

# No. 19-496

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## IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MUENCH PHOTOGRAPHY, INC.,

Plaintiff-Appellant,

v.

MCGRAW-HILL GLOBAL EDUCATION HOLDINGS, LLC, and  
MCGRAW-HILL SCHOOL EDUCATION HOLDINGS, LLC,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the Southern District of New York

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### BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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## INTEREST OF THE UNITED STATES AND INTRODUCTION

The United States files this amicus brief pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a). This case concerns the proper construction of the Copyright Act. The United States has significant responsibilities related to the registration of creative works under that Act. Congress has made the United States Copyright Office, headed by the Register of Copyrights, responsible for administering the registration system and determining whether works meet the requirements for registration. *See* 17 U.S.C. §§ 408-410, 702. The interpretation of the Copyright Act is also of interest to the United States Patent and Trademark Office, which advises the President and other agencies on matters of intellectual property policy, *see* 35 U.S.C. § 2(b)(8)-(12), and which advocates the effective protection of intellectual property.

The district court here held that the registration of a copyright for a collective work did not extend to the copyrights of individual component works contained within the registered collective work, even though the registrant owned the rights in the component works at the time of registration. This holding directly conflicts with intervening decisions of the Fourth and Ninth Circuits. It also runs contrary to the Copyright Office's longstanding guidance, which permitted the appellant's assignee to register its copyrights in such component works—here, photographs—through the application process the court deemed insufficient. As the Fourth and Ninth Circuits



have recognized, the Copyright Office’s guidance is consistent with the applicable provisions of the Copyright Act and is entitled to deference. This Court should therefore reverse and remand for further proceedings.

## STATEMENT

### I. Statutory And Regulatory Framework

#### A. Copyright Registration Generally

The Copyright Act vests the author of any “work of authorship” with a copyright upon the work’s creation and fixation in a tangible medium, without any application to the government. 17 U.S.C. § 102(a); *id.* § 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

“[R]egistration is not a condition of copyright protection.” *Id.* § 408(a). Nevertheless, a copyright claimant has the option to apply to register his copyright with the Register. *See* 17 U.S.C. §§ 408-412, 701.

The Register has statutory authority to examine registration applications and determine whether “the material deposited constitutes copyrightable subject matter and ... the other legal and formal requirements of this title have been met.” 17 U.S.C. § 410(a). If so, the Register registers the claim and issues the claimant a certificate of registration. *See id.*

Registration affords the copyright claimant benefits that mere copyright ownership alone does not. A copyright claimant of a United States work generally may not sue for infringement until his copyright claim has been registered. 17 U.S.C.

§ 411(a); *see generally Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). If a copyright is registered before infringement, or within three months of the first publication of the work, registration also allows the claimant to seek statutory damages and attorney’s fees. *See* 17 U.S.C. §§ 412, 504-505. Finally, a certificate of registration with an effective date before or within five years of first publication constitutes prima facie evidence of copyright validity and the facts stated in the certificate of registration. *See id.* § 410(c).

## **B. Registration Of Collective Works And Component Works**

Compilations—including “collective works,” which are compilations that include independently copyrightable materials—are afforded copyright protection. *See* 17 U.S.C. §§ 101, 103, 201(c).<sup>1</sup> This protection “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.” *Id.* § 103(b). However, if the author of a collective work is also the author of the component works, or if the authors of the component works transfer all rights

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<sup>1</sup> The Copyright Act defines a “compilation” as a “work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101. Thus, the term “compilation” includes collections of data that are not in themselves copyrightable material, such as a list of stock prices for a certain day. A “collective work,” such as a newspaper, is a type of compilation that includes independently copyrightable component works. *See id.* Because the issue presented here involves only collective works—not compilations more generally—this brief refers to “collective works.”

in the works to him, the author of the collective work may claim a copyright in the component works that make up the collective work. *See id.* § 201(c), (d).

This case concerns the ways in which a collective-work claimant who also holds the copyrights in the collective work's component works may register its copyrights in those component works. The Copyright Act provides that “[t]he application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include” specified information, including “the name and nationality or domicile of the author” and “the title of the work.” 17 U.S.C. § 409. In addition to statutory authority to determine whether an application for registration meets the “legal and formal requirements” of Title 17, *id.* § 410(a), the Copyright Act gives the Register authority to “specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration,” and these “regulations may require or permit, for particular classes, ... a single registration for a group of related works.” *Id.* § 408(c)(1); *see also id.* § 702 (giving the Register general authority to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title”).

