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# A Circuit Split Involving Ten Federal Circuits: Why Copyright Infringement Actions Should Be Allowed to Proceed After an Application for a Copyright is Filed

MORGAN L. JOHNSON\*

*In 2010, the Supreme Court’s decision of Reed Elsevier, Inc. v. Muchnick addressed the subject matter jurisdiction of a trademark infringement claim. Not only did this avoid the larger question of when a trademark is “registered” under § 411(a), but it lead to further division among the circuit courts. Section 411(a) sets forth the requirements for a trademark infringement suit to be filed; most importantly that it must be “registered.” The registration approach has determined that a trademark is only registered when a party receives an affirmative or negative response, directly from the Copyright Office. The application approach, however, finds the trademark to be “registered” whenever the application has been submitted, along with the accompanying fees and forms.*

*Since the Reed Elsevier case, four more federal circuits have been forced to decide when a trademark is registered. This has led to a five-to-five circuit split regarding the two approaches. This note determines that the application approach is the appropriate interpretation of the registration requirement. This will be shown through: (II) a brief description of the opposing viewpoints, (III) the reasoning for the registration approach, (IV) the reasoning for the application approach, and finally (V) why the application approach is superior to the registration approach. Finally, this articles calls upon the Supreme Court to finally decide the issue of registration, so as to clarify at least one aspect of trademark rights.*

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## I. INTRODUCTION

Imagine creating a copyrightable work, submitting the application to the Copyright Office, and knowing the copyright will be granted as soon as an agent reviews the application. Meanwhile, you have to helplessly watch as others infringe your work for years. In addition to defenselessly watching others infringe your work, you must cross your fingers and hope that the Copyright Office makes a final decision within three years of submitting your application. If your copyright is not granted within the three years, you may never be able to recover for the infringement. The damages resulting from a person willfully infringing *your* creations would forever be outside of your grasp. Unfortunately, the current split among the federal circuits creates just this situation in over half of the circuits.

A three-year statute of limitations on copyright infringement claims brought under Chapter 17 of the United States Code presents this very real issue in copyright law today.<sup>1</sup> In an era of ever increasing intellectual property and copyrighted material, and with current backlogs of up to eight months before receiving an actual decision from the Copyright Office,<sup>2</sup> it is foreseeable that in the near future the three-year statute of limitations could

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1. 17 U.S.C.A. § 507 (LexisNexis 1998); see *Lego A/S v. Best-Lock Constr. Toys, Inc.*, 874 F. Supp. 2d 75 (D. Conn. 2012).

2. U.S. COPYRIGHT OFFICE, *I've Submitted My Application, Fee, and Copy of My Work to the Copyright Office. Now What?*, <http://www.copyright.gov/help/faq/faq-what.html#> (last visited Oct. 13, 2013).

be a serious bar to a person seeking to protect their copyrightable material.<sup>3</sup> This has the potential to be further exacerbated by issues within the government itself.<sup>4</sup>

There are two prevalent interpretations of 17 U.S.C. § 411 (the institution of a civil copyright infringement case), which lead to different conclusions as to what is the appropriate point in time to file a claim for copyright infringement. Central to this debate is the presence of a sharp divide between the federal circuit courts, with an equal number of circuits supporting each approach. The differences between these two interpretations will be discussed in further detail in parts III and IV of this Article, but the two approaches are generally referred to as the application approach and the registration approach.<sup>5</sup> The division among these approaches has led to at least five circuits (or district courts within those circuits) adopting the application approach,<sup>6</sup> and at least five adopting the registration approach.<sup>7</sup>

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3. See Nathan R. Curtis, Note, *Statutory Cosmetic Surgery: Misinterpretation of the Copyright Act's Registration Requirement in Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 2011 BYU L. REV. 83, 83 (2011).

4. Due to the government shutdown (lapse in government funding) in October of 2013, the Copyright Office was closed for fourteen days. A notice on the Copyright Office homepage stated that submissions would not be reviewed or processed until the office reopened. Potentials for government shutdown or interruptions add further delay to the potential eight month waiting period to receiving a certificate of copyright registration. The notice that was present in 2013 read:

Due to the lapse in government funding, the U.S. Copyright Office is closed, as is the greater Library of Congress. As such, the office is unable to update the information on this website, respond to inquiries, or process transactions. Registration submissions will be accepted for the purpose of securing date of receipt, but will not be processed. Website updates and all normal business activity will resume when the government reopens.

If you would like to file a copyright registration online, the online registration system is available. Filing your claim now will help ensure the earliest possible effective date of registration, although copyright registrations will not be processed until the Copyright Office reopens.

U.S. COPYRIGHT OFFICE, <http://www.copyright.gov> (last visited Oct. 13, 2013).

5. *Compound Stock Earnings Seminars, Inc. v. Dannenberg*, No. 3:10CV2201D, 2012 U.S. Dist. LEXIS 1014 (N.D. Tex. Jan. 4, 2012).

6. See *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 616 (9th Cir. 2010); *Apple Barrel Prods. v. Beard*, 730 F.2d 384 (5th Cir. 1984); *Panoramic Stock Images, Ltd. v. McGraw-Hill Cos.*, 961 F. Supp. 918, (N.D. Ill. 2013); *Alicea v. Machete Music*, No. 10-CV-30002-MAP, 2012 U.S. Dist. LEXIS 22596 (D. Mass. Feb. 23, 2012); *Iconbaazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D. N.C. 2004).

7. See *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005); *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1489 (11th Cir. 1990); *N.J. Media Grp., Inc. v. Sasson*, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536 (D.N.J. Jan. 4, 2013); *Hawaiian Vill. Computer, Inc. v. Print Mgmt. Partners, Inc.*, 501 F. Supp. 2d 951

The main argument regarding § 411 centers around § 411(a), which states that a person cannot file a civil action for infringement of a copyright until there is preregistration or *registration* of the copyright in accordance with the Copyright Act.<sup>8</sup> While this may seem straightforward, the federal circuits are split over the meaning of “registration” within this statute.<sup>9</sup> The registration approach interprets § 411 to mean that a copyright is only “registered” when the party receives an affirmative or negative response from the Copyright Office,<sup>10</sup> while the application approach interprets § 411 to mean that, for purposes of a copyright infringement claim, a copyright is “registered” when an application has been submitted (accompanied by the appropriate fees and forms).<sup>11</sup>

This Article agrees with the five federal circuits that have come to the conclusion that the application approach is the correct interpretation of § 411. Registration, such that an owner may protect their copyrightable material through infringement actions, is affected upon submission of the application and accompanying documents to the Copyright Office. In addition to this, this Article recognizes that within the last several years, and since the Supreme Court’s opinion in *Reed Elsevier*,<sup>12</sup> many more circuits have been forced to choose which approach to adopt. Post-*Reed Elsevier*, many more

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(E.D. Mich. 2007); *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06CV00697JCH, 2006 U.S. Dist. LEXIS 71240 (E.D. Mo. 2006).

8. 17 U.S.C.A. § 411(a) (LexisNexis 2008). Section 411(a) in full reads:

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil 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. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

9. *Brooks-Ngwenya v. Indianapolis Pub. Schs.*, 564 F.3d 804, 806 (7th Cir. 2009).

10. *N.J. Media Grp., Inc. v. Sasson*, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536 (D.N.J. Jan. 4, 2013).

11. *Cosmetic Ideas*, 606 F.3d at 615.

12. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) was a 2010 opinion by the United States Supreme Court which addressed the jurisdictional requirements to hear a § 411 copyright infringement case. The implications of this decision, and how it changed the discussion of § 411 will be addressed in Section II.

courts have chosen to subscribe to the interpretation of the application approach over that of the registration approach.

What follows will be an overview of how the application and registration approaches have developed over the years and a discussion of the circuits (or district courts within each circuit) who have adopted each approach. Included in this background will be a detailed discussion of each approach, found in part III and IV, especially focused on the views of the four most recent circuit courts to have adopted their respective approaches in the last three years. The Article will then conclude in part V with a discussion of why the application approach is the correct statutory interpretation.

## II. THE CIRCUIT SPLIT

Chapter twenty-eight of the United States Code grants original and exclusive jurisdiction over copyright claims to the federal district courts.<sup>13</sup> The first issue that arose within these district courts, with respect to § 411, was whether the federal courts had subject matter jurisdiction over copyright infringement claims, for copyrights that had yet to receive formal approval from the Copyright Office.<sup>14</sup> The original split between the circuits was at what point a party had a recognizable claim under § 411, such that the district court possessed jurisdiction to hear the infringement claim.<sup>15</sup> Under the registration approach, no lawsuit for copyright infringement may be brought until an affirmative or negative ruling on the copyright is received. Under the application approach, no lawsuit may be brought until the application for the copyright is submitted. This issue remained unaddressed by the Supreme Court until 2010.

