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Supreme Court to Resolve Copyright Infringement Circuit Split

On June 28, 2018, the U.S. Supreme Court agreed to resolve a long-standing circuit split by answering the question of whether copyright registration occurs when a copyright owner files an application to register the copyright or when the Register of Copyrights registers the copyright (or refuses to register a copyright). The issue is important because “registration” of a copyright is a precondition to filing suit for copyright infringement under the Copyright Act. 17 U.S.C. § 411(a).

The circuits have long been split on what constitutes “registration” for the purpose of being able to file suit. The Supreme Court finally decided to take up the issue by granting cert in a case from the Eleventh Circuit, *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*. In *Fourth Estate*, the plaintiff’s copyright infringement claims were dismissed for failure to obtain a copyright registration before filing suit. Instead, the plaintiff had filed copyright applications for the infringed works with the Copyright Office, but the Register of Copyrights had not yet acted on the applications.

Today, there is a split among the circuits as to whether a plaintiff must have received a copyright registration before filing suit (the “registration approach”) or rather must only have a copyright application on file (the “application approach”) with the Copyright Office before filing suit. The Fifth and Ninth Circuits have adopted the application approach, while the Tenth and Eleventh Circuits have adopted the registration approach. The First and Second Circuits have acknowledged but not decided the issue. The Sixth and Seventh Circuit Courts of Appeals have not squarely decided the issue, although their district courts have favored both approaches. In the Sixth Circuit, the Eastern District of Michigan, Southern District of Ohio, Northern District of Ohio, and Middle District of Tennessee have all adopted the registration approach. In the Seventh Circuit, however, district courts are split, with the Western District of Wisconsin adopting the registration approach

and the Northern District of Illinois adopting the application approach. The Copyright Office has weighed in on the issue and favors the registration approach.

The risk of following the registration approach, according to its opponents, is that the copyright registration process is voluntary and can take over a year to be processed by the Copyright Office. While the Copyright Office offers an expedited registration process for a significant fee that provides a registration decision in approximately five working days, the *Fourth Estate* plaintiffs argued that the expedited process is costly (\$800 per claim, in addition to the regular application fee) and not an option for the budget-conscious plaintiff. Because of this, the registration approach may result in valid copyright infringement claims being lost because of the three-year statute of limitations under the Copyright Act. By contrast, proponents of the registration approach argue that the language of the Copyright Act is clear—no action for infringement can be instituted until “registration of the copyright claims has been made in accordance” with the Act.

The Supreme Court’s resolution will provide much-needed clarity and uniformity on this issue of statutory construction and likely prevent forum shopping in future copyright infringement litigation.

For more information, please contact [Carl Eppler](#), or any attorney in Frost Brown Todd’s [Intellectual Property Practice Group](#).

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