

FOURTH ESTATE AS A VEHICLE TO IMPEL REGISTRATION AND LIMIT ORPHAN WORKS?

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I. INTRODUCTION

Whenever a work is fixed in a tangible medium of expression for the first time, a copyright in that work automatically comes into existence.¹ But if the copyright holder wants to sue an alleged infringer, they must comply with the provisions of Title 17, the part of the U.S. Code that deals with copyrights. One such provision is 17 U.S.C. § 411(a), which states that, for U.S. works, a complaint cannot be filed until “registration . . . has been made in accordance with this title.”²

Section 411(a) is written in the passive voice, a grammatical faux pas which led to a question that split the circuits: by whom must registration be made? On one side, the Fifth and Ninth Circuits adopted the “application approach,” where the copyright holder satisfies the registration requirement by sending in a complete application.³ On the other side, the Tenth and Eleventh Circuits championed the “registration approach,” which views registration as made by the Copyright Office (“Office”) when it either approves or denies the registration application.⁴ In *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, the Supreme Court affirmed the Eleventh Circuit and adopted the registration approach nationwide.⁵ Justice Ginsburg wrote a unanimous opinion for the court, and no separate opinions were filed.⁶

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1. 17 U.S.C. § 102(a) (2018).

2. 17 U.S.C. § 411(a) (2018).

3. *See* *Apple Barrel Prods. v. Beard*, 730 F.2d 384, 386–87 (5th Cir. 1984), *abrogated in part by* *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621–22 (9th Cir. 2010), *abrogated by Fourth Estate*, 139 S. Ct. 881.

4. *See* *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1205 (10th Cir. 2005), *abrogated in part by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1339, 1341 (11th Cir. 2017), *aff’d*, 139 S. Ct. 881 (2019).

5. 139 S. Ct. 881 (2019).

6. *Id.*

Fourth Estate was correctly decided, both as a matter of statutory analysis and as a matter of policy. Textually, the Court was correct to focus specifically on the context of § 411(a) itself and decline Fourth Estate's invitation to go on a broad-ranging survey of other sections. More importantly for this Note, the Court also correctly handled the policy dimensions. The application approach courts were sympathetic to plaintiffs, seeking to protect their works from infringement, who may have accidentally run afoul of the statute of limitations. But they neglected the general public's interest in a complete, accurate, and current registry. And they also did not mention that Congress, the people's representatives, had already balanced these interests, and had over multiple decades consistently struck the balance in favor of maintaining the registry. The Supreme Court recognized all of this, albeit somewhat obliquely, and therefore, rightly rejected the application approach attempt to write policy preferences for plaintiffs into the copyright law.

Section 411(a) and the registration formality have also played a central role in the vigorous, long-raging debate in legal academia over whether copyright formalities are a good thing.⁷ This debate has generated several proposed formalities to help tailor the American copyright system to better suit the author's end goals.⁸ In the meantime, the Office has noted a growing problem with so-called "orphan works."⁹ Orphan works, which are works for which the copyright owner cannot be found, can create significant legal uncertainty, which may prevent an otherwise-interested potential licensee from productively using the orphaned work.¹⁰ Fourth Estate, copyright formalities, orphan works: these three seemingly-disparate strands actually tie together. Congress's insistence on maintaining a complete and accurate registry through formalities helped guard against works being orphaned.¹¹ In contrast, the modern, international trend of loosening formalities has worsened the orphan

7. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 489–90 (2004) (promoting formalities as a way to adapt copyright law to the internet age and allow easy reuse of works with limited commercial value); Jane C. Ginsburg, *"With Untired Spirits and Formal Constancy": Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1584–86 (2013) (criticizing formalities proponents as either actively seeking to expropriate authors for non-compliance or hiding their true confiscatory motives behind a mask of concern for the completeness of the public record).

8. See, e.g., Ginsburg, *supra* note 7, at 1588 (proposing conditioning the validity of a transfer of copyright ownership on recordation of a written document with the Copyright Office).

9. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1–14 (2006).

10. *Id.* at 1.

11. See *id.* at 43.

works problem.¹² But there may be a solution: Fourth Estate incentivizes timely registration of works. When combined with new proposed formalities, ones that even anti-formalities scholars approve of, Fourth Estate can help Office records stay valid and complete, thereby mitigating the creation of future orphan works.

This Note proceeds in four parts. Part II addresses § 411(a) and other relevant provisions of the Copyright Act, including their development and the legislative history and intent that shaped their current forms. Part III discusses Fourth Estate and the circuit split it resolved. Part IV surveys the academic debate surrounding copyright formalities, as well as the literature discussing the orphan works problem. Lastly, Part V argues that Fourth Estate, when combined with other proposed formalities in the literature, will help prevent future orphan works, thus vindicating the policy rationales that have preserved the registration formality in American copyright law.

II. A BRIEF HISTORY OF THE REGISTRATION REQUIREMENT

To contextualize § 411(a) and the *Fourth Estate* decision, this Note briefly discusses the history of the registration requirement in American copyright law. The current version of 17 U.S.C. § 411(a) has two main components. First, § 411(a) sets the general rule that a copyright infringement lawsuit for a U.S. work cannot be filed “until preregistration or registration of the copyright claim has been made in accordance with this title.”¹³ Second, an applicant who is denied registration by the Office is given an entitlement to file suit anyway, provided that they serve notice and a copy of the complaint on the Register of Copyrights.¹⁴ The Register then has a statutory right to intervene in the lawsuit on the issue of registrability, although refusal to intervene does not deprive the court of jurisdiction over that issue.¹⁵

12. *See id.* As the trend is international, the orphan works problem is also international. *See, e.g.*, MARCO RICOLFI, LYNNE BRINDLEY, CLAUDIA DILLMAN, TARJA KOSKINEN-OLSSON, TOBY BAINTON, ANNE BERGMAN-TAHON, JEAN-FRANÇOIS DEBARNOT, MYRIAM DIOCARETZ & OLAV STOKKMO, COPYRIGHT SUBGROUP, HIGH LEVEL EXPERT GRP. ON DIG. LIBRARIES, REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS 4–9 (2007).

13. 17 U.S.C. § 411(a) (2018). Authors asserting moral rights in visual works are exempt from this requirement. *Id.*

14. *Id.*

15. *Id.*

A. BEFORE THE 1976 ACT

Harsh, mandatory formalities were a part of American copyright law from its very beginnings.¹⁶ When the newly-independent United States enacted its first copyright law, the Copyright Act of 1790, it required several formalities as preconditions to copyright protection.¹⁷ Among these formalities was a requirement that an author register their work with the local district court.¹⁸ Since a copyright under the 1790 Act could not arise without registration, it necessarily followed that a suit for copyright infringement could not be filed until the copyrighted work had actually been registered by the government. The rest of the world gradually loosened their formalities over time, foreshadowing the eventually successful calls for the United States to follow suit.

