



No. 08-103

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**In the Supreme Court of the United States**

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REED ELSEVIER, INC., ET AL., PETITIONERS

*v.*

IRVIN MUCHNICK, ET AL

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
SUPPORTING VACATUR AND REMAND**

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### **QUESTION PRESENTED**

Whether 17 U.S.C. 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions.

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## **INTEREST OF THE UNITED STATES**

Section 411(a) of the Copyright Act (Act) provides that “no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title” or registration has been refused. 17 U.S.C. 411(a). This case presents the question whether that provision limits the subject-matter jurisdiction of the federal courts.

The United States has significant responsibilities related to, and derives important benefits from, the registration of creative works under the Copyright Act. The United States Copyright Office, headed by the Register of Copyrights (Register), is responsible for administering the registration system and determining whe-

ther works meet the requirements for registration. In addition, the Act's registration provisions ensure that the Register's views are considered in copyright litigation, and facilitate the acquisition of creative works by the Library of Congress.

The registration requirement 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. Finally, the requirement is of interest to the Department of Justice, which has recognized the principal role of civil enforcement in the effort to combat copyright violations. See Office of the Att'y Gen., U.S. Dep't of Justice, *Report of the Department of Justice's Task Force on Intellectual Property* 39 (Oct. 2004).

#### STATEMENT

1. The Copyright Act, 17 U.S.C. 101 *et seq.*, grants copyright protection to "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. 102(a). Copyright protection "vest[s] in the author of an original work from the time of its creation," *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-547 (1985), and confers on the author certain exclusive statutory rights, including the rights to copy, distribute, and perform the copyrighted work. 17 U.S.C. 106. Anyone who violates those rights "is an infringer of the copyright," and may be liable for damages or injunctive relief. 17 U.S.C. 501(a), 502, 504.

The Copyright Act establishes a permissive scheme of registration and deposit of copyrighted works, which is administered by the Register of Copyrights, as direc-

tor of the Copyright Office. 17 U.S.C. 701(a).<sup>1</sup> An owner of a copyright “may obtain registration of the copyright” by sending to the Copyright Office a copy of the work, along with an application containing information about the work and the application fee. 17 U.S.C. 408(a) and (b), 409.

In determining whether to grant an application for registration, the Copyright Office’s examiners analyze 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). To “constitute[] copyrightable subject matter,” the work must display the minimal degree of creativity necessary to be a “work[] of authorship.” 17 U.S.C. 102(a); 37 C.F.R. 202.1; *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). The Act provides a non-exhaustive list of categories of works that constitute “works of authorship,” including “literary works,” “musical works,” and “sound recordings.” 17 U.S.C. 102(a). The Register has promulgated regulations identifying certain categories of works that generally are *not* subject to protection, including “[w]orks consisting entirely of information that is common property containing no original authorship,” such as standard calendars and schedules of sporting events; fonts; slogans; and blank forms. 37 C.F.R. 202.1. In addition, ideas and the like—including methods, processes, and systems—may not be registered because they are not entitled to copyright protection. 17 U.S.C. 102(b); 37 C.F.R. 202.1(b).

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<sup>1</sup> The Register is responsible more broadly for “[a]ll administrative functions and duties” under the Copyright Act. 17 U.S.C. 701(a). In addition to overseeing copyright registration and other copyright formalities, the Register’s responsibilities include assisting the judiciary and the government with “issues relating to copyright.” 17 U.S.C. 701(b)(2).

If the Register concludes that the work contains copyrightable material, “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. 410(b). If the Register determines that “the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason,” the Register must refuse to register the work and “notify the applicant in writing of the reasons for such refusal.” *Ibid.*<sup>2</sup>

Registration of creative works confers significant benefits on the Library of Congress and the public. See H.R. Rep. No. 7083, 59th Cong., 2d Sess. 8 (1907) (registration requirement in the 1909 Copyright Act was enacted “[f]or the protection of the public itself”). The copy of the work that a registration applicant must deposit with the Copyright Office or the Library of Congress is, in the case of published works, as well as unpublished works that are requested by the Library, ordinarily transferred to the collections of the Library of Congress. 17 U.S.C. 407(b), 408(b). The registration system therefore serves as a major source of the Library’s acquisitions.<sup>3</sup> See U.S. Copyright Office, *Annual Report of the Register of Copyrights, Fiscal Year Ending September 30, 2007*, at 13-14, 16 (Sept. 30, 2007)

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<sup>2</sup> We are informed by the Copyright Office that it typically registers approximately 98-99% of the claims submitted to it. In fiscal year 2007, the Office received 541,212 claims. U.S. Copyright Office, *Annual Report of the Register of Copyrights, Fiscal Year Ending September 30, 2007*, at 11 (Sept. 30, 2007).

<sup>3</sup> Owners of copyrights in published works generally are required to deposit one or more copies of their works with the Copyright Office, regardless of whether the owner chooses to register the work. See 17 U.S.C. 407(a). But the penalties for noncompliance with this requirement are modest, 17 U.S.C. 407(d), and rarely enforced.

(*Copyright Report*); Library of Congress, *Annual Report of the Librarian of Congress for the Fiscal Year Ending September 30, 2007*, at 25 (2008) (“Each year, the Copyright Office registers more than 500,000 claims and transfers more than 1 million copyrighted works to the Library’s collection through the copyright deposit system.”). Registration also enables the Copyright Office to compile a public record of copyright claims, and the deposited copies provide definitive evidence of what the work was at the time of registration.

