaining (or being denied) a certificate of registration.”)).

113. *See id.* at 1486-89.

114. *Id.* at 1489.

115. *Id.* at 1488.

116. *Id.* at 1489.

117. *Id.* n.6.

118. 416 F.3d 1195 (10th Cir. 2005).

119. *La Resolana*, 416 F.3d at 1197.

build a number of townhouses being sold in the area.¹²⁰ Clay Realtors, who had met with La Resolana in late 1996 in a series of discussions regarding development plans for townhouses in Angel Fire, happened to be the seller.¹²¹ In response to this discovery, La Resolana submitted an application for registration of the copyrighted drawings on November 6, 2003.¹²² On November 20, La Resolana sued Clay Realtors for copyright infringement.¹²³

Clay Realtors claimed that the court lacked subject matter jurisdiction and moved to dismiss on March 8, 2004.¹²⁴ Because La Resolana had not obtained a certificate of copyright registration from the Copyright Office prior to filing their complaint, Clay Realtors argued that La Resolana did not have standing to sue.¹²⁵ La Resolana responded with a March 10, 2004 letter from the Copyright Office.¹²⁶ The letter stated that copyright registration had been approved on January 22, 2004, and that the effective date of registration was November 19, 2003, one day prior to commencement of the action.¹²⁷ The district court refused to admit the letter into evidence and found that the drawings were not yet registered.¹²⁸ It dismissed the case without prejudice based on lack of subject matter jurisdiction and La Resolana appealed.¹²⁹

B. Decision

After engaging in the most comprehensive analysis of the two competing registration interpretations to date, the Tenth Circuit Court of Appeals affirmed the district court's holding.¹³⁰ The court adopted the Approval approach, referring to the method as the "Registration approach,"¹³¹ and reasoned that the plain language of §§ 408 & 410 "require[d] a series of affirmative steps by *both* the applicant and the Copyright Office."¹³² Because La Resolana's registration application had neither been approved nor rejected before initiation of the suit, the court held that La Resolana did not have standing to sue.¹³³

The court began its analysis with § 411(a): "no 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

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.*

125. *Id.*

126. *Id.*

127. *See id.* at 1197-98.

128. *Id.* at 1198.

129. *Id.*

130. *See id.* at 1208.

131. *See id.* at 1201-02.

132. *Id.* at 1200 (emphasis added).

133. *See id.* at 1201-02.

accordance with this title.”¹³⁴ Because the term preregistration was added to the statute in a 2005 amendment after commencement of the suit, and had not yet been defined by the Copyright Office, the court held that the new language did not control the outcome of the case.¹³⁵ Next, the court attempted to determine the meaning of registration under § 411 by looking to § 410: “[w]hen, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter . . . the Register shall register the claim and issue to the applicant a certificate of registration.”¹³⁶ To “examine” and “register” a copyright application, and “issue” a certificate of registration, the Register must act affirmatively. Because the Register “shall register the claim” only “after examination,” and La Resolana’s suit was initiated prior to registration, the court reasoned that La Resolana’s suit was premature.¹³⁷ According to the court, the process required by § 410 failed to indicate that the filing of an application alone would be sufficient to register the work and confer standing.¹³⁸

To support its view that registration did not occur upon application, the court addressed the language of § 408. According to § 408, a copyright claimant “may” obtain copyright registration by successful application. Because Congress used “may,” a discretionary term, indicating that the claimant does not automatically obtain registration, rather than the word “shall,” which would mandate registration upon application, the court found that § 411 could require the Register’s substantive review of the material before conferring jurisdiction.¹³⁹ Using the Approval approach and interpreting the Act using the plain language of Title 17, the Tenth Circuit thus concluded that registration required approval or rejection of a copyright application.¹⁴⁰

The court, however, disagreed with other courts adopting the Approval approach, concluding that a registration *certificate* was not a jurisdictional requirement.¹⁴¹ According to the court, § 411 demonstrates “that registration is separate from the issuance of a certificate of registration”¹⁴² Section 411 makes no reference to a certificate at all, and even under § 410(c) a certificate of registration is only *prima facie* evidence of the validity of a copyright, not a condition of registration.¹⁴³ Therefore, to satisfy the jurisdictional prerequisite of registration under Title 17, the Tenth Circuit required a copyright claimant to wait for the

134. *Id.* at 1200.