Pursuant to this statutory authority, the Register promulgated regulations governing registration requirements. *See* 37 C.F.R. § 202.3. The Copyright Office has defined certain groupings of independently copyrightable materials as a single work for registration purposes. *See* 37 C.F.R. § 202.3(b)(4). The regulations also provide that automated databases may be registered as a group of related works. *See* 37 C.F.R.

§ 202.3(b)(5) (“[T]he Register of Copyrights has determined that, on the basis of one application, deposit, and filing fee, a group registration may be made for automated databases and their updates” under certain conditions).<sup>2</sup>

Although these regulations do not address whether any component works within an automated database are also registered when the database is registered, the Copyright Office has addressed this issue in guidance documents. In the *Compendium of Copyright Office Practices (Compendium)*, a publicly available manual providing advice regarding registrations, and in Circulars providing advice to the public, the Copyright Office has consistently taken the position that the registration of a collective work also registers any independently copyrightable works within the collective work—*e.g.*, the component works—in which the claimant owns all rights, even if the registration application does not specify the titles and authors of the component works. Thus, for example, if a claimant owns the copyright to both a magazine edition and the articles within that magazine, registration of the magazine will register each of the component articles as well. And if a claimant owns the rights to a number of photographic images and places those images in a database, the claimant’s registration of the database serves to register each of the component images.

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<sup>2</sup> The wording of 37 C.F.R. § 202.3(b)(4) and (5) has been altered slightly since the registrations at issue in this case, but then as now, the Register permitted a single application to register multiple works in some circumstances.

The version of the *Compendium* in effect at the time of the registrations at issue in this case instructed that when registering a collective work, “the application should name the author of the collective work,” but that “[t]he names of the individual authors of separate contributions being registered as part of the claim need not be given on the application.” *Compendium II* § 615.06; *see also id.* (“The registration [of a collective work] may cover (a) the collective work authorship, (b) any contribution created by the employee or other party commissioned by the author of a work made for hire, and (c) any other contributions that the claimant of the collective work obtained by transfer.”).<sup>3</sup> The *Compendium* also stated that “[i]f the work being registered was created by a large number of authors, the application will be considered

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<sup>3</sup> The third edition of the *Compendium* (*Compendium III*) was issued in 2014. The second edition of the *Compendium* (*Compendium II*) was effective, with periodic revisions, from 1984 until that time. *See Prior Editions of the Compendium of U.S. Copyright Office Practices*, <https://www.copyright.gov/comp3/prior-editions.html> (last visited June 6, 2019). *Compendium III* continues to permit applications that do not list all component-work authors and titles. *See Compendium III* § 613.10(F) (2017) (“encourag[ing]” but not requiring applicants to include all authors); *id.* § 618.7(B)(2) (providing that applicants “may provide” the author and titles of component works in which they own all rights and are seeking registration, but stating that “this is optional”).

The current version of the *Compendium* now also includes a note regarding the district court decision incorporated by reference in this case. *See Compendium III* § 613.10(F) (2017) (stating that “[o]ne district court has concluded that if the applicant does not identify each author in the application, the registration does not cover any portion of the work that was created by an unnamed author,” and that “[t]he Fourth and Ninth Circuits have reached the opposite conclusion”).

acceptable if it names at least three of those authors, followed by a statement such as ‘and [number] others.’” *Compendium II* § 615.07(b)(3).

In several Circulars, the Copyright Office has explained that registration of various forms of collective works will also register independently copyrightable works that the copyright claimant owns contained within the collective work. *See* Circular 62, *Copyright Registration for Serial Issues* (2006), <http://webarchive.loc.gov/all/20060830195017/http://www.copyright.gov/circs/circ62.pdf> (last visited June 6, 2019) (“When a serial issue includes independently authored contributions in which all rights have been transferred in writing to the claimant of the entire serial issue, it is not necessary to include the names of the contributors at space 2. Whether those contributors are listed or not, the copyright claim in the serial issue as a whole would extend to those contributions.”); Circular 62A, *Group Registration of Newspapers and Newsletters on Form G/DN* (2006), <http://webarchive.loc.gov/all/20060830213935/http://www.copyright.gov/circs/circ62a.pdf> (last visited June 6, 2019) (registration covers “any independently authored contributions (not done by employees) in which all rights have been transferred to the claimant by the contributors ... even though the individual contributors are not named”).<sup>4</sup>