The non-mandatory registration requirement, as we know it today, was first enacted by the Copyright Act of 1909.¹⁹ The 1909 Act was a compromise—it made copyright attach to a work upon publication with notice of copyright,²⁰ thereby removing registration as a prerequisite to copyright for the first time in U.S. history.²¹ To counterbalance this, § 12 of the Act instituted formalities as a prerequisite to filing a copyright infringement suit.²² As originally enacted, § 12 stated that a copyright infringement suit could not be maintained until the plaintiff complied with the deposit and registration formalities.²³ With this, the United States reached a general balance between rewarding authors and promoting registration, which it maintains to this day (at least domestically). But even this was not enough for some.

The 1909 Act registration requirement did not answer a major question—can an author who applies for registration but is rejected nevertheless sue?²⁴ In the influential 1958 case, *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, the Second Circuit held that such an applicant cannot sue unless they first succeed in a mandamus action compelling the Register to accept their

16. See 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 17:83 (2020).

17. Copyright Act of 1790, §§ 3–4, 1 Stat. 124, 125 (repealed 1831).

18. *Id.* § 3.

19. Pub. L. No. 60-349, § 12, 35 Stat. 1075, 1078 (1909) (repealed 1976).

20. *Id.* § 9.

21. See Daniel Gervais & Dashiell Renaud, *The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It*, 28 BERKELEY TECH. L.J. 1459, 1467–68 (2013).

22. Copyright Act of 1909, Pub. L. No. 60-349, § 12.

23. *Id.*

24. See *id.*

application.²⁵ The plaintiff had twice tried to register a copyright in a watch, and each time the Office refused to issue a certificate of registration, on the grounds that the watch was not copyrightable as a work of art.²⁶ Judge Learned Hand held that the plaintiff failed to comply with the registration requirement, and therefore could not sue.²⁷

The majority made one argument from precedent and one from text.²⁸ Judge Hand emphasized the D.C. Circuit's decision in *Bouve v. Twentieth Century-Fox Film Corp.*, affirming a grant of mandamus against the Register.²⁹ Judge Hand reasoned that since mandamus is only available when no other adequate remedy exists, that must mean a copyright lawsuit cannot be filed while the question of registration has not been decided.³⁰ And because the Register's rejection is reviewable by the courts, plaintiff Vacheron was obligated to first seek mandamus.³¹ The opinion concluded its analysis with the text of the registration requirement: the applicant was required to comply with both the deposit and registration formalities.³² But submission of an application for registration was required to fulfill the deposit formality, so the only remaining condition for registration as a separate formality had to be the Register's acceptance.³³ The majority, therefore, embraced a souped-up version of the registration approach, forcing rejected applicants to start a separate lawsuit against the Register—and presumably leaving those who lost that lawsuit out of luck.

Dissenting, Chief Judge Clark expressed the same policy views and party sympathies as modern day application approach advocates.³⁴ In Clark's view, the plaintiff complied with the deposit and registration requirements by submitting the application for registration, even though they were rejected.³⁵ Plaintiff should not have to “assume the risk of waiting[,] perhaps until its right is lost[,]” for the Register to perform their statutory duty.³⁶ Therefore, as an act of “simple justice” and equity, the lower court should have held the case

25. 260 F.2d 637, 639–41 (2d Cir. 1958), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

26. *Id.* at 644 (Clark, C.J., dissenting).

27. *Id.* at 639 (majority opinion).

28. *See id.* at 639–41.

29. *See id.* at 640.

30. *Id.*

31. *See id.*

32. *Id.* at 640–41.

33. *Id.*

34. *See id.* at 645 (Clark, C.J., dissenting).

35. *Id.* at 644–45.

36. *Id.* at 645.

until the Register granted or was compelled to grant registration, after which plaintiff could file a supplemental complaint.³⁷ Eventually, Chief Judge Clark would win the specific battle, but lose the overall war. Congress abrogated *Vacheron* by statute in 1976, but—ironically—the details of Congress’s enacted provision would later prove critical to the registration approach’s nationwide victory.³⁸

B. THE COPYRIGHT ACT OF 1976 AND BEYOND

The Copyright Act of 1976 (the 1976 Act) is the basis of the modern American copyright regime.³⁹ The 1976 Act represented a sea change.⁴⁰ For the first time, copyright in a work became automatic upon fixation, without any prerequisite formalities.⁴¹ More importantly for this Note, the 1976 Act codified the registration requirement as 17 U.S.C. § 411(a). The new wording of the registration requirement was as follows: “Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title.”⁴²

The 1976 Act’s major change to the registration requirement was the addition of a provision explicitly repudiating *Vacheron*.⁴³ The new § 411(a) granted rejected applicants the right to sue upon denial, without the need to first obtain mandamus against the Register.⁴⁴ If the Register refused a properly made application, the applicant would still be allowed to file suit for copyright infringement, provided that they serve a notice and a copy of the complaint on the Register.⁴⁵ The Register would then have the statutory right to intervene within sixty days, thereby becoming a party to the action with respect to the issue of registrability.⁴⁶

The 1976 Act brought American copyright law significantly closer to the international, anti-formality vision of copyright.⁴⁷ By the time the 1976 Act was enacted, the international community had coalesced around the anti-formality

37. *Id.*

38. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 411(a), 90 Stat. 2541, 2583; *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889, 890–91 (2019).

39. *See* 1 PATRY, *supra* note 16, § 1:71.

40. *See id.* § 1:72.

41. *Compare* Copyright Act of 1976 § 102, *with* Copyright Act of 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075, 1078 (1909).

42. Copyright Act of 1976 § 411(a).

43. H.R. REP. NO. 94-1476, at 157 (1976).

44. *See* Copyright Act of 1976 § 411(a).

45. *Id.*

46. *Id.*

47. *See* 1 PATRY, *supra* note 16, § 1:71.

regime of the Berne Convention for the Protection of Literary and Artistic Works (“Berne”).⁴⁸ Berne, the major international copyright treaty, allows for international copyright protection by obligating its member states to respect the copyrights in works originating from other member states.⁴⁹ Berne’s view of formalities is made clear in Article 5(2), which explicitly states that “[t]he enjoyment and the exercise” of copyright “shall not be subject to any formality.”⁵⁰ The Berne formality ban does have an important exception: Berne member countries are allowed to impose formalities on domestic authors.⁵¹ This exception explains both § 411(a)’s continued existence and its limited application to United States works only.

The United States brought its copyright law into compliance with Berne through the Berne Convention Implementation Act of 1988.⁵² Joining Berne was a pragmatic decision born of economic necessity.⁵³ But, just because the United States signed on to the letter of Berne, did not mean that it had signed on to its spirit. In some areas, including formalities and copyright registration, Congress took a grudging, minimalist approach to Berne compliance.⁵⁴ The House of Representatives, in its official report, made it clear that it had decided to “revise United States law only to the extent absolutely necessary to make it compatible with Berne.”⁵⁵ In keeping with this philosophy, the House elected to keep § 411 on the grounds that it was a procedural requirement working no loss of copyright.⁵⁶ Since a copyright owner could sue regardless of whether their application was accepted or rejected, the House thought that registration was not a formality.⁵⁷ Importantly, the House report stated that § 411(a) was in the public interest because it would promote litigation efficiency, deter suits

48. *See* S. REP. NO. 100-352, at 2 (1988) (“For more than 100 years, the Berne Convention has been the major multilateral agreement governing international copyright relations.”).