The Supreme Court finally looked to address this split between the circuits in their 2010 decision of *Reed Elsevier*.<sup>16</sup> One question reviewed by the Court was whether a copyright was registered such that a federal court would have jurisdiction to decide a case of infringement.<sup>17</sup> While the Court avoided the larger issue of the circuit split between the application and registration approaches mentioned previously, it clarified that the issue is not one of jurisdiction.<sup>18</sup> The Supreme Court held that the federal courts have subject matter jurisdiction to hear an infringement case, even if the item has

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13. 28 U.S.C.A. § 1338 (LexisNexis 2011).

14. *Reed Elsevier*, 559 U.S. 154; see *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1198 (10th Cir. 2005).

15. *Reed Elsevier*, 559 U.S. at 159; see *La Resolana*, 416 F.3d 1195.

16. *Reed Elsevier*, 559 U.S. at 159-60.

17. *Id.* at 163.

18. *Id.* at 164.

not been “registered” as required by § 411(a).<sup>19</sup> While this would seem to resolve the issues between the two approaches, after the 2010 decision of *Reed Elsevier* the contemporary issue has become whether the court’s interpretation of “registered” means that a copyright infringement case can withstand a motion to dismiss for failure to state a claim.<sup>20</sup> The split between the circuits regarding the registration and application approaches essentially remained undisturbed, with the minor difference being that courts now evaluate each approach for purposes of a motion to dismiss for failure to state a claim, as opposed to a motion to dismiss for lack of subject matter jurisdiction.<sup>21</sup> The courts now have jurisdiction simply to determine if an infringement action is registered, such that there is a legitimate claim for infringement, and the case may move forward. Because the opinion did little to change the debate, circuits which had previously adopted either the registration or application approach have simply reaffirmed their belief in their respective approach post-*Reed Elsevier*.<sup>22</sup>

### III. THE REGISTRATION APPROACH

The registration approach posits that a claim for copyright infringement may only be brought upon an affirmative or negative decision from the Copyright Office of the application for a copyright.<sup>23</sup> While some of the courts that follow this approach have suggested that the plaintiff must have a physical copy of the grant or denial of the copyright to file a claim,<sup>24</sup> the consensus is that there simply must be a decision from the Copyright Office.<sup>25</sup> These courts will grant a motion to dismiss for failure to state a claim (or previously a motion to dismiss for lack of jurisdiction) if the applicant has only filed his or her application with the Copyright Office before bringing suit.<sup>26</sup>

One basic rationale for this approach is that in a situation in which an owner’s application for copyright is refused, 17 U.S.C. § 411(a) still allows for an infringement claim to be filed so long as notice is served on the Cop-

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19. *Id.* at 165.

20. *See* *N.J. Media Grp., Inc. v. Sasson*, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536 (D.N.J. Jan. 4, 2013). The courts now have jurisdiction to decide if there is a recognizable claim. This determination is also focused on whether a copyright has been registered by the time of the suit.

21. *Id.*

22. *See, e.g.*, *Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013).

23. *See N.J. Media Grp.*, 2013 U.S. Dist. LEXIS 1536.

24. *See* *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053 (C.D. Cal. 2004); *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3-4 (D.D.C. 2002).

25. *E.g.*, *Charles F. Vatterott Constr. Co. v. Esteem Custom Homes, LLP*, 686 F. Supp. 2d 934 (E.D. Mo. 2010).

26. *E.g., id.*

right Office Register.<sup>27</sup> Other courts adopting the registration approach focus on the seemingly plain language of § 411.<sup>28</sup> In addition to the plain language of § 411, these courts will look to the surrounding sections (primarily §§ 408 and 410) for how these sections use the words “registration” and “application.”<sup>29</sup>

Only the Tenth and Eleventh Circuits have conclusively adopted the registration approach in their circuit courts.<sup>30</sup> Both of these circuit decisions were rendered before the *Reed Elsevier* opinion from the Supreme Court, and thus discuss the registration approach in the context of jurisdiction.<sup>31</sup> Despite this, both circuits have reaffirmed their reasoning and belief in the registration approach in a post-*Reed Elsevier* reading of § 411.<sup>32</sup> The other three circuits that have adopted the registration approach have only had their decisions reach the district courts within those circuits, but there is every indication that their circuit courts would rule in favor of the registration approach.<sup>33</sup>

#### A. THE TENTH CIRCUIT: *LA RESOLANA ARCHITECTS*

In the Tenth Circuit case of *La Resolana Architects v. Clay Realtors Angel Fire*, the plaintiff, an architectural firm, had drawn plans for a potential townhouse project, the Angel Fire project, in the year 1997.<sup>34</sup> The project was ultimately abandoned.<sup>35</sup> In 2003, an employee of the architectural firm visited a building site of the defendant and recognized the townhouses as similar to the ones designed for the abandoned Angel Fire project.<sup>36</sup> Less than a month later, the plaintiff filed a copyright for the drawings of the townhouses from the Angel Fire project, and filed a lawsuit for copyright infringement thirteen days after filing for a copyright.<sup>37</sup> The court contemplated a motion to dismiss because the plaintiffs only had a letter from the

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27. 17 U.S.C.A. § 411(a) (LexisNexis 2008).

28. *E.g.*, *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200 (10th Cir. 2005).

29. *Id.* at 1200-01.

30. *La Resolana*, 416 F.3d at 1195; *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1489 (11th Cir. 1990).

31. *M.G.B. Homes*, 903 F.2d at 1489; *La Resolana*, 416 F.3d 1195.

32. *See Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119-20 (10th Cir. 2013); *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1302 n.8 (11th Cir. 2012).

33. *See, e.g.*, *N.J. Media Grp., Inc. v. Sasson*, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536 (D.N.J. Jan. 4, 2013); *Hawaiian Vill. Computer, Inc. v. Print Mgmt. Partners, Inc.*, 501 F. Supp. 2d 951 (E.D. Mich. 2007); *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06CV00697JCH, 2006 U.S. Dist. LEXIS 71240 (E.D. Mo. 2006).

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

35. *Id.*

36. *Id.*

37. *Id.*



Copyright Office stating that the copyright was approved for registration (which had been received nearly five months into the litigation), but a certificate of registration had not yet been issued by the Copyright Office.<sup>38</sup> The copyright registration was to be effective the day before the initiation of the lawsuit, as soon as the certificate of registration was finally received.<sup>39</sup> The court eventually granted the defendant's motion to dismiss for lack of jurisdiction, finding that the plaintiff had not satisfied the "registration" requirement of § 411.<sup>40</sup>

The court generally found that, because the registration of a copyright is a voluntary action, which allows a party to enforce their copyright in an infringement suit, the legislature meant to incentivize parties to register their copyrightable material in order for that party to take advantage of the ability to file an infringement claim.<sup>41</sup>

The court aligned itself with the registration approach based upon the "[a]ct's seemingly plain language."<sup>42</sup> It found that the statute in question contained affirmative steps that had to be taken, by both the applicant and the Copyright Office, before "registration" was complete.<sup>43</sup> The court seemingly found the most important affirmative acts to be the purported requirement from §§ 410(a) and 410(b).<sup>44</sup> Section 410(a) requires the Register to "'examine,' to 'register,' and then to 'issue' the certificate of registration" before a copyright is registered,<sup>45</sup> and § 410(b) alternatively requires the Register to "determine[] . . . the material deposited does not constitute copyrightable subject matter" before refusing the registration.<sup>46</sup>

While the court in *La Resolana* suggested that the letter the architectural firm had received from the Copyright Office (stating that the copyright had been approved, but the certificate may be delayed) would be sufficient for an infringement claim, the case was ultimately dismissed because the lawsuit was brought before any such letter or affirmative response from the Copyright Office had been received.<sup>47</sup>

As noted previously, the Tenth Circuit has impliedly upheld their adoption of the registration approach after the *Reed Elsevier* decision.<sup>48</sup>

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38. *Id.* at 1198.

39. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1197-98 (10th Cir. 2005).

40. *Id.* at 1208.

41. *See id.* at 1199-1200.

42. *Id.* at 1201.

43. *Id.*

44. *See La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005).

45. *Id.* at 1201 (quoting 17 U.S.C.A. § 410(a) (LexisNexis 2014)).

46. *Id.* at 1201 (quoting 17 U.S.C.A. § 410(b) (LexisNexis 2014)).