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<sup>4</sup> The Copyright Office has updated its Circulars, as well as the *Compendium*, since the registrations at issue here. Like the *Compendium*, the Circulars continue to permit a collective work’s registration to register component works without listing component-work titles and authors in some circumstances. Circular 65, *Copyright Registration for Automated Databases*, was in effect during the registrations in question,

Since the district court decision in this case, the Copyright Office has conducted rulemakings regarding the registration requirements for automated databases consisting predominantly of photographs. In 2011, the Office announced a pilot program in which applications for group registration of photographic databases could be made online. *See Registration of Claims of Copyright*, 76 Fed. Reg. 4072, 4073 (Jan. 24, 2011) (indicating the Office was considering “a review of the circumstances and conditions under which database registrations may be made and the extent to which, going forward, such registrations should continue to be deemed to cover not only the compilation authorship ... but also any or all of the works assembled in the database”). In 2012, the Office adopted a final rule requiring copies of all component-work photographs to be part of the deposit accompanying both paper and online applications to register automated databases. *See Deposit Requirements for Registration of Automated Databases That Predominantly Consist of Photographs*, 77 Fed. Reg. 40,268 (July 9, 2012). The Office encouraged claimants to use other avenues to register groups of photographs—in part because of the uncertainty caused by the district court’s decision here—but made clear that the automated-database registration route remained available. *See id.*

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but has since been removed from distribution while under revision. *See* <http://webarchive.loc.gov/all/20060830213227/http://www.copyright.gov/circs/circ65.pdf> (last visited June 6, 2019); <https://www.copyright.gov/circs/circ65.pdf> (last visited June 6, 2019).

The Copyright Office reiterated the availability of the automated-database avenue to register groups of photographs in 2018, when it promulgated new regulations requiring applicants to submit a spreadsheet listing the title and, if applicable, the month and year of publication of each photograph being registered. *See Group Registration of Photographs*, 83 Fed. Reg. 2542 (Jan. 18, 2018); 37 C.F.R. § 202.20(c)(2)(vii)(D)(8). Under this revised regime, the Copyright Office still does not require claimants to include all component-work authors in its registration application for an automated database in order for the resulting registration to cover component works for which the claimant owns all rights.

## **II. Proceedings Below**

Plaintiff Muench Photography, Inc. (Muench) alleged that McGraw-Hill Global Education Holdings, LLC, and McGraw-Hill School Education Holdings, LLC, (McGraw) infringed its copyrights in multiple photographs. Dkt. No. 1. McGraw moved to dismiss the suit, claiming that Muench had not provided evidence of copyright registration. Dkt. Nos. 32-33. Muench offered to file an amended complaint adding registration information. Dkt. No. 35.

In 2012, the district court denied Muench's request to file an amended complaint, concluding that component works not listed by author in a collective work's registration application had not been registered, and that amendment to include such registrations would thus be futile. Dkt. No. 36 (SPA1-5). The court determined that "a substantial majority of the copyright claims" that Muench asserted



had been infringed “rely upon copyright registrations that this Court already has found to be insufficient as a matter of law.” *Id.* at 2 (SPA-2). The court “adopt[ed] and incorporate[d] the reasoning” of an earlier ruling in a different case, in which the court had determined that the copyright registrations at issue here were invalid based on the court’s interpretation of 17 U.S.C. § 409’s requirements. *Id.* (citing *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ’g Co.*, 712 F. Supp. 2d 84, 94 (S.D.N.Y. 2010) (No. 1:09-cv-02669) (*Muench I*)).

In *Muench I*, the district court concluded that Muench’s registrations of various databases did not extend to the component-work photographs within those databases. *See* 712 F. Supp. 2d at 92-95. In the court’s view, “[a] plain reading of [17 U.S.C.] § 409 of the Copyright Act mandates that the copyright registrations at issue here contain the names of all the authors of the work.” *Id.* at 94. The court concluded that “the registration of a collective work reaches the individual works only when the author of the collective work authored each of the individual works.” *Id.* “[B]ecause the Copyright Act is clear on its face, *i.e.*, a copyright registration must contain certain pieces of information including the author’s name, the registrations at issue here cover only the database as a whole (the compilation) but do not cover Plaintiff’s individual contributions.” *Id.* at 95.