49. Berne Convention for the Protection of Literary and Artistic Works art. 5(1), July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

50. *See id.* art. 5(2).

51. *See id.* art. 5(3).

52. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853, 2853.

53. *See* 7 PATRY, *supra* note 16, § 23:1 (characterizing the U.S. decision to join Berne as “driven by a serious deficit in the international balance of payments and an increased importance of intellectual property as a net export industry”).

54. *See* H.R. REP. NO. 100-609, at 40 (1988) (making clear that there was a “conceptual decision to revise United States law only to the extent absolutely necessary to make it compatible with Berne”).

55. *Id.*

56. *Id.* at 41.

57. *Id.*

over uncopyrightable material, and ensure a central public repository of copyright ownership claims.⁵⁸

Even after joining the anti-formality Berne regime, the United States has nevertheless rejected calls to take the last step and eliminate the registration before suit requirement. The proposed Copyright Reform Act of 1993 would have eliminated § 411(a) entirely.⁵⁹ The 1993 Act explicitly sought to bring American copyright law into harmony with international norms.⁶⁰ In language befitting the strongest Berne advocates, the House report on the 1993 Act decried § 411(a) as “no longer represent[ing] good copyright policy.”⁶¹ The report condemned the registration requirement for discriminating against U.S. authors in favor of foreigners, failing as a mechanism of incentivizing deposits, and serving as the Office’s justification for turning examination of registration applications into a more restrictive process that served as a gatekeeper to courts.⁶² The bill passed the House, but never made it through the Senate.⁶³

Instead, Congress addressed dissatisfaction with the registration requirement by enacting certain carveouts. First, in 1990 Congress exempted lawsuits invoking moral rights, under 17 U.S.C. § 106A, from § 411(a)’s scope.⁶⁴ Next, in 2005, Congress addressed the problem of pre-publication infringement by creating a copyright preregistration option.⁶⁵ As the Supreme Court later suggested in *Fourth Estate*, from this history a pattern emerges.⁶⁶ Congress has occasionally enacted new provisions to alleviate the concerns of copyright holders, but the public interest in the copyright registry is so strong that registration as a prerequisite to suit has been maintained since its 1909 inception.⁶⁷

58. *Id.* at 41–42.

59. Copyright Reform Act of 1993, H.R. 897 (103rd Cong. § 6(a)(B) (1993)).

60. H.R. REP. NO. 103-388, at 9 (1993).

61. *Id.*

62. *Id.* at 9–11.

63. John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1442 (2009).

64. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 606(c)(1), 104 Stat. 5089, 5131.

65. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 104(1), 119 Stat. 218, 221–22.

66. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019).

67. *See id.*

III. A CIRCUIT SPLIT AND ITS RESOLUTION

Because of Congress's failure to specify in § 411(a) who makes registration, and when, circuits were forced to make the decision themselves. A circuit's reasoning and ultimate decision tended to reflect its views, not just of registration before suit, but of formalities in general. Along this axis, a split emerged. Circuits adopting the "application approach" tended to focus on the subset of public policy concerns weighing against formalities, with special concern for authors who might lose the right to sue because of the statute of limitations expiring during Office processing of the registration application.⁶⁸ Circuits following the "registration approach" instead emphasized formalities as critical incentives in an overall statutory structure, noting the sheer number of provisions that would be meaningless if registration did not require approval or denial by the Office.⁶⁹ The Supreme Court essentially adopted the registration approach reasoning wholesale, with no concession for public policy.⁷⁰ This Note will now survey both sides of the circuit split, as well as the Supreme Court's eventual resolution.

A. THE APPLICATION APPROACH

The Ninth Circuit's *Cosmetic Ideas* decision clearly illustrates application approach courts' textual analysis of copyright law, as well as their anti-formalist policy concerns.⁷¹ *Cosmetic Ideas* involved copyright in a necklace design.⁷² The plaintiff filed suit after sending an application to the Office and receiving confirmation of receipt, but before the Register of Copyrights approved or denied the application.⁷³ The district court granted defendant's motion to dismiss for lack of subject-matter jurisdiction.⁷⁴

The majority acknowledged that it needed to start with the plain language of the statute.⁷⁵ But since neither § 411(a) nor the definition of "registration"

68. See *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618–22 (9th Cir. 2010) (choosing the application approach because it better fulfilled Congress's purpose in passing § 411(a)), *abrogated by Fourth Estate*, 139 S. Ct. 881.

69. See *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1203–05 (10th Cir. 2005) (rejecting the application approach, despite its policy appeal, because the plain meaning of § 411(a) commanded otherwise), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

70. See *Fourth Estate*, 139 S. Ct. at 888–92.

71. See *Cosmetic Ideas*, 606 F.3d at 616–21. These policy concerns persisted even after the U.S. eliminated many of its formalities to join Berne. See H.R. REP. NO. 103-388, at 9–11 (1993).

72. *Cosmetic Ideas*, 606 F.3d at 614.

73. *Id.*

74. *Id.*

75. *Id.* at 616.

in 17 U.S.C. § 101 stated who makes registration or when it occurs, the court turned to the statute as a whole and found it ambiguous.⁷⁶ The court observed that the second part of § 411(a) discusses “registration ha[ving] been refused,” suggesting that registration is an act by the Register that is separate from mere delivery.⁷⁷ But instead of letting that settle the textual inquiry, the majority noted two other provisions of the Copyright Act, §§ 408 and 410(d), as creating doubt as to who obtains registration and whether the applicant’s or Register’s action is more important.⁷⁸ The majority thus decided to resolve the conflict through policy, by choosing the approach it felt best served Congress’s purpose for enacting, not the specific § 411(a) formality, but the entire, generally anti-formality 1976 Act.⁷⁹

Turning to policy, the court found four reasons why the application approach better suited the purpose of “providing broad copyright protection while maintaining a robust federal register.”⁸⁰ Two of the arguments were about the application approach’s advantages.⁸¹ First, the application approach avoided unnecessary delay, since the Office’s ultimate decision does not impact plaintiff’s right to sue.⁸² In contrast, the registration approach would lead to a period of “legal limbo” that is strange and inefficient, one that academics and even registration approach courts had lamented.⁸³ Second, Office delay could result in a plaintiff running afoul of the three year statute of limitations for copyright infringement claims, thereby losing the right to sue entirely.⁸⁴ The court cited 17 U.S.C § 410(d) as proving that Congress had a goal of protecting applicants from the consequences of Office delay.⁸⁵ And when it came to fulfilling that goal, only the application approach would suffice.⁸⁶

The other two arguments played defense by arguing that the application approach could match the registration approach’s purported advantages.⁸⁷ Since the application and registration approaches both require the copyright

76. *Id.* at 616–17.

77. *Id.* (quoting 17 U.S.C. § 411(a) (1976)) (emphasis omitted).

78. *Id.* at 617–18.

79. *See Cosmetic Ideas*, 606 F.3d at 618.

80. *Id.* at 619–21.

81. *See id.*

82. *Id.* at 619–20.

83. *Id.* (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][a][i] (2008)).