47. *Id.* at 1208.

48. *See Enter. Mgmt. Ltd. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013).

More directly, several district courts within the Tenth Circuit have explicitly continued the use of the registration approach after 2010.<sup>49</sup>

#### B. THE ELEVENTH CIRCUIT: *M.G.B. HOMES*

The Eleventh Circuit case of *M.G.B. Homes v. Ameron Homes* also involved plans for a housing development.<sup>50</sup> The plaintiff, M.G.B. Homes, filed suit against the defendant, a rival homebuilder, for allegedly copying the floor plan found on one of M.G.B.'s flyers.<sup>51</sup> Despite the main issue being the scope of the copyright received by M.G.B., the court did briefly address the registration approach in all but name.<sup>52</sup>

M.G.B. filed for a copyright on May 5, 1986 but did not receive a certificate of registration until several months later on July 28, 1986.<sup>53</sup> M.G.B. filed a copyright infringement complaint a few weeks before receiving its certificate of registration, on July 3, 1986.<sup>54</sup> However, because M.G.B. had not yet received an affirmative action from the Copyright Office at the time of the initiation of the lawsuit, the court dismissed the case.<sup>55</sup> M.G.B. eventually refiled the lawsuit and amended the complaint after they had received the certificate, in order to comply with the district court's reading of § 411.<sup>56</sup> The Eleventh Circuit, on appeal, condoned the fact that the district court had waited to exercise jurisdiction until M.G.B. had actually received a certificate of registration.<sup>57</sup> While this court did not explicitly state that it was adopting the registration approach, a subsequent opinion,<sup>58</sup> and many district courts within this circuit,<sup>59</sup> have interpreted the language in *M.G.B.* to have done exactly that. Although the subsequent decision by the circuit court decision was decided before *Reed Elsevier*, at least one district court

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49. *E.g.*, *Viesti Assocs. v. Pearson Educ., Inc.*, No. 12-cv-02240-PAB-DW, 2013 U.S. Dist. LEXIS 113323, at \*5 (D. Colo. Aug. 12, 2013); *GeoSpec1 Sys., LLC v. Infrastructure Corp. of Am.*, No. 13-cv-00407-PAB-BNB, 2013 U.S. Dist. LEXIS 110519, at \*10 (D. Colo. Aug. 6, 2013).

50. *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1487 (11th Cir. 1990).

51. *Id.* at 1487-88.

52. *Id.* at 1488-89.

53. *Id.* at 1489.

54. *Id.*

55. *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1489 (11th Cir. 1990).

56. *Id.*

57. *Id.* at 1489-90.

58. *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1285 (11th Cir. 2000).

59. *See, e.g.*, *Marc Anthony Builders, Inc. v. Javic Props., LLC*, No. 8:11-CV-00432-EAK-AEP, 2011 U.S. Dist. LEXIS 74706, at \*5 (M.D. Fla. July 12, 2011); *Kaye Homes, Inc. v. Original Custom Homes Corp.*, No. 2:07-cv-392-FtM-29SPC, 2007 U.S. Dist. LEXIS 60847, at \*6 (M.D. Fla. Aug. 20, 2007).

within the Eleventh Circuit has continued to uphold the registration approach precedent post-*Reed Elsevier*.<sup>60</sup>

### C. DISTRICT COURTS WITHIN THE SIXTH, THIRD, AND EIGHT CIRCUITS

While the Eighth, Sixth, and Third Circuit Courts have not affirmatively made a decision to follow the registration approach, many district courts within these circuits have begun to adopt the registration approach.

District courts in the Eighth Circuit first adopted the registration approach in 2006.<sup>61</sup> In *TVI, Inc.*, the court, like many other courts adopting the registration approach, opted for a reading of the “plain language.”<sup>62</sup> A separate district within the Eighth Circuit, previous to *Reed Elsevier*, also found that the Eight Circuit would likely opt for a plain reading approach to the statute, and favor the registration approach.<sup>63</sup>

District courts in the Sixth Circuit began to adopt the registration approach slightly before the *Reed Elsevier* opinion.<sup>64</sup> The court in *Hawaiian Village Computer Inc.* found that although the Sixth Circuit had declared registration to be “a prerequisite to filing a copyright infringement suit,”<sup>65</sup> the circuit court had not yet addressed the registration or application approaches.<sup>66</sup> This court found that, because of the language of a prior decision, the Sixth Circuit would give considerable deference to the plain language of the statute.<sup>67</sup> As plain language analysis is central to the registration approach, the court in *Hawaiian Village* determined “that the Sixth Circuit would favor the registration approach.”<sup>68</sup> At least one subsequent district court decision has affirmed the analysis done by this court.<sup>69</sup>

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60. See *Marc Anthony Builders*, 2011 U.S. Dist. LEXIS 74706, at \*5.

61. *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06cv00697JCH, 2006 U.S. Dist. LEXIS 71240 (E.D. Mo. Sept. 29, 2006).

62. See *id.*

63. *Charles F. Vatterott Constr. Co. v. Esteem Custom Homes, LLP*, 686 F. Supp. 2d 934, 939 (E.D. Mo. 2010).

64. *Hawaiian Vill. Computer, Inc. v. Print Mgmt. Partners, Inc.*, 501 F. Supp. 2d 951, 953-54 (E.D. Mich. 2007); *Teevee Toons, Inc. v. Overture Records*, 501 F. Supp. 2d 964, 967 (E.D. Mich. 2007).

65. *Hawaiian Vill. Computer*, 501 F. Supp. 2d at 953 (citing *Murray Hill Publ'ns, Inc. v. ABC Commc'ns.*, 264 F.3d 622, 630 (6th Cir. 2001)).

66. *Hawaiian Vill. Computer*, 501 F. Supp. 2d at 953.

67. *Id.* at 954. The previous case of *Murray Hill* from the Sixth Circuit analyzed derivatives works under the Copyright Act. *Murray Hill*, 264 F.3d 622. The *Hawaiian Village* court chose to follow the *Murray Hill* court's method of analysis, whose first step involved looking at the plain language of the statute.

68. *Hawaiian Vill. Computer*, 501 F. Supp. 2d at 954.

69. *Teevee Toons*, 501 F. Supp. 2d at 968.

Finally, two years ago, and after the *Reed Elsevier* decision, district courts in the Third Circuit began to align themselves with the registration approach. In *Patrick Collins, Inc.* the court found the statute unambiguous and opted for a plain reading of the statute.<sup>70</sup> With little additional rationale, the court emphatically stated that “[i]n enacting 17 U.S.C. § 411(a), Congress chose the registration approach, and we must abide by that decision.”<sup>71</sup> In 2013, a district court within the Third Circuit again recognized that the circuit court had yet to adopt either approach.<sup>72</sup> This court, instead of relying on *Patrick Collins*, decided to consult “case law in the Third Circuit decided post-*Reed Elsevier*.”<sup>73</sup> After reviewing these cases, the court determined that the adoption of the registration approach in the Third Circuit was likely, going so far as to say that the plaintiffs could not have a valid claim for copyright infringement until they actually held a certificate of copyright registration.<sup>74</sup>

#### IV. THE APPLICATION APPROACH

The application approach, on the other hand, posits that a claim of copyright infringement may be brought at any point after the application has been submitted to the Copyright Office.<sup>75</sup> This is based upon two main ideas. The first idea is that, because copyrights are backdated to the date of application, plaintiffs should be able to defend themselves from infringement at any point after this date. Several courts have also pointed to the fact that under the registration approach, the statute of limitations, coupled with potential backlogs at the Copyright Office, could create a situation in which a person could never defend against a clear infringement.<sup>76</sup> The second main reason for allowing infringement suits after an application is submitted to the Copyright Office is based on a contextual statutory analysis. Many of these courts point to the language of surrounding sections to buttress their use of the application approach. For example, courts point to the language of 17 U.S.C. § 408, which states that registration can be obtained

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70. *Patrick Collins, Inc. v. Doe*, 843 F. Supp. 2d 565, 570 (E.D. Pa. 2011).

71. *Id.*

72. *N.J. Media Grp., Inc. v. Sasson*, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536, at \*5 (D.N.J. Jan. 4, 2013).

73. *Id.* at \*6.

74. *See id.* at \*6-7. This diverges slightly from the consensus of courts adopting the registration approach. Typically any notice by the Copyright Office that the registration is imminent, or a certificate is forthcoming, is sufficient to show registration. *See, e.g.*, *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005).

75. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612 (9th Cir. 2010).