Muench unsuccessfully sought certification under 28 U.S.C. § 1292(b) to interlocutorily appeal the order concluding that the copyrights in the photographs at issue were not registered. Dkt. Nos. 62, 80. Final judgment was entered in February

2019. *See* Dkt. Nos. 118, 119 (SPA-6-31). Muench filed a timely notice of appeal, indicating its intent to raise the registration issue. Dkt. No. 120.

### **SUMMARY OF ARGUMENT**

When the Copyright Office registers a claim for a collective work, the registration covers not only the collective work itself, but also any independently copyrightable component works whose copyrights are held by the claimant, so long as those component works haven't been previously published or registered. In this case, the district court held that when the claimant is not the author of the component works, 17 U.S.C. § 409 unambiguously requires the claimant's application to list additional information, including the author of each such work, and that the application is ineffective to register the component works unless it includes such information. That holding is incorrect. Far from providing an unambiguous answer, the text of Section 409 is in fact silent regarding the application requirements for registering component works as part of a collective work.

For more than forty years, since the Copyright Office started registering works under the Copyright Act of 1976, the Copyright Office has interpreted Section 409 to permit claimants in some circumstances to register component works within a collective work without specifying all component-work authors. Unlike the district court's reading, that longstanding administrative interpretation gives meaning to all the Act's registration provisions. It also reflects a reasonable and pragmatic implementation of the statute, informed by the Copyright Office's experience

registering hundreds of thousands of copyright claims a year. This Court has already concluded that the Copyright Office’s reading of the statute on this point is entitled to a measure of deference, and that the registration of a collective work also registers component works in which the claimant owns the copyrights. The Court should now join the Fourth and Ninth Circuits in squarely rejecting the erroneous reading of Section 409 espoused by the district court.

## **ARGUMENT**

### **The Copyright Act Does Not Require A Collective-Work Registration Application To Identify The Authors Of All Claimed Component Works In Order To Register Those Component Works.**

#### **A. Section 409 Is Ambiguous Regarding Component-Work Registration.**

The Copyright Act provides that “[t]he application for copyright registration shall be made on a form prescribed by the Register of Copyrights.” 17 U.S.C. § 409. Section 409 specifies multiple kinds of information that the application form “shall include,” such as “the title of the work,” “the year in which creation of the work was completed,” and “the date and nation” of first publication (if previously published). *Id.* § 409(6), (7), (8). Section 409 also specifies that the application form shall include “the name and nationality or domicile of the author or author.” *Id.* § 409(2). Focusing on this last requirement, the district court interpreted Section 409 as an unambiguous statutory mandate that a collective-work claimant must list all authors of all component works in his application in order to register those component works

along with the collective work. *See Muench I*, 712 F. Supp. 2d at 92-95; Dkt. No. 36 at 2 (SPA-2).

The district court erred. As the Fourth and Ninth Circuits have recognized, Section 409 is ambiguous with respect to the registration requirements for component works included within registered collective works. *See Metropolitan Reg'l Info. Sys., Inc. v. American Home Realty Network, Inc.*, 722 F.3d 591, 597 (4th Cir. 2013) (“As applied to a collective work whose author has also acquired the copyrights in individual component works, the text of Section 409 is ambiguous at best.”); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 685 (9th Cir. 2014) (Copyright Office’s practice regarding registration of collective works does not violate “any clear requirement to list individual authors and titles of the components within the work”). Indeed, Section 409 says nothing about how a copyright claimant must register component works. It simply states that a registration application form must include prescribed information. The statute does not specify whether an application to register a collective work must include authors—or any other work-specific information—for every component work sought to be covered by the registration, or whether listing such information for the collective work alone suffices. *See Alaska Stock*, 747 F.3d at 681 (concluding that Section 409’s requirement that “‘author or authors’ ... must be listed in this context are the author or authors of the collective work itself”). Nor does the statute specify whether the registration of a collective work may cover independently copyrightable component works that the claimant

owns; it does not address the scope of a registration at all. As to these issues, Section 409 is silent.

In reading Section 409 to require collective-work claimants to identify the authors of all component works, the district court not only misconstrued that section, but placed it at odds with other provisions in the Copyright Act. In particular, the district court's reading of Section 409 would render superfluous a portion of Section 408, another provision of the Copyright Act governing copyright registration. It thereby flouts "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation marks and brackets omitted); *see also United States v. Lockhart*, 749 F.3d 148, 154 (2d Cir. 2014) ("[S]tatutory phrases should not be construed in isolation; we read statutes as a whole.") (quotation marks omitted).