2. Because registration “is not a condition of copyright protection,” 17 U.S.C. 408(a), the author of a copyrightable work possesses the exclusive statutory rights set forth in 17 U.S.C. 106 even if he has not filed a registration application with the Copyright Office. The filing of such an application is, however, a statutory prerequisite to the commencement of an infringement suit. Section 411(a) provides that “no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. 411(a).<sup>4</sup> If the Register has refused to register

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<sup>4</sup> “Preregistration” is a pre-publication procedure that may be employed for certain categories of works that the Register has determined have “a history of infringement prior to authorized commercial distribution.” 17 U.S.C. 408(f)(2); 37 C.F.R. 202.16(b)(1); H.R. Rep. No. 33, 109th Cong., 1st Sess. Pt. I, at 4-5 (2005). Preregistration is not a substitute for registration; within three months after the work is published, the copyright owner must submit an application for registration. 17 U.S.C. 408(f)(3). To reinforce that requirement, the statute further provides that, when an infringement of a preregistered work occurs within two months after first publication of the work, an infringement suit must be dismissed unless the copyright owner applies for registration no later than one month after discovering the infringement (or

the work, “the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.” *Ibid.* Thus, a suit for infringement may not be “instituted” until the putative copyright owner has applied to register her copyright and the Register has either granted or denied that application. If a person whose application was denied files suit for infringement, the Register may intervene in the action “with respect to the issue of registrability of the copyright claim” in order to defend her decision not to register the copyright. *Ibid.*

In a suit for infringement of a registered copyright, a registration certificate issued within five years after the work’s first publication constitutes “prima facie evidence of the validity of the copyright and of the facts stated in the certificate.” 17 U.S.C. 410(c). That rebuttable presumption obviates the need for the plaintiff to prove that the relevant work is copyrightable, and that she owns the copyright, if the defendant does not contest those points.<sup>5</sup> In addition, statutory damages and attorneys’ fees are generally unavailable for infringement that occurs before the effective date of registration. 17 U.S.C. 412; 17 U.S.C. 410(d). Thus, although a plaintiff who has submitted a registration application can file suit

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within three months after publication if that date comes earlier). 17 U.S.C. 408(f)(4).

<sup>5</sup> If a defendant challenges the presumption on the ground that the certificate contains inaccurate information that was knowingly submitted in the registration application, “the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.” See *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, Pub. L. No. 110-403, § 101(a)(5), 122 Stat. 4257 (amending 17 U.S.C. 411 to add a new Subsection (b)).

for infringement even if the application is denied, the Register's granting of the application has significant consequences for the conduct of the litigation.

3. This case involves consolidated class actions for copyright infringement. J.A. iii. Respondents—the plaintiffs in the district court—include large numbers of freelance authors of newspaper and magazine articles who allege that their copyrights were infringed by unauthorized reproduction and publication of their works in electronic databases. J.A. 1, 16-17, 48-49, 69-72, 80-81. Respondents sued petitioners—publishers and online database companies—in the United States District Court for the Southern District of New York. Respondents invoked the subject-matter jurisdiction of the district court under 28 U.S.C. 1331, which confers jurisdiction over civil actions arising under federal law, and 28 U.S.C. 1338(a), which provides that the district courts “shall have original jurisdiction of any civil action arising under any Act of Congress relating to \* \* \* copyrights.” See J.A. 4, 49, 69, 82.

In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), this Court confirmed “the basic soundness of [respondents’] liability theory,” Pet. App. 6a, by holding that publishers were required to obtain licenses from freelance authors in order to reproduce and distribute their articles in electronic databases. Following the Court’s decision in *Tasini*, the parties to the instant suits engaged in almost four years of negotiations, resulting in a global settlement agreement among freelance author groups, publishers, and electronic database companies. *Id.* at 7a-9a. The settlement agreement provides that petitioners will compensate a large class of freelance authors whose work has been reproduced electronically. J.A. 116-136. In return, the authors agree to

release all past, present, and future claims arising from the use of their articles in the databases, regardless of whether their works are registered. J.A. 113-114, 139-143. The agreement covers many works that are not registered, but it is structured to provide greater compensation to the authors of works that were registered at the relevant time. Pet. App. 8a.

The parties submitted the proposed settlement to the district court. Pet. App. 9a. Some class members (the Muchnick respondents) opposed the motion for class certification and settlement, arguing that the compensation provided under the settlement was inequitably distributed. *Ibid.* The objecting class members did not contend, however, that 17 U.S.C. 411(a) barred the court from certifying a class, or approving a settlement, that encompassed plaintiffs whose copyrights were unregistered. Pet. App. 9a. The district court certified the class described in the agreement and entered a final judgment approving the settlement. *Id.* at 9a-10a.

4. The Muchnick respondents appealed. Although no party contended on appeal that Section 411(a) limited the court's jurisdiction to claims based on registered copyrights, the court of appeals *sua sponte* ordered the parties to address the district court's subject-matter jurisdiction. Pet. App. 9a-10a, 46a-47a. The parties all responded that the district court had jurisdiction to enter the judgment approving the settlement agreement. Pet. Br. 7.

The court of appeals vacated the district court's approval of the settlement and remanded for further proceedings. Pet. App. 1a-45a. Relying primarily on the Second Circuit's "binding precedent" and "the persuasive authority of our sister circuits," the court held that "[S]ection 411(a)'s registration requirement limits a dis-

trict court's subject matter jurisdiction to claims arising from registered copyrights only." *Id.* at 12a-13a (citing *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 114, 115 (2d Cir. 2003), and *Morris v. Business Concepts, Inc.*, 259 F.3d 65, 72, 73 (2d Cir. 2001)). The court observed that, unlike provisions that govern the timing of particular steps in a case already within the court's jurisdiction, "[S]ection 411(a) creates a statutory condition precedent to the suit itself." *Id.* at 17a (citing, *inter alia*, *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*), and Fed. R. Crim. P. 33).