76. *See, e.g., id.* at 620.

once a party delivers all of the relevant documents (such as the application, fee, etc.) to the Copyright Office.<sup>77</sup>

The Ninth Circuit has most definitively adopted the application approach,<sup>78</sup> while decisions from the Fifth<sup>79</sup> and Seventh<sup>80</sup> Circuits have been interpreted to have adopted the application approach. While all of these decisions were made before the *Reed Elsevier* opinion, they have since been reaffirmed. In addition to these circuits, district courts within the First and Fourth Circuits have sided with the application approach in the last several years.<sup>81</sup>

#### A. THE NINTH CIRCUIT: *COSMETIC IDEAS V. IAC*

The most thorough analysis of the application approach was done in the Ninth Circuit case of *Cosmetic Ideas*. This case involved a dispute between Cosmetic and the parent company of The Home Shopping Network (IAC) over a piece of jewelry designed by Cosmetic.<sup>82</sup> Cosmetic began selling the piece around 1999, and claimed that around 2005, IAC began selling a “‘virtually identical’ necklace.”<sup>83</sup> It was not until after IAC began selling the alleged copy that Cosmetic filed the paperwork for a copyright with the Copyright Office in 2008.<sup>84</sup> Cosmetic filed suit less than two weeks after receiving a notice from the Copyright Office that it had received the application and all of the necessary documents.<sup>85</sup>

The court first analyzed the plain language of the statute in question, § 411, because when a statute is unambiguous, there is generally no need for

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77. In relevant portion, 17 U.S.C. § 408(a) reads:  
[T]he 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. §408(a) (LexisNexis 2005) (emphasis added).

78. *Cosmetic Ideas*, 606 F.3d 612.

79. *Apple Barrel Prods. v. Beard*, 730 F.2d 384 (5th Cir. 1984).

80. *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003).

81. *Performance Sales & Mktg. LLC v. Lowe’s Cos.*, No. 5:07CV00140-RLV-DLH, 2012 U.S. Dist. LEXIS 131394, at \*34-35 (W.D. N.C. Sept. 14, 2012); *Alicea v. Machete Music*, No. 10CV30002-MAP, 2012 U.S. Dist. LEXIS 22596, at \*8-9 (D. Mass. Feb. 23, 2012).

82. *Cosmetic Ideas*, 606 F.3d 612.

83. *Id.* at 614.

84. *Id.*

85. *Id.*

further analysis.<sup>86</sup> The court found the language of § 411 to be unclear as to the implication of “registration,” and that the accompanying definitions for Title 17<sup>87</sup> provided even less clarification for what “registration” is meant to entail.<sup>88</sup> Because of this, the court then looked at the Act “as a whole,” in order to determine the statutory intent and context.<sup>89</sup>

The court acknowledged the fact that some of the provisions, § 410(a) and the end of § 411(a), described the actions and steps that must be undertaken by the Register of Copyrights.<sup>90</sup> Section 410(a) states that “the Register shall register the claim and issue . . . a certificate of registration,” and § 411(a) states that when filing an infringement suit, after an application is initially rejected, a copy must be served on the Register of Copyrights.<sup>91</sup> While this may seem to suggest that “registration” is not effected upon the receipt of an application, the court found that in the overall context of Title 17, the application approach more appropriately conformed to the congressional intent.<sup>92</sup>

Specifically, the court pointed to the fact that § 408 only states that a party “*may obtain registration . . . by delivering*” the appropriate paperwork to the Copyright Office.<sup>93</sup> In addition to this, § 411(a) allows a party to file a copyright infringement suit even if the Copyright Office rejects the copyright outright.<sup>94</sup> Finally, the court noted that by the time of the opinion, *Cosmetic* had in fact received a certificate of registration, which had an effective date dating back to several weeks before the initiation of the lawsuit.<sup>95</sup> Thus, for purposes of this specific lawsuit, the issue of IAC’s motion to dismiss for failure to state a claim had become moot.<sup>96</sup>

Despite this analysis, the court was not satisfied that “the plain language of the Act unequivocally support[ed] either the registration or application approach.”<sup>97</sup> This led the court to do a historical and contextual anal-

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86. *Id.* at 616 (citing *United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009)).

87. 17 U.S.C.A. § 101 (LexisNexis 2005).

88. *Cosmetic Ideas*, 606 F.3d at 616.

89. *Id.* at 617.

90. *Id.*

91. *Id.* (citing 17 U.S.C.A. §§ 410(a) (LexisNexis 2014), 411(a) (LexisNexis 2008)).

92. *See Cosmetic Ideas*, 606 F.3d at 617.

93. *Id.* (citing 17 U.S.C.A. § 408(a) (LexisNexis 2005)).

94. 17 U.S.C.A. § 411 (LexisNexis 2008).

95. *Id.* at 616.

96. The court determined that although the issue of the motion was moot, it would still definitively decide whether to adopt the registration or application approach in the circuit. The court found that the problem presented in the case was “capable of repetition yet evading review” as well as being an unsettled issue among the district courts within the circuit. *Cosmetic Ideas*, 606 F.3d at 616.

97. *Id.* at 618.

ysis of § 411 beginning at its inception.<sup>98</sup> After this review, the court found that the application approach “better fulfills Congress’s purpose of providing broad copyright protection while maintaining a robust federal register.”<sup>99</sup>

Perhaps most importantly, the leading treatise on copyrights best summarized the policy reasons behind the court’s adoption of the application approach when it said, “[g]iven that the claimant . . . will ultimately be allowed to proceed regardless of how the Copyright Office treats the application, it makes little sense to create a period of ‘legal limbo’ in which suit is barred.”<sup>100</sup>

## B. THE FIFTH CIRCUIT: *APPLE BARREL PRODUCTIONS*

The Fifth Circuit, in *Apple Barrel Productions*, dealt with a battle between two children’s country music programs.<sup>101</sup> The court, pre-*Reed Elsevier*, dispatched with the issue of when a copyright is registered with little more than one sentence. The *Apple Barrel* court cited to the previously mentioned leading treatise on copyright infringement actions,<sup>102</sup> and simply said, “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.”<sup>103</sup>

Several district courts within the Fifth Circuit have addressed this issue, post-*Reed Elsevier*, and have determined that the application approach is still applicable within the Fifth Circuit.<sup>104</sup> The court in *Compound Stock Earnings* addressed another criticism of the application approach that is not always as prevalent in the argument over which approach is the correct interpretation of § 411. One of the issues that the court wrestled with was whether only requiring an application would create a situation in which a party, with no legitimate claim to the copyrightable work or who had not actually filed the application, could rely on the previously filed application, and maintain an action for copyright infringement. While the likelihood of this scenario would be rare, the court still decided to address this potential issue of the application approach. It ultimately looked to other case law in the circuit, and noted that courts generally review the application to ensure

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98. *Id.* at 619.

99. *Id.*

100. *Id.* at 620 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][a][i] (2008)).

101. *Apple Barrel Prods. v. Beard*, 730 F.2d 384, 385 (5th Cir. 1984).

102. NIMMER, *supra* note 100.

103. *Apple Barrel Prods.*, 730 F.2d at 386-87.

104. *E.g.*, *Compound Stock Earnings Seminars, Inc. v. Dannenberg*, No. 3:10CV2201D, 2012 U.S. Dist. LEXIS 1014 (N.D. Tex. Jan. 4, 2012).

that it was filed by the party who had instituted the suit, and to perform a preliminary analysis of the sufficiency of the application.<sup>105</sup>

### C. THE SEVENTH CIRCUIT: A TREND TOWARDS THE APPLICATION APPROACH

The Seventh Circuit has at worst been a circuit that flip-flops between each approach, most recently aligning with the application approach, and at best is a circuit which has recognized that post-*Reed Elsevier*, use of the application approach is the appropriate standard.

The first major decision from the Seventh Circuit regarding the application versus registration approach debate did not come until 2003.<sup>106</sup> Like many other circuits, the Seventh Circuit looked to the leading treatise on copyright for their analysis of the requirements of § 411.<sup>107</sup> The court stated that “an application for registration must be filed before the copyright can be sued upon.”<sup>108</sup>

The Seventh Circuit then followed this decision, only a year later, with a case that seemed to directly conflict with that reading.<sup>109</sup> Curiously, the court in *Gaiman* believed this question to be unanswered by *Chicago Board of Education*, and determined that application alone was insufficient under § 411.<sup>110</sup> The court determined that an affirmative or negative action must be taken by the Copyright Office before a lawsuit can be brought, which is exactly what is required under the registration approach.<sup>111</sup>

No other significant decision took place until after the decision in *Reed Elsevier*, and post-*Reed Elsevier* only the Northern District of Illinois has addressed this contradiction. Only one of these district court opinions, *TriTeq Lock*, has found that the precedent in the Seventh Circuit requires a following of the registration approach.<sup>112</sup> As suggested above, the most recent trend within the Seventh Circuit is an adoption of the application approach. Notably, the two most recent decisions in the Seventh Circuit’s District Courts have adopted the application approach explicitly, and not found *Gaiman* or *TriTeq Lock* to mandate anything to the contrary.