Section 408(c)(1) provides the Register with specific authority to promulgate regulations that "may require or permit ... a single registration for a group of related works." Section 408(c)(2)(B) requires the Register to establish regulations permitting such a single registration for a specific type of works (same authored contributions to periodicals within a twelve-month period), and specifies that the application for such a registration must "identif[y] each work separately, including the periodical containing it and its date of first publication." 17 U.S.C. § 408(c)(2)(B). As the Ninth Circuit has pointed out, this provision would be redundant if, as the district court held, Section

409 already required registrants to include all its specified categories of information—including title, publication date, and author—for any component work covered by registration of the collective work. *Alaska Stock*, 747 F.3d at 681.

Section 408 also undermines the district court’s assumption that Congress intended Section 409 to address group-work registration at all. Section 408(c)(1) gives the Register authority to establish a “single registration for a group of related works.” But it does not include the requirement found in Section 408(c)(2) to list works and their publication dates separately. Congress chose to make that requirement applicable only to a single category of collective works (certain periodical contributions), and Congress expressly provided that Section 408(c)(2)’s specific registration regime was “[w]ithout prejudice to the general authority provided under” Section 408(c)(1). The contrast between Sections 408(c)(1) and 408(c)(2) evidences Congress’s intent to give the Register flexibility in creating group registration rules. Section 409—enacted with Section 408—is understandably silent regarding the application requirements for a group registration regime that had not yet been created.

Indeed, the only reference Section 409 makes to the registration of collective works indicates that Congress did *not* intend this section to control the registration requirements for component works. Section 409(9) states that the “application ... shall include ... in the case of a compilation ... an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered.” 17 U.S.C.

§ 409(9). As the Ninth Circuit observed, this provision “does not say that the registration application must include a ‘title’ for each constituent work, just an ‘identification’ of any ‘preexisting work or works.’” *Alaska Stock*, 747 F.3d at 680. Thus, even divorced from Section 408 and the larger statutory context, the district court erred in concluding that a “plain reading” of Section 409’s language compelled the inclusion of component-work authors in order to register component works within a collective work.

**B. This Court Should Defer To The Copyright Office’s Longstanding, Consistent, And Reasonable Interpretation Of Section 409.**

Given that Section 409 does not specify the scope of a collective work’s registration, and does not explicitly require a collective-work application to list every author for every component work being registered, Congress has not “directly spoken to the precise question at issue” here. *Sai Kwan Wong v. Doar*, 571 F.3d 247, 255 (2d Cir. 2009). Accordingly, this Court must determine “what deference is properly accorded” the agency’s interpretation “to fill the statutory gap left by Congress.” *Id.* at 258. Even when “[a]n agency interpretation ... does not qualify for *Chevron* deference,” it “is still entitled to ‘respect according to its persuasiveness.’” *Estate of Landers v. Leavitt*, 545 F.3d 98, 107 (2d Cir. 2008) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001)). In determining the level of deference an agency’s interpretation warrants, “courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the

agency's position." *Mead Corp.*, 533 U.S. at 228 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). As it has previously, this Court should conclude that the Copyright Office's longstanding, reasonable implementation of the statute "merit[s] some deference whatever its form, given the 'specialized experience and broader ... information' available to the agency." *Morris v. Business Concepts, Inc.*, 283 F.3d 502, 505-06 (2d Cir. 2002) (quoting *Mead Corp.*, 533 U.S. at 234).

For decades, the Copyright Office has consistently interpreted Section 409 to permit claimants to register component works they own by registering the collective work, even if the collective-work registration does not specify the author's information (or Section 409's other categories of information) for each component work. In keeping with the terms of Section 409, the Copyright Office requires every application for registration of a compilation copyright to contain Section 409's specified categories of information (*e.g.*, title, author, publication date) for the collective work. The Copyright Office does not, however, require applicants to list all such information for component works the applicant owns in full and also wishes to register. *See Compendium II* § 615.06 (providing that collective work "application[s] should name the author of the collective work," and that "[t]he names of the individual authors of separate contributions being registered as part of the claim need not be given on the application"); *see also id.* ("The registration may cover (a) the collective work authorship, (b) any contribution created by the employee or other party commissioned by the author of a work made for hire, and (c) any other



contributions that the claimant of the collective work obtained by transfer.”); *id.* § 615.07(b)(3) (“If the work being registered was created by a large number of authors, the application will be considered acceptable if it names at least three of those authors, followed by a statement such as ‘and [number] others.’”).<sup>5</sup> The Office’s understanding, long embodied in the agency’s “generally applicable” and publicly available manual, warrants “the high end of the spectrum of deference.” *Estate of Landers*, 545 F.3d at 107-10 (deferring to a “longstanding” and “consistent” agency interpretation “set forth in a policy manual,” noting that it was “relatively formal within the universe of informal interpretations”).