84. *Id.* at 620–21. The court noted that the registration approach would therefore harm plaintiffs “who applied for registration towards the end of the three-year [statute of limitations]” *Id.* at 620.

85. *Cosmetic Ideas*, 606 F.3d at 620.

86. *Id.* at 620–21.

87. *Id.*

holder to submit an application for registration, complete with all the necessary information, both approaches equally served the goal of maintaining a robust national registry.⁸⁸ The court ended by rejecting arguments that the registration approach would give courts the benefit of the Register’s opinion on copyrightability at the outset of litigation.⁸⁹ The majority noted that Office approval/rejection will typically occur before a lawsuit is resolved, giving the Register the opportunity to intervene.⁹⁰ Because the Register’s decision is both perfunctory and reviewable by the courts, the better approach would be to let the Office and the courts work simultaneously, rather than waiting for the Register.⁹¹ In conclusion, the majority adopted the application approach to lessen the impact of the registration formality on authors and to allow plaintiffs to be heard on the merits, despite the lack of an Office decision on registrability.⁹²

Overall, the main error of the *Cosmetic Ideas* majority, both textually and on policy, was that it looked at the whole forest while missing the specific tree of interest. For its textual analysis, the court acknowledged that the second part of § 411(a) supported the registration approach, yet it went on a broad hunt for references to registration in other sections to give meaning to § 411(a)—even if that meant making § 411(a) internally inconsistent.⁹³ And even the court’s holistic view of copyright’s statutory scheme was incorrect: it did not mention—which the Supreme Court picked up on—the fact that the application approach would render useless several provisions of the Copyright Act.⁹⁴

On policy, the majority telegraphed its preferences when it found that Congress’s purpose was “providing broad copyright protection while maintaining a robust federal register.”⁹⁵ The majority correctly noted that the 1976 Act *generally* reduced and eliminated formalities.⁹⁶ But the retention of registration before suit in particular—as an *exception* to the trend—should have alerted the majority as to just how important Congress thought it was to have a complete, accurate, and timely copyright registry. When viewed in that light,

88. *Id.* at 620.

89. *Id.* at 621.

90. *Id.*

91. *Id.*

92. *See Cosmetic Ideas*, 606 F.3d at 620–22.

93. *See id.* at 617–18; *see also* Brief for the Respondents at 22, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (No. 17-571).

94. *Compare Cosmetic Ideas*, 606 F.3d at 617–18, *with Fourth Estate*, 139 S. Ct. at 888–90.

95. *See Cosmetic Ideas*, 606 F.3d at 619. It is quite revealing that the interest in maintaining a robust federal register, which § 411(a) was designed to further, is relegated to a dependent clause.

96. *Id.* at 618–19.

the court should have concluded that the registration approach was the correct interpretation of 17 U.S.C. § 411(a) to adopt.

B. THE SUPREME COURT AND THE REGISTRATION APPROACH

In contrast to *Cosmetic Ideas*, Justice Ginsburg's unanimous affirmance in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, wholly endorsed both registration approach reasoning and § 411(a) as part of Congress's vision of copyright formalities.⁹⁷ The very facts of *Fourth Estate*, which involved the copyrights in online news articles, are a stark demonstration of the importance of actually waiting for the Register's decision.⁹⁸ Plaintiff's application for registration was rejected multiple times, both because its check for fees was rejected by the bank and, more importantly, because it had incorrectly submitted its news articles as a group database.⁹⁹ Nevertheless, plaintiff filed suit, with a complaint alleging that an application for registration had been filed.¹⁰⁰ The district court dismissed the complaint, and the Eleventh Circuit affirmed.¹⁰¹ The Eleventh Circuit confirmed its adoption of the registration approach using mostly textual arguments, but it did briefly acknowledge that § 411(a) was a part of Congress's statutory scheme to encourage early registration without formally compelling it.¹⁰²

Justice Ginsburg began the Court's opinion with the statutory text, mainly focusing on how many of the Copyright Act's statutory provisions would be superfluous under the Ninth Circuit's application approach.¹⁰³ Starting with § 411(a) itself, there would be no need to give an applicant the right to sue upon rejection if the application approach were adopted.¹⁰⁴ Furthermore, the last sentence of § 411(a), giving the Register the right to intervene, would be useless if a suit could be filed and resolved (perhaps through settlement) before the Register could finish examination.¹⁰⁵ The Court rejected plaintiff's argument that the purpose of the second sentence of § 411(a) was to require plaintiffs to give notice to the Office of suits based on rejected registrations.¹⁰⁶

97. See *Fourth Estate*, 139 S. Ct. at 886, 888–91.

98. See *id.* at 887.

99. Brief for the United States as Amicus Curiae Supporting Respondents at App. 1a–9a, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (No. 17–571).

100. *Fourth Estate*, 139 S. Ct. at 887.

101. *Id.*

102. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 134–42 (11th Cir. 2017), *aff'd*, 139 S. Ct. 881 (2019).

103. See *Fourth Estate*, 139 S. Ct. at 888–90.

104. *Id.* at 889.

105. *Id.*

106. *Id.*

Such a conclusion would require the word “application” to have two different meanings in two consecutive sentences.¹⁰⁷ The Court found other parts of Title 17 further confirmed the registration approach’s correctness: §§ 410(a)–(b) showed that application and registration are separate, and there would be no reason to enact §§ 410(d) and 408(f) under the application approach.¹⁰⁸

Ultimately, Justice Ginsburg, unlike the *Cosmetic Ideas* court, correctly recognized that it was necessary to “look to the specific context” of the word “registration.”¹⁰⁹ And in the context of § 411(a) in particular, registration would have to refer to the Office’s approval of an application.¹¹⁰ The Court persuasively articulated why the statutory structure supported the registration approach. But ultimately all that was needed was the fact that the application approach forces § 411(a) to contradict itself, a point which Wall-Street.com’s brief made more clearly and directly than the Court’s opinion.¹¹¹

Next, the Court refuted Fourth Estate’s historical arguments.¹¹² § 411(a)’s enactment was not an endorsement of Chief Judge Clark’s *Vacheron* dissent and the application approach, but rather an endorsement of the Hand majority opinion and a reaffirmation of the registration requirement, with an added exception in the case of rejection.¹¹³ The exception, as discussed earlier, would be unnecessary if Office action was no prerequisite to filing suit.¹¹⁴ In addition, Congress had rejected multiple attempts across multiple decades to revoke the registration requirement.¹¹⁵ Instead, Congress balanced the policy concerns by keeping the general rule, while restricting its reach to domestic authors only.¹¹⁶ The Court’s historical analysis is confirmed by the text of the House Report on the 1976 Act, which the Court alluded to but did not directly quote.¹¹⁷ *Vacheron*, as construed by the report, covered “an applicant[] who has sought registration and has been refused”—which is inconsistent with Fourth Estate’s argument that such an applicant had already made registration by submitting their ill-fated application.¹¹⁸ Besides, if Congress had intended to embrace the

107. *Id.*

108. *Fourth Estate*, 139 S. Ct. at 889–90.