135. *Id.*

136. *Id.* at 1201.

137. *Id.* at 1201, 1208.

138. *Id.* at 1201.

139. *Id.*

140. *Id.* (“[R]egistration . . . does not occur until the Register of Copyrights takes action.”).

141. *Id.* at 1202-03.

142. *Id.* at 1203.

143. *See id.*; *see also* 17 U.S.C.A. § 411 (West 2005).

Copyright Office to process her application before bringing suit, rather than requiring her to wait for the Copyright Office to issue or deny a registration certificate. After reaching this conclusion, the court speculated as to how a litigant might demonstrate her copyright registration to a court in the absence of a certificate.¹⁴⁴ According to the court, an “owner can still attempt to prove registration through other means, such as testimony or other evidence from the copyright office.”¹⁴⁵ The court conceded that the “other evidence,” “could be a letter similar to the one presented by La Resolana . . . or perhaps an affidavit from a person with first-hand knowledge of a copyright’s registration.”¹⁴⁶ Therefore, had La Resolana appealed the district court’s evidentiary ruling excluding the March 10th letter, and argued its validity as evidence of registration, the court would not have dismissed the complaint for lack of subject matter jurisdiction.¹⁴⁷

IV. ANALYSIS

The Approval approach and the Tenth Circuit’s opinion in *La Resolana Architects v. Clay Realtors Angel Fire*¹⁴⁸ are rife with inconsistencies and traps for unwary copyright owners. Not only did the court misinterpret the registration requirement, it confused and mischaracterized the registration issue throughout the case, ignored valid policy considerations, and erected an unnecessary barrier to copyright protection. The court also incorrectly claimed that a recent amendment to the Copyright Act’s registration provision would address the detrimental implications of the court’s statutory interpretation. Although the amendment increases copyright protection for certain digital works, the new scheme does not address the copyrights of authors working outside of the entertainment industry. Preregistration is an inequitable and insufficient solution to copyright infringement that values economic productivity over creative control. Together, the Approval approach and the preregistration scheme fail to address the problem presented in *La Resolana* as sufficiently as would the Application approach. The Application approach is thus a sounder method for achieving the dual goals of creative protection and public progress.

A. Confusing the Issue

In *La Resolana*, the Tenth Circuit attempted to support its view of Title 17’s registration requirement by mischaracterizing the competing interpretative approaches, obfuscating the issue, and ignoring valid public policy concerns in the face of an inconsistent statutory scheme. *La*

144. *Id.* at 1207-08.

145. *Id.*

146. *Id.* at 1207 n.13.

147. *See id.* at 1208.

148. 416 F.3d 1195 (10th Cir. 2005).

Resolana essentially required the court to determine the meaning of “registration” under § 411. By labeling the Approval approach as the “Registration approach,”¹⁴⁹ the court presupposed that its interpretation of the statute was the correct interpretation. An approach with the title of that which it seeks to prove is inappropriately aligned with the conclusion before its argument is even propounded. Thus, before the interpretations were evaluated, the court automatically established the Application approach as something separate and apart from registration.

Courts adopting the Application approach never denied that registration was a jurisdictional prerequisite to a copyright infringement action; they merely proposed that the successful submission of an application satisfied § 411’s registration requirement.¹⁵⁰ The “Approval approach” is therefore a more appropriate characterization of the Tenth Circuit’s interpretation. The “Approval approach,” like the “Application approach,”¹⁵¹ describes that which will constitute registration under its interpretation and prevents the court from putting the cart before the horse, so to speak.