The court of appeals held that all claims within the certified class needed to satisfy Section 411(a)'s registration requirement, and that the named plaintiffs' satisfaction of that requirement was not sufficient to allow the class action to go forward. Pet. App. 20a-24a. The court found the registration requirement to apply even though the district court had approved the parties' settlement rather than adjudicating the claims on the merits. *Id.* at 24a n.7. The court further concluded that the supplemental jurisdiction statute, 28 U.S.C. 1367(a), did not authorize the district court to exercise jurisdiction over claims involving unregistered copyrights. Pet. App. 25a-27a. Based on its conclusion that "the District Court lacked jurisdiction to certify the class and approve the settlement agreement," the court of appeals vacated and remanded for further proceedings. *Id.* at 27a.

Judge Walker dissented. Pet. App. 27a-45a. He concluded that the text and history of Section 411(a), viewed in light of this Court's decisions, including *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), do not suggest that Congress intended the registration requirement to function as a jurisdictional limitation. Pet. App. 27a-38a.

Judge Walker also would have held that even if Section 411(a) were jurisdictional, the district court had authority to approve the settlement. *Id.* at 38a-45a.

#### SUMMARY OF ARGUMENT

I. The registration requirement contained in 17 U.S.C. 411(a) is not a jurisdictional prerequisite to a suit for copyright infringement. Section 411(a) has none of the attributes that this Court has identified as indicative of jurisdictional status. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-515 (2006). The provision “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Id.* at 515 (quoting *Zipes v. TWA*, 455 U.S. 385, 394 (1982)). It appears in the Copyright Act, grouped with other formal obligations placed on copyright owners, and is separate and distinct from the provisions that grant jurisdiction over copyright actions, 28 U.S.C. 1331 and 1338(a). Nor does any special circumstance—such as a settled construction by this Court, cf. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756-757 (2008), or a relation to sovereign immunity, cf. *United States v. Dalm*, 494 U.S. 596, 608-610 (1990)—justify treating the registration requirement as jurisdictional in the absence of express statutory language to that effect.

II. This Court has recognized that although many non-jurisdictional requirements are subject to waiver, forfeiture, and equitable exceptions, see, e.g., *Zipes*, 455 U.S. at 393, some should be enforced more rigidly, see *Hallstrom v. Tillamook County*, 493 U.S. 20, 23, 31 (1989), and some may be raised by the court on its own motion, see, e.g., *Day v. McDonough*, 547 U.S. 198, 205, 209 (2006). In determining the appropriate method of implementing particular non-jurisdictional require-

ments, this Court has considered the relevant statutory language, other indicia of congressional intent, and, in particular, the extent to which such requirements protect institutional or public interests beyond the interests of the parties to the litigation. See, *e.g.*, *id.* at 205-206; *Hallstrom*, 493 U.S. at 28-29.

In providing that “no action for infringement of the copyright in any United States work shall be instituted” until a registration application has been granted or denied, 17 U.S.C. 411(a), Congress used emphatic language that “cannot easily be read as containing implicit exceptions.” *United States v. Brockamp*, 519 U.S. 347, 350 (1997). In addition, the registration requirement serves important public interests beyond those of the parties to an infringement suit. The requirement safeguards the source of a significant portion of the Library of Congress’s acquisitions, and helps ensure that the Copyright Office maintains a public record of copyrighted works. Registration also gives courts the benefit of the Register’s expertise on issues of registrability, and serves judicial economy by narrowing the issues that must be litigated.

Because Section 411(a)’s registration requirement is not primarily intended as a protection for the defendant, but instead serves broader public and governmental interests, the defendant’s failure to raise non-compliance with that requirement as a ground for dismissal is not ordinarily a sufficient reason for the district court to excuse that failure. Rather, district courts typically should enforce that requirement *sua sponte*, and should decline to adjudicate an infringement suit on the merits when the plaintiff has not complied with the statutory prerequisite. Cf. *Day*, 547 U.S. at 205, 209. After judgment, however, Section 411(a), as a non-jurisdictional

provision, should be subject to the general rule that defenses or objections that are not raised prior to judgment are deemed forfeited. See *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004).

## ARGUMENT

### I. SECTION 411(a) DOES NOT LIMIT THE SUBJECT-MATTER JURISDICTION OF THE FEDERAL COURTS

The registration requirement contained in 17 U.S.C. 411(a) is not a jurisdictional prerequisite to the district court’s adjudication of a suit for copyright infringement. In recent years, this Court has distinguished between requirements that are genuinely jurisdictional, in that they define the scope of the courts’ adjudicatory power, and rules that, however important and categorical, are not jurisdictional in nature and consequence because they address matters other than the courts’ power to decide. See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-511, 515 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 455-456 (2004). Under the analysis set out in these cases, Section 411(a)’s registration requirement is not jurisdictional.

A. In *Arbaugh*, the Court announced a general rule of construction that “when Congress does not rank a statutory limitation \* \* \* as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” 546 U.S. at 516. In light of the significant consequences of characterizing a requirement as jurisdictional—a jurisdictional limit “can never be forfeited or waived,” and *must* be raised *sua sponte*, regardless of the “unfair[ness] and waste of judicial resources” occasioned by doing so, *id.* at 514-515 (citation omitted; brackets in original)—the Court looked for clear indicia of congressional intent, *id.* at 513-516.

Applying that standard, the Court held that Title VII's limitation on coverage to defendants with at least 15 employees, 42 U.S.C. 2000e(b), is not jurisdictional. The Court emphasized that neither the general federal-question statute, 28 U.S.C. 1331, nor Title VII's jurisdictional provision, 42 U.S.C. 2000e-5(f)(3), contains any employee-numerosity requirement. *Arbaugh*, 546 U.S. at 514-515. Rather, "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 515 (quoting *Zipes v. TWA*, 455 U.S. 385, 394 (1982)). While recognizing that Congress "could make the employee-numerosity requirement 'jurisdictional,'" *id.* at 514, the Court declined to adopt that reading in the absence of any indication in the text or statutory structure that Congress so intended, *id.* at 515-516.