109. *See id.* at 890 (quoting Brief for Petitioner at 29, *Fourth Estate*, 139 S. Ct. 881 (No. 17-571)).

110. *Id.*

111. *See id.* at 889; Brief for the Respondents at 22–23, *Fourth Estate*, 139 S. Ct. 881 (No. 17-571).

112. *Fourth Estate*, 139 S. Ct. at 890–92.

113. *Id.* at 890–91.

114. *Id.* at 891.

115. *Id.*

116. *Id.*

117. *See id.* at 890–91.

118. *See* H.R. REP. NO. 94-1476, at 157 (1976).

application approach wholesale, would it not have chosen the easier and clearer route of saying that a lawsuit may not be filed unless an *application for registration* has been made in accordance with Title 17?

Fourth Estate's policy-based arguments fared no better. Fourth Estate argued that since registration is not required for copyright to exist, the application approach was needed to protect authors of works not yet fully registered.¹¹⁹ But copyright owners are protected by damages even before registration, as long as they make sure to get the Register's decision on their application before filing suit.¹²⁰ The Court also dismissed copyright plaintiffs' biggest concern, that copyright holders might be barred from relief due to the statute of limitations expiring before Office action.¹²¹ The majority noted that the average processing time was seven months.¹²² Responsibility for fixing administrative delays ultimately rested with Congress, who could fix any issues with budget or staff.¹²³ The Eleventh Circuit had therefore properly concluded that § 411(a) requires the Register to issue a decision on an application before a lawsuit can be filed, and the judgment was affirmed.¹²⁴

On policy, the Court correctly noted that the interests of copyright plaintiffs can be, *and in the past have been*, accommodated by Congress, without the need to reinterpret § 411(a).¹²⁵ Copyright policy, as well as history and text, thus confirm that Congress, regardless of what it thought about other formalities, highly valued registration before suit in particular. When faced with a plaintiff prejudiced by § 411(a), Congress chose, and would later choose again and again, to pass a specific accommodation, not to eliminate the registration formality entirely. For all these reasons, the Court was correct in choosing the registration approach.

IV. OF ORPHANS AND COPYRIGHT SCHOLARS

A. ORPHAN WORKS

The United States has a problem with orphan works, i.e., works for which the copyright owner cannot be determined or found—and the registration approach may help mitigate it.¹²⁶ Having a complete, accurate, and timely

119. *Fourth Estate*, 139 S. Ct. at 891.

120. *Id.*

121. *Id.* at 892.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.* at 891–92.

126. *See* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 1; Brief of Pub. Knowledge & The R St. Inst. As Amici Curiae in Support of Respondents at 9–11,

registry serves an important public purpose by making it easier for prospective users to know that a work is copyrighted and contact the author, thus facilitating rights clearance and productive transactions.¹²⁷ As some have noted, Congress kept the registration formality to ensure such a comprehensive registry—and the registration approach adopted by the Supreme Court in *Fourth Estate* both vindicates this purpose and mitigates the orphan works problem about to be described.¹²⁸ Conversely, an incomplete or incorrect registry will leave prospective users in doubt as to whether they can make use of a work without the threat of future infringement liability.¹²⁹ A registry's usefulness is thus influenced by the level of formalities in the copyright law, and Congress's deformatizing in the 1976 Act therefore worsened the orphan works problem.¹³⁰ And even scholars who are generally opposed to formalities have acknowledged both that orphan works are a problem and that formalities may be part of the solution.¹³¹

While there are many reasons why a work could end up orphaned, one substantial reason is that the work was never registered with the Office.¹³² When this happens, potential users are deprived of a valuable source of information and a lead in the search process.¹³³ The inability to secure permission from an identifiable copyright owner makes the use of orphan works risky.¹³⁴ There is a possibility that the owner could resurface after extensive investment in and use of the orphan work has already been made, possibly resulting in massive liability.¹³⁵ The risk and uncertainty surrounding an orphan work is often enough to deter others, especially organizations such as libraries and nonprofits, from making productive use of it.¹³⁶ In this manner, a significant part of American culture and its works can end up behind a legal wall.¹³⁷

Fourth Estate, 139 S. Ct. 881 (No. 17-571), 2018 WL 5617891 [hereinafter Public Knowledge Amicus Brief].

127. See Ginsburg, *supra* note 7, at 1585.

128. See Public Knowledge Amicus Brief, *supra* note 126, at 9–11, 14–16.

129. See *id.* at 7–11.

130. See *id.* at 3, 5; see also U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 43–44.

131. See Ginsburg, *supra* note 7, at 1613.

132. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 3–4.

133. See *id.*

134. *Id.* at 1.

135. *Id.*

136. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 1.

137. See *id.*

In 2006, at the request of several senators and representatives, the Office released a report on the orphan works problem.¹³⁸ Despite the lack of prior systematic, empirical research, the Office estimated as a proxy that about fifty percent of the over 850 comments it received described orphan works situations.¹³⁹ It also drew statistics from some of the public comments it received—for example, a Carnegie Mellon University book digitization project had been unable to locate copyright owners for about twenty-two percent of its books.¹⁴⁰ Since then, other studies have confirmed the existence and substantial scope of the orphan works problem.¹⁴¹ U.S. studies of the proportion of orphan works in library collections have put forward estimates ranging from seventeen to more than fifty percent.¹⁴²

The Office's ultimate recommendation was to amend Title 17 to add a section limiting the remedies available to orphan work copyright owners.¹⁴³ The provision would be triggered if the user conducted a reasonably diligent search for the copyright owner without success and then proceeded to provide attribution if possible and reasonably appropriate.¹⁴⁴ If those conditions were met, both monetary and injunctive relief for the copyright holder would be limited.¹⁴⁵ Damages would not be assessed against a noncommercial user who promptly ceased use of the work upon notice, and in all other cases damages would be capped to reasonable compensation.¹⁴⁶ As for injunctions, a user turning the orphan work into a derivative work incorporating a significant amount of the user's expression could not be enjoined from continued use and preparation of the new work, provided that reasonable compensation was paid.¹⁴⁷ In all other circumstances, courts should account for harm to the user's reliance interest in continued use of the orphan work.¹⁴⁸ Lastly, the Office recommended that the provision sunset in ten years, so that Congress could evaluate if any changes were necessary.¹⁴⁹

138. *Id.* at 1–2.

139. *Id.* at 21.

140. *Id.* at 92 n.345.

141. See David R. Hansen, Gwen Hinze, Kathryn Hashimoto, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 4–11 (2013) (discussing several studies, both domestic and foreign, estimating the size of the orphan works problem).

142. *Id.* at 7–8.

143. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 93, 95.

144. *Id.* at 95–96.

145. *Id.* at 115.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 121.