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105. *Id.* at ¶¶ 14-15.

106. *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003).

107. NIMMER, *supra* note 100.

108. *Chicago Bd. of Educ.*, 354 F.3d at 631.

109. *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

110. *Id.* at 655.

111. *Id.* The court’s exact language was that “an application to register must be filed, and either granted or refused, before suit can be brought.” (emphasis added). *Id.*

112. *TriTeq Lock & Sec. L.L.C. v. Innovative Secured Solutions, L.L.C.*, No. 10CV1304, 2012 U.S. Dist. LEXIS 14147, at \*11 (N.D. Ill. Feb. 1, 2012).



First, at the beginning of 2013, the court in *Leventhal v. Schenberg* specifically pointed to *Chicago Board of Education* and *Reed Elsevier* as requiring only that the application be “filed before the copyright can be sued upon.”<sup>113</sup> The court found the attached letter of receipt from the Copyright Office to be sufficient to allow the litigation to proceed.<sup>114</sup>

In August of 2013, the Northern District of Illinois, in *Panoramic Images*, again decided to side with *Chicago Board of Education* and adopt the application approach.<sup>115</sup> This court explicitly acknowledged that *Gaiman* and *TriTeq Lock* seemed to have adopted the registration approach within the Seventh Circuit, but instead pointed to *Leventhal* and *Hard Drive Productions*<sup>116</sup> for the trend of using the application approach within the circuit.<sup>117</sup> While the Seventh Circuit court has not clarified this discrepancy between their opinions, the trend among the district courts tends to support an adoption of the application approach within the Seventh Circuit.<sup>118</sup>

#### D. DISTRICT COURTS WITHIN THE FIRST AND FOURTH CIRCUITS

Similar to the Seventh Circuit, the First and Fourth Circuits have trended towards an adoption of the application approach. Additionally, the decisions to come out of these circuits have almost entirely been rendered after the decision in *Reed Elsevier*, tending to suggest that the application approach is gaining more momentum after the Supreme Court’s opinion.

The First Circuit has discussed this issue after *Reed Elsevier*, but provided no guidance as to what their understanding of “registration” is.<sup>119</sup> The First District Court within the First Circuit to decide this issue did so in 2003.<sup>120</sup> The court looked at §§ 408(a), 410(d), and 411(a) to determine

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113. *Leventhal v. Schenberg*, 917 F. Supp. 2d 837, 844 (N.D. Ill. 2013) (quoting *Chicago Bd. of Educ.*, 354 F.3d at 631).

114. *Id.* at 844-45.

115. *Panoramic Stock Images, Ltd. v. McGraw-Hill Cos.*, 961 F. Supp. 2d 918, 927 (N.D. Ill. 2013).

116. The case of *Hard Drive Productions* was decided in 2011, before *TriTeq*. *Hard Drive Prods. v. Doe*, No. 10CV1304, 2011 U.S. Dist. LEXIS 118049 (N.D. Ill. Oct. 12, 2011).

117. *Panoramic Images*, 961 F. Supp. 2d at 927.

118. It seems that the Northern District of Illinois at first decided on the application approach (*Hard Drive Productions*), reversed course to the registration approach (*TriTeq*), and then decided the application approach was in fact correct (*Leventhal* and *Panoramic Images*).

119. *Airframe Sys. v. L-3 Comm’ns. Corp.*, 658 F.3d 100, 105 (1st Cir. 2011) (stating that “proof of registration” is still an element, but not providing what constitutes either “proof” or “registration”); *Latin Am. Music Co. v. Media Power Grp., Inc.*, 705 F.3d 34, 42-43 (1st Cir. 2013) (same).

120. *Foraste v. Brown Univ.*, 248 F. Supp. 2d 71, 75-78 (D.R.I. 2003).

how the Act as a whole treated the word “registrations.”<sup>121</sup> The court was most persuaded by § 410(d), which states the effective date of the registration is that the date that the application was received.<sup>122</sup> The court then quickly chose to adopt the application approach within that district.<sup>123</sup> Since then, only one other district court has addressed this issue.<sup>124</sup>

Before *Reed Elsevier*, at least one district court within the Fourth Circuit determined that the use of the application approach was a proper reading of § 411.<sup>125</sup> In *Iconbazaar*, the court looked to the history of the statute to determine what the intent of Congress was, as well as looking at the overall context of the provision in question (§ 411).<sup>126</sup> Upon this analysis, the court determined that the application approach was the best way to realize congressional intent. It also found that the plaintiff’s attached letter from the Copyright Office, stating that they had received all appropriate documents and payments, was sufficient to show registration under § 411.<sup>127</sup> After *Reed Elsevier*, one more district decided in favor of the application approach.<sup>128</sup> The court followed much of the same reasoning as in *Iconbazaar*, and recognized a trend within the district courts of the Fourth Circuit.<sup>129</sup>

Both the First Circuit and the Fourth Circuit have had district courts adopt the application approach within the last two years.<sup>130</sup> This has been accompanied by district courts within the Seventh Circuit, in the last several years, reversing course and again adopting the application approach.<sup>131</sup> It seems that these three circuits will soon align themselves with both the Fifth and Ninth Circuits’ use of the application approach.

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121. *Id.*

122. *Id.* at 77.

123. *Id.*

124. *Alicea v. Machete Music*, No. 10CV30002-MAP, 2012 U.S. Dist. LEXIS 22596, at \*5 (D. Mass. Feb. 23, 2012) (declining to choose because the plaintiff would fail to satisfy the test under both the application and registration approaches). The court noted that *Foraste* might suggest a trend towards the application approach. *Id.*

125. *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004); *see also* *Pure Country Weavers v. Bristar, Inc.*, 410 F. Supp. 2d 439, 444 (W.D.N.C. 2006) (stating that it did not have to pick a side, but the analysis suggesting that the application approach would be acceptable).

126. *Iconbazaar*, 308 F. Supp. 2d at 634.

127. *Id.* at 634 n.3.

128. *Performance Sales & Mktg. LLC v. Lowe’s Cos.*, No. 5:07CV00140-RLV-DLH, 2012 U.S. Dist. LEXIS 131394 (W.D.N.C. Sept. 14, 2012).

129. *Id.* at \*34-35.

130. *Alicea v. Machete Music*, No. 10-CV-30002-MAP, 2012 U.S. Dist. LEXIS 22596 (D. Mass. Feb. 23, 2012); *Performance Sales*, 2012 U.S. Dist. LEXIS 131394.

131. *Leventhal v. Schenberg*, 917 F. Supp. 2d 837, 844 (N.D. Ill. 2013) (quoting *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003)).

## V. ANALYSIS

The above analysis and interpretation by the courts clearly indicates that only one approach can be correct, and leaves little common ground between the two approaches. Much like the court in *Prunte*, this Article finds the application approach to be the correct interpretation and “joins Judge Kennedy, the leading copyright treatise, and those courts that have held that an infringement suit may be brought when a copyright application is completed and submitted to the United States Copyright Office.”<sup>132</sup> The analysis that follows will further elaborate the reasoning for the application approach being the correct interpretation and application of § 411.

This analysis will first discuss the issues and flaws present in the reasoning of the courts adopting the registration approach, followed by the justifications for a “plain language” analysis leading to an adoption of the application approach, and finally why, if a plain language analysis alone is not persuasive, the application approach is still the appropriate interpretation of § 411.

### A. WHY THE REGISTRATION APPROACH IS THE IMPROPER INTERPRETATION OF § 411

The Eleventh Circuit was the first Circuit court to adopt the registration approach.<sup>133</sup> In 1990, when it was decided, the question was approached as solely a jurisdictional question due to the decision being rendered pre-*Reed Elsevier*.<sup>134</sup> This circuit court performed little analysis of the statute in question other than determining that previous case law required “registration,” which is now recognized as a somewhat ambiguous term in the Copyright Act.<sup>135</sup> The court then ratified the lower court’s finding that a party must have the certificate of registration in-hand in order to file a copyright infringement suit.<sup>136</sup> The Eleventh Circuit, and the district courts within that Circuit, have yet to provide insight into how and why the decision to follow the registration approach was made; as well as why this cursory analysis should still be applicable almost twenty-five years later.