B. Under this Court's analysis in *Arbaugh*, Section 411(a)'s registration requirement is not jurisdictional. *First*, Congress broadly vested the federal district courts with original jurisdiction over copyright actions, without specifying that jurisdiction is in any way dependent on registration. Copyright actions are encompassed within the grant of federal-question jurisdiction in 28 U.S.C. 1331, cf. *Arbaugh*, 546 U.S. at 505, and also within the independent grant of jurisdiction over copyright and patent actions in 28 U.S.C. 1338(a). Section 1338(a) expansively confers jurisdiction over "any civil action" arising under "any" federal copyright statute. 28 U.S.C. 1338(a). Neither Section 1338(a) nor Section 1331 is confined by its terms to actions involving works that have been registered by the Copyright Office. Cf. *Arbaugh*, 546 U.S. at 515. Rather, the registration requirement appears in Chapter 4 of the Copyright Act,

which does not speak to the power or duties of the federal courts but instead imposes various obligations on copyright owners. See, *e.g.*, 17 U.S.C. 407 (requiring deposit of work in the Copyright Office).

*Second*, Section 411(a) does not “speak in jurisdictional terms,” and it does not limit Title 28’s grants of jurisdiction over copyright claims. See *Arbaugh*, 546 U.S. at 515 (quoting *Zipes*, 455 U.S. at 394). Rather, by providing that “no action for infringement \* \* \* shall be instituted until preregistration or registration of the copyright claim has been made,” 17 U.S.C. 411(a), the provision merely establishes steps that a copyright holder must take before filing suit. The provision thus speaks to the obligations of the parties rather than to the power of the court.<sup>6</sup> See *Arbaugh*, 546 U.S. at 505; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (“jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the

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<sup>6</sup> Section 411(a) does mention “jurisdiction” once, in its final sentence, which states that when the Register has refused to register a work, the Register’s decision not to intervene in a subsequent suit for infringement of that work “shall not deprive the court of jurisdiction to determine that issue.” That sentence was enacted to overturn *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958), in which the court of appeals held that copyright owners who had been refused registration were required to seek mandamus against the Register to obtain registration before they could sue for infringement. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 157 (1976). In referring to “jurisdiction to determine *that issue*,” Congress indicated that the narrow import of the provision is to clarify that a copyright owner whose application for registration has been denied may have all issues—registrability as well as infringement—determined in one action against the infringer. Section 411(a)’s final sentence therefore has no bearing on the question whether Section 411(a) deprives the federal courts of subject-matter jurisdiction over certain copyright actions.

parties”) (citation omitted). To be sure, Section 411(a) states the registration requirement in “emphatic” terms, but that does not suggest that the provision is jurisdictional. *Arbaugh*, 546 U.S. at 510; see *Hallstrom*, 493 U.S. at 31 (statutory requirement can be mandatory but not necessarily jurisdictional); pp. 20-24, *infra*.

Section 411(a)’s text is very different from the statutory language that this Court has found sufficient to demonstrate congressional intent to limit subject-matter jurisdiction. For example, in *Rockwell International Corp. v. United States*, 549 U.S. 457, 467-470 (2007), the Court held that 31 U.S.C. 3730(e)(4)(A), which states that “[n]o court shall have jurisdiction over an action under [the False Claims Act] based upon the public disclosure of allegations or transactions,” was a sufficiently “clear and explicit withdrawal of jurisdiction” under *Arbaugh*. *Rockwell*, 549 U.S. at 468 (emphasis omitted). Other statutes that the Court has described as jurisdictional include 16 U.S.C. 814 (“district courts shall only have jurisdiction of cases when the amount claimed \* \* \* exceeds \$3,000”), and 7 U.S.C. 2707(e)(3) (district courts are “vested with jurisdiction to entertain” suits against persons subject to orders of the Egg Board). See *Arbaugh*, 546 U.S. at 515 n.11 (listing statutes).

Although the Court has occasionally accorded jurisdictional import to statutory requirements that do not use the term “jurisdiction,” the concerns that underlay those decisions are not present here. For example, the Court has relied on *stare decisis* to hold that certain time limits are jurisdictional, despite the lack of any textual reference to jurisdiction. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753-754, 756-757 (2008) (relying on *stare decisis* to hold that the

statute of limitations governing the Court of Federal Claims is jurisdictional); *Bowles v. Russell*, 127 S. Ct. 2360, 2363-2364 & n.2 (2007) (citing a “century’s worth of precedent” supporting the conclusion that 28 U.S.C. 2107(a)’s time limit for filing a notice of appeal is jurisdictional).<sup>7</sup> Similarly, in *United States v. Dalm*, 494 U.S. 596, 608-610 (1990), the Court relied on principles of sovereign immunity in holding that the statute of limitations for a tax recovery suit against the government should be construed as jurisdictional. Section 411(a), by contrast, does not implicate principles of sovereign immunity, and this Court has never before construed it to impose a jurisdictional rule.

*Third*, the legislative history of Section 411(a), like the text of the provision, describes the registration requirement in non-jurisdictional terms. Cf. *Zipes*, 455 U.S. at 394. The House Report on the Copyright Act of 1976 states that “copyright registration \* \* \* is a condition of certain *remedies* for copyright infringement,” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 150 (1976) (emphasis added), and that “registration must be made before a suit for copyright infringement is instituted,” *id.* at 157. The Report thus describes registration as an obligation of the plaintiff in an infringement suit, rather than as a prerequisite to the court’s exercise of adjudicatory power. And in 1988, when Congress considered altering or repealing Section 411(a) in connection with

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<sup>7</sup> In addition, the statutory provision at issue in *Bowles* provides that, unless the notice of appeal in a federal civil case is filed in a timely fashion, “no appeal shall bring any judgment, order or decree \* \* \* before a court of appeals for review.” 28 U.S.C. 2107(a). Although Section 2107(a) does not use the term “jurisdiction,” it speaks to the power of the court of appeals (rather than to the behavior of the litigant) by stating that an untimely notice of appeal will not bring the case to the court.

the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, the committee reports described the requirement as a “prerequisite to suit,” H.R. Rep. No. 609, 100th Cong., 2d Sess. 41 (1988), but nowhere suggested that repealing Section 411(a) would broaden the jurisdiction of the courts.