For the reasons discussed above, the Copyright Office’s decision to not require collective-work claimants to list information for every component work they own is consistent with the terms of the Copyright Act. And the agency’s approach is a reasonable response to practical concerns about the operation of the registration system. Many traditional forms of collective works, such as newspapers and magazines, can contain hundreds—if not thousands—of copyrightable works that the

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<sup>5</sup> As discussed above, the *Compendium II* was in effect at the time of the registrations here; the superseding *Compendium III* has analogous provisions maintaining the Copyright Office’s well-established views on this question. *See supra* p. 6. And as noted, the Copyright Office’s interpretation of Section 409’s registration requirements for collective and component works is also apparent from its Circulars governing specific types of collective works. *See supra* p. 7 (discussing Circulars 62 and 62A).

claimant owns but did not author. Listing all component works and their authors could be so burdensome on applicants as to discourage registration. *See Metropolitan Reg'l Info. Sys.*, 722 F.3d at 599 (reasoning that “[a]dding impediments to automated database authors’ attempts to register their own component works conflicts with the general purpose of Section 409 to encourage prompt registration, ... and thwarts the specific goal embodied in Section 408 of easing the burden on group registrations”).

Indeed, in drafting the Copyright Act, Congress specifically identified the need to avoid burdensome registration requirements as a motivation for giving the Register the authority to allow a single registration for groups of works. *See* 17 U.S.C. § 408(c). The House Report to the Act notes that there is a “principle of administrative flexibility underlying all of the deposit and registration provisions,” and states:

The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forego [*sic*] copyright altogether. Examples of cases where these undesirable and unnecessary results could be avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

H. Rep. No. 94-1476, at 154 (1976). The district court’s overbroad reading of Section 409, however, would deprive the Copyright Office of Section 408’s intended flexibility to implement registration requirements pragmatically.

Moreover, at the time that Congress was drafting Section 409 as part of the Copyright Act of 1976, and until recently, Copyright Office personnel had to manually type in all the information received on a paper registration application into the Office’s catalog of registered works. Entering hundreds of authors and titles of component works for the many collective works registered would have imposed a huge burden on the Copyright Office as well as on applicants, and would have required higher application fees to defray processing costs. *See Metropolitan Reg’l Info. Sys.*, 722 F.3d at 599 (concluding that “it would be ... [absurd and] inefficient to require the registrant to list each author for an extremely large number of component works”) (alterations in original).

The Copyright Office’s guidance regarding component works is also consistent with the purposes of the registration system. Providing information to the public is only one of those purposes. *See generally* Letter from Karyn A. Temple, Register of Copyrights, to Hon. Jerrold Nadler, Chairman, Comm. on the Judiciary, and Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, U.S. House of Representatives (May 31, 2019) (attachment entitled “Explanation of U.S. Copyright Office Registration Processes and Challenges,” at 2-5), <https://www.copyright.gov/laws/hearings/response-to-april-3-2019-house-letter.pdf> (last visited June 6, 2019).

The registration process—and the accompanying deposit requirements—can also promote judicial efficiency in infringement actions, since the Office can clarify the scope of the claimed copyright and help courts later establish the nature and ownership of the copyright at the time of registration. Deposit copies of works also serve as a source of acquisitions for the Library of Congress. *See* 17 U.S.C. § 408(b); U.S. Copyright Office, Fiscal 2017 Annual Report, at 10, <https://www.copyright.gov/reports/annual/2017/ar2017.pdf> (last visited June 6, 2019). Had the Copyright Office imposed burdensome requirements in order to enhance the public record, these other purposes could have gone unfulfilled. Thus, the reasonableness of the Copyright Office’s implementation of the statute is underscored by the practical difficulties and potential counterproductivity of requiring claimants to detail the component works to which a collective-work registration is intended to extend.<sup>6</sup>