The only circuit court to provide their analysis before adopting the registration approach was the Tenth Circuit.<sup>137</sup> The analysis of this specific decision will be particularly scrutinized due to the prevalence of its reason-

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132. *Prunte v. Universal Music Grp.*, 484 F. Supp. 2d 32, 39-40 (D.D.C. 2007).

133. *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1488-89 (11th Cir. 1990).

134. *Id.*

135. *Id.*

136. *See id.* at 1489.

137. *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005).

ing in other opinions that have adopted the registration approach and proponents of such an approach. The reasoning of this particular opinion also deserves heightened exploration because of the serious weight that this reasoning is given when arriving at a conclusion in favor of registration in other courts throughout the United States.<sup>138</sup> The Tenth Circuit adopted the registration approach by supposedly using the “plain language” of the provision in question (§ 411).<sup>139</sup> However, the court’s “plain reading” of the language contained in § 411 ventured into an analysis of other sections of the Copyright Act, particularly § 410.<sup>140</sup> This court, when venturing into other sections, failed to recognize that these sections did not purport to be for the purpose of analyzing when a civil infringement claim may be brought.<sup>141</sup> This is in stark contrast to § 411 of the Copyright Act, which is explicitly entitled “Registration and civil infringement actions,” and meant to be consulted for purposes of these issues.<sup>142</sup>

The court encountered this exact problem when trying to use § 410 to support the choice of the registration approach. It determined that § 410(a), which states that the Copyright Office can issue a “Certificate of Registration” after reviewing the submitted material,<sup>143</sup> suggested that the submission of the application materials and the point of registration are two separate events.<sup>144</sup> However, this court then partially undermined its reasoning by acknowledging that § 411 (the provision in question) does not contain any reference to a “certificate” when discussing the requirements for bringing a copyright infringement suit.<sup>145</sup> Based upon this, the Tenth Circuit’s use of § 410 to justify its interpretation of § 411 seems to be, at best, misguided.

Much like other courts adopting the registration approach, the Tenth Circuit then suggested two different policy rationales for interpreting the

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138. *E.g.*, *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06CV00697JCH, 2006 U.S. Dist. LEXIS 71240 (E.D. Mo. Sept. 29, 2006); Nathan R. Curtis, Note, *Statutory Cosmetic Surgery: Misinterpretation of the Copyright Act's Registration Requirement in Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 2011 BYU L. REV. 83 (2011).

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

140. *Id.* at 1203.

141. 17 U.S.C.A. § 411 (LexisNexis 2008).

142. *See* 17 U.S.C.A. § 411 (LexisNexis 2008).

143. 17 U.S.C. § 410(a) reads:

When, after examination, the Register of Copyrights determines that . . . the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

17 U.S.C.A. § 410(a) (LexisNexis 2014).

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

145. *Id.*

statute as it had done. The first reason was that Congress had “created significant incentives” for an owner to copyright their material, and that this was a carrot-and-stick approach to coax the owner into copyrighting their work.<sup>146</sup> The court declared that this carrot-and-stick rationale was paramount to the underwriting of this statute.<sup>147</sup> Despite claiming that its rationale was founded upon the “plain meaning” of the statute, this court as well as many others, without any citation to legislative intent, decided that the congressional intent of § 411 was to use it as a “‘carrot’ to induce registration.”<sup>148</sup> While *La Resolana Architects* as well as several other cases did spend a portion of their opinions addressing several of the amendments, they have not gleaned any meaningful intent from the actual *legislature* itself.<sup>149</sup>

As many cases adopting the registration approach have simply stated that they agree with the statutory history analysis done in *La Resolana Architects*, some deconstruction of the specific steps taken in that part of the analysis is appropriate. *La Resolana Architects* first pointed to a 1988 amendment in which Congress sought to align United States law with an international convention known as the Berne Convention.<sup>150</sup> Because Congress, instead of rewriting the entirety of Title 17 to comply with this new convention, simply placed an exception in § 411,<sup>151</sup> the court interpreted this to mean that Congress intended “registration” to be required for all domestic suits.<sup>152</sup> This exception was meant to ensure that foreign works did not have to undergo the formalities required by United States law, as it was in conflict with a main objective of the Berne Convention that formalities (such as registration) would not be a prerequisite for a work to be copyrighted.<sup>153</sup> The court in *La Resolana* suggested that by not exempting domestic works from “registration” under § 411, Congress had expressed their intent that domestic works would still be required to receive actual notice of registration before a copyright owner could pursue infringement actions.<sup>154</sup> This, however, begs the question. To find that not exempting domestic

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146. *Id.* at 1204-05.

147. *Id.*

148. *E.g., La Resolana*, 416 F.3d at 1204-05; *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06cv00697JCH, 2006 U.S. Dist. LEXIS 71240, at \*16 (E.D. Mo. Sept. 29, 2006); *Charles F. Vatterott Constr. Co. v. Esteem Custom Homes, LLP*, 686 F. Supp. 2d 934, 938 (E.D. Mo. 2010).

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

150. *Id.*

151. At the time the exception read: “[E]xcept for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States . . . .” 17 U.S.C.A. § 411 (LexisNexis 2008).

152. *La Resolana*, 416 F.3d at 1206.

153. *Id.* at 1205-06.

154. *Id.*

works requires use of the registration approach presupposes that the registration approach is in fact the correct interpretation of the word “registration.” The interpretation of this word, and its surrounding language, is fundamental to the debate between the two approaches.<sup>155</sup> Nothing in the legislative history of the 1988 amendment indicates that congressional action was meant to help alleviate these starkly conflicting approaches throughout its inaction.<sup>156</sup>

The Tenth Circuit then pointed to opportunities in 1993 and 2005 to remove the word “registration,” where the language was ultimately left in.<sup>157</sup> This analysis, cited by many courts adopting the registration approach, does nothing to further the debate over the definition of “registration” or show the intent of congress in this respect. While it is true that the federal courts must interpret statutes to “give effect to the intent of Congress,”<sup>158</sup> implicit in this charge is the principle that that courts shall not manufacture policy rationales which are not shown to be the intent of Congress.<sup>159</sup> Although the court found that “Congress . . . took up the question of whether to eliminate registration as a prerequisite to filing suit for infringement” and did not adopt either of the amendments,<sup>160</sup> inaction by Congress should not be interpreted to be an affirmation of one interpretation of a present ambiguity. As a recent study by the Brookings Institute has shown, the last three congressional sessions (110th-112th) have concluded with fewer than twelve percent of the total bills introduced eventually becoming law.<sup>161</sup> During the 100th congressional session, which declined to adopt the amendments suggested to be important by *La Resolana*, the passage rate was slightly higher at 16.9%.<sup>162</sup> Still, with passage rates well below twenty percent, failure to adopt an amendment should not be pointed to as definitive congressional intent for that statute. Additionally, the differing interpretation of the application and registration approach existed at the

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155. *Supra* notes 8-11.

156. *See La Resolana*, 416 F.3d at 1206.

157. *Id.*

158. *TVI, Inc. v. InfoSoft Techs., Inc.*, No. 4:06cv00697JCH, 2006 U.S. Dist. LEXIS 71240, at \*2 (E.D. Mo. 2006) (quoting *United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000)).

159. *See id.*

160. *La Resolana*, 416 F.3d at 1206.

161. BROOKINGS INST., *Vital Statistics on Congress, Chapter 6: Legislative Productivity in Congress and Workload*, Table 6-1, [http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Chapter%206%20%20Legislative%20Productivity%20in%20Congress%20and%20Workload\\_UPDATE.pdf](http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Chapter%206%20%20Legislative%20Productivity%20in%20Congress%20and%20Workload_UPDATE.pdf) (last updated Apr. 18, 2014).

162. *Id.*

time of these proposed amendments.<sup>163</sup> Congress' failure to change the language of a statute that was contemporaneously being interpreted in two different manners should clearly not be viewed as congressional support for either of the approaches.

While eventually siding with the registration approach, the court in *Patrick Collins* clearly acknowledged that its "own policy views do not give [it] license to rewrite an unambiguous statute."<sup>164</sup> Although this court's view of the statute is in conflict with this Article's position, this court correctly recognized that policy rationales should not be the main purpose for the adoption of either of the approaches.<sup>165</sup>

Although several courts have relied heavily on policy reasons for adopting the registration approach, still more have focused on the plain language of the statute. The real problem with adopting the registration approach based on this rationale is the analysis that is done while looking at the "plain language" of § 411.