The “Registration approach,” was the first of many mischaracterizations that obfuscated the registration issue and devalued the Application approach. The court also inappropriately used “[s]ubsequent Acts of Congress” to support its interpretation.¹⁵² In referring to the 1988 amendment, which created a narrow registration exception for Berne works of foreign origin,¹⁵³ the court misrepresented the question at issue in *La Resolana*. After evaluating the congressional debate, and discussing the important purpose of registration incentives, the court stated, “it is clear that in passing the original Copyright Act of 1976 and the Berne Act in 1988, Congress sought to create and retain the incentives to registration, make certain benefits available only to registrants, and, in fact, condition federal court intervention on registration of the copyright.”¹⁵⁴ The court’s argument was a subterfuge used to undermine the credibility of the Application approach and indicate its inconsistency with legislative intent to maintain registration incentives. The debate between the Senate and the House of Representatives addressed the abandonment of

149. *La Resolana*, 416 F.3d at 1201-02.

150. *See* Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am., 81 F. Supp. 2d 70, 72 (D.C. Cir. 2000); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984); *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991) (citing *Apple Barrel Productions*).

151. *La Resolana* states:

Two conflicting interpretations of the Act’s registration requirement have been upheld by circuit courts: 1) *registration occurs when* the copyright owner submits an application for registration to the copyright office, or, conversely 2) *registration occurs when* the copyright office actually approves or rejects the application. We hold that the second interpretation is correct.

La Resolana, 416 F.3d at 1197 (emphasis added).

152. *Id.* at 1205.

153. *Id.* at 1205-06.

154. *Id.* at 1206.

the registration requirement altogether, not whether application submission satisfied registration.¹⁵⁵

Proponents of the Application approach do not propose to eliminate registration as a pre-requisite for infringement litigation; they merely suggest that registration involves fewer formalities than those suggested by proponents of the Approval approach.¹⁵⁶ Claimants are still required to submit a fee, deposit, and application in order to register their copyrights and receive the benefit of federal standing.¹⁵⁷ Again, the issue in *La Resolana* is *what* registration requires, not *whether* it is required.¹⁵⁸ Consequently, the court's reference to the 1988 amendment neither supported nor addressed their interpretation of the Act.

The court also obscured the actual issue in *La Resolana* when it created and attacked a fictional argument in favor of the Application approach. The court addressed "the argument that copyright holders are left without a remedy until registration,"¹⁵⁹ and dismissed it as "beg[ging] the question,"¹⁶⁰ once again mischaracterizing the issue and misrepresenting the Application approach as an interpretation that separates *application* from *registration*. Courts adopting the Application approach have not attempted to support their interpretation of § 411's registration requirement with the conclusion that owners cannot enforce their copyrights absent registration. These courts have, however, proceeded upon this assumption, instead arguing what registration under the Act should entail.¹⁶¹ By implying that these courts rely on an argument that begs the question, the Tenth Circuit erroneously imposed its own confusion of the registration issue upon those adopting the competing approach.

B. Ignoring Valid Policy Considerations

In addition to mischaracterizing the interpretive approaches and obfuscating the issue in *La Resolana*, the Tenth Circuit Court of Appeals

155. *Id.* at 1205.

156. *See generally id.* at 1205-06.

157. *See, e.g., Int'l Kitchen*, 81 F.Supp.2d at 72 ("To best effectuate the interests of justice and promote judicial economy, the court endorses the position that a plaintiff may sue once the Copyright Office receives the plaintiff's application, work, and filing fee."); *Apple Barrel Productions*, 730 F.2d at 386-87 ("In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application."); *Lakedreams*, 932 F.2d at 1108 (citing *Apple Barrel Productions*).

158. *La Resolana*, 416 F.3d at 1197.

159. *Id.* at 1204.