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<sup>6</sup> The Copyright Office has broad discretion in administering copyright registration, *see* 17 U.S.C. §§ 409, 702, and it may use this discretion to require claimants to list more information on registration applications than the bare minimum required by Section 409. When claimants apply to register an automated database consisting primarily of photographs, the Office now requires claimants to list all photograph titles. *See Group Registration of Photographs*, 83 Fed. Reg. 2,542 (Jan. 18, 2018). Claimants must also deposit more material in connection with the registration of an automated database than the claimant did at the time of these registrations, and the Office may revisit the automated-database registration system more comprehensively in the future. *See Deposit Requirements for Registration of Automated Databases That Predominantly Consist of Photographs*, 77 Fed. Reg. at 40,270 (noting the possibility of “additional regulatory amendments relating to various group registration options, including group registrations of automated databases”).

### **C. This Court Has Previously Concluded That The Copyright Office’s Guidance Regarding Component-Work Registration Is Persuasive.**

This Court has previously addressed the Copyright Office’s implementation of collective-work and component-work registration requirements in *Morris v. Business Concepts, Inc.*, 259 F.3d 65 (2d Cir. 2001), *opinion modified*, 283 F.3d 502 (2d Cir. 2002), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). In *Morris*, this Court recognized that the Copyright Office’s implementation is “persuasive” and should be afforded a measure of deference. 283 F.3d at 505-506. The *Morris* Court noted that under *Skidmore*, “even where an agency’s interpretation of law is not entitled to highly deferential treatment,” it may “merit some deference whatever its form, given the specialized experience and broader ... information available to the agency.” *Id.* (internal quotation marks omitted).

In *Morris*, a magazine publisher registered monthly issues of its magazine as collective works. *See* 259 F.3d at 67-68. Copyrights in some of the individual articles were held by the articles’ author. *See id.* One such author, who had granted the publisher an exclusive license in her articles, argued that the publisher’s registration of the copyright in the collective works (the magazines) sufficed to register her copyrights in her individual works. *See id.*

The Court rejected that argument. In so doing, however, the court acknowledged that “where the owner of a copyright for a collective work also owns the copyright for a constituent part of that work, registration of the collective work is

sufficient to permit an infringement action under § 411(a) for the constituent part.” *Morris*, 259 F.3d at 68. The Court therefore agreed with the author that “if she can establish that [the registrant] owned the copyright in [the author’s] articles at the time it registered the issues of [the magazine] as collective works, then that registration was adequate” to support an action under Section 411(a) for infringement of the copyrights in the individual articles. *Id.* at 69. Although this Court did not squarely address Section 409’s requirements in connection with component works, the opinion makes clear that the registration in question did not include the titles or authors of the component works. *See id.* at 72. As discussed, this conclusion accords with the conclusions of the Fourth and Ninth Circuits. *See Metropolitan Reg’l Info. Sys.*, 722 F.3d 591; *Alaska Stock*, 747 F.3d at 673.

The panel modified its original opinion on panel rehearing, but it left the foregoing statements in place. *See Morris*, 283 F.3d at 503, 505-506. The Court thus “h[eld] that *unless the copyright owner of a collective work also owns all the rights in a constituent part*, a collective work registration will not extend to a constituent part.” *Id.* at 505-06 (emphasis added). In so doing, the Court looked specifically to the Copyright Office’s guidance regarding registration of collective works and component works. *Id.* at 505. The Court pointed out that under that guidance, registration of a collective work will not register the component works “if all rights in [the] constituent work have not been transferred to the claimant,” but that “[i]f ... all rights have been transferred to the claimant, then the constituent work is included in the registration of the collective

work.” *Id.* The Court stated that “[w]e find the Office’s interpretation persuasive” and entitled to deference. *Id.* Thus, this Court has already approved the Copyright Office’s longstanding position regarding registration of component works.<sup>7</sup>

The district court suggested that *Morris*’s analysis is confined to serials and does not apply to automated-database registration. *See Muench I*, 712 F. Supp. 2d at 93 (reasoning that another district court erred in applying *Morris* in the automated-database context). But there is no basis in either *Morris* opinion for so limiting this Court’s reasoning. *See Morris*, 259 F.3d at 68-69 (addressing collective-work registration generally); *Morris*, 283 F.3d at 505-06 (same). Nor was this Court’s willingness in *Morris* to afford the Copyright Office’s implementation of the statute some deference dependent on the particular type of collective work at issue. *See Morris*, 283 F.3d at 505-06. Although this Court pointed to the view of the Copyright