#### B. WHY THE APPLICATION APPROACH IS THE CORRECT "PLAIN LANGUAGE" ANALYSIS OF § 411

Almost universally, courts determining whether the application or registration approach is appropriate discuss the "plain language" of § 411. The analysis of the plain language of § 411 strays to other sections under both approaches. The Supreme Court has deemed plain language analysis appropriate for statutory construction when an ambiguous term can be clarified in the broader context of the statute.<sup>166</sup> Statutory construction such as this is a "holistic endeavor."<sup>167</sup> However, "[w]hen examining statutory language, the court should generally give words their ordinary, contemporary, and common meaning."<sup>168</sup> The sections of the Copyright Act that are typically consulted to better understand the meaning of "registration" within § 411 are

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163. See, e.g., *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1489 (11th Cir. 1990); *Apple Barrel Prods. v. Beard*, 730 F.2d 384 (5th Cir. 1984).

164. *Patrick Collins, Inc. v. Doe*, 843 F. Supp. 2d 565, 570 (E.D. Pa. 2011).

165. See *id.*

166.

A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

*United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (internal citation omitted).

167. *Id.*

168. *Mays & Assocs. v. Euler*, 370 F.Supp.2d 362, 368 (2005) (citing *Williams v. Taylor*, 529 U.S. 420, 431 (2000)).

§§ 408-412.<sup>169</sup> However, the majority of the focus is spent on §§ 408, 410, and other parts of 411.<sup>170</sup>

The usefulness of § 410 (specifically § 410(a))<sup>171</sup> can be dispatched with most easily. Proponents of the registration approach point to § 410(a) for the idea that affirmative action must be taken by the Copyright Office in order to effect registration.<sup>172</sup> However, as the *Iconbazaar* court noted, there is no suggestion that § 410(a) is meant to impose limitations on the institution of a copyright infringement claim.<sup>173</sup> Part (a) only discusses when a certificate of registration may be issued to the applicant, and is placed in the Act so that the Register of Copyrights' ultimate determination about the application is required in order to issue that certificate.<sup>174</sup>

Perhaps the only pertinent part of § 410 would be subpart (d).<sup>175</sup> As noted by several courts, this section could be used in support of either approach.<sup>176</sup> The most succinct explanation of how this section supports both approaches comes from the Ninth Circuit.<sup>177</sup>

Because this subsection dates a later-approved registration as of the date of its application, it supports the interpretation that application is the critical event [supporting the application approach]. However, because this back-dating does not occur until after the Copyright Office or a court has deemed the registration acceptable, the statute could be read to require action by the Register to effect registration [supporting the registration approach].<sup>178</sup>

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169. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 617 (9th Cir. 2010).

170. *Id.*

171. This subsection instructs the Register of Copyrights to issue a “certificate of registration” upon a finding that all legal and formal requirements are met by the materials that has been submitted for copyright registration. 17 U.S.C.A. § 410(a) (LexisNexis 2014).

172. See, e.g., *La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1201 (10th Cir. 2005); *Strategy Source, Inc. v. Lee*, 233 F. Supp. 2d 1, 3 (D.D.C. 2002).

173. “[T]his statute could be read to apply only to the requirements for issuance of a registration certificate, not to the requirements for instituting an action for infringement.” *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004)

174. 17 U.S.C.A. § 410(a) (LexisNexis 2014); see *Iconbazaar*, 308 F. Supp. 2d at 634.

175. “The 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.” 17 U.S.C.A. § 410(d) (LexisNexis 2014).

176. *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010).

177. *Id.*

178. *Id.* (internal citations omitted).



Regardless of which approach uses this subsection as support, the end result is still that the copyright registration date will be backdated to when the application was accepted by the Copyright Office. Due to the registration date being that of the receipt of the application, a party is entitled to file suit against any infringement that has taken place on the date of the application or forward. This should be seen to bolster the position of the application approach because the registration approach would create a sort of dead-time after the effective date of registration but before receipt of the registration certificate. Infringements during this dead-time can ultimately be litigated, but the copyright holder must likely wait in excess of eight months to take any action if one subscribes to the registration approach. Despite this, some courts have still found that this section can be “read in two ways”<sup>179</sup> and does not “unequivocally support”<sup>180</sup> either approach. To address this, courts will sometimes continue to look to other sections for the broader context of this statute.<sup>181</sup>

Addressing the broader context of the statute, § 408 helps to show why the application approach is the most appropriate interpretation of § 411;<sup>182</sup> specifically, § 408(a).<sup>183</sup> As noted previously, “If the statute is unambiguous and if the statutory scheme is coherent and consistent, [the] inquiry ends there.”<sup>184</sup> This section clearly states that *registration of a copyright claim* can be obtained by delivering the application with the appropriate fees.<sup>185</sup> It should be reiterated that the ultimate question is at what point “*Registration of the copyright claim*”<sup>186</sup> is made, for purposes of filing an infringement claim under § 411. This language in § 408(a) would seem to end the inquiry, but still courts march forward in their analysis.

Lastly, courts will look to the surrounding language of § 411(a). Section 411(a) provides an applicant the opportunity to file an infringement suit even if the application was rejected.<sup>187</sup> Some courts which adopt the

179. *Iconbazaar*, 308 F. Supp. 2d at 634.

180. *Cosmetic Ideas*, 606 F.3d at 618.

181. *E.g.*, *Cosmetic Ideas*, 606 F.3d at 618; *Iconbazaar*, 308 F. Supp. 2d at 634.

182. *See Iconbazaar*, 308 F. Supp. 2d at 634.

183. In relevant part, this section reads:

[T]he 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) (LexisNexis 2005).

184. *Mays & Assocs. v. Euler*, 370 F. Supp. 2d 362, 368 (D. Md. 2005) (quoting *Scott v. United States*, 328 F.3d 132, 139 (4th Cir. 2003)).

185. 17 U.S.C.A. § 408(a) (LexisNexis 2005).

186. 17 U.S.C.A. § 411(a) (LexisNexis 2008) (emphasis added).

187. 17 U.S.C.A. § 411(a) (LexisNexis 2008):

registration approach find that the backdating done under § 410(d) is sufficient to satisfy any unfair prejudice that would result by having to wait to file an infringement suit, because regardless of the outcome a suit may eventually be filed.<sup>188</sup> Additionally, some courts have found this mechanism in § 411(a), which requires notice of the suit be provided to the Copyright Office, to merely be a chance for the Copyright Office to defend their ultimate denial of the copyright.<sup>189</sup> Specifically, courts have looked to a Senate report for the idea that this ability to file a claim after copyright rejection “merely provides . . . the [Copyright] Office . . . a second opportunity to express its views on the claim's validity . . . .”<sup>190</sup> Because of this, § 411(a) should not be interpreted as merely another mechanism through which an applicant may institute an infringement suit after waiting months for a decision from the Copyright Office, as some courts have suggested.<sup>191</sup> Instead this provision is merely a safeguard which allows the applicant to challenge the validity of the Copyright Office’s rejection without having to postpone the owners copyright infringement litigation, and potentially ultimately forfeiting any damages they may receive.<sup>192</sup>

During statutory interpretation, in addition to analyzing individual sections, the Supreme Court has continually stated that laws must be given a “sensible construction” and that an application “which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it . . . .”<sup>193</sup> As mentioned in the introduction, construction of § 411 in accordance with the registration approach has the potential to lead to an absurd consequence as a result of following the approach.

The statute of limitations for an infringement action is three years,<sup>194</sup> but a suit cannot be brought until it is registered.<sup>195</sup> Conceivably, a situation

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

188. See *Mays & Assocs.*, 370 F. Supp. 2d 362.

189. *Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806-07 (2009). This analysis by registration approach courts undermines their own idea that the applicant can file an infringement suit regardless of the outcome, as long as they wait for a decision. This reasoning suggests that filing an infringement suit after denial is a ‘last ditch effort,’ and not simply a situation in which the applicant has to wait to file their claim, as suggested by the court.

190. *Id.* at 807 (citing S. REP. NO. 100-352, at 14 n.2 (1988)).

191. *Id.* at 806-07.

192. S. REP. NO. 100-352, at 14 n.2 (1988); see *supra* notes 2-3.

193. *United States v. Katz*, 271 U.S. 354, 357 (1926).

194. 17 U.S.C.A. § 507(b) (LexisNexis 2013).