In holding that Section 411(a)’s registration requirement is jurisdictional, the court of appeals stated that Section 411(a) does not simply govern the conduct of proceedings *after* the court has asserted jurisdiction, but rather “creates a statutory condition precedent to the suit itself.” Pet. App. 17a.<sup>8</sup> The same is true, however, of exhaustion requirements and statutes of limitation, which are ordinarily treated as non-jurisdictional even though they establish prerequisites to the plaintiff’s commencement of suit. See *Day*, 547 U.S. at 205 (explaining that a “limitations defense resembles other threshold barriers” such as “exhaustion of state remedies” that are typically treated as “nonjurisdictional”); *John R. Sand & Gravel Co.*, 128 S. Ct. at 753 (explaining that “the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver”); *Zipes*, 455 U.S. at 392-398. To be sure, if a particular requirement applies to litigation conduct

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<sup>8</sup> In that regard, the court of appeals contrasted Section 411(a) with Federal Rule of Criminal Procedure 33, which establishes time limits for filing a post-verdict motion for a new trial in a federal criminal case. See Pet. App. 17a. In *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*), this Court held that the time limits established by Rule 33 are non-jurisdictional. The court of appeals in this case explained that, unlike Section 411(a)’s registration requirement, which by its terms applies to the initiation of suit, “Rule 33 merely sets forth a time limit for moving in a case that undoubtedly already falls within the district court’s jurisdiction.” Pet. App. 17a.

that can occur only after the court has acquired jurisdiction, that fact supports the conclusion that the requirement is non-jurisdictional. See *Scarborough v. Principi*, 541 U.S. 401, 413-414 (2004) (holding that requirements governing attorney-fee applications under 28 U.S.C. 2412(d)(1) are not jurisdictional, in part because those requirements “relate[] only to postjudgment proceedings auxiliary to cases already within th[e] court’s adjudicatory authority”); *Bowles*, 127 S. Ct. at 2365. It does not follow, however, that every “statutory condition precedent” to the commencement of suit (Pet. App. 17a) is jurisdictional in nature.

In sum, there is no evidence that Congress intended to imbue the registration requirement with jurisdictional force. As in *Arbaugh*, requiring the courts to dismiss a copyright infringement action for lack of registration even after judgment could create “unfair[ness] and waste of judicial resources.” 546 U.S. at 515 (citation omitted; brackets in original). In this case, for example, the court of appeals’ invocation of Section 411(a) after judgment rendered the significant expenditure of resources by the parties and the mediator a nullity, and also vitiated the parties’ agreement to provide authors compensation for the use of their copyrighted works. Even in a less wide-ranging case, requiring courts to treat the plaintiff’s failure to register his copyright as a ground for setting aside a final judgment on appeal could work significant unfairness. The text, history, and purposes of Section 411(a) do not suggest that Congress intended such a result. *Ibid.*<sup>9</sup>

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<sup>9</sup> The court of appeals based its contrary decision primarily on decisions predating *Arbaugh* that characterize Section 411(a) in jurisdictional terms. Pet. App. 12a-13a; see, e.g., *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200 (10th Cir. 2005).

## II. SECTION 411(a) IS A MANDATORY PREREQUISITE TO SUIT THAT ORDINARILY SHOULD BE RAISED *SUA SPONTE* BY DISTRICT COURTS

Non-jurisdictional statutory threshold requirements are applied with varying degrees of rigorousness. Depending on the nature and purposes of the requirement at issue, such provisions may (or may not) be subject to waiver, forfeiture, equitable exceptions, *sua sponte* enforcement, or a combination thereof. See, e.g., *Hallstrom*, 493 U.S. at 23; *Zipes*, 455 U.S. at 393; *Day*, 547 U.S. at 205, 209. Thus, Section 411(a)'s non-jurisdictional character does not by itself resolve the question whether an infringement suit should be dismissed for non-compliance with the registration requirement even when the defendant does not seek dismissal on that basis.<sup>10</sup>

In determining whether a particular rule is subject to equitable exceptions or may be raised by the court on its own motion, a key consideration is whether the rule is intended to benefit only the parties to the suit, or whe-

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These “drive-by jurisdictional rulings,” see *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)), should be given little weight because they predate *Arbaugh* and did not apply the analytic approach that this Court articulated in that case.

<sup>10</sup> Federal Rule of Criminal Procedure 52(b) and this Court's decisions construing the Rule illustrate that district courts are sometimes required to address *sua sponte* issues that the parties have not identified. Rule 52(b) states that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention.” The very concept of an “error” that “was not brought to the court's attention” presupposes that the trial court may sometimes be obligated to issue a legal ruling that neither party requests. See *United States v. Olano*, 507 U.S. 725, 733 (1993) (“Although in theory it could be argued that if the question was not presented to the trial court no error was committed by the trial court, \* \* \* this is not the theory that Rule 52(b) adopts.”) (brackets and citation omitted).

ther it serves broader systemic interests that the parties might not adequately represent. See, *e.g.*, *Hallstrom*, 493 U.S. at 24-26, 28-29; *Day*, 547 U.S. at 205, 209; cf. *Arizona v. California*, 530 U.S. 392, 412 (2000). Section 411(a)'s registration requirement falls in the latter category. By making the right to sue for copyright infringement contingent on registration, Congress sought to expand the Library of Congress's collection of copyrighted works, provide a public record of copyright ownership, and afford courts the benefit of the Copyright Office's expertise. In light of those considerations, district courts should strictly enforce the registration requirement in cases where the defendants raise the issue. Further, courts should ordinarily dismiss *sua sponte* infringement suits premised on unregistered copyrights, even when the defendant does not assert the plaintiff's non-compliance with Section 411(a) as a ground for dismissal. After judgment, however, defenses based on Section 411(a) should be considered forfeited, except in exceptional circumstances that are not present here.