160. *Id.*

161. *See, e.g., Int'l Kitchen*, 81 F.Supp.2d at 72 ("[I]f Kitchen Exhaust indeed filed its copyright application, deposited its work, and paid the appropriate fee before filing suit, the court shall hear its claims . . ."); *Apple Barrel Productions*, 730 F.2d at 386-87 ("In order to bring suit for copyright infringement, it is not necessary to prove possession of a registration certificate. One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.").

failed to give deference to public policy in the face of an inconsistent statutory scheme. The court stated, “[if] the statutory language is not ambiguous, and the ‘statutory scheme is coherent and consistent,’ our inquiry ends.”¹⁶² In *La Resolana*, the court concluded that both conditions were met, when in fact, neither were satisfied. Section 411 entitles a copyright owner to sue for infringement “where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused.”¹⁶³ Imagine a situation in which two different copyright owners wish to sue for infringement of their works. The first owner sends in his registration application, which is subsequently rejected by the Copyright Office, and then initiates suit. The second author submits his registration application, initiates suit, and then receives a certificate of registration indicating the approval of his application. By adopting the Application approach in this situation, both authors will be entitled to protect their work in federal court. By adopting the Approval approach, however, the author with the claim involving non-copyrightable material will be afforded the opportunity to protect his work, while the author with copyrightable material will not. The Approval approach thus effectuates an inconsistent statutory scheme, a scheme affirmed by the Tenth Circuit in *La Resolana*. Because a claimant may bring suit regardless of whether his copyright registration application is rejected, federal standing is not dependent upon the *result* of an application’s review by the Copyright Office. Therefore, it makes little sense to force a claimant to wait until approval or rejection before bringing suit, and to condition his ability to enforce his copyright in federal court upon the review of his application.

In addition to denying the author with copyrightable material, and arguably the more credible claim to protection, the Approval approach ignores “developments in the law, which continues to move in the direction of increased control.”¹⁶⁴ While it has been argued that the removal of copyright formalities has reduced copyright’s social utility by “expanding the domain of copyright beyond works for which application of the law is useful,”¹⁶⁵ the Application approach merely removes an unnecessary step in a formality that remains intact. Furthermore, § 411’s grant of federal standing to authors suing for infringement of non-copyrightable work is much more likely to improperly expand the scope of copyright law than will the acceptance of the Application approach.

An author’s ability to sue upon the submission of his copyright application is also more consistent with the purpose behind Title 17’s registration incentives. By conditioning remedies on the approval or rejection

162. *La Resolana*, 416 F.3d at 1200 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

163. 17 U.S.C. § 411(a).

164. Sprigman, *supra* note 2, at 487.

165. *Id.* at 489.

of a copyright application, a court employing the Approval approach makes the crucial act that of the Copyright Register rather than that of the claimant. If the goal of implementing registration incentives is to encourage authors to submit their work to the Copyright Office, why condition remedies on an element over which authors have no control? Copyright infringement remedies do not encourage the Register to approve or reject applications; therefore, conditioning remedies upon the Register's acts is an unnecessary formality. By applying the Application approach and making registration dependent upon the acts of the author, the goals of the Copyright Act will be achieved in a manner more consistent with public policy and legislative intent. The Library of Congress will still continue to expand its collections, and copyright infringers will be prevented from using a ministerial formality as a weapon to avoid litigating the merits of an infringement claim. Under the Application approach, stealing original work and diluting it during the Register's four to five month processing period will no longer save a copyright infringer from having to pay for his misdeed.

C. The Preregistration Scheme

Because *La Resolana* initiated suit prior to the enactment of FECA, the Tenth Circuit Court of Appeals did not analyze § 411's preregistration language.¹⁶⁶ However, the court claimed that the amendment supported its statutory interpretation, noting that "the availability of a preregistration scheme would in whole or in part address the problem presented by this case: the need to sue for infringement to prevent dilution of a copyright but the inability to do so without completed registration."¹⁶⁷ While the Tenth Circuit was correct in so far as it presupposed that preregistration would *in part* address the problem presented by its decision in *La Resolana*, the preregistration scheme neither supported the Approval approach, nor adequately addressed the issue in the case. Instead of indicating what might satisfy registration requirements under the Act, the preregistration scheme added another formality in need of interpretation. Instead of adopting the Application approach and thereby eliminating the problem of an infringer's opportunity to dilute stolen copyrights before the commencement of litigation, the court relied on the possibility that a new amendment would solve the problems it had created by adopting the Approval approach.¹⁶⁸

By requiring the review of an application by the Copyright Office before acknowledging registration under the Act, the court not only denied hearing a meritorious claim, it created an economically dangerous situation for *digital* copyright owners. "It's one thing to take someone else's townhouse blueprints and try to quickly construct them. It's an-

166. *La Resolana*, 416 F.3d at 1200.