This proposal, although never passed by Congress, may be a balanced method of allowing use of existing orphan works, but by its own terms it only deals with works that have already been orphaned.¹⁵⁰ The proposed statutory language does nothing to prevent works from becoming orphaned in the first place.¹⁵¹ The Report acknowledged that the orphan works problem was a result of the dramatic changes of the 1976 Act, even specifically pointing to the elimination of renewal registrations as a factor aggravating the orphan works problem.¹⁵² This suggests that formalities, especially registration, play an important role in providing the information needed to prevent orphan works. Vigorous enforcement of the registration formality through the registration approach thus may counteract the growing number of orphan works.¹⁵³

Ultimately, preventing the orphan works problem from worsening, rather than just finding ways to allow reasonable use of already-orphaned works, will require an effective method of keeping track of copyright ownership over long periods of time. The registration formality plays a crucial part in enabling this tracking. Even those suspicious of formalities have acknowledged the value that registration information provides to the public and to authors.¹⁵⁴ But registration, even as enforced by the registration approach, is only one piece of the puzzle. Prompt registration can track a work's creation, but subsequent events, such as sale or inheritance of the copyright, can render the registry out-of-date.¹⁵⁵ Might there be a way to ensure that the registry is updated whenever a copyright is transferred, such that the current owner is always known?

B. THE ACADEMIC LITERATURE ON COPYRIGHT FORMALITIES

Despite their somewhat technical and dry nature, copyright formalities have spawned considerable academic criticisms and proposed reforms.¹⁵⁶ Copyright academics writing about formalities have largely split into two sides. One side is in favor of increased formalities. Professor Chris Sprigman has written in defense of this side's views.¹⁵⁷ The other side, spearheaded by Professor Jane Ginsburg, is skeptical of the harsh penalties involved in new

150. *See id.* at 127.

151. *See* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 127.

152. *Id.* at 41–44.

153. *See* Public Knowledge Amicus Brief, *supra* note 126, at 2–3, 9–11.

154. *See, e.g.*, Ginsburg, *supra* note 7, at 1585–87.

155. *See id.* at 1613.

156. *See, e.g.*, Sprigman, *supra* note 7, at 486–91; Ginsburg, *supra* note 7, at 1584–88.

157. *See, e.g.*, Sprigman, *supra* note 7, at 554–68 (advocating the enactment of an inexpensive, mandatory license for works out of compliance with formalities, on the grounds that this would allow others to easily use works which the author economically judged to be worth less than the cost of formalities compliance).

formalities proposed by those like Sprigman.¹⁵⁸ While both sides agree that registration is generally desirable, they differ in the means they would use to encourage it.¹⁵⁹

In Sprigman's view, mandatory formalities are desirable in the internet age, so as to prevent copyright law from being the main barrier to creative reuse of works.¹⁶⁰ The current, voluntary incentives to register fall short because they cannot incentivize copyright holders who do not expect to make significant revenue from their works.¹⁶¹ Before the 1976 Act, these copyright holders would let their works fall into the public domain.¹⁶² Then anyone could copy and make use of the work to their heart's content, without need for payment or fear of a lawsuit.¹⁶³ But in the current regime, the costs of finding the copyright owner and negotiating with them in a limited-information context will be so high that the work will not be used.¹⁶⁴ Of course, Sprigman recognized that mandatory formalities affecting both domestic and international authors would violate Berne.¹⁶⁵ But Sprigman believes that re-imposing the full, traditional set of mandatory formalities on U.S. authors only, as permitted by Berne, would be "a significant improvement on the status quo."¹⁶⁶

Sprigman outlined two main proposals to reintroduce formalities into copyright.¹⁶⁷ One would require amending Berne, and the other would not.¹⁶⁸ First, Sprigman suggested revising Berne to replace the Article 5(2) formalities prohibition with a provision allowing certain "interoperable" formalities.¹⁶⁹ While Berne members would not be required to re-impose formalities, any countries that chose to do so would be required to permit foreign authors to instead comply with the formalities of either their home country or the country of first publication or registration.¹⁷⁰ The Berne signatory countries would also establish an international central copyright registry run by the World Intellectual Property Organization, and they would enter into a side agreement

158. See Ginsburg, *supra* note 7, at 1584–87.

159. See *id.* at 1587–88; Sprigman, *supra* note 7, at 488–91.

160. See Sprigman, *supra* note 7, at 489–90.

161. *Id.* at 495.

162. *Id.* at 496.

163. See 3 PATRY, *supra* note 16, § 9:6.

164. Sprigman, *supra* note 7, at 496–97.

165. See *id.* at 541–42.

166. *Id.* at 551–52.

167. *Id.* at 545–68.

168. *Id.* at 546, 551.

169. *Id.* at 546–47.

170. Sprigman, *supra* note 7, at 547.

standardizing the requirements and formatting of registration data.¹⁷¹ While this is an interesting proposal, it has very little chance of becoming reality—Berne requires unanimous approval of any amendments.¹⁷² One holdout nation can prevent any changes to the status quo.¹⁷³

If Berne could not be amended, Sprigman proposed an alternative set of “new-style formalities.”¹⁷⁴ Sprigman’s main unilateral proposal was to limit the remedies of copyright owners, including authors of foreign works not subject to the registration requirement, who did not comply with copyright formalities.¹⁷⁵ Instead, these owners would only be allowed to recover a nominal fee, equivalent to the cost of complying with formalities, as part of a statutory compulsory licensing scheme.¹⁷⁶ Sprigman viewed this proposal through a law and economics lens: an author who does not comply with formalities has sent a price signal, stating that they value the copyright in their work at less than the cost of compliance with formalities.¹⁷⁷ A default license set at the cost of compliance would thus promote efficiency by eliminating transaction costs and giving the author a good price, one that is not less than the author’s own expected revenue.¹⁷⁸

While Sprigman’s compulsory license proposal is interesting, it is ultimately unlikely to be effective or become law. Sprigman’s proposal presumes authors are rational actors who have set internal dollar values for their works.¹⁷⁹ But noncompliance with formalities does not necessarily signal any conscious opinions that the author might have about their work’s value. Instead, it could signal a general ignorance about copyright law. And actually finding and setting the correct default license fee to accomplish Sprigman’s aims is much easier said than done. Anti-formalities scholars also dispute whether this scheme would comply with Berne, as well as possible additional international treaty obligations to ensure available, effective injunctive relief.¹⁸⁰ As such, a proposal like Sprigman’s is unlikely to end up solving copyright’s ills.

The anti-formality academics, such as Professor Ginsburg, are skeptical of both pro-formality proposals and motivations.¹⁸¹ Ginsburg seems to place pro-

171. *Id.*

172. Berne Convention, *supra* note 49, art. 27(3).

173. *See id.*

174. Sprigman, *supra* note 7, at 554–55.

175. *Id.* at 555–56.

176. *Id.* at 555.

177. *See id.* at 556.

178. *Id.*

179. *See, e.g., id.* at 513, 555.

180. *See* Ginsburg, *supra* note 7, at 1593–97.