195. 17 U.S.C.A. § 411(a) (LexisNexis 2008).

could arise under the registration approach in which an owner could not protect their copyrightable materials because registration could be so delayed that an owner would not have time to institute an infringement action.<sup>196</sup> If “registration” is not effected until a certificate of registration is received, the owner must wait on the Copyright Office and the delays of the federal government. If application affects the registration, the owner is not punished for the backlogs and stalemates within the federal government. As there is a reasonable application of § 411 which would not result in this absurd outcome, the application approach more appropriately follows the Supreme Court’s methods of statutory construction.<sup>197</sup>

### C. WHY THE APPLICATION APPROACH IS THE CORRECT ANALYSIS OF § 411 EVEN IF A PLAIN LANGUAGE APPROACH IS UNSATISFACTORY

Even if a court were not persuaded by the plain language of § 411 and its surrounding sections, the application approach is still the most appropriate approach to align with the congressional intent of § 411. In statutory construction, if plain language analysis is inconclusive, legislative intent is an appropriate place to look for clarification.<sup>198</sup>

This argument is not purely academic, as several courts have found the plain language of the statute inconclusive or unconvincing, yet have still made ultimate findings as to which approach is appropriate.<sup>199</sup> The court in *Performance Sales* stated that § 411(a), because of the existence of § 410(d), is ambiguous.<sup>200</sup> This court then determined that the congressional intent was not to place the owner in “legal limbo” while the Copyright Of-

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196. See *Iconbazaar, L.L.C. v. Am. Online, Inc.*, 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004); *supra* note 4 and accompanying text. While the delay in an affirmative action by the Copyright Office may be one source of problems, the filing of an infringement suit in practice also requires several information gathering and preparatory steps before the suit is actually filed. Even if the action by the Copyright Offices does not take the full three years, a delay near three years may, in practice, prevent recovery of damages from infringers.

197. See *Katz*, 271 U.S. at 357.

198. The Court in *Katz* stated that a court could look to the “legislative scheme or plan by which the general purpose of the act is to be carried out[.]” in order to ascertain the appropriate application of the statute. *Katz*, 271 U.S. at 357.

199. See, e.g., *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 618 (9th Cir. 2010); *Performance Sales & Mktg. LLC v. Lowe’s Cos.*, No. 5:07CV00140-RLV-DLH, 2012 U.S. Dist. LEXIS 131394, at \*33 (W.D.N.C. Sept. 14, 2012).

200. *Performance Sales*, 2012 U.S. Dist. LEXIS 131394, at \*33. Section 410(d) says “The effective date of a copyright registration is the day on which an application, deposit, and fee . . . have all been received in the Copyright Office.” 17 U.S.C.A. 410(d) (LexisNexis 2014).

office reviewed the application.<sup>201</sup> This court also found the application approach to be the best policy because “the Copyright Office typically registers approximately ninety-eight to ninety-nine percent of claims submitted to it.”<sup>202</sup>

Likewise, the Ninth Circuit was “not persuaded that the plain language of the Act unequivocally supports either the registration or application approach.”<sup>203</sup> However, this court noted that a needless delay is presented by the registration approach due to the fact that a party is allowed to litigate a claim for copyright infringement regardless of whether the Copyright Office ultimately rejects the application.<sup>204</sup> It noted that “legal limbo” can be avoided by subscribing to the application approach.<sup>205</sup> Additionally, the Ninth Circuit pointed out that many of the courts adopting the registration approach confess that “construing the statute this way leads to an inefficient and peculiar result.”<sup>206</sup> The Ninth Circuit Court in *Cosmetic* seemed to, at worst, suggest that both approaches were appropriate interpretations of § 411, but because of the “legal limbo” presented by the registration approach, the application approach was the best choice to align with congressional intent.<sup>207</sup> Based upon the systematic rejection of arguments made by courts adopting the registration approach, this court seems to have determined definitively that the application approach is the only logical result because it “best effectuate[s] the interests of justice and promote[s] judicial economy.”<sup>208</sup>

## VI. CONCLUSION

While the issue of when a copyright infringement claim can be filed has been an issue with diverging conclusions for some time, it has become a larger issue in recent times. The number of circuits (or district courts within those circuits) deciding these issues as a case of first impression is now occurring at a staggering rate. More importantly, since the 2010 Supreme Court decision in *Reed Elsevier*, more courts have chosen to align themselves with the application approach than the registration approach.

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201. *Performance Sales*, 2012 U.S. Dist. LEXIS 131394, at \*34.

202. *Id.* (citing *NIMMER*, *supra* note 100).

203. *Cosmetic Ideas*, 606 F.3d at 618.

204. *See* 17 U.S.C.A. § 410(a) (LexisNexis 2014); *id.* at 619.

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

206. *Id.* (citing *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146, 1148 (N.D. Cal. 1998)); *see also* *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491 EDL, 2002 U.S. Dist. LEXIS 15321, at \*4 (N.D. Cal. Aug. 19, 2002); *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056-57 (C.D. Cal. 2004).

207. *Cosmetic Ideas*, 606 F.3d at 619-22.

208. *See id.* at 621 (quoting *Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (internal quotation marks omitted)).

The courts that have adopted the registration approach have first done so in: 1990,<sup>209</sup> 2005,<sup>210</sup> 2006,<sup>211</sup> 2007,<sup>212</sup> and 2013.<sup>213</sup> Only one Circuit has chosen to adopt the registration approach post-*Reed Elsevier*.<sup>214</sup> While the remainder of the Circuits that adopted the registration approach before *Reed Elsevier* have continued to follow the precedent within the circuit, the Eighth Circuit has not rendered a decision which would indicate if it will continue to follow the registration approach.<sup>215</sup>

In direct contrast to this, circuits adopting the application approach for the first time have done so in: 1984,<sup>216</sup> 2004,<sup>217</sup> 2010,<sup>218</sup> 2012,<sup>219</sup> and 2013.<sup>220</sup> Three of the five circuits have chosen to adopt the application approach post-*Reed Elsevier*. Similar to those courts that adopted the registration approach before 2010, all of the circuits which adopted the application approach before *Reed Elsevier* have since reaffirmed their approach.<sup>221</sup>

Of the circuits that have weighed in to the discussion post-*Reed Elsevier*, a clear majority (a three-to-one ratio) have subscribed to the application approach. This suggests that as copyright law is brought into the twenty-first century, and as courts take a more thorough look at § 411(a), the application approach is becoming more heavily favored.

As more circuit courts (and not simply their district courts with each circuit) take a definitive stance on this issue, the Supreme Court will likely have to address this issue; unlike how the Court sidestepped a decision on the two approaches in *Reed Elsevier*. While there seems to be a near-even

209. M.G.B. Homes v. Ameron Homes, 903 F.2d 1486, 1489 (11th Cir. 1990).

210. La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005).

211. TVI, Inc. v. InfoSoft Techs., Inc., No. 4:06CV00697JCH, 2006 WL 2850356 (E.D. Mo. Sept. 29, 2006).

212. Hawaiian Vill. Computer, Inc. v. Print Mgmt. Partners, Inc., 501 F. Supp. 2d 951 (E.D. Mich 2007).

213. N.J. Media Grp., Inc. v. Sasson, No. 2:12-3568(WJM), 2013 U.S. Dist. LEXIS 1536 (D.N.J. Jan. 4, 2013).

214. *Id.*

215. While the Eight Circuit did render an opinion in 2010 stating that it would continue to follow the registration approach, this was before the final decision was issued for *Reed Elsevier*. Charles F. Vatterott Constr. Co. v. Esteem Custom Homes, LLP, 686 F. Supp. 2d 934 (E.D. Mo. 2010).

216. Apple Barrel Prods. v. Beard, 730 F.2d 384 (5th Cir. 1984).

217. Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004).

218. Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 616 (9th Cir. 2010).

219. Alicea v. Machete Music, No. 10CV30002-MAP, 2012 U.S. Dist. LEXIS 22596, (D. Mass. Feb. 23, 2012).

220. Panoramic Stock Images, Ltd. v. McGraw-Hill Cos., 961 F. Supp. 918, (N.D. Ill. 2013); Leventhal v. Schenberg, 917 F. Supp. 2d 837, 844 (N.D. Ill. Jan. 17, 2013).

221. The 2010 decision of *Cosmetic* was rendered after *Reed Elsevier*, thus has not needed to be reaffirmed.

division among the circuits, the trend of recent decisions provide credence to the conclusion that the application approach is the most correct application of the congressional intent for § 411.

When not bound by precedent with their respective circuits, courts should take note of the extensive history and argument levied by proponents of each approach. Construing § 411 and its surrounding sections pursuant to the appropriate judicial methods should result in a clear shift towards adoption of the application approach. A continued surge in courts deciding these cases as an issue of first impression should begin to put more pressure on the Supreme Court to once again address this issue. If the current trend holds true, and the Supreme Court does not sidestep the issue again, the next few years should finally yield guidance from the Supreme Court clearly adopting the application approach.