**A. Section 411(a) Is A Mandatory Prerequisite To Suit That Should Be Strictly Enforced When Raised By A Party**

1. In *Hallstrom*, this Court recognized that a statutory prerequisite may be a "mandatory condition[] precedent to commencing suit" even if it is not jurisdictional.<sup>11</sup> 493 U.S. at 23, 26, 31. There, the Court considered the notice-and-delay provision of the Resource Conservation and Recovery Act of 1976 (RCRA), which applied to citizen suits against private parties for violating

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<sup>11</sup> The Court in *Hallstrom* left open the question of whether the relevant provision was "jurisdictional in the strict sense of the term," because resolving that question was not necessary to the Court's conclusion that the provision was mandatory. 493 U.S. at 31.

RCRA, and stated that “[n]o action may be commenced \* \* \* prior to 60 days after the plaintiff has given notice” to, *inter alia*, the Administrator of the Environmental Protection Agency. 42 U.S.C. 6972(b)(1). The Court explained that, “[u]nder a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.” *Hallstrom*, 493 U.S. at 26. The Court also observed that permitting equitable exceptions to the notice requirement could “frustrate[]” Congress’s intent to allow government agencies the opportunity to enforce RCRA themselves upon learning of the allegations, and also to promote judicial economy by providing a window for voluntary compliance. *Id.* at 28-29; see *Brockamp*, 519 U.S. at 350-352 (time limit for filing tax recovery claim was mandatory in view of its “emphatic” language and furtherance of system-related interests); cf. *Munsell v. Department of Agric.*, 509 F.3d 572, 581 (D.C. Cir. 2007) (exhaustion requirement in 7 U.S.C. 6912(e) is “both mandatory and nonjurisdictional”).

2. Section 411(a) similarly speaks in emphatic and facially unqualified terms: “*no action* for infringement \* \* \* *shall be instituted until* preregistration or registration of the copyright claim has been made,” (emphasis added). This language is most naturally read as creating a mandatory condition precedent to suit. See *Hallstrom*, 493 U.S. at 26, 31. That conclusion is reinforced by Section 501(b), which states that the “owner of an exclusive right under a copyright is entitled, *subject to the requirements of section 411*, to institute an action for any infringement.” 17 U.S.C. 501(b) (emphasis added). That language confirms that the preconditions to suit set forth in Section 411(a), among which is registration of the copyright that is alleged to have been in-

fringed, are “requirements” upon which the right to sue depends.<sup>12</sup>

3. Like the notice requirement in *Hallstrom*, Section 411(a)’s registration requirement serves important purposes beyond protecting the interests of the parties in an individual suit. See H.R. Rep. No. 7083, 59th Cong., 2d Sess. 8 (1907) (registration requirement in the 1909 Copyright Act was enacted “[f]or the protection of the public itself”). The requirement encourages authors to deposit their creative works with the Copyright Office, thereby providing the Library of Congress with an important source of its acquisitions. See H.R. Rep. No. 609, *supra*, at 42 (emphasizing importance of this cost-free method of acquisition); *Copyright Report* 13 (“Copyright deposits form the core of the Library’s ‘Americana’ collections and serve as the primary record of American creativity.”). In addition, registration enables the Copyright Office to compile a record of copyrighted works, which serves as a valuable resource for those seeking to use copyrighted works lawfully. See *id.* at 12.

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<sup>12</sup> The Copyright Act’s preregistration procedures demonstrate the high priority that Congress placed on registration. 17 U.S.C. 411(a); 408(f). The preregistration procedure was added to the Copyright Act in response to the increasing prevalence of pre-publication infringement, which cannot easily be remedied if the copyright owner must wait to obtain registration before suing for infringement. See H.R. Rep. No. 33, 109th Cong., 1st Sess. Pt. I, at 4-5 (2005). Although Section 411(a) permits a copyright owner to sue if she has preregistered her works, in order to “ensure that preregistered works are formally registered,” *id.* at 5, Congress provided that failure to timely register renders the preregistration ineffective, and can mandate the dismissal of the suit. 17 U.S.C. 408(f)(4); see note 4, *supra*. These limitations reflect Congress’s intent to permit suits prior to registration only in specific circumstances, and on the condition that the works are ultimately registered.

The registration requirement also ensures that the court in an infringement suit can consider the Copyright Office's judgment as to the copyrightability of the work. See, *e.g.*, H.R. Rep. No. 609, *supra*, at 41 ("Registration \* \* \* assists the courts in resolving the underlying copyright dispute."); *id.* at 41-42 (Judicial Conference of the United States stated that elimination of registration requirement would cause "increased difficulty in trying copyright cases."); *Torres-Negrón v. J&N Records, LLC*, 504 F.3d 151, 161-162 (1st Cir. 2007). When registration is made within five years of the work's first publication, the certificate is "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. 410(c). Section 411 also contemplates active participation by the Copyright Office in certain infringement suits following its registration decision, either when the plaintiff files suit after his registration application has been denied, see 17 U.S.C. 411(a), or when the Copyright Office grants the application but the defendant subsequently alleges that the putative copyright owner's certificate contains intentionally inaccurate information, see Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 101(a)(5), 122 Stat. 4257. In addition, the registration requirement may sometimes obviate the need for the court to rule on infringement claims at all, since a potential plaintiff whose registration application is denied by the Copyright Office may forgo suit rather than challenge the Register's determination.