167. *Id.* at 1207.

168. *Id.*

other thing to capture digital files and begin electronically distributing them.”¹⁶⁹ Where it might take a number of months to erect a building, a digital file may be copied in a matter of minutes. Digital files intended for publication are also often available online before their completion or publication and well before their commercial distribution.¹⁷⁰ Under the Approval approach, the four to five months it takes the Copyright Office to process an application can be economically destructive to digital content creators.¹⁷¹ “Obviously, the increasingly frequent situation of copyrighted works being distributed illegally via the internet before they are even made available for sale to the public severely undercuts the ability of copyright holders to receive fair and adequate compensation for their works.”¹⁷² The preregistration scheme was enacted in response to this problem.¹⁷³ However, employed in conjunction with the Approval approach, preregistration serves as a Band-Aid for specified authors only; an incomplete and inequitable solution that elevates the economic concerns of some over the creative control of all.

The Copyright Office’s interim regulations note that “[p]reregistration serve[s] as a place-holder for limited purposes - notably where a copyright owner needs to sue for infringement while a work is still being prepared for commercial release.”¹⁷⁴ Although preregistration is not a proxy for registration and preregistered work “must be registered within one month after the copyright owner becomes aware of infringement but in no case later than three months after first publication,” preregistration allows an owner to satisfy the requirements necessary to initiate an infringement action.¹⁷⁵ The regulations, however, identify only six classes of works eligible for preregistration under the Act: motion pictures, sound recordings, musical compositions, literary works being prepared for publication in book form, computer programs (including video games), and advertising or marketing photographs.¹⁷⁶ The specific works were chosen by the Register of Copyrights after movie studio and record company representatives “persuaded Congress that the existing rules making copyright registration a prerequisite for suit . . . [and] awards of attorney’s fees and statutory damages [were] unduly burdensome on plaintiffs seeking relief against pre-release infringement”¹⁷⁷ Because these specific works were determined to have had a “history of

169. Patrick Ross, When a Copyrighted Work Isn’t Copyrighted, Posting to The IPcentral Weblog, http://weblog.ipcentral.info/archives/2005/08/when_a_copyright.html#more (Aug. 5, 2005).

170. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286.

171. Ross, *supra* note 169.

172. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286 (citing 151 Cong. Rec. S495 (daily ed. Jan. 25, 2005) statements of Senator Hatch (bill sponsor)).

173. *Id.*

174. *Preregistration of Unpublished—Interim*, *supra* note 71 at 61,905.

175. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,290.

176. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,905-06.

177. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,287.

infringement prior to authorized commercial distribution”¹⁷⁸ and “[b]ecause works intended for publication usually are not registered until they are in final form and are being disseminated to the public,”¹⁷⁹ the registration practices of particular copyright owners dictated the preregistration guidelines. The preregistration scheme thus addresses the detrimental implications of the *La Resolana* decision for a select group of digital copyright owners only. By affording these authors an opportunity to gain earlier copyright protection, it acknowledges and remedies “damage to the content creator [that] is obviously going to be far greater, far quicker [for works that can be immediately electronically distributed.]”¹⁸⁰ The scheme, however, if viewed as a supplement to the Approval approach and a solution to these detrimental implications, will not save future copyright owners, like *La Resolana*, who do not fall within the protected classes of the new regulation. Because architectural blueprints and photographs for artists’ exhibitions and portfolios were not deemed to have a history of pre-release infringement, owners of unpublished work, like *La Resolana* and *Foraste*, whose work has been infringed prior to the approval of a registration application, will not likely be able to initiate an infringement suit at the same time as owners belonging to an enumerated preregistration class. This scheme affords greater protection to certain owners based on the likelihood of immediate publication and profit realization rather than legitimate copyrights, and the likelihood of infringement rather than actual infringement.