181. *See id.* at 1584–85.

formalities advocates into two subgroups.¹⁸² The first group seeks to use formalities as an excuse to neuter copyrights they dislike and erect hurdles for litigious authors.¹⁸³ Accordingly, she believes this group should be condemned.¹⁸⁴ The second group wants increased formalities to maintain a better public record of copyright claims, thus facilitating rights searching and clearance.¹⁸⁵ While Ginsburg sympathizes with this goal, she expresses concern over arguments by some in this group that a robust public record can only be built through the threat of copyright confiscation.¹⁸⁶ To this end, she proposes her own, voluntary measure to promote a complete public registry—a measure which may provide unexpected synergy with *Fourth Estate* and the registration approach.¹⁸⁷

Ginsburg argues that, regardless of intent, the pro-formality approach of limiting remedies to incentivize registration is likely to violate Berne.¹⁸⁸ Conditioning injunctive relief on registration would ignore the historical widespread availability of injunctive relief, which Berne presumably incorporated in its command to provide means of redress.¹⁸⁹ Furthermore, it could also violate the United States' obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, which may require injunctions to, not just be available, but also be used and effective.¹⁹⁰ As for default licensing schemes like Sprigman's, Ginsburg contends that they would run afoul of Berne's three-step test for exceptions to exclusive rights, since they would not be a "special case[] that do[es] not conflict with a normal exploitation of the work."¹⁹¹

Despite Professor Ginsburg's general skepticism of new-style formalities, she was not categorically opposed to copyright formalities. In particular, she proposed her own formality to facilitate rights clearance: a requirement that transfers of copyright ownership be recorded with the Office to be given legal effect.¹⁹² In Ginsburg's view, this requirement does not violate Berne, since it merely controls who can enjoy and exercise the full panoply of Berne rights.¹⁹³

182. See Ginsburg, *supra* note 7, at 1584–88.

183. *Id.* at 1584–85.

184. *Id.*

185. *Id.* at 1585.

186. See *id.* at 1585–86.

187. See *id.* at 1613–21.

188. See *id.* at 1593–97.

189. See *id.* at 1593–94.

190. Ginsburg, *supra* note 7, at 1595–97.

191. See *id.* at 1594–95 (quoting Agreement on Trade-Related Aspects of Intellectual Property art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299) (internal quotations omitted).

192. *Id.* at 1612–13.

193. *Id.* at 1611–13.

A transfer recordation requirement would be akin to the commonplace requirement that transfers of a copyright's exclusive rights be memorialized in a signed writing, which is generally believed to be compatible with Berne.¹⁹⁴ In fact, failure to comply could actually *benefit* the author-transferor by returning the rights to them.¹⁹⁵

Professor Ginsburg did acknowledge that her proposal, meant to ensure a complete and accurate chain of title, would have difficulty filling two major types of gaps.¹⁹⁶ First, under a voluntary registration regime, recording transfers of ownership means little without an initial starting point, a first link in the chain that can be confirmed valid.¹⁹⁷ Second, as the Office noted, oftentimes the ownership of a work can become muddled if the author dies, or if a corporate owner merges or goes bankrupt, thus leading to transfer by operation of law.¹⁹⁸ Ginsburg's main response to both points is to impose on the transferee of copyright an obligation to record both the transfer and the registration.¹⁹⁹

This response is not fully convincing. Transfers by operation of law can make many people joint co-owners, which could lead to a confusing state of affairs where nobody is sure who has to record. In addition, Ginsburg's proposal casts all the risks and obligations regarding chain of title on the transferee. Forcing otherwise willing buyers to shoulder the risk may scare them off, especially when there is even a hint of a cloud over the copyright's title, thereby depriving the author of revenue and the public of a useful work.

There is another, more fundamental flaw with Ginsburg's proposal. As a Congressional study recognized, the mere recordation of transfers, even if compelled by law, is of little value "[i]n the absence of a basic [copyright] registry system."²⁰⁰ Such a registry is vital to identifying the work covered by the transfer and deriving the full chain of title for the copyright.²⁰¹ Ginsburg's proposal to force grantees to record missing initial registrations will do nothing for copyrights that are never transferred in the first place. But perhaps *Fourth Estate* and the registration requirement can supply the registry with the information needed for Ginsburg's proposal to take full effect, thereby also

194. *See id.* at 1612–13.

195. *See* Ginsburg, *supra* note 7, at 1613.

196. *See id.* at 1616–19.

197. *See id.* at 1616.

198. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 28–29.

199. *See* Ginsburg, *supra* note 7, at 1616–18.

200. STAFF OF S. SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS, 86TH CONG., STUDY NO. 19: THE RECORDATION OF COPYRIGHT ASSIGNMENTS AND LICENSES 124–25 (Comm. Print 1960) (authored by Alan Latman).

201. *Id.*

lessening the burden on transferees to do something the author should have done in the first place.

Ultimately, Ginsburg's recordation requirement has significant gaps. But if even Ginsburg, no fan of formalities, finds this proposal agreeable, it will likely be approved by the pro-formality camp as well. The transfer recordation requirement can also have international effect,²⁰² unlike § 411(a), which explicitly only applies to U.S. works.²⁰³ The recordation of transfer requirement, together with the registration requirement, could thus serve as a consensus first step towards a registry that keeps perfect track of a copyright's chain of title, at least for U.S. domestic works.

V. **COULD *FOURTH ESTATE* ADDRESS ORPHAN WORKS BY ENCOURAGING PROMPT REGISTRATION?**

The ideal copyright registry would contain ownership and contact information for every copyright at every moment in time, from creation to expiry. There are two major ways a registry could fail to meet this standard. First, a copyright may be registered a significant time after its creation, or even never at all. Second, the registry might lose track of the ownership claims to an initially registered copyright due to subsequent transfers of ownership.

The strength or weakness of formalities plays a key role in determining whether the registry meets the standard or falls into the two traps mentioned above. Indeed, as part of its decision to keep § 411(a) on the books, Congress has recognized how formalities benefit the public and authors, both in general and with regards to the registry.²⁰⁴ Professor Ginsburg's proposal would address the second problem, and the registration approach to § 411(a) will help mitigate the first. Of course, little can be done about already-orphaned works. But even by itself, the *Fourth Estate* decision should help curtail future orphan works, at least for works created in the United States.²⁰⁵

Fourth Estate provides an answer to the problem of initial registration. The registration approach to § 411(a) will incentivize the author, the very first link in the copyright chain of title, to register their claim early. As for the issue of losing track of copyright ownership due to transfers, Ginsburg's proposal will address that issue by ensuring that valid transfers of ownership must be recorded. Ginsburg identifies several concerns with her proposal, of which the cost of recordation and the problem of gaps in the record are most relevant to

202. See Ginsburg, *supra* note 7, at 1620.

203. 17 U.S.C. § 411(a) (2018).

204. See H.R. REP. NO. 100-609, at 40–44 (1988).

205. § 411(a) only applies to U.S. works, not to foreign ones. 17 U.S.C. § 411(a).

this Note.²⁰⁶ The cost of recordation, much like the delay in registration processing, can be dealt with by taking the Supreme Court's suggestion in *Fourth Estate* and appealing to Congress.²⁰⁷ And initial gaps in the record can be dealt with through a combination of forcing transferees to record, and through *Fourth Estate*'s incentives to register early. With those suggestions implemented, Ginsburg's proposal will ensure that the Office's records of transfer of ownership will correctly reflect subsequent owners of a copyright. And the registration approach will help the Office know about the first link in the chain of title. When put together, the result is a copyright registry that best facilitates rights-clearing and will minimize the chance of future orphan works.