Although the lower courts are divided regarding the deference due the Register's registration decisions,<sup>13</sup>

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<sup>13</sup> A majority of courts of appeals to consider the issue defer to the Copyright Office's opinion on registrability in the context of an infringe-

Congress evidently intended the Register's expertise to serve as a resource to courts adjudicating copyright claims and contemplated an active role for the Register in certain infringement suits. The Register cannot perform those functions when copyright owners do not present their works for registration. Thus, in light of Section 411(a)'s mandatory language and the broad systemic purposes that the registration requirement serves, district courts should enforce that requirement rigorously when it is invoked by a party.<sup>14</sup>

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ment action. See *Torres-Negrón*, 504 F.3d at 161-162; *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) (en banc), cert. denied, 546 U.S. 813 (2005); *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230-1231 (9th Cir. 1998), cert. denied, 526 U.S. 1158 (1999); *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986); *Norris Indus., Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1982), cert. denied, 464 U.S. 818 (1983). But see *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 413-414 (2d Cir. 1985); *Atari Games Corp. v. Oman*, 888 F.2d 878, 887 (D.C. Cir. 1989) (Silberman, J., concurring); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 742 (2d Cir. 1991).

<sup>14</sup> Section 411(a) requires the plaintiff to possess a registration certificate, to have been refused registration, or to have preregistered, at the time the suit is commenced. Although some courts have held that Section 411(a)'s precondition to suit is satisfied by simply filing an application for registration, see, e.g., *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-387 (5th Cir. 1984), those decisions are contrary to Section 411(a)'s plain text, and therefore incorrect. Section 411(a) unambiguously states that registration must have been "made in accordance with this title"—i.e., granted by the Copyright Office—before a suit may be filed. See, e.g., *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1203-1205 (10th Cir. 2005). And although Section 411(a) allows the putative copyright owner to sue even if his registration application is denied, the statute clearly contemplates that the plaintiff will commence the suit only after the Copyright Office has acted on the application. See 17 U.S.C. 411(a) (providing that, where a properly submitted registration application "has been refused, the ap-

**B. Section 411(a)'s Registration Requirement Ordinarily Should Be Enforced *Sua Sponte* By District Courts, But Non-Compliance With That Requirement Provides No Basis For Vacatur Of The Judgment In This Case**

1. In light of the important public and judicial interests described above, district courts should ordinarily notice a plaintiff's non-compliance with Section 411(a) *sua sponte* even if the defendant does not move to dismiss on this ground. Cf. *Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 808 (7th Cir. 2009) (“[C]ourts enforce mandatory (though non-jurisdictional) rules—even if the parties do not raise them—in a variety of ways.”).

This Court has held that *sua sponte* enforcement can be appropriate where a non-jurisdictional rule or defense implicates extra-party interests. See *Day*, 547 U.S. at 205-206, 209 (holding that because the habeas statute of limitations “implicate[d] values beyond the concerns of the parties,” including comity, finality, and judicial economy, the court had discretion to raise the defense *sua sponte*) (citation omitted); *Arizona*, 530 U.S. at 412-413 (holding that because the res judicata defense “is not based solely on the defendant’s interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste,” a court “may dismiss the action *sua sponte*” on this ground); see also *United States v. Mitchell*, 518 F.3d 740, 749-751 (10th Cir. 2008) (same as to the time limita-

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plicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights”). Moreover, if the district court were to adjudicate an infringement suit on the merits while the plaintiff’s application was pending before the Copyright Office, the court would be deprived of the Register’s views on such issues as copyrightability.

tion in Federal Rule of Appellate Procedure 4(b)); cf. *Mackay v. Uinta Devel. Co.*, 229 U.S. 173, 176 (1913) (where procedural “provisions are for the benefit of the defendant \* \* \* the court will not, of its own motion, inquire as to the regularity of the issue or service of the process”).

Here, Congress has sought to encourage copyright owners to register their works by making registration a mandatory prerequisite to the commencement of an infringement suit. That requirement serves in part to further systemic goals such as the supplementation of the Library of Congress’s collection and the creation of a public record of copyrighted works. The protection of those public interests should not depend on whether the defendant in a particular case identifies the plaintiff’s non-compliance with the registration requirement as a ground for dismissal. Compliance with Section 411(a)’s threshold requirement also ensures that the court can take account of the Register’s views on the issue of copyrightability. Cf. *Arizona*, 530 U.S. at 412-413; *Mitchell*, 518 F.3d at 749 (*sua sponte* adjudication can be appropriate “when the issue implicates the court’s power to protect its own important institutional interests”).

In light of these considerations, the district court in an infringement suit should ordinarily dismiss the complaint *sua sponte* if the plaintiff has failed to register her copyright, even if the defendant does not request that relief. Although the district court has discretion whether to enforce Section 411(a) *sua sponte*, see *Day*, 547 U.S. at 209, the concerns embodied in the provision would generally weigh strongly in favor of enforcement. A plaintiff’s failure to register should ordinarily be evident at the outset of the lawsuit, when the court and the parties have not yet expended any resources. And be-

cause Section 411(a) furthers public and governmental interests beyond the concerns of the court and the parties to a particular case, the court should not decline to enforce the requirement *sua sponte* unless it is satisfied that the public interest will not be harmed thereby. Given that the interests of the Library of Congress and the public are best served by rigorous enforcement of Section 411(a), *sua sponte* dismissal will ordinarily be the proper course.<sup>15</sup>