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<sup>7</sup> This Court’s analysis of Section 409’s registration requirements for an exclusive licensee do not bear on its conclusion regarding copyright-owner registration. *See Morris*, 259 F.3d at 71-72. The registrant in *Morris* could not have registered its collective work (a magazine, in which it owned the copyright) and *Morris*’s article (in which it held an exclusive license but did not hold the copyright itself) in the same application. *See Compendium II* § 310 (requiring an exclusive licensee to list the owner as the copyright “claimant” in a registration application, and precluding different claimants for different works from seeking registration in the same application). Thus, the only way the registrant could have even arguably registered *Morris*’s article was as a stand-alone work, not as a component work being registered along with the larger collective work. It was in this context that the Court addressed Section 409’s requirements for exclusive licensees. *See Morris*, 259 F.3d at 72 (noting that the registrations at issue there “contained none of the information required by § 409 for proper registration of the articles, such as *Morris*’s name, the title of her articles, or the proper copyright claimant”).

Act reflected in the Copyright Office’s circular governing serials, *see id.* at 505, the same statutory interpretation underlies the Office’s automated-database registration regime: the Copyright Office does not read Section 409 to mandate the inclusion of all component-work authors in order to register components works the claimant owns along with the collective work containing them. And if this Court were to adopt the district court’s reasoning regarding “[a] plain reading of § 409,” *Muench I*, 712 F. Supp. 2d at 94, that conclusion would logically extend to component works within any type of collective work, including serials. The district court thus erred in suggesting a relevant difference between “serials and automated databases,” since they are “governed by separate registration requirements.” *Id.* at 93. Section 409’s language makes no distinction among types of works.

The district court’s conclusion that 17 U.S.C. § 103 controls the scope of a compilation’s registration is also mistaken. *See Muench I*, 712 F. Supp. 2d at 94. Section 103 specifies that a compilation is copyrightable subject matter, and provides that a copyright in a compilation “extends only to the material contributed by the” compilation’s author and “does not imply any exclusive right in the preexisting material.” 17 U.S.C. § 103(b). The district court interpreted these provisions to signify that “the registration of a collective work reaches the individual works only when the author of the collective work authored each of the individual works.” *Muench I*, 712 F. Supp. 2d at 94.



Section 103, however, says nothing about the *registration* of copyrights. Instead, as part of Chapter 1 within Title 17, governing “Subject Matter and Scope of Copyright,” Section 103 addresses the existence of copyrights, not the registration of copyrights. The latter topic is addressed in Chapter 4, “Copyright Notice, Deposit, and Registration.” It is undisputed that—as Section 103 provides—a collective work’s author can create a copyrighted work by the selection and arrangement of other works, but cannot acquire rights to another author’s work by simply including it within a collective work. The question here, however, concerns what procedures a copyright claimant who owns the copyright in both a collective work and in some or all of the collective work’s component works must comply with in order to register all the relevant copyrights. Chapter 1 does not address this question, or indeed, anything about the registration procedures.

Nor did the district court explain its apparent differentiation among the different categories of information that Section 409 requires in a registration application. The court cited with approval a case concluding that the registration of a collection of songs extended to individual songs even though the song titles were not listed in the registration. *Muench I*, 712 F. Supp. 2d at 94 (citing *Szabo v. Errisson*, 68 F.3d 940 (5th Cir. 1995)). But Section 409 makes no distinction between an application’s need for titles and authors. *See* 17 U.S.C. § 409(2), (6). If the district court were correct that Section 409 requires the inclusion of each component-work author, the statute would equally require the inclusion of component-work titles and

all other information specified in that provision. Such a regime would prove particularly burdensome with respect to traditional collective works, such as newspapers. In order to register even those articles within a newspaper written by the newspaper's employees (of which the newspaper publisher is deemed the author under 17 U.S.C. § 201(b)), a claimant would have to list on the application the headlines of each of the articles individually. No court of appeals has ever concluded that the Copyright Act compels such a regime, which would represent a startling departure from the flexibility the Copyright Office has long utilized to craft sensible registration requirements.

## CONCLUSION

For the foregoing reasons, this Court should reverse and remand the case for further proceedings.

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## CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify this brief complies with Second Circuit Rules 29.1(c) and 32.1(a)(4)(A), because according to the word count of Microsoft Word, the brief contains 6,905 words, excluding the parts of the brief exempted under Rule 32(f).

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2019, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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