Again, imagine a situation in which two different copyright owners wish to sue for infringement of their works. This time, the first owner wishes to sue for the infringement of a sound recording which falls within an enumerated preregistration class. The owner preregisters his work, sues for infringement, and then submits a registration application for the work within the time required by the new regulation. His registration application is then approved by the Copyright Office. The second copyright owner wishes to sue for the infringement of a building plan which does not fall within an enumerated preregistration class. This owner successfully submits a registration application, initiates suit, and then also receives a certificate of registration indicating the approval of his application. Under the Approval approach, even though both registration applications will be approved *after* the owners have initiated suit, only the owner with the preregistered sound recording will be afforded the opportunity to protect his work. Under the Approval approach, even though both copyrights have been infringed, only the copyright which was more likely to be infringed will be argued in federal court. Thus, together, the Approval approach and the preregistration scheme facilitate an inequitable application of the law where not all copyright owners will

178. *Preregistration of Unpublished—Interim*, *supra* note 71, at 61,905-06.

179. *Preregistration of Unpublished—Proposed*, *supra* note 74, at 42,286.

180. Ross, *supra* note 169.

be able to exercise their rights in the same way. If instead, the preregistration scheme were to coexist with the Application approach, all copyright owners would receive equal protection under the Act. By adopting the Application approach, the law will not discriminate between what is more and what is less likely to be profitable. Those owners whose practices prevent them from registering until commercial distribution will still receive protection, and copyright owners with unpublished work will receive the same benefits as owners with copyrights having a history of pre-release infringement.

While the preregistration scheme may address the dilution of copyrights for certain classes of copyright owners, its enactment does not support the Tenth Circuit's adoption of the Approval approach. Preregistration was not created to answer whether or not jurisdictional prerequisites were met by an application's submission or an application's approval or rejection. It was created in response to the pleas of motion picture studios and record companies whose profits were being siphoned away through internet piracy.¹⁸¹ Neither does preregistration indirectly support the Approval approach. Rather, it imposes additional interpretive burdens upon the court. Instead of indicating what might satisfy registration requirements under the Act, the preregistration scheme adds another formality in need of interpretation. The new scheme poses a problem identical to that of registration; what exactly satisfies preregistration, application submission or application approval?

CONCLUSION

If the purpose of the Copyright Act of 1976 was to relax the procedural mechanisms that made it overly cumbersome for authors to protect their works, the Tenth Circuit's reading of Title 17 in *La Resolana* blatantly ignores legislative intent. If an additional goal of the Act was to create a uniform federal copyright system, the recent split among federal circuits regarding registration formalities requires a remedy from the United States Supreme Court. If the Tenth Circuit's interpretive approach goes unchecked and federal circuits continue to embrace the Approval approach, by engaging in inconsistent and inequitable interpretations of the Copyright Act's registration requirement, the balance between creative ownership and cultural progress will be lost.

As federal copyright law endeavors to encourage creative genius by increasing the control copyright owners may exert over their creations, it is important to remember that all copyright owners should be able to exercise their intellectual property rights in the same way. As federal copyright law endeavors to enrich the public record in the Library of Congress by preserving registration incentives, it is important to remem-

181. U.S. Copyright Office, Frequently Asked Questions: Registering a Work, <http://www.copyright.gov/help/faq/faq-register.html#length> (last visited Jan. 23, 2006).

ber that procedural formalities should not condition rights or benefits upon that which the copyright owner has no control. By adopting the Application approach, the Supreme Court will ensure that public policy and the interests of justice eclipse statutory inconsistencies. The owner with copyrightable work who initiates an infringement claim after successfully submitting a registration application but before receiving notice of its review, will be afforded the same rights as the owner who initiates suit after the rejection of his application, and the owner whose preregistered work has yet to be infringed.

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