2. A different rule should apply, however, in the courts of appeals. “Only lack of subject-matter jurisdiction is preserved post-trial,” and non-jurisdictional barriers to relief are considered forfeited if not raised before judgment on the merits. *Kontrick*, 540 U.S. at 459; *ibid.* (timeliness issue “could be raised, at the latest, at the trial on the merits”) (citation omitted); see Fed. R. Civ. P. 12(h); 5C Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1394, at 557 (3d ed. 2004) (“A defense that has not been raised in a pleading, by motion, or at trial normally will be considered waived and cannot \* \* \* be heard for the first

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<sup>15</sup> To be sure, Section 411(a) does not categorically require *sua sponte* dismissal in every case, and the district court may well have been justified in eschewing that course under the unusual circumstances of this case. All parties to the suit agreed that inclusion of unregistered works in some sort of global settlement was advisable; the named plaintiffs had registered their works; the court was not being asked to adjudicate the claims on the merits and therefore had less need of the Copyright Office’s expertise; and the settlement served the public interest in increasing the availability of the materials to the public while recognizing the authors’ copyright rights. In addition, the harm to the Library of Congress’s interests appears to be insubstantial in a case like this one, which involves articles published in newspapers and other periodicals. The Library typically obtains copies of such works when the periodical itself is registered and/or deposited.

time on appeal.”). The forfeiture-after-judgment rule applies with equal force to prerequisites to suit and other mandatory rules. See, *e.g.*, *Kontrick*, 540 U.S. at 456 (an “inflexible claim-processing rule \* \* \* even if unalterable on a party’s application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point”); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 700 (1972) (compliance with mandatory requirements for removal “may not be raised for the first time on appeal”); *Sierra Club v. Yeutter*, 926 F.2d 429, 437 (5th Cir. 1991) (notice-and-delay provision was forfeited if not raised before judgment).<sup>16</sup> And once an issue is considered forfeited, appellate courts generally will not adjudicate it, either at the urging of the parties to the appeal or on the court’s own motion. Cf. *Carlisle v. United States*, 517 U.S. 416, 422-423 (1996) (declining to construe Federal Rule of Criminal Procedure 29 in a manner that would permit the court to raise an issue *sua sponte* even after the party no longer had the ability to raise it).

To be sure, appellate courts may “[i]n exceptional circumstances, \* \* \* in the public interest, \* \* \* notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Silber v. United States*, 370 U.S. 717, 717-718 (1962) (citation omitted); *Brickwood Contrac-*

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<sup>16</sup> Another example arises in the criminal context. While an indictment is a non-jurisdictional but constitutionally required element of a criminal case, such that the case should be dismissed if a defect in the indictment is discovered before judgment, *United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978), the conviction may stand on appeal if the defect was not raised in the district court. *United States v. Cotton*, 535 U.S. 625, 631-632 (2002) (applying plain-error review).

*tors, Inc. v. Datamet Eng'g, Inc.*, 369 F.3d 385, 396-397 (4th Cir. 2004) (en banc) (applying plain-error rule to failure to comply with mandatory claim-processing rule of Federal Rule of Civil Procedure 11). But this is a high bar, reflecting the substantial costs of addressing a new issue after the record is closed: prejudice to the party who prevailed below and loss of the judicial resources expended in adjudicating the matter on the merits. As against these costs, significant interests must militate in favor of addressing the issue on appeal.

The situations at the appellate court level in which the interests served by Section 411(a) would outweigh the substantial concerns embodied in the forfeiture rule are likely to be extremely rare. A plaintiff's failure to comply with Section 411(a)'s registration requirement should ordinarily be apparent at the outset of the case, and the district court can dismiss the suit without devoting substantial resources to it. Once a final judgment has been entered and the case has reached the court of appeals, however, the district court has already expended significant resources, and has decided the case (or approved a settlement). Insisting on a rigid application of Section 411(a) on appeal would therefore waste judicial resources in most cases. *Arbaugh*, 546 U.S. at 515. It could also cause substantial injustice in cases in which the work was correctly determined to be copyrightable and the plaintiff prevailed on his copyright infringement claim.<sup>17</sup>

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<sup>17</sup> To the extent that the registration requirement serves to encourage the submission of works that will supplement the Library of Congress's collection, the requirement might be roughly analogized to a district court filing fee. Because such a fee serves the interests of the United States in its administration of the federal judicial system, its enforcement would not ordinarily depend on any action of the defendant.

3. Under the circumstances of this case, the inclusion within the plaintiff class of individuals who had not registered their copyrights provides no sound basis for vacatur of the district court's judgment on appeal. An industry-wide settlement is unquestionably in the public interest because it recognizes freelance authors' copyright rights while ensuring the public availability of their works—a key concern of the Copyright Act. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (“[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works.”); *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001). The parties determined that a global settlement of all possible claims—including those based on currently unregistered works (which could be registered in the future)—was necessary in order to guarantee the availability within the electronic archives of all of the newspaper and magazine contents at issue. The parties then invested substantial time and resources, all of which would be rendered nugatory by enforcement of Section 411(a)'s registration requirement at this late stage.

Nor would implementation of a settlement that encompassed unregistered works significantly undermine Section 411(a)'s purposes. The copyrightability of the articles at issue has never been in dispute. See 17 U.S.C. 102(b). Given the nature of the relevant works, moreover, the settlement will not substantially impair the Library of Congress's interest in supplementing its collection. See note 15, *supra*. Enforcing Section 411(a) for the first time on appeal, despite the parties' forfei-

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But if the plaintiff's failure to pay the fee somehow went unnoticed throughout the district court litigation, that failure would not constitute a jurisdictional defect warranting vacatur of the judgment on appeal.

ture, would waste the resources expended by the parties and court to achieve a comprehensive solution, and also disserve the public interest in electronic access to all of the works at issue here, all without furthering any meaningful countervailing purpose.

#### CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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