One major objection to the effectiveness of *Fourth Estate* (and therefore to the effectiveness of the registration requirement combined with Professor Ginsburg's proposal) comes out of the *Cosmetic Ideas* opinion. Since the litigious copyright owner is obligated under either approach to deliver a complete application to the Office, the registration approach should be no more effective than the application approach at ensuring a complete registry.²⁰⁸

What this objection misses is the value of *timely* registration. Every day an existing copyright is not registered is a day where a potential licensee might search the registry and not find the copyright and its owner. An out-of-date registry puts the burden on every prospective user of a copyrighted work to search and re-search the records, in case the situation has changed, leading to unnecessary and redundant costs and perhaps even dissuading the prospective user from making beneficial use of the work. The Office itself recognized the importance of prompt registration long ago.²⁰⁹ The Office's report also demonstrates the value of registration in maintaining an accurate registry, noting that the elimination of the renewal registration formality, which required an author to re-register their copyright after twenty-eight years,

206. See Ginsburg, *supra* note 7, at 1613–14, 1617.

207. See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019).

208. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 620 (9th Cir. 2010), *abrogated by Fourth Estate*, 139 S. Ct. 881.

209. See REGISTER OF COPYRIGHTS, 87TH CONGRESS, REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 74 (Comm. Print 1961) (“To be most useful and reliable as a source of information, registration should be made shortly after the first public dissemination of the work.”). The Register recommended a three-month grace period after U.S. dissemination and a six-month one for dissemination abroad. All remedies would be available if registration was made within the grace period. But, if registration was delayed beyond that, then pre-registration infringement would only have limited remedies. *Id.* This recommendation impacts American copyright law to this day. See 17 U.S.C. § 412 (2018).

exacerbated the orphan works problem.²¹⁰ Of course, Congress had weighed this interest against the benefits of an automatic life-plus-fifty year copyright term, ultimately adopting the latter.²¹¹ But Congress has made the exact opposite determination about § 411(a)—it felt that the requirement of registration before suit would improve the copyright registry, and that § 411(a) should therefore be kept.²¹² The application approach may have resulted in copyrights eventually being registered, but *Fourth Estate* and the registration approach will encourage registration shortly after creation. And for that reason, *Fourth Estate* will help improve the copyright registry.

Another objection is based on technological progress. Yes, it says there was a problem with the paper registry of the past, and as a result we have an orphan works problem. But now that we have modern technologies, like computers, the risk of future orphan works should be much lower, since it should be easier than ever before to both find works and track their ownership.²¹³ Because of that, there is no need to make life harder for copyright holders, either by forcing them to wait for the Register before suing or by requiring transfers of ownership to be recorded with the Office. This critique has some force.

But even the most diligent tracker of copyright ownership claims cannot track claims whose existence it does not know. Better technology can address half of the problem by improving the Office's tracking of existing copyrights, but it cannot omnisciently scan existing works, especially works with no information in them tending to identify the author. Better technology is no silver bullet for an author's failure to register their copyright. For that, the Office needs incentives for authors to register their works, and *Fourth Estate's* adoption of the registration approach will provide a powerful incentive to do so.

Perhaps the strongest objection is related to non-sophisticated authors. Many smaller authors will probably not keep up with the latest in copyright law or Supreme Court decisions. The registration approach will just harm them when they show up at the courthouse without first complying with § 411(a). This could even create a two-tier copyright system, where sophisticated corporate users can enjoy the powerful remedies conditioned on prompt registration, such as injunctions and maximum statutory damages, while being

210. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 42–44.

211. *Id.* at 43.

212. See 5 PATRY, *supra* note 16, § 17:83.

213. See Michael W. Carroll, *A Realist Approach to Copyright Law's Formalities*, 28 BERKELEY TECH. L.J. 1511, 1534 (2013); Olive Huang, Note, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 278 (2006).

impervious to economically infeasible lawsuits filed by unsophisticated authors who did not register in time.²¹⁴

This objection can be broken up into two different subcomponents. First is an argument that small-time authors do not know about the registration requirement and should therefore not be held to it. But ultimately, getting a lawsuit dismissed for § 411(a) grounds (possibly in combination with a statute of limitations defense) is the kind of thing that should only happen at most once. Once the author realizes that their suit was dismissed, they should be cognizant of the need to promptly register any future copyrights. Knowledge can also be increased through efforts by the Office or other parts of the government to educate the public at large about copyright. Second, even if the small-time author knows that they should register promptly, the expense of registering each work they create, with an uncertain likelihood that the registration will even be worth it, is too burdensome. But fees, like delay, are a real-life concern that should be addressed by Congress, not through judicial rewriting of § 411(a). As such, the *Fourth Estate* Court has already provided the mechanism to address both arguments: appeal to Congress to increase the staffing and funding of the Library of Congress.

As a closing reminder, it should be emphasized that § 411(a)'s reach is strictly limited to U.S. works in order to comply with Berne. That means that the registration requirement, as well as *Fourth Estate*, will have very little to no impact on foreign orphan works. And the Office did note that foreign orphan works form “a large class of works for which locating the copyright owner is often very difficult.”²¹⁵ Unfortunately, motivating foreign copyright owners to register promptly will be more difficult than motivating domestic copyright owners, since foreign authors have stronger Berne protections against formalities. Perhaps work could be done here by the new-style formalities proposed by commentators such as Professor Sprigman. But the scope of this Note is limited to *Fourth Estate* and § 411(a), and neither of them have the power to mitigate the foreign orphan works problem.

VI. CONCLUSION

The Supreme Court has finally resolved a long-standing circuit split regarding when copyright registration is made. The immediate impact may be limited to a flurry of motions to dismiss in copyright cases that were filed in application approach circuits. But the reasoning in *Fourth Estate* makes it clear that the Supreme Court places a high, maybe even controlling, value on

214. See Tehranian, *supra* note 63, at 1403.

215. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS, *supra* note 9, at 59.

statutory arguments over public policy arguments as they apply to copyright registration. Those unhappy with the current state of affairs or the current copyright law must direct their complaints to Congress, which can enact measures to alleviate their concerns.

In its ruling, the Supreme Court vindicated the registration requirement as a tool to facilitate a copyright registry useful to both authors and users. By doing so, the Court properly recognized and deferred to the rationale expressly cited by past Congresses as a reason to keep § 411(a) around. This stands in marked contrast to the application approach courts, who tended to specifically favor plaintiffs in their public policy analysis, with less attention paid to the public policy concerns favoring a strong registry and prompt registration.

The *Fourth Estate* decision will likely encourage not just registration, but *prompt* registration, which is an important first step in maintaining a copyright registry. To help keep better track of registered copyrights, Congress could enact a proposal akin to Ginsburg's, which would require copyright transfers to be recorded in the registry. This formality was previously a part of American copyright law and is one of few formalities that might be able to garner support from copyright scholars on different sides of the formalities debate. With a registry that both knows of claims earlier and keeps better track of ownership changes, the orphan works problem can be prevented from getting worse. American copyright law will have moved one step closer to a world where the formalities Congress has chosen to retain can have their full intended effect, a world hopefully without orphan copyrights.